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THE JURISPRUDENCE OF REMEDIES: CONSTITUTIONAL LEGALITY AND THE LAW OF TORTS IN *BELL v. HOOD* *

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The rights of individuals and the justice due to them, are as dear and precious as those of States. Indeed, the latter are founded upon the former; and the great end and object of them must be to secure and support the rights of individuals, or else vain is Government.

Justice Cushing in *Chisholm v. Georgia*,
2 U.S. (2 Dall.) 419, 468 (1793).

I. *BELL v. HOOD* ON REMAND TO THE DISTRICT COURT

In 1945, Arthur L. Bell and others, as individuals and on behalf of an organization called "Mankind United," instituted litigation in the United States District Court for the Southern District of California. The plaintiffs claimed they had been unlawfully detained and subjected to unreasonable searches and seizures by members of the Federal Bureau of Investigation. Bell and the others prayed recovery in damages for these alleged violations of the fourth and fifth amendments to the United States Constitution.

The district court dismissed the action for want of a federal question. The court of appeals affirmed.¹ On certiorari the Supreme Court

* I would like to express my gratitude to Professor Paul Bator for his inspiring introduction to these problems.

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¹ *Bell v. Hood*, 150 F.2d 96 (9th Cir. 1945).

reversed,² holding that the complaint stated a claim which would arise under "the Constitution or laws of the United States"³ for the purposes of jurisdiction, but expressed no opinion whether it stated a cause of action as pleaded.

On remand, the district court dismissed the suit for failure to state a claim upon which relief could be granted.⁴ The court reasoned as follows:

If the action was against federal officers as agents, it was essentially an action against the government to which the United States had not consented but had expressly barred by the Tort Claims Act.⁵

If the officers had acted unconstitutionally, and consequently outside the scope of their authority, they lost their governmental immunity. Therefore, since the Bill of Rights only protects against governmental action, the plaintiffs had failed to state a claim under federal law.⁶

Furthermore, even if the action could be said to arise under federal law, federal law provided no relief. Under *Erie R.R. v. Tompkins*,⁷ there is no federal common law. Any right of action available in federal court must be given either by the Constitution or by federal statute, and neither granted a right to recover here.⁸ While the plaintiff might have had a cause of action in common law tort under state law, the action could not be maintained in the district court since it did not arise under the laws of the United States.⁹

The existence of a federal equity power to enjoin federal officials threatening unconstitutional action would not support an action for damages because the equity jurisdiction conferred on the federal courts by the Constitution created only a duty to apply the equitable rules and principles recognized by the English Chancery at the time of the Constitution and not a power to exercise broad discretion at law.¹⁰ And finally, the mere availability of equitable relief supported the nonexistence of a legal remedy to redress violations of fourth and fifth amendment rights, under the well-established principle that an injunction will issue *only* if there is no adequate remedy at law.¹¹

² 327 U.S. 678 (1946).

³ 28 U.S.C. § 41(1) (1940), as amended, 28 U.S.C. § 1331 (1964).

⁴ 71 F. Supp. 813 (S.D. Cal. 1947).

⁵ *Id.* at 817 (citing 28 U.S.C. §§ 921, 931, 943 (1946)).

⁶ *Id.*

⁷ 304 U.S. 64 (1938).

⁸ 71 F. Supp. at 817.

⁹ *Id.*

¹⁰ *Id.* at 818-19.

¹¹ *Id.* at 819. At that time the principle was codified, 28 U.S.C. § 384 (1940).

A. The Critical Thesis

I hope to show in this article that the district court in *Bell v. Hood* reached the wrong result for the wrong reasons. Neither history nor policy can be adduced to justify the result. There is nothing in the historical development of remedial jurisprudence to suggest that remedial law has not been fully applied to protect personal interests defined in "political" documents like the Constitution. In fact, the history of substantive legality is the history of the remedial system. Only when these are treated together can the development of the norms of a legal system become meaningful.

The continuing validity of the notion of the Constitution as law requires full implementation of the remedial system available. But the effect of the district court's decision in *Bell v. Hood*, if accepted,¹² is to cast substantial doubt on this notion of the Constitution as judicially cognizable law.

Additional problems to be treated are raised by the nature of the federal system. The particular difficulty of *Bell v. Hood* lies in the interplay between state and federal substantive law, overlaid by the interplay of state and federal remedial competence. Specifically, the wrongs in *Bell* were both state torts and infringements of federally protected rights. State and federal remedial systems must work in concert to protect state and federal interests wronged by a single series of actions.

But this does not mean, as the district court held, that the federal remedy cannot exist. A federally created remedy in damages is possible under existing decisions; is sensible under existing circumstances; and is necessary for the protection of essential liberties.

B. The Logic of the Opinion

The bodies of doctrine contained in the deceptively simple propositions offered up by the district court in *Bell v. Hood* combine to deny relief to a plaintiff who has admittedly suffered a clear legal wrong. According to the court, federal relief is available only when unconstitutional activity is threatened—not when it has been accomplished.¹³ Under the allegations of the complaint, taken as true, the plaintiff has

¹² Lower federal courts since that time have tended to accept the opinion as dispositive, with neither question nor discussion. *See, e.g.*, *Johnston v. Earle*, 245 F.2d 793, 796 (9th Cir. 1957) ("very able opinion"); *Koch v. Zuieback*, 316 F.2d 1, 2 (9th Cir. 1963) (citing *Bell* and *Johnston*).

The Supreme Court has, evidently, referred to Judge Mathes' "very able opinion" in only one case. The references are not particularly flattering. *Wheeldin v. Wheeler*, 373 U.S. 647, 655 n.3, 657-58 n.6 (1963) (Brennan, J., dissenting).

¹³ 71 F. Supp. at 819.

suffered the precise harm against which the Bill of Rights was designed to protect.¹⁴ Those amendments, conceived as the cornerstone of liberty against the excesses of government, are in such a situation reduced to vacuous liturgy.

The compelling logic of the first and second points in the opinion rests on the erroneous assumption that there is no such thing as "color" of federal authority. As I shall demonstrate in part IV, actions against federal officers as such reach back into the infancy of the Union.¹⁵ While it is true these early actions were based on state tort law, it must be remembered that the federal courts did not have general federal question jurisdiction until 1875.¹⁶ Any suspicion that these cases were not being brought against federal officers as "federal agents" is dispelled by the number of cases in which state court proceedings were removed to federal court on the ground that the federal officers were acting under "color" of federal office.¹⁷ Indeed, as a conceptual matter, the constitutionality of the congressional grant of removal jurisdiction as to federal officers, where there is otherwise no federal question in the case, must assume that providing a federal forum for the protection of those persons carrying on the business of the federal government is justified.¹⁸ It is highly incongruous to argue that the defendant is a federal officer for purposes of jurisdiction but not for the purpose of stating a cause of action.

It is quite true that when an officer is acting unconstitutionally he is not acting within his federal authority and has therefore lost his substantive immunity from suit.¹⁹ But it does not follow that he has lost his character as a federal officer. He is still acting under "color" of federal law.²⁰ If the district court admits it has equitable power over a federal officer preparing to act unconstitutionally,²¹ it must follow that the court has power over him when he has so acted. The proposition that individuals are protected by the Bill of Rights only against the prospective unconstitutional activity of federal agents is patently absurd.

¹⁴ See pp. 33-39 *infra*.

¹⁵ See text accompanying notes 262-63 *infra*.

¹⁶ Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470.

¹⁷ Act of March 3, 1863, ch. 81, § 5, 12 Stat. 756; see F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 61 n.21 (1928).

¹⁸ *Tennessee v. Davis*, 100 U.S. 257 (1879).

¹⁹ *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619-20 (1912); *Nationwide Charters & Conventions, Inc. v. Garber*, 254 F. Supp. 85 (D. Mass. 1966).

²⁰ *Weeks v. United States*, 232 U.S. 383, 393, 397, 398 (1914).

Compare the treatment of state officials exceeding their authority in *Monroe v. Pape*, 365 U.S. 167, 183-87 (1961) (civil action for damages under federal statute); *Screws v. United States*, 325 U.S. 91, 107-11 (1945) (criminal prosecution) (majority opinion on the point).

²¹ As it did admit. 71 F. Supp. at 818-19.

Furthermore, to attempt to distinguish equity power from federal jurisdiction at law is to fundamentally misunderstand the nature of the constitutional grant.²² Congress has conferred jurisdiction on the federal courts in both law and equity since 1789. There is no reason to believe that the constitutional grant of equitable power was any more self-executing than the grant of jurisdiction at law.²³

The Tort Claims Act lends no support to the district court's conclusion that the agents were immune from suit. Section 931 (a) of the 1946 Act²⁴ provided for a waiver of immunity by the government in certain cases. The language declared the United States to be liable "in the same manner and to the same extent as a private individual under like circumstances" The Act is not dispositive of the question whether the *officer* is liable, whether or not the action is against the government. Congress can, of course, replace remedies against federal officers by allowing suit against the government.²⁵ But so long as it has not done so there is no reason to suppose that federal agents do not remain subject to suit under traditional notions of personal liability.

The district court held that in the absence of federal common law the right of action must be given either by the Constitution or by statute. The court, in other words, assumed that any remedy must be set forth expressly in either of these bodies of positive law. If the court was saying there was no power in the federal judiciary to fashion a remedy enforcing a right created by an act of Congress where the act did not specify the remedy by which it was to be enforced, it was stating a proposition completely alien to the *Erie* doctrine and without support in the structural reality of the federal system.²⁶ Neither *Erie* nor the nature of the federal courts as tribunals of limited jurisdiction requires such a result.

Erie did nothing more than clarify the powers of the concurrent jurisdictions in terms of the substantive interests of the states and the Union. It cast no doubt on the power of federal courts, where the issues in the case raise questions of federal law, to fashion interstitial

²² See Wechsler, *Comment*, in GOVERNMENT UNDER LAW 134 (A. Sutherland ed. 1956).

²³ This is not the place to reopen the argument over the extent to which either of the constitutional grants is self-executing, or the extent to which Congress can place limitations on that jurisdiction. The point here is that there is, for our purposes, no distinction between the two. See generally H. M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 312-40 (1953).

²⁴ Act of Aug. 2, 1946, ch. 753, § 410(a), 60 Stat. 843, at 844, *as amended*, 28 U.S.C. § 2674 (1964).

²⁵ *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 722 (1949) (Frankfurter, J., dissenting).

²⁶ *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). See also cases cited note 174 *infra*.

substantive rules²⁷ or exercise inherent remedial power within the area of federal political concern.²⁸ These problems will be discussed more fully in part V, but it is worth noting here my belief that the district court unfortunately confused the *Erie* problem with the allocation of the law-making function between Congress and the federal judiciary.²⁹

A further problem with the district court's argument here is the implicit decision that the Constitution, without more, does not create duties enforceable at the instance of a party aggrieved. Such a position is impossible to sustain in light of the admitted judicial power to "void" unconstitutional legislation or enjoin threatened unconstitutional activities. In addition, a passive view of constitutionally created interests in liberty raises significant questions about the nature of the document as law. I will deal with this question in part III.

Whether interests defined by federal law may be enforced in federal courts where state law provides the rules of actionability is not a simple question. It requires further elucidation of the meaning of "arising under" in this context, and some useful method for distinguishing relative competence. I will deal with this in parts IV and V.

The simplest but most troublesome argument advanced by the district court is the support it finds for the denial of legal relief in the availability of equitable remedies.³⁰ As I will show in part IV, legal relief has traditionally been viewed as the standard, effective method, and the one which presents the least danger of interference with the proper functioning of government. It is the purest casuistry to argue the availability of an equitable remedy in support of the denial of a remedy at law when equitable remedies exist and may be applied only where the remedy at law is inadequate. Certainly the remedy at law is inadequate where there is none, but that is the question for decision. To assume that the historical existence of equitable relief must have been premised on a decision against legal relief denies what the Supreme Court admitted: that the question presented was one of first instance.³¹

For the purposes of a motion to dismiss, the district court in *Bell* found no difficulty in concluding the alleged conduct was wrongful.³²

²⁷ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957); "The range of judicial inventiveness will be determined by the nature of the problem."

²⁸ Justice Iredell's theoretical discussion in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 434 (1793), is relevant in this regard. For a good discussion of these problems, see Friendly, *In Praise of Erie—and the New Federal Common Law*, 19 RECORD OF N.Y.C.B.A. 64, 92 (1964).

²⁹ See *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 319-20 (1955); *National Mut. Ins. Co. v. Tidewater Transfer Co., Inc.*, 337 U.S. 582 (1949).

³⁰ 71 F. Supp. at 819.

³¹ *Bell v. Hood*, 327 U.S. 678, 684 (1946).

³² 71 F. Supp. at 816.

Insofar as federal jurisdiction was proper, the conduct could have been wrongful only in the sense that it violated specific provisions of the Bill of Rights. The simple issue is why there is no remedy in tort for an act admittedly wrongful which causes harm to a well-defined legal interest.

Due largely to the influence of legal realism on modern thinking, most theorists would today agree that the mere existence of a wrongful act which causes harm to another is not ground for an action in tort to recover money damages.³³ Sir Frederick Pollock claimed the existence of a right of action wherever there is harm caused by another without just cause or excuse.³⁴ The idea, an old one, can be traced at least to the thirteenth-century *ostensurus quare* summons by which the defendant was ordered to appear and show cause for having damaged the plaintiff.³⁵ Pollock's theory, rejected by the English courts since 1895,³⁶ would tell us more about tort theory if he had been less ambiguous in his use of the terms "right" and "excuse."

If Pollock had been using "excuse" in the Wigmoreian sense, perhaps his claim would have been more meaningful. Wigmore distinguishes right, responsibility (cause) and excuse as elements of tort adjudication.³⁷ Here "right" becomes an interest which the law will protect against harm provided the one responsible for the harm does not have an "excuse." The claim of justification is hence a plea in avoidance particular to this defendant and not a claim that plaintiff's interest does not deserve protection. The latter claim is implicitly rejected by denominating plaintiff's interest a "right." The failure to see this distinction is apparent in cases like *Mogul Steamship Co. v. McGregor, Gow & Co.*:³⁸ while recognizing that acts which damage the trade of another are actionable if done without just cause or excuse, the court there went on to find just cause in the defendant's right to carry on his trade freely and in any manner that best suited him. The opinion would have been more rational had it merely said the plaintiff had no interest which the law would protect from harm arising out of commercial competition.

Bell v. Hood, however, is quite different. There, the district court recognized an interest protected by the Constitution but whose violation could not be redressed in damages. Part II of this article

³³ W. PROSSER, *TORTS* 4 (3d ed. 1964) [hereinafter cited as PROSSER].

³⁴ F. POLLOCK, *TORTS* 17 (P. Landon ed. 1939) [hereinafter cited as POLLOCK].

³⁵ T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 367 (5th ed. 1956) [hereinafter cited as PLUCKNETT].

³⁶ POLLOCK 44 (editor's note).

³⁷ Wigmore, *The Tripartite Division of Torts*, 8 HARV. L. REV. 200 (1894).

³⁸ 23 Q.B.D. 598 (1889).

will detail the historical use of damages as a remedy for the violation of ordinary legal interests as well as for the violation of what I shall call interests in liberty: that is, interests which are defined or classified by a political ethic.³⁹ The basis of the plaintiffs' claim in *Bell* was that the conduct complained of was wrongful because it was specifically condemned by the Bill of Rights. In part III I will examine the function of that condemnation in terms of the concept of legality.

II. SOME CONSIDERATIONS OF HISTORY

In this part I will trace the historical relationship between constitutional interests in liberty and the ordinary remedial legal system. Admittedly, the use of history to prove the validity of a contemporary theory or verbal construct is dangerous at best. I will not attempt to state categorically the truth of historical propositions, but will merely point to significant correlations between historical ideas and ways in which the law has dealt with particular problems, noting that similar propositions might very well have been so treated for dissimilar reasons.⁴⁰ It is also admittedly difficult to base a legal argument on the sense of justice in a people, to argue from a constructed or discovered political ethic.⁴¹ Nevertheless, it is impossible to deny the existence of political ethics in the history of any culture. I therefore feel quite justified in tracing historical connections between contemporary and ancient ethical-legal relationships.

This part is divided into four sections. The first examines the legal relationship between political ethics and legally identifiable interests. The second relates those identifiable interests to the process of remedial growth. The third discusses a particular instance of these relationships; the interests identified will be those defined by legislation, with remedial growth a function of the creation of civil remedies to enforce those statutes. The last section deals with contemporary policies of the federal courts regarding the creation of remedies based upon legislatively identified interests.

³⁹ The term "interest" is used in this paper to "denote the object of any human desire." RESTATEMENT (SECOND) OF TORTS § 1 (1965). As in the *Restatement*, my use of the term carries no implication that the object of desire is or is not deserving of legal protection. *Id.*, comment (a). See also Lever, *Means, Motives and Interests in the Law of Torts*, in OXFORD ESSAYS IN JURISPRUDENCE 50-56 (A. Guest ed. 1961). Unless properly modified the term is purely descriptive. A legally protected interest, however, refers to one that society has recognized as being so legitimate that it will impose a sanction upon one who interferes with the realization of the desire that is the subject of the interest.

This use of "interest" is consistent with Professor Fried's distinction between "want" and "interest." Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 756 n.2 (1963).

⁴⁰ See E. CORWIN, LIBERTY AGAINST GOVERNMENT 22-23 (1948).

⁴¹ *But cf.* Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 HARV. L. REV. 904, 922-23 (1962).

A. Political Ethics and Legal Interests

Debate on the "original understanding" of Magna Charta continues in the twentieth century much in the same way as debate on the purposes and intent of the framers of the fourteenth amendment of the Constitution.⁴² Without entering the debate, however, there are some things which may be said about the nature of Magna Charta and its importance.

It is now well accepted that in the thirteenth century Magna Charta was a grant of rights to a limited class of beneficiaries rather than a declaration of English liberties.⁴³ Nevertheless, its importance as the first instance of a written and binding "deal" between sovereign and subject cannot be denied. In the centuries following it is this aspect of the charter, along with significant "misinterpretations" of several provisions, that becomes all important.⁴⁴

For my purposes the most significant aspect of the charter is its common law character. The feudal barons, at least, contended that they were merely interested in securing and restoring rights which existed before the reign of John and which were being presently abused by him.⁴⁵ Magna Charta was thus declarative and not creative. It was part of the common law, rather than "special law," because it was declarative and because it applied to all persons in all parts of the realm.⁴⁶ Through "virtual representation" it was the product of common consent,⁴⁷ and was intended to exist in perpetuity.⁴⁸ Magna Charta was to have the force of fundamental law in statutory form.⁴⁹ In other words, it embodied all the distinctive aspects of early common law.

By the end of the thirteenth century any doubt about the common law nature of the charter was removed by royal confirmation. Edward I confirmed Magna Charta as part of the common law and directed that pleas thereon be accepted in the courts of the realm.

Edward, by the Grace of God, King of England, Lord of Ireland, Duke of Guian, to all those that these present letters shall hear or see, Greeting. Know ye that we, to the Honor

⁴² See Radin, *The Myth of Magna Charta*, 60 HARV. L. REV. 1060 (1947).

⁴³ E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 30 (1929); McIlwain, *Magna Charta and Common Law*, in MAGNA CHARTA COMMEMORATION ESSAYS 171 (H. Malden ed. 1917) [hereinafter cited as COMMEMORATION ESSAYS]; McKechnie, *Magna Charta, 1215-1915*, in *id.* at 12, 17.

⁴⁴ In my view every document of liberty has two aspects: a specific provisional purpose and an historic ethical sense. This duality will be relevant at several points in this paper.

⁴⁵ COMMEMORATION ESSAYS 17, 170.

⁴⁶ *Id.* at 146, 155-56, 170-71, 175.

⁴⁷ *Id.* at 175; cf. J. MARITAIN, MAN AND THE STATE 33, 35 (1954).

⁴⁸ COMMEMORATION ESSAYS 146.

⁴⁹ *Id.* at 172, 175.

of God, and of the Holy Church, and to the Profit of our Realm, have granted for us and our Heirs, that the Charter of Liberties and the Charter of the Forest, which were made by common Assent of all the Realm, in the Time of King Henry our Father, shall be kept in every Point without Breach. (2) And we will that the same Charters shall be sent under our Seal, as well to our Justices of the Forest, as to others, and to all Sheriffs of Shires, and to all our other Officers, and to all our Cities throughout the Realm, together with our Writs, in which it shall be contained, that they cause the forsaid Charters to be published, and to declare to the People that we have confirmed them in all Points; (3) And that our Justices, Sheriffs, Mayors, and other Ministers, which under us have the Laws of our Land to guide, shall allow the said Charters pleaded before them in Judgment on all Points, that is to wit, the Great Charter as the Common Law, and the Charter of the Forest, for the Wealth of our Realm.⁵⁰

As a statute affirming the common law provisions of the charter it was beyond the dispensing power of the crown.⁵¹

The significance of the common law nature of Magna Charta cannot be overstressed. It directly refutes the notion that laws that place limits on governmental activity are somehow different from private law. The apparent difference arises from the conceptual difficulty in constructing norms that are to be binding upon the organs holding the residuum of lawmaking power.⁵² But therein lies the fertility of the common law. Norms arise as experience points to interests that are worthy of legal protection. Particularly substantial interests in liberty become interests protected by the common law. Magna Charta may not have originally been a charter of liberties in the modern sense; the nature of liberties must necessarily change as the common law refines and redefines interests protectable by law. Put another way:

It seems safer, however, to maintain that there are two Great Charters (or two aspects of the one charter) each of which, valuable in its own sphere and period, has rendered inestimable services to the growth of sound theories of government—the original feudal charter, and the charter of seventeenth century interpretations. Part, at least, of the greatness of the Charter would seem to lie, not so much in what it was

⁵⁰ 25 Edw. 1, c. 1 (1297). See also Dunham, *Magna Charta and British Constitutionalism*, in *THE GREAT CHARTER* 26, 30-31 (2d ed. 1966).

⁵¹ *COMMEMORATION ESSAYS* 152; A. DICEY, *LAW OF THE CONSTITUTION* 201 (10th ed. 1959). See also pp. 33-44 *infra*.

⁵² J. AUSTIN, *LECTURES ON JURISPRUDENCE* No. 6, § 292 (R. Campbell ed. 1875): "[T]here can be no legal right as against the authority that makes the law on which the right depends." See also Justice Holmes for the Court in *Kawananakoa v. Polybank*, 205 U.S. 349, 353 (1907).

to its framers in 1215, as in what it afterwards became to the political leaders, to the judges and lawyers, and to the entire mass of the people of England in later ages.⁵³

The same process that transformed the political ethic of the barons at Runnymede into legally protected interests operated to transform the political ethics of eighteenth century Englishmen on the American continent into bills of rights. Apart from the differing structures of the governments there is little to distinguish the processes. In neither case were the specific contents of the interests fashioned out of air; ⁵⁴ they were derived from common concern with the libertarian interests of citizens, and from the historical experience, both in England and in the colonies, with the efforts of governments to abridge or ignore those interests. The eighteenth century affirmations of interests in liberty implicitly assert that those interests exist apart from the specific structure of government. The American Constitution changed the structure of government in order to better protect those interests.⁵⁵

Interests in liberty inhere in a people as a matter of heritage, culture and experience. Such of these interests as appear in major political documents must be recognized as limitations on government because in government resides the greatest potential of abuse.⁵⁶ The American Constitution transformed a political ethic into a recognized legal norm in the manner of Magna Charta. This is clear from the two most vital aspects of the opinion in *Marbury v. Madison*.⁵⁷ To hold that the Constitution applies in ordinary cases before ordinary courts, and that legislation must be consistent with it, was not to express a new legal doctrine. The statute of Edward I, reproduced above, expressed an almost identical sentiment: Magna Charta was not to be breached in any point, and its provisions could be pleaded in ordinary courts of law.⁵⁸ That command was followed for centuries: the charter was so treated as late as the colonial period. It was argued by William Penn in his own defense,⁵⁹ by Andrew Hamilton for John Peter Zenger,⁶⁰ and by James Otis in *Paxton's Case*.⁶¹

⁵³ COMMEMORATION ESSAYS 12.

⁵⁴ A. DICEY, LAW OF THE CONSTITUTION 196 (10th ed. 1959).

⁵⁵ THE FEDERALIST No. 47 (J. Madison).

⁵⁶ See, e.g., B. DEJOUVENEL, ON POWER; ITS NATURE AND THE HISTORY OF ITS GROWTH 1-13 (1949); note 207 *infra*.

⁵⁷ 5 U.S. (1 Cranch) 137, 177 (1803).

⁵⁸ Cf. *Bowman v. Middleton*, 1 Bay. 252, 254 (S.C. 1792); 42 Edw. 3, c. 1 (1368).

⁵⁹ 6 How. St. Tr. 951 (1670).

⁶⁰ 16 Am. St. Tr. 1 (1734).

⁶¹ 1 Quin. 51-57 (Mass. 1761). See generally *Klopper v. North Carolina*, 386 U.S. 213, 223 (1967); *Huratado v. California*, 110 U.S. 516 (1883); Hazeltine, *The Influence of Magna Charta on American Constitutional Development*, in COMMEMORATION ESSAYS 180.

Here is the convergence of political ethics and legal principles derived from historical experience. The ethical interest in liberty becomes infused in law, applicable and enforceable as such. The profound implication of this proposition is that the administration of the common law is coextensive with the administration of fundamentals of liberty. The purpose in treating interests in liberty as part of the common law is to assure their application in practice through protection by judicial process. That purpose is frustrated when courts of law recognize their existence as political ethic yet deny adequate remedy in their service.⁶²

B. Legal Interests and Remedial Growth

There is perhaps no area of the law that affords greater possibility for confusion than the relationship between the changing content of legally identifiable interests and the creation of an adequate remedial system. Some clarification of this relationship may be drawn from an examination of the development of interest and remedial creativity.

It would have made little sense for Edward I to have proclaimed Magna Charta as the law of the land and directed that it be received as pleaded in courts of the realm when he knew full well that the existing writ system was largely inadequate for the purpose.⁶³ No writ could run against the king, as the author of all writs,⁶⁴ nor against the king's officials.⁶⁵ But Edward had already met this problem by inserting two provisions in the Statute of Westminster II (1285). Chapter 13 gave persons wrongfully imprisoned a cause of action against officials without regard to their official capacity:

. . . (4) And if they do imprison other than such as have been indicted by Inquest, the Parties imprisoned shall have

⁶² Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. . . . It is prescribing limits, and declaring that those limits may be passed at pleasure.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

⁶³ L. EHRLICH, *PROCEEDINGS AGAINST THE CROWN (1216-1377)*, at 111 (Oxford Studies in Social and Legal History No. 12, 1921).

⁶⁴ H. BRACON, *DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE*, f.382b; EHRLICH, *supra* note 63, at 26.

⁶⁵ EHRLICH, *supra* note 63, at 111; Y.B. Pasch. 35 Edw. 1 (1307) (Rolls series, at 466-70, A. Horwood ed. 1879). See also Pierson v. Ray, 386 U.S. 547, 558, 565 n.5 (1967) (Douglas, J., dissenting). However, there is recent evidence that after Magna Charta this was not necessarily true. See Turner, *The Royal Courts Treat Disseisin by the King: John and Henry III, 1199-1240*, 12 AM. J. LEGAL HIST. 1, 17 (1968).

their Action by a Writ of Imprisonment against the Sheriffs, as they should against any other person that should imprison them without Warrant.⁶⁶

The last section of the statute, chapter 50, stated an even broader principle:

. . . (2) Moreover, concerning the statutes provided where the Law faileth, and for Remedies, lest suitors coming to the King's court should depart from thence without Remedy, they shall have writs provided in their cases. . . .⁶⁷

If chapter 50 had been taken in the middle ages to mean what it seems to say when read from contemporary perspective, the entire development of English law might have been quite different. But there is no evidence that the section was ever used as authority for remedial creativity. Scholarly writings on the development of trespass on the case make no mention of chapter 50. The earliest case reference that I have been able to find is in the latter half of the nineteenth century.⁶⁸ Lord Coke merely noted that chapter 50 distinguished this statute from those which gave a remedy to the king only.⁶⁹

But Magna Charta was not left without teeth. Sentence of excommunication for violations was imposed in 1253, and on several occasions in the fourteenth century the Commons petitioned for criminal penalties against king's ministers who violated its provisions.⁷⁰ During the reign of Edward III we find the following enactments:

First, we have commanded all our Justices, That they shall from henceforth do equal Law and execution of Right to all our Subjects, Rich and Poor, without having regard to any Person, and without omitting to do Right for any Letters or Commandment which may come to them from us, or from any other, or by any other Cause.⁷¹

Item, That no Man of what Estate or Condition that he be, shall be put out of his Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due Process of the Law (par due proces de lei).⁷²

⁶⁶ 13 Edw. 1, c. 13, § 4 (1285).

⁶⁷ *Id.* c. 50, § 2.

⁶⁸ *Couch v. Steel*, 118 Eng. Rep. 1193, 1196 (Q.B. 1854) (citing the *Digests of Comyns*).

⁶⁹ 2 E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 486 (1642) [hereinafter cited as *INSTITUTES*]. *But cf.* Fricke, *The Juridical Nature of the Action on the Statute*, 76 L.Q. REV. 240 (1960); Linden, *Tort Liability for Criminal Nonfeasance*, 44 CAN. BAR. REV. 25, 35-36 (1966).

⁷⁰ *COMMEMORATION ESSAYS* 154, 177.

⁷¹ 20 Edw. 3, c. 1 (1346).

⁷² 28 Edw. 3, c. 3 (1354). *Cf.* *Murray v. Hoboken Land Co.*, 59 U.S. (18 How.) 272 (1855).

Chapter 10 of the same statute contains a rather extraordinary provision. To remedy the abuses of the officials of London, certain criminal fines (payable to the king) were imposed. In addition to the pains and penalties, it provided: "(4) . . . the Plaintiffs shall recover the treble Damages against the Said Mayor, Sheriffs, and Alderman."⁷³

This evidence, of course, is hardly proof of any extensive creation of remedies to redress damage to interests defined by the Great Charter. There is no clear proof that interests in liberty were fully recognized as protectable during the period of the development of the action on the case.⁷⁴ Nevertheless, we are forced to the recognition that myth is often of more contemporary import than scientific history. Just as the myth of Magna Charta became, after Coke, more important than the fact of the charter,⁷⁵ the myth of remedial creativity took on new life after the passage of centuries.

For the origins of the myth we must look elsewhere than to Lord Coke. Chapter 24 of Westminster II⁷⁶ has received the greatest scholarly attention,⁷⁷ but Coke, in dealing with this chapter, merely noted that under its provisions a petition for which no remedy existed was to be referred to Parliament.⁷⁸ In the late seventeenth century it was argued that chapter 24 provided a statutory basis for the action on the case, and thus by definition allowed the creation of remedies to redress violations of yet unactionable interests.⁷⁹ Blackstone accepted this view and pronounced the judgment that had the idea been accepted in the fourteenth century the system of equity would not have been necessary.⁸⁰

Notwithstanding the lack of firm foundation in evidence from the middle ages, it is not surprising to find post-seventeenth-century rhetoric more compelling to subsequent generations. Comyns, for example, states two relevant principles: that an action on the case does not depend upon the existence of a writ but varies according to the

⁷³ 28 Edw. 3, c. 10, § 4 (1354).

⁷⁴ See, e.g., Dix, *The Origins of the Action of Trespass on the Case*, 46 YALE L.J. 1142 (1936), which makes no mention of any such protection.

⁷⁵ See Kurland, *Magna Charta and Constitutionalism in the United States: "The Noble Lie,"* in THE GREAT CHARTER 51 (2d ed. 1966).

⁷⁶ 13 Edw. 1, c. 24 (1285).

⁷⁷ See, e.g., PLUCKNETT 372-73, Plucknett, *Case and the Statute of Westminster II*, 31 COLUM. L. REV. 778 (1931); Dix, *The Origins of the Action of Trespass on the Case*, 46 YALE L.J. 1142 (1936).

⁷⁸ 2 INSTITUTES 408.

⁷⁹ Plucknett, *Case and the Statute of Westminster II*, 31 COLUM. L. REV. 778, 781 (1931).

⁸⁰ 3 W. BLACKSTONE, COMMENTARIES *51 [hereinafter cited as COMMENTARIES]. On the other hand, it is also possible that the rigidity in the law courts to which Blackstone alluded was a function of the existence of the Chancellor's jurisdiction. See generally 5 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 279-99 (3d ed. 1922).

circumstances,⁸¹ and that whenever a statute prohibits conduct, any such action which causes harm may be the basis for an action on the case.⁸² And in *Chisholm v. Georgia*,⁸³ Attorney General Randolph argued that the common law established the principle that no prohibitory act shall be without its vindicatory quality; that an infraction is still punishable even though no express penalty is provided.⁸⁴ *Ubi jus ibi remedium* was thus carried into American constitutional law at a very early date.⁸⁵ More important than its contemporary vitality is the coincidence of its rise in popularity with legal developments of the seventeenth century.

The full relevance of the ability of courts to protect identifiable interests by the process of remedial growth is found in the seventeenth century fight for the independence of the judiciary—the notion of judicial review. The details of the struggle between crown and Parliament for legislative supremacy cannot detain us here. More pertinent is the effort by the judiciary, under the leadership of Coke, to retain the power to apply the whole, the fundamental law, in the adjudication of ordinary cases.⁸⁶

In his *Institutes*, Coke stated that “the power and jurisdiction of the parliament, for making of laws in proceeding by bill, it is so transcendant and absolute, as it cannot be confined either for causes or persons within any bounds.”⁸⁷ This should not be taken to mean that Coke opted for the supremacy of Parliament as against the same absolute power in the king;⁸⁸ he was speaking of a species of judicial jurisdiction (the “High Court” of Parliament) and not legislation in the modern sense.⁸⁹

Coke contributed the notion of Parliamentary supremacy *under* the law, which in time, with the differentiation of legislation and adjudication, became transmutable into the notion

⁸¹ 1 J. COMYNS, DIGEST 139, 140 (1762).

⁸² *Id.* at 248.

⁸³ 2 U.S. (2 Dall.) 419 (1793).

⁸⁴ *Id.* at 422. See generally *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1884); *Paxton's Case*, 1 Quincy 51, 57 (Mass. 1761) (“Pity it would be, they should have like Right, and not like Remedy; the Law abhors Right without Remedy.”); *Adam v. Waltham*, Y.B. 21-22 Edw. I. 320, 322 (1294); 3 COMMENTARIES *23; H. BROOM, A SELECTION OF LEGAL MAXIMS 153-55 (8th ed. 1911); 2 E. COKE, A COMMENTARY UPON LITTLETON f. 197b (F. Hargrave & C. Butler, ed. 1832); A. DICEY, LAW OF THE CONSTITUTION 199 (10th ed. 1959); Plucknett, *Case and the Statute of Westminster II*, 31 COLUM. L. REV. 778, 783, 786 (1931).

⁸⁵ See also Justice Wilson's remarks in the case, 2 U.S. (2 Dall.) 419, 456, 460 (1793).

⁸⁶ *Bonham's Case*, 77 Eng. Rep. 628, 638 (C.P. 1610).

⁸⁷ 4 INSTITUTES 36.

⁸⁸ *But cf.* 1 COMMENTARIES *160.

⁸⁹ *Rowles v. Mason*, 123 Eng. Rep. 829, 892 (K.B. 1612); 2 INSTITUTES 497-98; 4 *id.* 37; E. CORWIN, LIBERTY AGAINST GOVERNMENT 38 (1948).

of *legislative* supremacy within a law subject to construction by the process of adjudication.⁹⁰

Coke's assertion of common law supremacy disappears in Blackstone.⁹¹ But in spite of the impact of Blackstone on eighteenth century colonial legal thought,⁹² his view was clearly rejected in *Marbury v. Madison*.⁹³ The power of the judiciary to apply fundamental ethics of liberty transformed into legal norms is secured in the American experience.

Nevertheless, there has remained in American law a failure to make a pair of simple but essential connections: to connect the principle of judicial review with the process of remedial growth through the judicial creation of civil actions based upon constitutionally defined interests in liberty, and to see constitutional guarantees of liberty as identifiable interests worthy of protection in the same manner as any other species of interest. In the absence of these connections the words of Dicey are perhaps somewhat less than realistic:

[T]here runs through the English constitution that inseparable connection between the means of enforcing the right and the right to be enforced which is the strength of judicial legislation. The saw *ubi jus ibi remedium*, becomes from this point of view something much more important than a mere tautological proposition. In its bearing upon constitutional law, it means that the Englishmen whose labors gradually formed the complicated set of laws and institutions which we call the Constitution, fixed their minds far more intently on providing remedies for the enforcement of particular rights or for averting definite wrongs, than upon any declarations of the Rights of Man or Englishmen. The Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty. Nor let it be supposed that this connection between rights and remedies which depends upon the spirit of law pervading English institutions is inconsistent with the existence of a written constitution, or even with the existence of constitutional declarations of rights. The Constitution of the United States and the constitutions of the separate states are embodied in written or

⁹⁰ E. CORWIN, *LIBERTY AGAINST GOVERNMENT* 57 (1948).

⁹¹ "[T]here is no court that has the power to defeat the intent of the legislature, when couched in such evident and express words." 1 COMMENTARIES *91.

"So long . . . as the English Constitution lasts, we may venture to affirm that the power of Parliament is without control." *Id.* at *162.

"Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other." *Id.* at *46.

⁹² E. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 85 (1929).

⁹³ 5 U.S. (1 Cranch) 137 (1803). See text accompanying notes 56-57 *supra*.

printed documents, and contain declarations of rights. But the statesmen of America have shown an unrivalled skill in providing means for giving legal security to the rights declared by American constitutions. The rule of law is as marked a feature of the United States as of England.⁹⁴

C. *Non-Judicially Defined Interests in Tort Adjudication*

If we can agree that constitutional interests in liberty have been defined and delineated in political documents, legislative enactments, and judicial experience so that these interests are readily discoverable within acceptable limits of judicial certainty, we can turn our attention to the form of the remedial system. Specifically, the concern is the law of torts: the availability of a civil remedy in damages to compensate for harm to constitutional interests in liberty.

As seen in the preceding sections, historical evidence that a tort remedy has been fundamental to a legal system that sought to protect well-defined interests in liberty is not conclusive.⁹⁵ On the other hand, neither is it trivial. Notions of judicial review that prevailed and expanded over centuries of experience seem to favor the proposition. In certain situations the absence of an action in tort meant that behavior harmful to constitutional interests in liberty would be unreviewable.⁹⁶

A modern conceptualism which would permit us to infer the existence of a broad view of the role and function of the law of torts cannot be transplanted to the middle ages. There is, nonetheless, much to be said for tort remedies in terms of historical experience.⁹⁷ Statements of causes of action in tort are simple, traditional and effective means of achieving judicial review of alleged harms to interests in liberty.⁹⁸ The tort action fulfills the need for a consistent judicial methodology, preserves the political ethic of governmental accountability, minimizes damage to the effective functioning of government, and serves the deterrent function essential to the protection of constitutional interests.⁹⁹

The action of trespass as it developed around the middle of the thirteenth century was initiated by the writ of trespass *vi et armis contra pacem*. The peace of the realm was threatened by personal injuries. Here is manifested the fundamental proposition that an ordered society

⁹⁴ A. DICEY, *LAW OF THE CONSTITUTION* 199-200 (7th ed. 1908).

⁹⁵ *Id.* at 193, 195.

⁹⁶ *See* *Tooker's Case*, 76 Eng. Rep. 562 (K.B. 1612). *Compare* 43 Edw. 3, c. 3 (1369); 28 Edw. 3, c. 3 (1354); 25 Edw. 3, stat. 5, c. 4 (1351) *with* Magna Charta c. 39 (1215). *See also* text accompanying notes 281-87 *infra*.

⁹⁷ *See* *Campbell v. Hall*, 98 Eng. Rep. 848 (K.B. 1774); *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774).

⁹⁸ *See, e.g.,* *Nixon v. Herndon*, 273 U.S. 536 (1927) (Holmes, J.); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

⁹⁹ *See generally* pp. 39-44 *infra*.

is impossible without a system of redress for wrongs between persons. The writ system, though far from a full and flexible remedial process, constituted the manner in which the king did justice between his subjects and provided personal security. Consistently, the later development of the action on the case gave redress for indirect rather than direct harms to the person.¹⁰⁰ The administrative impossibility of direct governmental involvement in all private disputes and the need for order, personal security and a regime of law in a meaningful sense of the word could be reconciled in the law of tort.

Today that law covers an enormously broad area of social contact.¹⁰¹ But the public element in the adjudication of disputes between individuals has not been eliminated.¹⁰² Tort adjudication continues to involve a determination of the reasonableness of the defendant's activity in its social context,¹⁰³ the need to protect and perpetuate the harmful activity,¹⁰⁴ the fairness of allowing plaintiff's damage to go undressed,¹⁰⁵ and the need to protect and perpetuate the plaintiff's activity or interest.¹⁰⁶

The Constitution, as an attempt to make more perfect a society that assures its citizens a regime of law, would fall far short of its objective without some body of rules serving the functions of the law of torts. We may well ask whether the Constitution does not *require*, in the absence of some other effective remedy providing a means for judicial review of alleged harms to interests in liberty, that there be available some remedy similar to a cause of action in tort.¹⁰⁷

The ordinary tort "action on the statute"—a cause of action in tort resulting from activity in violation of a legislatively created duty or standard—is analogous to a tort action claiming harm to interests in liberty. In some ways the development of the action on the statute is obscure, but its relation to the concern of this paper is significant enough to warrant detailed discussion.

The origin of the action on the statute can be traced to the customary judicial use of money to resolve disputes. Well before the de-

¹⁰⁰ PLUCKNETT, *supra* note 35, at 372.

¹⁰¹ PROSSER, *supra* note 33, at 6.

¹⁰² See, e.g., Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193-96 (1890); Sax & Hiestand, *Shunlordism as a Tort*, 65 MICH. L. REV. 869, 878 (1967).

¹⁰³ Foster v. Preston Mill Co., 44 Wash. 2d 440, 268 P.2d 645 (1954).

¹⁰⁴ Katz v. Kapper, 7 Cal. App. 2d 1, 44 P.2d 1060 (Dist. Ct. App. 1935).

¹⁰⁵ Rogers v. Elliott, 146 Mass. 349, 15 N.E. 768 (1888).

¹⁰⁶ Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 112 P.2d 631 (1941).

¹⁰⁷ Cf. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 449 (1963): "[I]t is easy to slip into the assumption that the right [to habeas corpus] has a kind of ultimate reality or existence apart from the institutional processes which we create to determine whether the right has been violated in a particular case."

velopment of trespass as a distinct form of action, money had been awarded in criminal appeals and the assize of novel disseisin.¹⁰⁸ The money awarded was a common form of resolution upon procurement of *licentia concordandi*, or leave to compromise.¹⁰⁹ Leave was necessary because the plaintiff had pledged assurance that the litigation was other than vexatious.¹¹⁰ *Licentia concordandi* was freely granted where the parties were able to settle their differences.¹¹¹

These early usages do not establish the origins of trespass or the action on the statute. They do demonstrate early judicial familiarity with money as a means of protecting both royal and private interests in settling disputes.¹¹²

A second reason for the flexibility of the forms of action in the early thirteenth century [the first being the effort by the the king's court to draw judicial business away from the feudal courts] lies in the principle of damages, so important in English law, which had been introduced through the medium of the assize of *novel disseisin* and was gradually spreading to other forms of action. Until after 1250 these actions for damages took no one fixed form, but were brought usually by a complaint in the form of a *quare* writ out of Chancery.¹¹³

Crimes, in general, were not only offenses against the king's peace but trespasses to the person. Disseisin, which lay for either actual loss of possession or nuisance, such as destruction of a mill or diversion of a water course, was often accompanied by force,¹¹⁴ injury to land or loss or damage to personal property. By the end of the twelfth century damages were the principal means of redressing such wrongs.¹¹⁵

Prior to the emergence of the common law there existed two main types of procedure under what was then the Germanic customary law. One was a demand for specific relief, *praecipe quod reddat*, the other a

¹⁰⁸ R. CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL* 291-92 (Selden Society 1958); C. FLOWER, *INTRODUCTION TO THE CURIA REGIS ROLLS* 159, 165, 473 (Selden Society 1944); PLUCKNETT, *supra* note 35, at 369; A. SIMPSON, *INTRODUCTION TO THE HISTORY OF THE LAND LAW* 29 (1961); Thorne, *Livery of Seisin*, 52 L.Q. REV. 345, 358 (1936).

¹⁰⁹ 2 COMMENTARIES *350; D. STENTON, *ENGLISH JUSTICE BETWEEN THE NORMAN CONQUEST AND THE GREAT CHARTER (1066-1215)*, at 7-10 (1964); FLOWER, *supra* note 108, at 480-98.

¹¹⁰ 2 COMMENTARIES *350; D. STENTON, *supra* note 109, at 43; CAENEGEM, *supra* note 108, at 293.

¹¹¹ D. STENTON, *supra* note 109, at 51.

¹¹² Originally, around 1166, novel disseisin was a criminal action; it soon developed into a mixed institution. Caenegem, *supra* note 108, at 297.

¹¹³ DIX, *The Origins of the Action of Trespass on the Case*, 46 YALE L.J. 1142 (1936). See also PLUCKNETT, *supra* note 35, at 369-72.

¹¹⁴ See, e.g., *Guleford v. Tergot*, Y.B. Pasch. 21 & 22 Edw. 1 (1293), cited in PLUCKNETT, *supra* note 35, at 357 n.4.

¹¹⁵ A. SIMPSON, *supra* note 108, at 29, putting the earliest case in 1198.

complaint of wrong, *quare*, looking toward compensation by way of *bot* or similar settlement.¹¹⁶ The development of the common law in the king's courts of the thirteenth century built upon these customary practices.

One of the structures created was the action on the statute. The difficulty of precise proof of this proposition stems from the concurrent development of trespass on the case. An action upon the case "may recite the 'custom of the realm' (as against innkeepers), or it may recite one of the scores of statutes the breach of which caused loss to the plaintiff. . . ." ¹¹⁷ Thus the action on the statute is not, and never was, a distinct form of action as opposed to a theory of recovery. In the late fourteenth and fifteenth centuries, actions labeled "trespass" were being brought upon statutes whether or not they provided in terms for special penalties.¹¹⁸

An interesting example of these early actions upon statutes is *Symond v. Hillyngton*,¹¹⁹ an action in trespass upon the Statute of Labourers,¹²⁰ which made criminal the departure of a servant from the employ of his master. The defendants in the case were the servant and one who took him away. Damages were awarded.

The fourteenth century Statutes of Forcible Entry¹²¹ were criminal enactments designed to punish bands of men who invaded private lands, disrupting peaceful possession or causing ouster. Cases found to the end of the fifteenth century cite these statutes as the basis for civil actions, even though later statutes of Henry IV¹²² and Henry VI¹²³ added provisions for double and treble damages respectively. It may be that the absence from the earlier statutes of any provision for a distinct writ created the impression that no action for damages would lie at law.¹²⁴ But by 1470, ordinary trespass actions appear with some regularity.¹²⁵ Appeals from awards of damages in these cases were being taken to the King's Council by parties who could not enforce their money judgments.¹²⁶

¹¹⁶ PLUCKNETT, *supra* note 35, at 372; Dix, *supra* note 113, at 1150.

¹¹⁷ PLUCKNETT, *supra* note 35, at 372.

¹¹⁸ Milson, *Trespass from Henry III to Edward III, Part II: Special Writs*, 74 L.Q. REV. 407, 428 (1958).

¹¹⁹ Y.B. 1 Hen. 6 (1422), 50 SELDEN SOCIETY 10 (1933).

¹²⁰ 23 Edw. 3, c. 2 (1349).

¹²¹ 5 Ric. 2, c. 7 (1381); 15 Ric. 2, c. 2 (1391).

¹²² 4 Hen. 4, c. 8, § 3 (1402).

¹²³ 8 Hen. 6, c. 9, § 6 (1429).

¹²⁴ Petition to the Bishop of Exeter, Chancellor of England (ca. 1398), in SELECT CASES IN CHANCERY, 10 SELDEN SOCIETY 83 (W. Baildon ed. 1896).

¹²⁵ Prior of Bruton v. Ede, Y.B. Pasch. 10 Edw. 4 (1470), 47 SELDEN SOCIETY 31 (1930); Bevyne v. Wodecokke, *id.* at 50.

¹²⁶ Jackson v. Ernely (1489), in Bayne, *Select Cases in the Council of Henry VII*, 75 SELDEN SOCIETY 68 (1956); Dyer v. Clinton (1497), *id.* at 111.

One might speculate that, had this development continued unrestricted, we would today have damage actions for violations of constitutionally guaranteed interests in liberty being brought as a matter of course. If such an action is permitted upon criminal statutes defining interests in personal security such an action may, it would seem, be brought upon constitutional provisions defining interests in personal liberty. However, somewhere between the sixteenth and eighteenth centuries there evolved an apparent judicial reluctance to allow actions upon statutes for the recovery of money awards.

The explanation for this development appears in the political climate of the seventeenth century. Up to and through the Tudor Reformation the supreme law-making power became ever increasingly lodged in the Parliament.¹²⁷ The representative character of that body led to greater legitimacy for its enactments. Indeed, the "will" of Parliament assumes the same mantle of supremacy worn by the crown in centuries past.¹²⁸ Henceforth the *intent* of the lawmaking branch becomes a factor of primary significance in the development of the common law. To permit civil actions upon criminal or regulatory legislation which did not provide for such remedies was thought somehow to add to the written law. According to this theory the remedial question raised in *Bell v. Hood* would be resolved by noting that neither the Constitution nor any act of Congress specifically provided for a remedy in damages to redress federal violations of interests in liberty.¹²⁹ However, the historical development of the theory will not support so broad a statement.

Two lines of argument can be identified in the earliest cases. One line asserted that the remedy attached to a *new* piece of legislation should be construed as exclusive until a backlog of common law experience integrated the legislation with the existing body of common law rights of action, or the legislature, in adding to its provisions, treated it as a common law right of action. This view would not allow a conservative treatment of interests in liberty insofar as they had their origin in the common law and were anything but new.

The second, more modern, strand argued that the question whether or not a damage remedy was to be allowed depended on the way in which the statutory "penalty" was defined. If the penalty were defined as a "sum certain," damages could be awarded to the private

¹²⁷ E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 41 (1930).

¹²⁸ No better expression of this sentiment can be found than the words of Blackstone, *supra* note 91.

¹²⁹ Such statutes exist, of course, for violations "under color of" state law, 42 U.S.C. § 1983 (1964), and by private persons acting in conspiracy, 42 U.S.C. § 1985 (1964).

plaintiff, but if defined in "uncertain" terms¹³⁰ any award had to be confined to the statutory scheme. This approach is more modern in the sense that it attempts to reflect the legal policy in terms of compensation rather than penalties. The wrong to the plaintiff is treated here as something distinct from the punitive sanction. However, subsequent to its appearance in the following few cases this second line of analysis does not reappear until the decision in *Couch v. Steel*¹³¹ two hundred years later.

Consideration of some of the cases from the mid-seventeenth century to the end of the nineteenth century sheds light on the workings of this supposed judicial deference. In *Robert Pilfold's Case*,¹³² the plaintiff sued in trespass *quare clausum fregit*, praying damages in the amount of ten pounds. The defendant appealed from the award of costs to the plaintiff. The court held:

In all cases where a man either before, or by the same statute shall not recover damages, if after the said Act another statute in a new case gives damages, either single, double or treble, &c. there the plaintiff shall not recover costs, for this Act is an Act of Creation, which creates and gives a recompence to the plaintiff, where in the same case no recompence was given before.

But otherwise it is of an Act of Addition, which adds greater recompence and satisfaction than was given before such Act: for where damages and costs were given by the common law, but the Act increases the damages, there the plaintiff shall recover his damages increased by the statute, and also costs.

*James v. Tintny*¹³³ was a writ of error to reverse a judgment of the Common Pleas for the defendant. Plaintiff sued in replevin to recover property taken by distress. Common Pleas held for the defendant and awarded damages, which award was assigned as error.

Under the statute of 21 Hen. VIII, c. 19(1530), damages could be awarded to the defendant to the extent they would have been awarded to the plaintiff had he prevailed in certain kinds of actions. The Lord Chief Justice argued that no damages should be awarded in this case because the matter was not within the statute. In dictum he stated that if a statute gave damages where none were available before, the winning party could not have costs because the statute is one of "creation." But if the statute gave damages where they could have

¹³⁰ *E.g.*, when provision was made for treble damages.

¹³¹ 118 Eng. Rep. 1193 (K.B. 1854). See notes 152-57 *infra* and accompanying text for a discussion of the case.

¹³² 77 Eng. Rep. 1102, 1103-04 (K.B. 1612).

¹³³ Argument of the Lord Chief Justice, 82 Eng. Rep. 396 (1639).

been recovered at common law or by force of preexisting statute, then the party could have his costs because the statute is an act of "addition" and not of creation.

This distinction was again raised in *North v. Musgrave*.¹³⁴ North brought an action in debt upon the statute, an Act for the Impounding of Distresses, 1 & 2 Phil. & Mar. c. 12,¹³⁵ claiming that he had suffered a distress of ten pence contrary to the provisions of the statute. Judgment in Common Pleas was in his favor for the statutory forfeiture plus damages. The defendant claimed as his third assignment of error

that costs and damages are given, which ought not to be upon a penal law. For he ought not to have more than the statute giveth; and therefore upon the Statute of Perjury, no costs are given: so upon the Statute of Gloucester [for Waste], the plaintiff shall recover no more than the treble value.

Rolls, for the plaintiff, replied that there were many precedents where damages were given upon the statute in issue, and offered the following analysis:

where the penalty given by the statute is certain, as here, upon which he may bring debt, there he shall recover damages: but where the penalty is uncertain, as upon the Statute of Gloucester, for treble damages, the statute which giveth the treble value, and the like; there, because it is incertain, he shall have no more.¹³⁶

The case was adjourned and further argument subsequently heard. At this time Maynard for the defendant cited *Pilfold's Case* for the proposition that no more than the statutory penalty ought to have been awarded.¹³⁷ Rolls disagreed, arguing that the case was not within *Pilfold's Case* "because that the Action is not a new Action, but the thing is a new thing, for which the old action is given."¹³⁸ The court agreed on the judgment as rendered below but split on the awarding of costs, Justice Barclay, on the authority of *Pilfold's Case*, saying they should not be allowed.

In *Ashby v. White*,¹³⁹ the plaintiff claimed he was wrongfully deprived of his right to vote in parliamentary elections and brought

¹³⁴ 82 Eng. Rep. 410 (K.B. 1639).

¹³⁵ (1554). "That no man shall take for keeping in pound, impounding, or poundage of any manner of distress, above the sum of four pence, upon pain of forfeiture of five pounds, to be paid to the party grieved."

¹³⁶ 82 Eng. Rep. at 410.

¹³⁷ *Id.* at 411-12.

¹³⁸ *Id.* at 412.

¹³⁹ 92 Eng. Rep. 126 (K.B. 1703), cited with approval in *Nixon v. Herndon*, 273 U.S. 536, 540 (1927) (Holmes, J.).

an action on the case for damages. *Ashby* is particularly important: the right asserted was political in the broadest sense, and the conduct complained of had been designated by the legislature as a public offense. *Ashby's* claim was not grounded upon an "act of creation," the penalty provided by statute was not compensatory and, if any sum was involved at all, it was stated in a sum certain. Most important, the case raised the issue whether the right to vote in a parliamentary election was an interest in liberty personal to the plaintiff that he could assert in a civil action.

Three members of the King's Bench held for the defendant, saying, *inter alia*: the matter was a public offense and therefore no action was given to the party; it was for Parliament to determine in the first instance whether there was a right to vote before an action could be brought for injury to that right; as a matter of statute the courts are bound by determinations of Parliament in matters of elections and may not act in the absence thereof, and therefore *Turner v. Sterling*¹⁴⁰ is distinguishable; if Parliament shall determine the party had a right to vote he may have his action at law for damages; by analogy to cases of public nuisance, no action will lie for damages where there is a remedy available by presentment, which again distinguishes *Turner* because there no other remedy was available.

The strangeness of the syllogistic argument can only be explained by a primary desire to avoid remedial creativity. Certainly the opinion stands or falls on the question whether, by making interference with the right to vote a public offense, Parliament has determined there is a right to vote. Evidently three members of the King's Bench thought not. For them the interest in voting was protected only by the criminal law and not the law of torts—for no reason other than the silence of Parliament.

Chief Justice Holt disagreed with his brothers in an opinion now famous for its libertarian ethics.¹⁴¹ He found that the plaintiff did have a right to vote by statute, and that therefore an action on the case would lie.

A right that a man has to give his vote at an election of a person to represent him in Parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendent thing, and of an high nature, and the law takes notice of it as such in divers statutes. . . . The right of voting at the election of burgesses is a thing of high-

¹⁴⁰ 86 Eng. Rep. 287 (K.B. 1683), holding that an action on the case would lie against the mayor of a town for refusing to perform his customary duties in the appointment of bridgemasters.

¹⁴¹ See Sax & Hiestand, *supra* note 102, at 879.

est importance, and so great a privilege, that it is a great injury to deprive the plaintiff of it¹⁴²

If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for . . . want of right and want of remedy are reciprocal.¹⁴³

It would look very strange, when the commons of England are so fond of their right of sending representatives to Parliament, that it should be in the power of a sheriff, or other officer, to deprive them of that right, and yet that they should have no remedy; it is a thing to be admired at by all mankind.¹⁴⁴

Where a new Act of Parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him. . . . [B]y West. I [Statute of Westminster First], 3 Ed. 1, c. 5, [1275], it is enacted, that forasmuch as elections ought to be free, the King forbids, upon grievous forfeiture, that any great man, or other, by power of arms, or by malice or menaces, shall disturb to make free elections. 2 Inst. 168, 169. And this statute, as my Lord Coke observes, is only an enforcement of the common law; and if the Parliament thought the freedom of elections to be a matter of that consequence, as to give their sanction to it, and to enact that they should be free; it is a violation of that statute, to disturb the plaintiff in this case in giving his vote at an election, and consequently actionable.¹⁴⁵

The Chief Justice's dissenting opinion was accepted by the House of Lords, which reversed the King's Bench and entered judgment for the plaintiff. If Chief Justice Holt's opinion is taken as the prevailing theoretical view, the following proposition should be settled: interests in liberty may be asserted in civil actions for damages even where a criminal penalty is attached to a legislatively defined right. Furthermore, in the absence of statute, the common law conception would apply without the barrier of legislative intent. Since the right asserted would be "only an enforcement of the common law," the full range of remedial power would be available.

The cases subsequent to *Ashby* substantially complicate the problem. None of the opinions attempt to distinguish *Ashby* on the ground that no interest in liberty was being asserted by the plaintiff. It is

¹⁴² 92 Eng. Rep. at 135-36.

¹⁴³ *Id.* at 136.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 136-37.

therefore difficult to decide if they can be explained on this silently understood ground; on the ground that the courts misunderstood the holding of *Ashby*; or on the ground that additional complicating factors were present. The complicating factors are implicit in the questions raised by these cases: (a) Will an action in tort for damages lie upon a criminal statute? (b) Will an action in tort for damages lie upon a statute providing for a penalty payable to someone other than the plaintiff? (c) Will an action in tort for damages lie upon a statute providing for a penalty payable to the plaintiff? (d) Will an action in tort for damages lie upon a statute specifically providing for enforcement by some other form of action?

In one type of case the plaintiff sues either in trover or debt,¹⁴⁶ but the relevant statute provides for a remedy in distress.¹⁴⁷ These cases uniformly hold that where the statute provides for recovery in a specified manner it may be enforced in that manner and no other. One of them, *Underhill v. Ellicombe*,¹⁴⁸ distinguished this kind of case from those involving a statutory penalty with no mode of recovery prescribed, but made no distinction between statutes providing for recovery in sums certain and those providing for recovery in sums uncertain. Nor

¹⁴⁶ *Stevens v. Evans*, 97 Eng. Rep. 761, 763 (K.B. 1761): "It is a rule, 'that upon a new statute which proscribes a particular remedy; no remedy can be taken, but the particular remedy provided by the statute.' Therefore clearly, no action of debt will lie for a poor's rate [43 Eliz. 1, c. 2 (1597)]." No authority was cited. *But see* Piffold's Case, 77 Eng. Rep. 1102 (K.B. 1612).

¹⁴⁷ *Doe dem. Murray v. Bridges*, 109 Eng. Rep. 1001, 1005-6 (K.B. 1831): "And as the Act [the Tax Redemption Act, 42 Geo. 3, c. 116, § 88 (1802)] has provided for [the tax] payment and recovery in this manner [distress], it appears to us that there can be no other mode of enforcing the payment And where the Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance can not be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case."

¹⁴⁸ 148 Eng. Rep. 489 (Ex. 1825). The plaintiff here sued in debt to collect composition money duly assessed in lieu of a statutory duty, 13 Geo. 3, c. 78, § 34 (1773). Baron, L.C., held:

This is a claim given by statute, and the same statute which creates it prescribes a particular remedy [distress] for its enforcement. Therefore, it appears to us that no other can be resorted to. . . . These are statutes which establish the right, to enforce which the present action has been brought. In creating the right, they also direct the remedy; and we have found no authority that any other can be pursued. No case in point has been stated in support of the action, and it appears to be a rather new experiment.

. . . The cases which were cited in support of the action do not maintain the proposition for which they were adduced. Generally they go to shew, that if a statute prohibits the doing of a thing under a penalty, to be paid to the party grieved, or without saying to whom it shall be paid, and does not prescribe any mode of recovery, this action may, in such case, be maintained by the party grieved, and for that there are many other authorities. Com. Dig. tit. "Debt," (A.), 1, *Presid. &c. of Physicians v. Solmond*, 1 Ld. Raym. 680 [91 Eng. Rep. 1353 (K.B. 1701)].

148 Eng. Rep. at 491-92. *See also* *Dundalk Western Ry. v. Tapster*, 113 Eng. Rep. 1287-1288 (Q.B. 1841): "The right and the remedy are both created by the Legislature, and the company are bound to pursue the remedy provided by it."

did *Underhill* say whether special damages could be had where the statute specified a sum certain recoverable in any mode. This was the issue in *North v. Musgrave*. And finally, *Underhill* did not deal with cases involving a criminal statute without provision for a penalty or forfeiture. That was the issue in *Ashby v. White*.

The relevant statute in *Stevens v. Jeacocke*¹⁴⁹ provided for a forfeiture and penalty payable to the plaintiff but did not specify any particular mode of recovery.¹⁵⁰ Nevertheless, the court held for the defendant on the authority of the *Underhill* line of cases.¹⁵¹ The court in *Stevens* failed to see the difference between questions (c) and (d) noted above. The policy problem in the former is whether the statutory penalty should be all the plaintiff recovers, that is, whether it should be viewed as something in the nature of a limitation on liability (or liquidated damages). Question (d) raises the distinct issue whether the specification of a particular form or mode of proceeding was intended as exclusive, or whether exclusiveness is supported by any significant policy consideration.

*Couch v. Steel*¹⁵² was an action by a seaman against the owner of his vessel for failure to keep aboard sufficient medical supplies. The statute¹⁵³ provided for a penalty of twenty pounds recoverable at the suit of any person payable in part to the "informer" and in part to the Seaman's Hospital Society. Lord Campbell initiated his analysis by noting that were it not for the penalty there would be no question that an action could be maintained for damages.¹⁵⁴ The general rule, he said, was that an action on the case would lie where one is harmed by the wrong of another,¹⁵⁵ and that a remedy lies upon every statute enacted for the benefit of the person where he suffers from a wrong done contrary to the statute.¹⁵⁶ Coming to the penalty provision, Lord Campbell said:

If the performance of a new duty created by Act of Parliament is enforced by a penalty, recoverable by the party grieved by

¹⁴⁹ 116 Eng. Rep. 647 (Q.B. 1848).

¹⁵⁰ 4 & 5 Vic., c. 57 (1841).

¹⁵¹ 116 Eng. Rep. at 652:

That therefore, if any infringement of a right was shewn, it was one in respect of which a specific remedy had been given: and that it was [sic] a rule of law that an action will not lie for the infringement of a right created by statute, where another specific remedy for infringement is provided by the same statute. . . . [Citing *Underhill* and *Doe dem. Murray v. Bridges*].

¹⁵² 118 Eng. Rep. 1193 (K.B. 1854).

¹⁵³ 7 & 8 Vic., c. 112, § 18 (1844).

¹⁵⁴ *But see* *Ashby v. White*, 92 Eng. Rep. 126 (K.B. 1703).

¹⁵⁵ *See* text accompanying notes 34-38 *supra*.

¹⁵⁶ For the latter proposition he cited J. COMYNS, DIGEST s.v. "Action Upon the Statute" (1762); for the former, the Statute of Westminster II, 13 Edw. I, c. 50 (1285). 118 Eng. Rep. at 1196.

the non-performance, there is no other remedy than that given by the Act, either for the public or private wrong; but, by the penalty given by the act now in question . . . compensation for private special damage seems not to have been contemplated. The penalty is recoverable in case of a breach of the public duty, though no damage may have been actually sustained by anybody; and no authority has been cited to us, nor are we aware of any, in which it has been held that, in such a case as the present, the common law right to maintain an action in respect of a special damage resulting from the breach of a public duty (whether such duty exists at common law or is created by statute) is taken away by reason of a penalty, recoverable by a common informer, being annexed as a punishment for the non-performance of the public duty.¹⁵⁷

Of the six cases dealt with here compensatory recovery was granted in two and denied in four. Comparing the two groups of cases yields interesting results.

In the four cases in which recovery was denied¹⁵⁸ the statutes involved provided for a mode of recovery that would compensate the plaintiff in money. In three of these four the plaintiff attempted to use some other form of action than that provided by the statute. Those cases were readily distinguishable from *Ashby* and *Couch*, where no mode of recovery existed which would provide the plaintiff with personal compensation in money. It is this statutory availability of personal compensation which reconciles the decisions. The really difficult case is *Stevens v. Jeacocke*, wherein the statute provided for a forfeiture and a "penalty" or "fine" payable to the party injured.¹⁵⁹ The difficulty is in deciding whether the money provision represents something like a criminal penalty or is more in the nature of a limitation on liability. Prosser argues:

The fact that [legislation providing that under certain circumstances particular acts shall or shall not be done] is usually penal in character, and carries with it a criminal penalty, will not prevent its use in imposing civil liability, except in the comparatively rare case where the penalty is made payable to the person injured, and clearly is intended to be in lieu of all other compensation.¹⁶⁰

In determining this, the amount of the penalty is important as an indication of legislative intent.¹⁶¹

¹⁵⁷ 118 Eng. Rep. at 1197.

¹⁵⁸ *Stevens v. Evans*, 92 Eng. Rep. 761 (K.B. 1761); *Underhill v. Ellicombe*, 148 Eng. Rep. 489 (Ex. 1825); *Doe dem. Murray v. Bridges*, 97 Eng. Rep. 1001 (K.B. 1831); *Stevens v. Jeacocke*, 116 Eng. Rep. 647 (Q.B. 1848).

¹⁵⁹ Cf. *Atkinson v. Newcastle Waterworks*, 2 Ex. D. 441 (1877); *North v. Musgrave*, 82 Eng. Rep. 410, 411 (K.B. 1639); *Couch v. Steel*, 118 Eng. Rep. 1193, 1197 (Q.B. 1854).

¹⁶⁰ PROSSER, *supra* note 33, at 192.

¹⁶¹ *Id.* at n.88 (citing *Groves v. Wimborne*, 2 Q.B. 402 (1898)).

Recall the explanation and analysis offered by Sergeant Rolls in *North v. Musgrave*:¹⁶² where the statute provides for a sum certain, additional damages shall be allowed, but where the sum is uncertain, he shall have no more. This distinction is more useful than Prosser's formula as a vehicle for discovering the legislative intent—for it is to legislative intent that we ultimately return. Sums certain as defined by statute are unlikely to have any reasonable relationship to the damage suffered, and consequently do not serve to compensate for actual loss. It is probable, on the other hand, that a general provision for recovery of damages—"uncertain" because it requires a computation in each instance—will compensate for the actual loss suffered. What is the reason for this judicial interest in compensation for loss?

Perhaps the most satisfactory explanation is that the courts are seeking, by something in the nature of judicial legislation, to further the ultimate policy for the protection of individuals, which they find underlying the statute, and which they believe the legislature must have had in mind. The statutory standard of conduct is simply adopted voluntarily, out of deference and respect for the legislature.¹⁶³

I think it safe to conclude that the reluctance to grant actions upon statutes for money damages during the eighteenth and nineteenth centuries is more apparent than real. Deference to legislative expression was a significant barrier only where the statute specified a mode of proceeding or a fixed sum penalty payable to the plaintiff. Obviously such considerations are inapplicable in actions to enforce interests defined by the Constitution. None of the ordinary barriers to judicial creativity are present. Constitutional rights are not "new" or the products of "acts of creation." They are of common law origin which predates their inclusion in a formal document.¹⁶⁴ Since the Constitution is not a criminal statute no remedy by presentment is available. It provides for no penalties payable either to plaintiffs or others. It defines no specific or particular mode of enforcement that would enable exclusive construction. It provides for no cause of action in tort for compensatory damages. In short, there is no affirmative remedy at law that will protect constitutionally defined interests in liberty.

¹⁶² 15 Car. 1 (1639), March's Cases 56 (1675).

¹⁶³ PROSSER, *supra* note 33, at 193.

¹⁶⁴ A. DICEY, *LAW OF THE CONSTITUTION* 196, 198 (7th ed. 1908); *see* *United States v. Cruikshank*, 92 U.S. 542, 551 (1873).

Dispute in the twentieth century has been confined, in the main, to distinguishing tort policy from the policy of criminal or regulatory law. A few central points are worthy of note.

Professor Lowndes argued that only criminal conduct deemed so unreasonable that it ought to be penalized by the civil as well as the criminal law ought to be held to create civil liability.¹⁶⁵ There are two errors of thought here. First, the statement turns legal method on its head. A standard of care is defined to protect certain social interests. If a particular interest is sufficiently vital, the *criminal* law is chosen out of the grab-bag of enforcement tools. In a rational system, the severest sanctions are applied with reservation. Lowndes seems to say that only those who commit "super-crimes" should be held accountable by the civil as well as the criminal law. But the force of the criminal law is seldom exhausted; Lowndes fails to explain why its force should be increased externally rather than internally. On the other hand, if he means only that unreasonable conduct should be deterred by some careful combination of criminal and civil sanction, I would agree. For good or ill, however, the law is not so structured at the present time. Ultimately, it is difficult to conceive of conduct so unreasonable as to be criminal but not so unreasonable as to be tortious.¹⁶⁶

Second, Lowndes restricts the purposes of tort liability to punishment and deterrence, and ignores the factor of individual compensation for harm suffered. Nor does he deal with the factual probability that tort liability may be the only method of enforcing the defendant's responsibility in the absence of prosecution.¹⁶⁷

Professor Thayer took another view of the issue:

Whenever due care is in issue, the breach of the statute supplies the legal equivalent of negligence. The defendant is in no position to meet the test of the prudent man.¹⁶⁸

He did not, however, foreclose denial of civil remedy for other, overriding policy considerations.¹⁶⁹

¹⁶⁵ Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361, 370 (1931).

¹⁶⁶ Lowndes concludes otherwise: "Carelessness may be criminal, but does it follow that criminality is careless?" 16 MINN. L. REV. at 369. See also Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1885-86 (1966).

¹⁶⁷ See the discussion of *Ashby v. White* in the text accompanying notes 139-45 *supra*.

¹⁶⁸ Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 334 (1913).

¹⁶⁹ Using the criminal law to define the standard of care does not necessarily result in the creation of strict liability. Defenses such as necessity, or reasonable effort to conform conduct to law, may be material to tort adjudication. See Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 458-60 (1932); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967).

Regulatory legislation has also been used extensively by courts as a basis for tort liability in damages.

Particularly when regulated conduct has been expressly proscribed by Congress, the [federal] courts have been quick to infer or recognize private remedies to aid those whom the statute was designed to protect.¹⁷⁰

This predisposition toward private remedies is significant for two reasons. Intricate considerations, not present with regard to more isolated statutory duties, militate against the creation of damage actions on regulatory legislation.¹⁷¹ It would seem reasonable to expect dislike of the private remedy to be manifested in the latter rather than the former situation. Second, the willingness of the federal courts to employ the private remedy is, in view of my concern with constitutional interests in liberty, highly relevant.

D. Actions on Statutes in Federal Practice and Theory

In construing federal legislation the federal courts quite clearly apply the approach of *Couch v. Steel*:¹⁷² in the absence of contrary legislative intent,¹⁷³ an action will lie for breach of a statutory duty provided such remedy is consistent with the purpose of the legislation. The instances in which this principle has been applied are too numerous to discuss in detail here.¹⁷⁴ One case, however, is worthy of particular mention by way of example.

*J. I. Case Co. v. Borak*¹⁷⁵ was a damage action for loss suffered due to defendants' violation of section 14(a) of the Securities Exchange Act of 1934.¹⁷⁶ The section was intended to

control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which

¹⁷⁰ O'Neil, *Public Regulation and Private Rights of Action*, 52 CALIF. L. REV. 231, 259 (1964).

¹⁷¹ See generally *id.* at 264-68.

¹⁷² Cited in *Reitmeister v. Reitmeister*, 162 F.2d 691, 694 (2d Cir. 1947) (L. Hand, J.).

¹⁷³ *E.g.*, Civil Rights Act of 1964, § 207(b), 42 U.S.C. § 2000a-6 (Supp. II, 1966).

¹⁷⁴ *E.g.*, *Wheeldin v. Wheeler*, 373 U.S. 647, 662, 664 n.12 (1963) (Brennan, J., dissenting); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 213 (1944); *Reitmeister v. Reitmeister*, 162 F.2d 691 (2d Cir. 1947); *Wills v. T.W.A.*, 200 F. Supp. 360, 364 (S.D. Calif. 1961); *Kardon v. National Gypsum Co.*, 73 F. Supp. 798, 802 (E.D. Pa. 1947); Lowenfels, *Implied Liabilities Based Upon Stock Exchange Rules*, 66 COLUM. L. REV. 12 (1966); Lowenfels, *Private Enforcement in the Over-the-Counter Securities Market: Implied Liabilities Based on NASD Rules*, 51 CORNELL L. REV. 633 (1966); O'Neil, *Public Regulation and Private Rights of Action*, 52 CALIF. L. REV. 231, 259 (1964); Note, *Federal Jurisdiction in Suits for Damages Under Statutes Not Affording Such Remedy*, 48 COLUM. L. REV. 1090 (1948).

¹⁷⁵ 377 U.S. 426 (1964).

¹⁷⁶ 15 U.S.C. § 78n(a) (1964).

. . . [had] frustrated the free exercise of the voting rights of stockholders.¹⁷⁷

The act granted to district courts jurisdiction over all suits in equity and actions at law to enforce duties created therein.¹⁷⁸ In passing on the significance of this jurisdictional grant, the Court quoted the following language from *Deckert v. Independence Shares Corp.*:¹⁷⁹

The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.¹⁸⁰

While the Act made no specific reference to private rights of action, the Court found that "among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result."¹⁸¹

The remedial flexibility of the federal courts was explained in the following way:

It is for the federal courts "to adjust their remedies so as to grant the necessary relief" where federally secured rights are invaded. "And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946).¹⁸²

¹⁷⁷ 377 U.S. at 431.

¹⁷⁸ *Id.*; cf. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

¹⁷⁹ 311 U.S. 282, 288 (1940).

¹⁸⁰ 377 U.S. at 433-34.

¹⁸¹ 377 U.S. at 432.

¹⁸² 377 U.S. at 433; cf. *Anderson v. Abbott*, 321 U.S. 349, 366 (1944).

Since this paper was prepared, the Supreme Court has decided *Wyandotte Co. v. United States*, 389 U.S. 191 (1967), in an opinion entirely consistent with the view expressed here:

This rule [that the United States may sue to protect its interests] is not necessarily inapplicable when the particular governmental interest sought to be protected is expressed in a statute carrying criminal penalties for its violation. Our decisions in cases involving civil actions of private parties based on the violation of a penal statute so indicate. In those cases we concluded that criminal liability was inadequate to ensure the full effectiveness of the statute which Congress had intended. Because the interest of the plaintiffs in those cases fell within the class that the statute was intended to protect, and because the harm that had occurred was of the type that the statute was intended to forestall, we held that civil actions were proper. That conclusion was in accordance with the general rule of the law of torts. See Restatement (Second) of Torts sec. 286.

389 U.S. at 201-02 (most citations omitted).

The decision in *J. I. Case* is a function of the presence of four dependent variables: (a) the protective purposes of the statute; (b) the absence of contrary legislative expression; (c) the grant of general jurisdiction to the federal courts; and (d) the inherent power of the federal courts to adjust remedies to meet needs.

In what way is the Bill of Rights so different from acts of Congress that courts will devise an effective remedial system to enforce the duties created by the latter but not the former? Is not the Constitution a "super-statute" in the sense that, if it does differ from ordinary legislation, its commands must be taken more seriously, its effectiveness must be more profound? Certainly the political ethic that creates the duties upon which the fabric of our civil society depends deserves at least as much remedial implementation as section 14(a) of the Securities Exchange Act of 1934.

If it is the absence of contrary legislative expression which frees the courts to engage in remedial creativity in the case of ordinary statutes, why is it not also true that the absence of such expression either in the Constitution or by the Congress enables the courts to fashion remedies protective of constitutional interests in liberty? Put another way, is there something in the Constitution or about its structure that renders it in this respect different from an ordinary statute?

If a grant of general jurisdiction in a statute provides the basis for remedial creativity to enforce the duties created by the statute, why does not the grant of general federal question jurisdiction provide the basis for remedial creativity to enforce duties created by the Constitution? Why should there be an inherent power in the federal courts to adjust remedies to meet needs in a statutory but not in a constitutional context?

III. THE CONSTITUTION AS LAW

A. Interests in Liberty and Analytical Jurisprudence

Constitutionally defined interests in liberty, as rules of decision in ordinary cases, ought to be accorded the same legal status as other authoritative pronouncements. Interests in liberty can function as rules of decision only because, apart from their essence as statements of political ethics,¹⁸³ they carry with them the force of ultimate authority.¹⁸⁴

¹⁸³ There is much in the writing of Learned Hand that could lead one to conclude that he did not see the Constitution as law in the ordinary sense, at least not the Bill of Rights. In any event, he was far from convinced that in implementing constitutional interests in liberty, the courts were enforcing law. See L. HAND, *THE SPIRIT OF LIBERTY* 73, 159-62, 277-78 (2d ed. 1953).

¹⁸⁴ Jacques Maritain argued that one cannot identify law and the legal order with the state—for the state is but part of the whole, which he called the body politic. For

Madison described the Bill of Rights as "prescriptions in favor of liberty [that] ought to be levelled against that quarter where the greatest danger lies."¹⁸⁵ They were placed in the document in order to provide final criteria for determining the authority of government to make and enforce law. The inclusion of interests in liberty in a document that thus functions as a code of procedure¹⁸⁶ has led some commentators to characterize them as merely "limitations" on power.¹⁸⁷ This characterization has resulted in a construction requiring the very existence of a private interest to be inferred from the "defect of power."¹⁸⁸

This view, so dearly embraced by analytical jurisprudence,¹⁸⁹ attempts to transmogrify a difference in intellectual approach into a distinction of legal significance. "Thou shall commit no murder" is a prescription directed to private persons placing limits on their freedom to act. It is also expressive of a human purpose:¹⁹⁰ an individual's

Maritain it was possible for the body politic to create the state as an instrument for the ordering of its affairs. By so doing, the state did not become the law or the source of law. Furthermore, in the process of creating the state it was possible for the people to define their interests in liberty and require those interests to be implemented as law. The definition of those interests by the body politic directly does not make them any less law than those instrumental activities that are directly the product of the state in its management function. J. MARITAIN, *MAN AND THE STATE* 1-27 (1960).

Corwin's thoughts are closely related to those of Maritain. In his numerous books, Corwin attempted to prove that the Constitution was more than a document "laying down the general features of a system of government." Corwin, *Constitution v. Constitutional Theory*, 19 AM. POL. SCI. REV. 290, 291, 302 (1925); see E. CORWIN, *LIBERTY AGAINST GOVERNMENT* 10-11, 57 (1948). See also K. OLIVECRONA, *LAW AS FACT* 40-41 (1962).

Hans Kelsen is contrary to Maritain: he identifies law and the state, arguing that since the chief characteristic of a state is the coercive ordering of human behavior, the existence of an identical primary characteristic in the law destroys any supposed dualism. For Kelsen the confusion arises from the personification of the state as a creator of law. But since in the Kelsen system the creation of law is always in accordance with some higher legal norm, saying that the state creates the law can mean only that the law regulates its own creation. H. KELSEN, *WHAT IS JUSTICE* 281-82 (1957).

¹⁸⁵ 5 WRITINGS OF JAMES MADISON 382 (G. Hunt ed. 1904).

¹⁸⁶ L. HAND, *THE SPIRIT OF LIBERTY* 159 (2d ed. 1953); H. L. A. HART, *THE CONCEPT OF LAW* 78-79 (1961).

¹⁸⁷ See notes 205-07 *infra* and accompanying text.

¹⁸⁸ See *id.*

¹⁸⁹ See, e.g., H. M. HART & A. SACHS, *THE LEGAL PROCESS* 141-55 (tent. ed. 1958); D. LLOYD, *THE IDEA OF LAW* 312-18 (1964); Corbin, *Legal Analysis and Terminology* 29 YALE L.J. 163 (1919); Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); Radin, *Restatement of Hohfeld*, 51 HARV. L. REV. 1141 (1938). Professor Edgar Bodenheimer notes that Hohfeld's "classifications of legal concepts have never been adopted by the courts." Bodenheimer, *Modern Analytical Jurisprudence and the Limits of its Usefulness*, 104 U. PA. L. REV. 1080, 1082 (1956).

¹⁹⁰ See, e.g., Corwin, *Constitution v. Constitutional Theory*, 19 AM. POL. SCI. REV. 290, 302 (1925): "The Constitution is thus always in contact with the sources of its being—it is a living statute, to be interpreted in the light of living conditions." Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 646 (1958): "It is [Hart's] neglect to analyze the demands of a morality of order that leads him throughout his essay to treat law as a datum projecting itself into human

interest in the security of his person. Recognizing the interest in law is a matter entirely different from deciding what remedial significance may attach to its assertion.¹⁹¹ The Bill of Rights gave legal recognition to the interests in liberty contained therein. It is our task to make the remedial decisions.

If interests in liberty are to be implemented in a manner distinguishable from, for example, section 14(a) of the Securities Exchange Act of 1934, the difference must be found in a sound construction of purpose. In other words, the refusal to apply so much of the remedial law as will make effective one purpose but not another must be rationally justified.¹⁹² What is at issue here is not only the necessity of a money judgment, but the coherence of legal policy.

A failure to see the purposeful nature of legal constructs infects the foundations of analytical jurisprudence. This theory attempts to state in some intelligible way all the possible variations of legal relationships through a system of word symbols. It is not entirely clear what use the theory would have even were it to achieve what it attempted. In any event, the analytical method sets out to explain the differences and relationships between liberties, rights, duties, powers, and so forth. Its fundamental assumption is the possibility of thinking about legal relations without regard to legal processes or social purpose: that it is possible to describe legal relations as they exist prior to any conflict between parties.¹⁹³ It seems to me that this assumption exhibits an internal inconsistency. Any attempt to describe the legal relations of

experience and not as an object of human striving." McDougal, *Law as a Process of Decision: A Policy-Oriented Approach to Legal Study*, 1 NATURAL L. F. 53, 58 (1956): "Fourthly, one may seek to clarify community policies with respect to decisions and to state what future decisions should be. Such clarification may include both the description of the policies sought by others and the recommendation of one's own specific preference as disciplined by knowledge of context." See also *Watson v. City of Memphis*, 373 U.S. 526, 532-33 (1962); Brief for the Government at 186, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

¹⁹¹ See *Wolf v. Colorado*, 338 U.S. 25 (1949).

¹⁹² In this respect the necessity for judicial choice of remedy is not different in principle from the necessity for choice of the applicable substantive rule of decision. In both instances a value choice, not a "neutral principle," decides the question. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); cf. *Stefanelli v. Minard*, 342 U.S. 117 (1951); *Wolf v. Colorado*, 338 U.S. 25 (1949); W. FRIEDMANN, *LAW IN A CHANGING SOCIETY* 47-48 (1959): "But if, as Professor Wechsler concedes, a value choice is inevitable and the Court should not be strictly bound by precedent, a 'principled' approach can mean little more than that the conflict of values should be frankly articulated and that the Court should not simply be guided by its preference in the case before it, but by consistency of reasoning."

¹⁹³ See D. LLOYD, *THE IDEA OF LAW* 313 (1964). The effort to describe legal relations prior to any conflict contradicts both Llewellyn's position that doing something about disputes is the business of law, and Lon Fuller's argument that law so conceived is at best a dangerous cliché. Fuller, *A Rejoinder to Professor Nagel*, 3 NATURAL L.F. 83, 103 (1958). See also H. KELSEN, *WHAT IS JUSTICE?* 4 (1957); McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 YALE L.J. 827, 834-38 (1941).

parties prior to any formal action by the legal process can amount to nothing more than argument in favor of that which is being described. Even if these legal relations are assumed to have been settled by prior adjudication factual identity itself is an assumption, a decision. The analytical view is not made consistent by the argument that, because the assertion of claims may be barred by mere procedural rules, it is valid to symbolically describe the substantive relationship of the parties in their out-of-court situation.¹⁹⁴ A contract that is void because its purpose is contrary to public policy may in fact be performed, as may a contract barred from enforcement by the statute of frauds. For what it is worth, the parties may behave in precisely the same fashion without having made a contract at all. In all three situations the out-of-court legal position can only be meaningfully described by reference to the view the legal process will take, or has taken, of the specific relationship. That view will ultimately depend on an applied conception of social purpose: whether the legal process will see the connection between the parties' relationship and some existing rule, principle or policy.¹⁹⁵

My criticism embodies what has been termed the "extreme sanctionist" position.¹⁹⁶ Nevertheless, the incoherence and uselessness of the analytical method remain. And even that system has been unable to avoid dependence on the remedial process. In my view, the attempt to distinguish "primary" from "secondary" or "remedial" rights has been no more successful than the attempt to make sense out of the maxim *ubi jus ibi remedium*.¹⁹⁷ In the Hohfeldian system, the terms "right" and "duty" are confined to those relationships which relate to the remedial process. They are secondary rights and duties. Real, primary relationships are described by the symbol "liberty-no right." Glanvill Williams' attempt to define "liberty"¹⁹⁸ did little more than distinguish between law and "no law." Where a right is something about which the law has something to say, a liberty is something about which the law has nothing to say—it is a negative legal relation.¹⁹⁹

¹⁹⁴ D. LLOYD, *supra* note 193, at 313. Cf. Bator, *supra* note 107, at 449. Professor Bator notes that in dealing with constitutional rights "it is easy to slip into the assumption that the right has a kind of ultimate reality or existence apart from the institutional processes which we create to determine whether the right has been violated in a particular case." Cf. D. LOISELL & G. HAZARD, *CASES ON PLEADING AND PROCEDURE—STATE AND FEDERAL* 1275-76 (1962).

¹⁹⁵ See E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 60, 76 (1961).

¹⁹⁶ D. LLOYD, *THE IDEA OF LAW* 317 (1964).

¹⁹⁷ See notes 83-85 *supra* and accompanying text.

¹⁹⁸ Williams, *The Concept of a Legal Liberty*, 56 COLUM. L. REV. 1129 (1956).

¹⁹⁹ *Id.* at 1142. Williams' definition of a legal liberty is another way of saying that a certain act is lawful because it is not unlawful. While the statement may be true (and all tautologies are) it fails to distinguish those acts that are legal because not illegal and those that are legal because they may not be made illegal by any act of

Williams contradicts his own assertion when he explains the difference between the statement "I have a liberty to do this," and the statement "I have a right not to be interfered with in doing this." He says:

The first means that I do not commit a tort or other legal wrong by doing so-and-so. The second means that you commit a tort or other legal wrong by interfering with my doing so-and-so. These are different statements.²⁰⁰

While granting that these are different statements, I am totally unable to appreciate why they are significantly so. Williams' inability to explain the meaning of the first statement without reference to the law of tort points up what Myres McDougal has labelled "normative-ambiguity."²⁰¹ Does the plaintiff have a right to be free to do something because the defendant has a duty not to stop him, or does the defendant have a duty because the plaintiff has a liberty? Does the plaintiff have a property right because he won the case or did he win the case because he had a property right? Did Mr. Frank lose his case because he had no protectable interest in liberty or does he have no protectable interest in liberty because he lost his case.²⁰² One could go on indefinitely. The simple conceptual point is that where a principle induced from the past is not broad enough to cover the immediate situation it cannot control the choice to be made. Where it is broad enough to cover the immediate case it assumes the choice to be made.²⁰³ The broadening and narrowing of induced principles is a method of advocacy, not a description of a legal process that has its eye on social purposes.

It is my belief that the enterprise of analytical jurisprudence was the outgrowth of remedial irrationality. The concern of courts with rules of actionability rather than with the existence of primary duties created a manifestly incoherent process in which primary duties became

positive law. An act of positive law, in this context, may be invalid whether it is formally regular or irregular. Williams' definition fails to distinguish a "legal liberty," as he uses the term, from a defined and protected interest in liberty as I have been employing that phrase. One cannot call activities included within the latter legal because not illegal. To do so would ignore the distinction between the "liberty" of speech and the "liberty" of two unmarried persons of different sex to have sexual relations in the absence of a fornication statute.

²⁰⁰ *Id.* at 1143.

²⁰¹ McDougal, *supra* note 190, at 59.

²⁰² Frank v. Maryland, 359 U.S. 360 (1959). *But see* Camara v. Municipal Court, 387 U.S. 523 (1967).

²⁰³ McDougal, *supra* note 190, at 63. "No decision is deduced from any other, although obviously, some decisions under appropriate circumstances sustain or inhibit others. Even if some uniform way existed of fixing upon the principle or *ratio decidendi* of every case, the decision to apply that ratio to some other case, the ratio of which that ratio was held to 'subsume,' would itself constitute a decision." M. KADISH, REASON AND CONTROVERSY IN THE ARTS 242 (1968).

dependent on the remedial system.²⁰⁴ The much deprecated forms of action rule from the grave; the tail wags the dog.

One further aspect of analytical thought merits particular attention. At one point in his writing Corwin stated: "It was also clear that the scope of judicial supervision of political power in our system has been greatly enlarged by the assumption that private interests are legally entitled to the immunities arising from mere defect of power in this, that, or other instrument of government."²⁰⁵ H. L. A. Hart made reference to this "defect of power" in discussing the distinction between primary duties directed to human activities, and secondary rules which provide that people may, by doing certain things, work changes in the primary rules. According to Hart, primary rules impose duties while secondary rules confer powers.²⁰⁶ An effective constitution, he says, does not impose a duty upon legislators not to act in a certain way, but confers upon them powers the exercise of which shall be void if not consistent with the grant of power.²⁰⁷

I am quite willing to accept this description because it does not require the conclusion that people have no interest in freedom from enactments that are the product of a defective exercise of power. The only conclusion which necessarily follows is that where granted powers are restricted, some method must be made available to enforce the restrictions. As to legislation, the ability to raise the issue of defective authority, coupled with the judicial power to declare such measures void, is an adequate way of enforcing the restrictions on power. The

²⁰⁴ H. HART & A. SACHS, *THE LEGAL PROCESS* 500 (tent. ed. 1958). "If the new remedial doctrine serves to simply reinforce and make more effectual well-understood primary obligations, the net result of innovation may be to strengthen rather than to disturb the general sense of security." *Id.* at 577; cf. Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306, 328 (1961).

²⁰⁵ Corwin, *Constitution v. Constitutional Theory*, *supra* note 190, at 291.

²⁰⁶ H. L. A. HART, *THE CONCEPT OF LAW* 78-79 (1961). Professor Hart's expressions here are difficult to reconcile with his "new approach" to analytical jurisprudence. "The technique I suggested was to forego the useless project of asking what the words taken alone stood for or meant and substitute for this a characterization of the function that such words performed when used in the operation of a legal system." Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953, 961 (1957). In any event, I fail to see how a functional description is significantly different from a catalog of rhetoric.

²⁰⁷ H. L. A. HART, *supra* note 206, at 68. For an indication of the significance of this discussion see text accompanying note 394 *infra*. Madison's view of the function of the Bill of Rights does not provide evidence for the analytical method. His style strongly suggests he saw the provisions as defining private interests. "If [the first ten amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 ANNALS OF CONG. 439 (1789). See *THE FEDERALIST* No. 78, at 506 (Mod. Lib. ed. 1941) (A. Hamilton): "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law."

same may not be true with regard to completed executive action. Declaring such action void is insignificant at best.²⁰⁸ In any case, the narrow argument being made here is simply that the ability to void legislation arising from a defect in power is a chosen remedy. It is not necessarily chosen by the analytical argument that restrictions on legislative power imply the absence of a power rather than the presence of a duty. Enjoining enactments that would violate restrictions on granted powers would be no less consistent or coherent.²⁰⁹

B. Interests in Liberty and Remedial Methodology

The argument that the Constitution, as law in courts, ought to be treated as any other body of legal rules should not prove disconcerting. The claim can only mean that legal methodology otherwise applicable is equally valid where the interests are constitutional ones. Sound legal method will, of course, account for the seriousness of constitutional questions and their broad political impact.

The most significant objection to ordinary legal method in constitutional cases is the recognition that judges must weigh competing interests,²¹⁰ and in doing so are without any clear guides to choice.²¹¹

If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator's work and his.²¹²

In constitutional adjudication the judge becomes more than legislator—he becomes the voice of the body politic. Since courts are necessary

²⁰⁸ The application of the exclusionary rule to bar the introduction of evidence obtained by methods that violate constitutional interests in liberty can be seen as a species of the "voiding" power. Where some affirmative governmental action, such as a criminal prosecution, follows the gathering of such evidence, the exclusionary rule operates to set at naught the use of "defective power." But the situation is quite different where a prosecution does not follow.

²⁰⁹ See *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964) (action to enjoin the functioning of a malapportioned state legislature).

²¹⁰ See Pound, *Interests of Personality*, 28 HARV. L. REV. 343 (1915). Pound's notion of the independent existence of interests that are merely recognized but not created by law has been strongly attacked by A. LUNDSTEDT, *LEGAL THINKING REVISED* 342-70 (1956). See also Fried, *supra* note 39; text accompanying note 193 *supra*. For an analysis on a somewhat broader level, see B. DE JOUVENEL, *ON SOVEREIGNTY* 153-57 (1957). However, the Pound view has apparently prevailed with the American Law Institute. See note 39 *supra*.

²¹¹ Kelsen, *supra* note 193, at 4, 125-28. Kelsen concludes that only positive law can select the just criteria in the distinction of legal incidents among people. The Aristotelian principle that the relative value of the two persons to whom they are distributed does not answer the question of relevant criteria. Cf. B. DE JOUVENEL, *supra* note 210.

²¹² B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113 (1921). See also E. ROSTOW, *THE SOVEREIGN PREROGATIVE* (1962); Amsterdam, Book Review, 63 COLUM. L. REV. 1152, 1159 (1963).

for the implementation of designated interests, it is necessary that their activity be made rational and therefore justifiable by the use of a sound method.

Where a court is faced with the question whether a right to damages should lie for invasion of a protected interest in liberty, it may inquire into the following considerations of policy: how serious is the injury to the particular plaintiff? to what extent does the conduct threaten harm to others similarly situated? to what extent can workable standards of adjudication be formulated? what is the social interest in permitting the conduct complained of? what burden will be imposed by this kind of judicial intervention in similar cases in the future? to what extent will this kind of judicial intervention interfere with other socially recognized values?²¹³ The treatment of the Constitution as "ordinary law," in the sense that this methodology applies, does not pose any serious threat to the political structure. The method accounts not only for the interests in liberty and the needs of government, but also for the proper role of the judiciary as an institution with its own limitations.²¹⁴ The method itself all but explicitly defines the function of an adversary process. It provides an additional safeguard in its amenability to the construction of a written opinion.²¹⁵ The possibility of a wrong decision must be viewed in conjunction with the need for the security of a final judgment.²¹⁶ If I am correct in this view, a position that would not accord ordinary legal treatment to constitutional interests in liberty must rest upon a rather cynical opinion of judicial personnel. Such a position, I can only assert, is neither justified nor realistically persuasive.²¹⁷

If the Constitution is law because it is susceptible to adjudication, it must follow that its substance cannot be understood apart from the institutions which administer it. When the institution is a court, one observable phenomenon of that institution is that its judgments necessitate the application of something that can properly be called a remedy. This perception is not trivial: if the implementation of interests in liberty defined by the Constitution is conditioned upon the existence of an institution capable of authoritative action, it is likewise conditioned by the internal rules of the institution. Rules such as those requiring

²¹³ See *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 990 (1963) [hereafter cited as *Associations*].

²¹⁴ See Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 *passim* (1963).

²¹⁵ See *Associations* 1005.

²¹⁶ See Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 483 (1963).

²¹⁷ See *id.* at 511; THE FEDERALIST No. 81 (Mod. Lib. ed. 1941) (A. Hamilton).

a case or controversy, or limiting the court's authority to apply certain remedies, condition the exercise of judicial power. Such limitations will be decisive in any attempt to obtain authoritative implementation of constitutional interests in liberty. Let the remedial process be inadequate or unjust and the meaning of judicial review ceases to be clear.²¹⁸ If it is accepted that the Constitution is law because justiciable, an inadequate remedial system defeats the goals inherent in the premise. In the extreme situation, the interests in liberty set forth in a written document which declares itself to be the supreme law are reduced to nothing more than "statements of tradition."²¹⁹

It is because remedial implementation of constitutional interests in liberty determines their reality that judicial concern with the effect of a decision must be more intense. Remedial implementation is universally meaningful because the class of persons who are the holders of these interests is coextensive with the political society. So far as the judgment must run, in the context of our present discussion, against government agents, remedial implementation may tend to deter governmental activity having aspects of conceded benefit. Moreover, the notion of adjudication by definition includes within its scope of authority the principle of finality.²²⁰ In the case of remedial implementation of constitutional interests, finality works to exclude all non-judicial institutions.²²¹

The question whether a given remedy shall be granted to redress a constitutionally defined interest in liberty, while posing an important issue, is not the most delicate constitutional task courts must face. Refusing to give judgment for the plaintiff in such a case does not mean the legislature would be incapable of providing a remedy. Nor does awarding the remedy necessarily mean the legislature could not remove it from future cases. Judgment for the defendant does not always imply judicial approval of the defendant's activities.²²² Indeed,

²¹⁸ See e.g., *Yakus v. United States*, 321 U.S. 414 (1944); *Cary v. Curtis*, 44 U.S. (3 How.) 235, 250 (1845).

²¹⁹ See Snee, *Leviathan at the Bar of Justice*, in *GOVERNMENT UNDER LAW* 107 (A. Sutherland ed. 1956). "The creation of a remedial framework to ensure effective implementation of [the fourteenth amendment] is, therefore, one of the important tasks of our system." Bator, *supra* note 216, at 446.

²²⁰ *Ex parte Watkins*, 28 U.S. (3 Pet.) 191 (1830). See also 2 J. STORY, *COMMENTARY ON THE CONSTITUTION*, § 1837 (4th ed. 1873).

²²¹ Whether an exception to this statement can be found in legislative power to control the remedial jurisdiction of courts is discussed at notes 233-35 *infra* and accompanying text. Otherwise, where a particular remedy is found constitutionally necessary no legislature or executive is empowered to alter implementation in future cases. Compare *Wolf v. Colorado*, 338 U.S. 25 (1949), with *Mapp v. Ohio*, 367 U.S. 643, 657 (1961). See also E. CORWIN, *AMERICAN CONSTITUTIONAL HISTORY* 10 (1964); Corwin, *Judicial Review in Action*, 74 U. PA. L. REV. 639, 651-52 (1926).

²²² Professor Bickel has taken a contrary view with regard to judicial approval of the constitutionality of statutes. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 48 (1961).

the judgment might express disapproval or admit illegality but decline a remedy for other reasons, as in *Bell v. Hood*. However, judgment for the plaintiff can place a burden on the Executive as a consequence of its invasion of constitutionally defined interests in liberty. One's initial temptation is to note that interests in liberty are constitutionally defined for that very reason. However, a rational process of decision must determine whether there are reasons for allowing governmental invasion of constitutionally defined interests in liberty.

The initial question—whether no remedy will *ever* be given to redress these kinds of invasions—must be answered in the negative. Judicial review, broadly cast, is itself a kind of remedy insofar as it requires as a minimum that government justify an alleged invasion of an interest in liberty. The power to declare legislation void is the ordinary instance of the application of a judicial remedy. Federal judicial power to issue injunctions²²³ and writs of habeas corpus²²⁴ in proper cases is beyond dispute. The power to require that evidence acquired through invasion of an interest in liberty be excluded from consideration by a court of law is also well established.²²⁵ But, with regard to federal invasions of constitutional interests in liberty, that is the extent of available federal remedies.²²⁶ The question, then, is not whether constitutional interests in liberty may be implemented by the judicial application of remedial law. Rather, there are four questions: (1) whether there is something peculiar about the Constitution which precludes its implementation by a remedy in damages; (2) whether damages would be so effective a remedy as to do violence to other admittedly valid interests; (3) whether there is something in the nature of judicial review itself which precludes the application of a damage remedy; and (4) whether such a remedy is really needed to protect the interests in question.

“[I]n laying down [constitutional] barriers against legislative invasions of private right [the Framers] wholly omitted to provide any positive guaranty or specific protection for them. No sanction or penalty is attached.” The omission has been filled by the judiciary in the exercise of a power “surrendered” to it. “Nor is it less curious to observe that this is the result of the action of the judiciary itself.”²²⁷

²²³ *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1920). *Ex parte Young*, 209 U.S. 123 (1908).

²²⁴ *Brown v. Allen*, 344 U.S. 443, 510 (1953) (opinion of Frankfurter, J.).

²²⁵ See note 221 *supra*.

²²⁶ Federal mandamus jurisdiction, 28 U.S.C. § 1361 (1964), may also be of help occasionally. State invasions of federal constitutional rights are, of course, covered by statute. See note 129 *supra*. For a discussion of state remedies, see notes 272-315 *infra* and accompanying text.

²²⁷ T. SEDGWICK, *INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW* 405-06 (2d ed., with Pomeroy's notes, 1874).

The situation is not curious at all. As I have tried to show in part II, the English judiciary had for centuries been implementing the substantive law by a remedial system that evolved through the common law process. I do not find it strange that eighteenth century men may not have supposed there would be any difficulty of implementation so long as the Constitution was the "Supreme Law of the Land" applicable in ordinary courts. Particularly is this understandable given the fact that the interests in liberty were themselves the product of judicial development.²²⁸

I have also tried to show in part II that there is nothing in history to show that damages—the ordinary remedy at law—were not as readily applied to protect interests in liberty as to protect other interests, whether or not defined in a document. If there is something peculiar about the Constitution that precludes this remedy, it has gone without mention for almost two centuries—unless the peculiarity is the consequence of some defect in the grant of judicial power to federal courts. However, of the existing remedies just mentioned,²²⁹ none was the product of specific legislation. All were judicially created pursuant to the grant of jurisdiction to the federal courts by the Constitution and the Congress.²³⁰ It is not correct to claim that the federal courts derive their equitable power from the Constitution but their jurisdiction at law from Congress.²³¹ "It was Congress after all that vested an equity jurisdiction in federal courts."²³²

It is an historical anomaly that the ordinary remedy of damages has become extraordinary. Is this because damages would be an overly severe form of redress? I think not, and there is substantial theoretical and practical evidence to support my view.

Herbert Wechsler has emphatically suggested that where a substantive right at issue is federal, "unless the Congress has made clear in the particular area an intention to refer questions of remedies to state law" the federal courts should determine and apply the governing rule.²³³ He has also argued that, unless Congress has specifically withdrawn a remedy, official immunity should be limited "to cases

²²⁸ As the district court recognized. *Bell v. Hood*, 71 F. Supp. 813, 816 (S.D. Cal. 1947).

²²⁹ Text accompanying notes 223-26 *supra*.

²³⁰ "There are certain sections of the Constitution that are viewed as self-executing; the judiciary need not await legislation in order to act under them. Where the Constitution contains express negatives, as in the Bill of Rights, no other basis for judicial creation of standards may be required." Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1089 (1964).

²³¹ The claim made in *Bell v. Hood*, 71 F. Supp. at 819.

²³² Wechsler, *Comment*, in *GOVERNMENT UNDER LAW* 134, 138 (A. Sutherland ed. 1956).

²³³ Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 241 (1948).

where relief cannot be granted unless judgment runs against the United States as such, as distinguished from its officers" ²³⁴ "[A]ll district courts [should] have the authority to grant all remedies against federal officials appropriate to the judicial power, in accordance with the principles of law." ²³⁵

Justice Harlan, arguing that the measure of damages in cases of invasion of interests in liberty by state officers should be based on the "deprivation of a constitutional right" rather than a common law right, expressed no concern that the imposition of such a remedy would unduly burden the functioning of the state government.²³⁶ Why the converse might be true with regard to the federal government remains a mystery. In Great Britain, the absence of a constitution applicable in courts of law results in the characterization of interests in liberty as common law rights. But regardless of the label, under English law government officials are personally liable in damages for activities that would, in this country, constitute invasions of the fourth or fifth amendments.²³⁷ It does not appear that the existence of such personal responsibility has worked any appreciable harm to the efficient function of the British executive.

IV. REMEDIAL PROBLEMS IN FEDERALISM

A. Damages as the Least Onerous Remedy

In the history of actions against federal officers, there is nothing to suggest that the damage remedy was ever regarded as inimical to the efficient functioning of the federal government. Since most of the early cases were originally brought in state courts, it would seem to follow that there is nothing *in the remedy itself* which would prevent its application to federal officers in federal cases. The remedy at law, in fact, appears to be the only one the propriety of which was never seriously questioned. It is indeed the one generally available, with equitable relief held to serve particular needs.²³⁸

On the other hand, since *Ableman v. Booth* ²³⁹ and *Tarble's Case* ²⁴⁰ it has been clear that state process, regardless of its form, can

²³⁴ *Id.* at 223.

²³⁵ *Id.* at 222.

²³⁶ *Monroe v. Pape*, 365 U.S. 167, 196 n.5 (1961) (concurring opinion). See *Pierson v. Ray*, 386 U.S. 547 (1967).

²³⁷ H. STREET, *FREEDOM, THE INDIVIDUAL AND THE LAW* 13-39 (2d ed. 1967). Blackstone reasoned that since the king could do no wrong, any injury inflicted must be the responsibility of the agent. 1 COMMENTARIES *246; cf. *Bell v. Hood*, 71 F. Supp. at 817.

²³⁸ Cf. Brest, *The Federal Government's Power to Protect Negroes and Civil Rights Workers Against Privately Inflicted Harm*, 2 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 29 (1966).

²³⁹ 62 U.S. (21 How.) 506 (1858).

²⁴⁰ 80 U.S. (13 Wall.) 397 (1871).

not operate to interfere with a federal function. Both cases involved state habeas corpus presuming to act upon persons held under federal authority. *Tarble's Case*, in following *Ableman*, refused to allow state courts the power to determine the validity of the federal authority being exercised. After *Tarble's Case*, the power of state courts would be limited to ascertaining whether or not colorable federal authority, as opposed to a mere pretense of authority, was being exercised. Neither case can be read either to hold that state courts have no power over the activities of federal officers, or to suggest that in an action for false imprisonment, for example, the state court would be without power to adjudicate the question of authority to imprison under federal law.²⁴¹

The general concurrent jurisdiction of state courts with respect to federal matters was affirmed in *Clafin v. Houseman*.²⁴² *Clafin* arose on a claim that because federal courts had exclusive jurisdiction in bankruptcy, an assignee in bankruptcy was without capacity to sue in state court. But *Clafin* held that unless some act of Congress either expressly or impliedly conferred exclusive jurisdiction of the matter upon the federal courts the matter could be heard in a state tribunal.²⁴³

The problem, however, is in drawing the line between state court interference with federal programs and the mere exercise of remedial power over federal officers. The early cases dealt with this problem largely in terms of the remedy which the state court sought to apply. That is, some remedies were considered more likely to interfere with federal functions than others. Habeas corpus is probably the clearest instance of a state process endangering a federal function.²⁴⁴

If the cases are divided into those involving equitable process, those dealing with criminal process, and actions at law, the evidence is conclusive that the latter were regarded as posing no danger of interference with federal functions. Research has not disclosed a single case holding that a civil action at law will not lie against a federal officer.

The matter was not always so clear with regard to state equitable actions. *McClung v. Silliman*²⁴⁵ is commonly read as holding that state

²⁴¹ Support for this conclusion is found in *Buck v. Colbath*, 70 U.S. (3 Wall.) 334 (1865), decided between *Ableman* and *Tarble's Case*. As United States Marshall, Buck seized certain property under a federal writ of attachment. Colbath sued in trespass for a wrongful taking. Justice Miller, for the Court, held that the state action here would in no way interfere with the federal function. He distinguished *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1860), on the ground that the state action there was an attempt to replevy property seized by the marshall under court order. He reasoned that since in *Buck* possession was in the court the marshall would not be the proper party, and title to the property could not be tried collaterally. *But cf.* *Bishop, The Jurisdiction of State and Federal Courts Over Federal Officers*, 9 COLUM. L. REV. 397, 407 (1909).

²⁴² 93 U.S. 130 (1876).

²⁴³ *Id.* at 141-42.

²⁴⁴ See *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408-09 (1871).

²⁴⁵ 19 U.S. (6 Wheat.) 598 (1821).

courts have no mandamus jurisdiction over federal officers.²⁴⁶ McClung originally sued in federal circuit court, praying that the officer in charge of the local United States Land Office be ordered to issue certain documents confirming his interest in particular parcels. The circuit court dismissed the suit on the ground that Congress had not granted lower federal courts the power to issue mandamus in such cases. McClung renewed his action in the state court, which affirmed its jurisdiction but denied relief on the merits. Justice Johnson's order at the end of his opinion for the Supreme Court is stated in terms of the "authority" of the state court, but it "affirms" the disposition below.²⁴⁷ At one point in the opinion Justice Johnson states that since mandamus power is denied to the federal courts "the inference clearly is, that all violations of private right, resulting from acts of such officers, should be the subject of actions for damages, or to recover the specific property . . . in Courts of competent jurisdiction."²⁴⁸ The "competent" courts here referred to must be, as Justice Marshall said in *Slocum v. Mayberry*,²⁴⁹ state courts.

This inference arising out of the absence of federal mandamus power, difficult to square with the structural presumption that state courts are of general jurisdiction, does not appear to have persuaded Justice Thompson. In *Kendall v. United States ex rel. Stokes*,²⁵⁰ the plaintiff sought mandamus (in the District of Columbia) against the Postmaster General to require the latter to pay over monies designated for him by an Act of Congress. While Congress had not given ordinary federal courts mandamus power, said Justice Thompson, the Act of February 27, 1801,²⁵¹ provided that in the territory ceded to the United States by Maryland, the laws of that state were to remain in force. Therefore, since mandamus was available under Maryland law

²⁴⁶ See, e.g., *Armand Schmoll, Inc. v. Federal Reserve Bank*, 286 N.Y. 503, 37 N. E.2d 225 (1941), citing many cases. See also Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385 (1964).

²⁴⁷ 19 U.S. (6 Wheat.) at 605. As Judge Conway argued, dissenting in *Armand Schmoll*, 286 N.Y. at 515, 27 N.E.2d at 230, the term "authority" as used by Justice Johnson in *McClung* could very well mean the state could not order the federal officer to do that which he had no power to do under substantive federal law. This reading would reconcile the language with the affirmance of the state court judgment rendered on the merits.

²⁴⁸ 19 U.S. (6 Wheat.) at 605. The common view is that until 1962 neither state nor federal courts (except the United States District Court for the District of Columbia) had original mandamus jurisdiction over federal officers. See Bishop, *The Jurisdiction of State and Federal Courts Over Federal Officers*, 9 COLUM. L. REV. 397, 399-400 (1909).

²⁴⁹ 15 U.S. (2 Wheat.) 1 (1817). There was no general federal question jurisdiction until 1875. Act of March 3, 1875, ch. 137, § 2, 18 Stat. 470. The absence of such jurisdiction passed unnoticed in the citation of *Slocum* in *Johnston v. Earle*, 245 F.2d 793, 794 (9th Cir. 1957).

²⁵⁰ 37 U.S. (12 Pet.) 524 (1838).

²⁵¹ Ch. 15, § 1, 2 Stat. 103.

it was available in this case. He added: "[T]here is nothing growing out of the official character of the party that will exempt him from this writ, if the act to be performed is purely ministerial."²⁵²

The amenability of federal officers to state equitable process was affirmed with the Supreme Court's decision, in 1912, in *Philadelphia Co. v. Stimson*.²⁵³ Relying on substantial authority, Justice Hughes said that federal officers were subject to equitable restraint where they act either unconstitutionally or without valid statutory warrant.²⁵⁴ Unfortunately, the district court in *Bell v. Hood* seems to have read *Stimson* as saying that federal officers may be subjected to equitable process *because* in acting either without valid authority or unconstitutionally they lose their character as federal officers.²⁵⁵ There is simply nothing in *Stimson* to support such an inference;²⁵⁶ the Court merely noted that

The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. . . . And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunctive process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. . . . And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. . . .²⁵⁷

The cases dealing with federal officers as defendants in state criminal actions are somewhat more confused than the equity cases. Nevertheless, there is no case holding that the states are without power to apply their criminal processes to federal officers.²⁵⁸ In some of these

²⁵² 37 U.S. (12 Pet.) at 617. *But see Ex parte Shockley*, 17 F.2d 133 (N.D. Ohio 1926), where a state court had imprisoned a federal officer for refusal to obey a state mandamus order. On federal habeas corpus, the district court held that even if the officer had the power to do what the state ordered him to do, the state was without power through mandamus or otherwise to control the exercise of official discretion. *See also Boske v. Comingore*, 177 U.S. 459 (1900); *In re Turner*, 119 F. 231 (S.D. Iowa 1902).

²⁵³ 223 U.S. 605 (1912).

²⁵⁴ *Id.* at 620.

²⁵⁵ 71 F. Supp. at 817.

²⁵⁶ *But cf. Illinois v. Fletcher*, 22 F. 776 (N.D. Ill. 1884), involving a murder charge against a United States Marshall. A removal petition was filed pursuant to an 1871 amendment including officers enforcing franchise laws within the removal statute. Act of Feb. 28, 1871, ch. 99, § 2, 16 Stat. 433, 438, *repealed*, Act of Feb. 28, 1894, ch. 25, § 2, 28 Stat. 36. The petition was denied on the ground that since the marshal denied participation in the shooting he could not have been acting under color of federal law. *Cf. Gay v. Ruff*, 292 U.S. 25 (1934).

²⁵⁷ 223 U.S. at 619-20, cited by the district court in *Bell*, 71 F. Supp. at 817.

²⁵⁸ *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820), involved the punishment of a draft delinquent by a state court martial. The Act of Congress had provided for such punishment but had not specified the nature of the tribunal except that it be a court martial. The opinion of Justice Bushrod Washington, so far as it was based on a theory of concurrent jurisdiction, was approved in *Clafin v. Houseman*, 93 U.S. 130 (1876).

cases the problem is clouded by the existence of a federal substantive rule potentially governing the activities of the officer;²⁵⁹ in others by doubt whether the state court applied state or federal law to determine whether the defendant was acting within the scope of his authority;²⁶⁰ and in others by the possibility that the state rule itself was inconsistent with the administration of some federal program.²⁶¹

By far the most persuasive evidence that damage actions are not inimical to the efficient functioning of the federal government is the number of Supreme Court cases allowing such actions in state courts. Since before *McClung* actions in trover²⁶² or to replevy goods²⁶³ had been brought against federal officers.²⁶⁴ It is true that in some cases

²⁵⁹ See, e.g., *In re Loney*, 134 U.S. 372 (1890); *In re Neagle*, 135 U.S. 1 (1889).

²⁶⁰ *In re Waite*, 81 F. 359 (N.D. Iowa 1897), involved a federal officer charged with authority to investigate frauds in the pension system. In the course of his investigation Waite attempted to draw a written statement from a pension applicant to the effect that one of his letters of application was fraudulent. Waite was convicted in the Iowa court for maliciously attempting to compel a person to do an act against his will by threatening accusation of a crime. The district court on habeas corpus held the state court to be without jurisdiction to apply its criminal law to an officer charged with federal authority. It conceded state power over officers acting in matters unrelated to their authority, but held that the question whether the bounds of authority were overstepped was one of federal law, and that such was not the case here. While the district court uses language of jurisdiction, it should be settled after *Claffin v. Houseman* that (subject to a right to remove, or habeas corpus) the state court was competent to adjudicate the matter and apply federal law to the question of overreaching.

²⁶¹ E.g., *Ohio v. Thomas*, 173 U.S. 276 (1899). Thomas, as governor of the Federal Home for Disabled Volunteer Soldiers, was convicted by Ohio for failing to display a 10" by 14" sign stating: "Oleomargarine Sold Here." The Home was constructed on land that the state had ceded to the federal government, but the United States had ceded back jurisdiction over the territory with the proviso that the cession back should not be construed to impair the powers of the Home's board of managers.

In *Mallory v. Wheeler*, 151 Wis. 136, 138 N.W. 97 (1912), the governor of a similar Home was ordered to appear and submit to examination by the administrator of the estate of one who had lived in the Home prior to his death. The state supreme court upheld the order, distinguishing *Ohio v. Thomas* on the ground that here the act required of Wheeler would in no way interfere with his duties, the management of the Home or any federal rule or regulations. Cf. *Johnson v. Maryland*, 254 U.S. 51 (1920) (mail truck driver arrested for failure to obtain a Maryland driver's license); Brief for Petitioner at 41 n.53, *Brooks v. Dewar*, 313 U.S. 354 (1941).

²⁶² *Crowell v. McFadon*, 12 U.S. (8 Cranch) 94 (1814).

²⁶³ *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1 (1817).

²⁶⁴ Damage actions against federal officials were regularly brought in state courts (alleging some species of common law tort), and defendants frequently attempted to bring the case into a federal court. The early removal statutes, however, granted federal officers no general right to removal. See *Tennessee v. Davis*, 100 U.S. 257, 267 (1879). Consequently, some courts were allowing removal under the predecessor of 28 U.S.C. § 1441 (1964), arguing that the defendant was acting under color of federal law, and that it followed that his authority to act—a federal question—was central to the disposition of the case. But the cases are often murky. For example, on their facts, *Bock v. Perkins*, 139 U.S. 628 (1891), and *Walker v. Collins*, 167 U.S. 57 (1897), are identical. Both were trespass actions against federal marshalls for wrongful taking of goods under writs of attachment.

In *Bock*, "arising under" removal was sustained since the case turned on the question whether the marshall rightfully executed a lawful order of a federal court. *Walker* is directly contrary. However, I think a careful examination of Justice White's opinion in that case makes it clear that his decision is based on insufficient allegations in the original complaint. It is unlikely that the Court intended to reverse *Bock*, decided 6 years earlier, without even citing it. *Bock* in turn rested its reasoning on

the right of action was denied on the basis of some federal authority justifying the defendant's actions.²⁶⁵ But that, of course, is always a matter of substantive defense. The district court in *Bell* confused the question of federal authority with the question of governmental immunity. The distinction between these two issues was definitively clarified in *Larson v. Domestic and Foreign Commerce Corp.*,²⁶⁶ decided a few years after *Bell*. In *Larson*, the corporation sued in federal court to enjoin the head of the War Assets Administration from selling coal to another on the ground that title to the coal was in the plaintiff under its contract with the W. A. A. The Supreme Court held that, if the actions of federal officers create personal liability, the mere fact of their office will not bar an action against them; personal liability arises where the officer exercises power beyond the limits imposed by the definition of his authority or where his authority or its exercise is unconstitutional.²⁶⁷ However, if the remedy to be applied requires official action it constitutes relief running directly against the government, which may not be had in the absence of the government's consent to be sued. Up to this point the Court was unanimous. The Justices split on that part of Chief Justice Vinson's opinion holding the mere commission of a tort insufficient to create personal liability. Justices Frankfurter and Burton, dissenting, would have recognized personal liability in such instances

Buck v. Colbath, 70 U.S. (3 Wall.) 334 (1865), discussed *supra* note 241. Other cases upholding "arising under" removal in actions involving federal officers are: *Sonnenheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401 (1899); *Rury v. Gandy*, 12 F.2d 620 (E.D. Wash. 1926); *Nationwide Charters & Conventions Inc. v. Garber*, 254 F. Supp. 85 (D. Mass. 1966); *Bradford v. Harding*, 108 F. Supp. 338 (E.D.N.Y. 1952); *Eighmy v. Poucher*, 83 F. 855 (N.D.N.Y. 1898).

Other courts disagreed on *Mottley* grounds (Louisville & Nashville R.R. v. *Mottley*, 211 U.S. 149 (1908)); *Mayo v. Dockery*, 108 F. 897 (E.D. N.C. 1901); *People's United States Bank v. Goodwin*, 160 F. 727 (E.D. Mo. 1908); *Thompson v. Standard Oil of N.J.*, 60 F.2d 162 (E.D. S.C. 1931) (upholding jurisdiction), *rev'd*, 67 F.2d 644 (4th Cir.), *cert. denied*, 292 U.S. 631 (1933). The circuit court in *Thompson* distinguished *Bock* and disapproved of *Rury v. Gandy* insofar as it said federal question jurisdiction was present whenever the acts complained of were performed by a federal officer in the course of a federal proceeding. Judge Parker dissented.

²⁶⁵ In *Harris v. Dennie*, 28 U.S. (3 Pet.) 292 (1830), an attaching creditor sought trover against a federal marshal for his subsequent attachment of the goods. Justice Story, speaking for the Court, reversed the state court award on the ground that, as a matter of federal law, the prior attachment was unlawful and therefore void. There is no indication in the case that Story doubted the power of the state court to proceed in trover. *Teal v. Felton*, 53 U.S. (12 How.) 284 (1851), was also an action in trover, to recover the value of a newspaper the postmaster refused to deliver because a written message was inscribed thereon in fraud of the postal rates. Speaking through Justice Wayne, the Court affirmed the state court's award on the merits, holding that the existence of a single letter or initial on the newspaper was not the kind of memorandum or message contemplated by the act. It is interesting that *Teal's* claim that he was exercising the discretion allowed him by federal law was rejected. Justice Wayne held that since the postmaster had exceeded his authority, he could not assert that authority in defense, and that in the absence of contrary congressional intent the case was properly before any court having jurisdiction in trover.

²⁶⁶ 337 U.S. 682 (1949).

²⁶⁷ Presumably, this broad statement is qualified by *Pierson v. Ray*, 386 U.S. 547 (1967).

save where relief ran against the government.²⁶⁸

In thus affirming *Stimson*, the Court in *Larson* clarified two important points: first, since a judgment in damages does not require official action there is no question of judicial power to grant such relief.²⁶⁹ Second, even injunctive relief is not automatically barred as relief requiring official action. Where an injunction is requested to remedy unconstitutional activity, the test is whether relief can be had merely by ordering cessation of the unconstitutional conduct. If not, the injunction must be denied.²⁷⁰

Emerging from this doctrinal labyrinth is the clear proposition that there is no barrier in theory, policy, or law to the assertion of a claim for damages arising out of the unconstitutional activities of federal officers.²⁷¹ Indeed, the refusal of the majority in *Larson* to extend

²⁶⁸ The classic instances of relief running against the government are property cases. In *Carr v. United States*, 98 U.S. 433 (1878), the petitioner attempted to assert prior successful judgments (obtained in state ejectment actions against federal officers in possession of the lands subject to the present dispute) by way of defense to a quiet title action brought by the United States. Justice Bradley had no trouble disposing of the ejectment judgments as of no effect. Once the state court determined that possession was in the government, he said, state jurisdiction in ejectment terminated. Cf. *Gallatin v. Sherman*, 77 F. 337 (S.D.N.Y. 1896), an action in ejectment by the landlord against the collector for the Internal Revenue Service to recover premises used as a bonded warehouse. The district court's determination that the action was removable was probably incorrect so long as state court disability in ejectment against the government is considered jurisdictional. See also *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1860).

²⁶⁹ 377 U.S. at 687.

²⁷⁰ 377 U.S. at 691 n.11. See *Brooks v. Dewar*, 313 U.S. 354 (1941), where the problem of state injunctive process was argued but not decided. Brief for Petitioner at 35-42.

²⁷¹ Along with *Stimson*, the district court in *Bell* cited *Ickes v. Fox*, 300 U.S. 82 (1937), and *Land v. Dollar*, 330 U.S. 731 (1947). In *Ickes*, the Supreme Court upheld on the authority of *Stimson* an action to enjoin the Secretary of the Interior from allegedly threatening to deprive the plaintiffs of vested property rights. The question whether the plaintiffs would have had a cause of action if the Secretary had deprived the plaintiffs of their property rights was answered in the affirmative in *Land*. That case involved an action to restrain members of the Maritime Commission from selling certain stock of which, it was alleged, they were unlawfully possessed; and praying the stock be returned. In upholding the jurisdiction of the federal district court, Justice Douglas said:

But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.

It is in the latter category that the pleadings have cast this case. That is to say, if the allegations of the petition are true, the shares of stock never were property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority as public officers. If ownership of the shares is in the United States, suit to recover them would of course be a suit against the United States. But if it is decided on the merits either that the contract was illegal or that respondents are pledgors, they are entitled to possession of the shares as against petitioners, though, as we have said, the judgment would not be *res judicata* against the United States.

330 U.S. at 738-39. Thus, *Land v. Dollar* does not support the district court in *Bell*; it strongly suggests the contrary. In remedial language, the action in *Land* was in replevin. No reason appears why plaintiffs could not have chosen trover, detinue or some other common law form.

the liability of federal officers to all cases in which a mere tort is alleged has the reciprocal significance of allowing liability to be imposed *only* where the federal officers have acted contrary to statute or unconstitutionally. In other words, their liability is confined to violations of federal law.

*B. Constitutional Interests as Dependent on State Rules
of Accountability*

It is more than probable that cases like *Bell v. Hood*—that is, those alleging that a federal officer has violated constitutionally defined interests in liberty—will be heard in a federal forum.²⁷² Therefore, the only choice of federal policy necessary is one of substantive law; there is no problem of choice of forum.

In the absence of a federally created damage remedy, there remain three possible avenues through which plaintiffs may obtain a remedy. First, the federal interest may be “enforced” by state rules making actionable the violation of interests defined by state law that occurs simultaneously with the violation of the federal interest.²⁷³ Second, the federal interest may be enforced by state rules that include the federal interest within a broader category of interests made actionable by state law. Third, the federal interest may be enforced by “borrowing” those state rules of actionability that include the federal interest as a matter of state law.

1. Professor Caleb Foote has amply demonstrated that the barriers erected by the vicissitudes of state tort law are such that affirmative civil actions are seldom instituted, and that when they are, anything even approaching success is rare.²⁷⁴ Professor Foote was concerned largely with the unconstitutional activities of state officers. Since the publication of his paper, the decision in *Monroe v. Pape*²⁷⁵ has supplied a more adequate federal corrective process with regard to state officers. But Foote’s arguments are, unfortunately, still applicable with equal force to federal officers.

²⁷² 28 U.S.C. §§ 1441-1442a (1964), would allow removal of virtually all such suits.

²⁷³ *E.g.*, *Krehbiel v. Henkle*, 142 Iowa 677, 121 N.W. 378 (1909), 152 Iowa 604, 129 N.W. 945 (1911) (trespass for unlawful search); *McClung v. Benton*, 123 Iowa 368, 98 N.W. 881 (1904) (same); *McMahan’s Adm’x v. Draffen*, 47 S.W.2d 716 (Ky. 1932) (state officers liable for search unreasonable under state constitution); *Shall v. Minneapolis, St.P.&S.S.M. Ry.*, 156 Wis. 195, 145 N.W. 649 (1914) (trespass for unlawful search; \$1 damages awarded).

²⁷⁴ Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

²⁷⁵ 365 U.S. 167 (1961).

The decisions in both *Monroe v. Pape* and *Mapp v. Ohio*²⁷⁶ were predicated on the insufficiency of existing corrective processes supplied by state tort law making actionable the violation of state interests concurrently with constitutional ones.²⁷⁷ Professor Foote suggests that tort claims making actionable the violation of constitutional interests—a federal claim—would supply a more adequate remedy.²⁷⁸ The presence of a federal claim would permit federal supervision of ancillary remedial matters, such as the measure of damages or the requirements of fault,²⁷⁹ with a view toward the protection of the specific constitutional interests involved.

2. If the existing state corrective processes, making actionable only state interests violated concurrently with the federal interests, are inadequate as a matter of federal law, in the absence of an adequate federal remedy due process may require that the states make actionable the specific violation of constitutionally protected interests in liberty.²⁸⁰ The due process argument involves the assertion that, without either a federal or an adequate state remedy, the conduct of the federal officials is essentially unreviewable. The proposition that *some* adequate avenue of judicial review must be available in this context rests fundamentally on *Crowell v. Benson*.²⁸¹

Crowell involved an award by a deputy commissioner of the United States Employees' Compensation Commission under the Longshoremen's and Harbor Workers Compensation Act.²⁸² The constitutional validity of the award depended on a finding that congressional power over maritime matters could extend to the facts of this case. The premise of Chief Justice Hughes' opinion was that Congress could not remove from the scope of judicial review, by imposing finality on administrative findings, the determination of factual matters upon which the constitutionality of the governmental action depended.²⁸³ On the basis of this premise, a distinction has been drawn between cases in which certain matters are removed from consideration by courts employed by the government to enforce its coercive measures,

²⁷⁶ *Mapp v. Ohio*, 367 U.S. 643 (1961).

²⁷⁷ *Monroe v. Pape*, 365 U.S. 167, 183 (1961); *id.* at 196 n.5 (Harlan, J., concurring); *Mapp v. Ohio*, 367 U.S. 643, 651-53 (1961).

²⁷⁸ Foote, *supra* note 274, at 511-13.

²⁷⁹ *Cf. Pierson v. Ray*, 386 U.S. 547 (1967).

²⁸⁰ *Cf. Parker v. Illinois*, 333 U.S. 571 (1948); *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931); *Ward v. Love County*, 253 U.S. 17 (1920).

²⁸¹ 285 U.S. 22 (1932).

²⁸² Act of March 4, 1927, ch. 509, 44 Stat. 1424.

²⁸³ 285 U.S. at 49-50.

and those in which judicial jurisdiction itself is withheld.²⁸⁴ In other words, the principle of *Crowell* is that although the jurisdiction of article III courts may be limited, it may not be so limited as to permit unconstitutional decisions. But does it follow that judicial review of the constitutionality of all extrajudicial coercion may be withheld consistent with due process?

I do not think *Crowell* can be read to allow this limitation.²⁸⁵ The claim there addressed itself to the constitutional legality of the administrative process and the execution of its judgment. Justice Hughes was saying that, while there is nothing inherently illegal about an administrative determination, due process requires some adequate judicial review prior to enforcement. It then follows that the execution of official action without even prior administrative hearing requires at least equal availability of review as a matter of due process. Justice Brandeis, in dissent, agreed that under some circumstances the constitutional requirement of due process means judicial process. He thus affirmed the careful relationship between the fifth amendment and article III. Brandeis' disagreement with the majority rested solely on the extent to which due process requires a trial de novo of facts that formed the basis of the governmental action in situations in which these facts had been determined by an administrative tribunal.²⁸⁶ His language in a later case bears repeating:

The supremacy of law demands that there shall be an opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality.²⁸⁷

The conclusion is inescapable that coercive governmental activity not preceded by either administrative or judicial determination of its

²⁸⁴ H. M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 312-40 (1953).

²⁸⁵ Assuming that Hart and Wechsler are correct in asserting that *Crowell* could have been otherwise decided if the administrative decision had been against the claimant, the authors nevertheless recognize that the proposition is inapplicable to cases of extra-judicial governmental coercive orders. *I.e.*, at the very least, *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943), must be distinguishable from *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

Two further distinctions from the *Bell* situation should be noted. First, in these cases the plaintiff has at least had the opportunity to raise his federal claims in an administrative proceeding, something obviously not true in *Bell*. Second, unlike *Crowell*, the plaintiff in *Bell* was asserting a constitutional rather than a statutory interest.

²⁸⁶ 285 U.S. at 88-93 (dissenting opinion).

²⁸⁷ *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (concurring opinion).

constitutionality, and for which there is no subsequent procedure readily available and adequate to the task, is not consistent with due process.²⁸⁸ If the federal courts insist on refusing to make available a remedy in damages, it is necessary to require the states to make available remedies which are designed to protect federal constitutional interests in liberty.²⁸⁹

It is consistent both with the federal structure and the requirements of due process that states in some situations be required to afford certain kinds of relief. In *General Oil Co. v. Crain*,²⁹⁰ the Tennessee court declined jurisdiction in a suit to enjoin the activities of a state officer on grounds of unconstitutionality. The Supreme Court held that the state could not constitutionally deny relief for a federal right. But for *Ex parte Young*,²⁹¹ decided the same day, *Crain* would have been a clear application of the principles of *Crowell*. In *Young*, the Supreme Court affirmed, on facts similar to *Crain*, the existence of a right to a similar remedy in federal court. But in the presence of an avenue of relief in the federal courts why does *Crain* require jurisdiction in the state courts?

The answer lies in the principles of *Testa v. Katt*.²⁹² There, a state court enforced the substantive interests created by the Emergency Price Control Act but refused to apply the federal remedy on the basis of state policy. In a unanimous opinion delivered by Justice Black, the Court held that federal policy must prevail as to federal rights, any inconsistent state policy to the contrary notwithstanding. Under this clear supremacy clause argument, *Crain* makes a bit more sense. Even if there were a Tennessee policy against granting injunctive relief against state officers on any ground, that policy would have to yield to a federal policy requiring such relief in constitutional cases.²⁹³

²⁸⁸ On May 28, 1968, the United States District Court for the Northern District of California held that § 460(b) (3) of the Selective Service Act was unconstitutional in that it prohibited review of selective service classifications otherwise than in criminal proceedings arising out of a refusal to report for induction or through habeas corpus proceedings. "The court concludes the Congress cannot make selective service induction orders unreviewable. Due process is offended by an administrative order which demands compliance or a term of imprisonment." *Petersen v. Clark*, 285 F. Supp. 700, 708 (N.D. Cal. 1968).

²⁸⁹ "It being the right of a party to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court." *General Oil Co. v. Crain*, 209 U.S. 211, 228 (1908). Cf. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

²⁹⁰ 209 U.S. 211 (1908).

²⁹¹ 209 U.S. 123 (1908).

²⁹² 330 U.S. 386 (1947).

²⁹³ On any reading, *Crain* is a less drastic exercise of federal power than *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931). In the latter case, the plaintiff had paid a valid tax rate while others similarly situated paid a lower rate. The

The principles of discrimination on the one hand, and of the supremacy of federal policy on the other, are therefore distinct. States may, of course, enforce a general "door closing" policy that does not discriminate against federal questions.²⁹⁴ But they may not do so even on a non-discriminatory basis where a conflicting federal policy must prevail, or where state courts of general jurisdiction must be available to hear claims as a matter of due process.

Nevertheless, it may well be asked whether, as a matter of political and institutional wisdom, it is desirable to require the states to provide a remedy rather than to create an adequate federal remedial process. Sound management of the federal system would seem to point to the latter in the absence of some significant reason for refusing to provide federal relief.²⁹⁵

3. It would not be an adequate solution to the *Bell v. Hood* problem for the district court to "borrow" a state rule of actionability.²⁹⁶ This alternative to a federal cause of action is a possible one, but creates more problems than it solves.

The "borrowing" technique is not unprecedented: it has been used, for example, in wrongful death actions wherein the plaintiff claims the death was caused by the unseaworthiness of a vessel subject to maritime law.²⁹⁷ However, this analogy demonstrates the lack of both need and wisdom in "borrowing" remedies from state law to vindicate federal claims. The primary difficulty is that "borrowing" is not a unitary notion; there are at least three possible approaches to the method.

First,²⁹⁸ even where the essential claim in the case involves federal law, it is possible to conceive of the *right to recover* as being "rooted"

state remedy would collect the unpaid balance from the other corporations and thus rectify the inequality. But the Court held that the plaintiff could neither be made to assume the burden of instituting action to collect the arrears nor to wait until they were collected. As a matter of federal law, he was entitled to a refund. 284 U.S. at 247. See Hart, *The Relation Between State and Federal Law*, 54 COLUM. L. REV. 489, 507 (1954).

²⁹⁴ Compare *Douglas v. New York, N.H.&H.R.R.*, 279 U.S. 377 (1929); *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950), with *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934). In *Douglas*, a Connecticut resident sued, in a New York state court under the F.E.L.A., a Connecticut corporation for an injury that had occurred in Connecticut. Though the court dismissed the action on the basis of a statute, there is some question whether it had power to entertain the suit apart from state law. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

²⁹⁵ Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 492 (1963).

²⁹⁶ E.g., CAL. CIV. CODE § 3281 (West 1946), quoted in *Bell v. Hood*, 71 F. Supp. at 817: "Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages."

²⁹⁷ See generally Hart, *The Relation Between State and Federal Law*, 54 COLUM. L. REV. 489, 531 (1954).

²⁹⁸ This is the approach of Mr. Justice Stewart. *The Tungus*, 358 U.S. 588 (1959).

in state law. From this perspective, the first question is whether the state rule of actionability includes violation of the federal duty among those violations which are made actionable.²⁹⁹ If so,³⁰⁰ the approach holds, the state rule cannot deviate or vary the absorbed federal rules defining the duty and its scope.³⁰¹ Finally, when the federal courts enforce the state rule of actionability (which includes within it the violation of the federal duty) they must enforce that state rule as an "integrated whole."³⁰²

In my opinion this approach is unintelligible. Fundamentally, it confuses the function of federal *review* of federal questions in state cases³⁰³ with federal "arising under" jurisdiction.³⁰⁴ The Supreme Court's opinion in *Bell v. Hood*³⁰⁵ means that the case, as pleaded, arises under federal law. The sense in which the case can be "rooted" in state law requires some explanation beyond "cause of action" rhetoric. If the claim made by the plaintiffs in *Bell* was truly "rooted" in state law, then it could not in any sense "arise under" federal law,³⁰⁶ despite the fact that any federal question in the case would be reviewable in the Supreme Court. In this regard, the maritime cases are

²⁹⁹ *Id.* at 591.

³⁰⁰ The question whether the federal duty must be included in order to avoid unconstitutional discrimination against federal law was not reached in *Curry v. Fred Olsen Line*, 367 F.2d 921 (9th Cir. 1966). The court held that since California included breach of implied warranty of fitness within the term "wrongful," unseaworthiness was also included within that term. 367 F.2d at 926-27. The question will be dealt with below.

³⁰¹ *E.g.*, *United New York & New Jersey Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613, 617 (1959); see *Curry v. Fred Olsen Line*, 367 F.2d 921, 929 (9th Cir. 1966).

³⁰² *The Tungus*, 358 U.S. 588, 592 (1958). "When admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached." *Id.* However, in *Hess v. United States*, 361 U.S. 314 (1960), Justice Stewart suggested this was not a limitless principle: "We leave open the question whether a state wrongful death act might contain provisions so offensive to traditional principles of maritime law that the admiralty would decline to enforce them." 361 U.S. at 320. See Currie, *The Choice Among State Laws in Maritime Death Cases*, 21 VAND. L. REV. 297 (1968); cf. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

³⁰³ *E.g.*, *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942).

By seeing the situation as presenting something of an *Erie* problem, Justice Stewart in *The Tungus* was able to avoid the responsibilities inherent in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). See Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 833 (1957).

³⁰⁴ *E.g.*, *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204 (1946).

³⁰⁵ 327 U.S. 678 (1946).

³⁰⁶ "In personal injury cases then, the question of whether the case arises under federal law is *uniformly* decided by reference to the question whether federal law gives an express or implied cause of action, or whether federal law merely sets a standard of conduct for a state cause of action." Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 911 (1967) (emphasis added). With all due respect to Professor Cohen, I find this statement curious—particularly so in view of the fact that he does not discuss the Supreme Court's opinion in *Bell v. Hood*.

not analogous, for there are situations in which the admiralty jurisdiction is more like diversity³⁰⁷ than it is like federal question jurisdiction. Therefore, cases that are truly "rooted" in state law can be heard in admiralty but, I submit, not in a court constituted to hear federal questions.

In the second approach the right is conceived of as "rooted" in federal law and the state rule of actionability is used as a "datum made relevant"³⁰⁸ by federal law. Under this approach, the federal forum "adopts" the state rule of actionability in order to provide a remedy for a claim "rooted" in federal law,³⁰⁹ but only if the state rule of actionability provides a general right to recover under *some* (other) body of law.³¹⁰ The federal forum would be permitted, however, to apply federal law only "to the extent not conflicting with the adopted" state rule.³¹¹

The most serious criticism that can be made of this approach is that it is pointless. If the state has no interest that demands more respect for its rules of actionability than use as a datum, it seems frivolous to maintain that a state rule of actionability is being applied. On the other hand, it makes no sense to say that federal substantive law "adopts" the state remedy, and also subject the federal substantive rules to a test of their compatibility with the adopted state remedy. The two statements are essentially inconsistent. One cannot say the case is "governed" by federal substantive law and also say that state law controls in case of inconsistency.

The third approach³¹² differs from the second in that it avoids the inconsistency of the latter. Rather than adopt the individual state's rules of actionability it looks for rules common to all states and adopts them as the applicable federal rule.³¹³ Under this approach, ancillary state rules would apply only to the extent they related to "non-essential matters."³¹⁴

This last approach has even less point than the second. It is a poorly disguised attempt, as used in the admiralty cases, to avoid a precedent holding that there is no remedy.³¹⁵ Since there is no such

³⁰⁷ *E.g.*, *Grant Smith-Porter Ship Co. v. Rhode*, 257 U.S. 469 (1922).

³⁰⁸ *Kay, Conflict of Laws: Foreign Law as Datum*, 53 CALIF. L. REV. 47, 59 (1965).

³⁰⁹ This is the approach of Mr. Justice Whittaker. *Goett v. Union Carbide Corp.*, 361 U.S. 340, 346 (1960) (dissenting opinion).

³¹⁰ *Id.* at 346-47.

³¹¹ *Id.* at 347.

³¹² This is the view of Mr. Justice Brennan, concurring and dissenting in *The Tungus*, 358 U.S. 597, 601 (1958): "It is the federal maritime law that looks to the state law of remedies here, not the state law that incorporates a federal standard of care."

³¹³ *Id.* at 608-09.

³¹⁴ *Id.* at 609.

³¹⁵ *The Harrisburg*, 119 U.S. 199 (1886).

barrier in precedent applicable to the *Bell v. Hood* situation, there is no sound basis for failing to provide a simple and effective federal damage remedy to protect constitutional interests in liberty.

V. A FEDERALLY CREATED REMEDY IN DAMAGES

The federal judiciary has long considered itself free to fashion federal rules for decision where both the necessity for such rules and their importance in connection with a specific national interest has been clear. Once necessity and connection with an object of national concern have been demonstrated, this ability of the federal courts to exercise common law power is not subject to serious question. The significance of *Erie* is its clarification of the factor of national concern as one of constitutional dimension. But the wisdom, in a particular instance, of judicial creativity is a more complex problem. It depends in large measure on the extent to which courts can feel justified in acting, rather than leaving the problem to the legislature.

One of the difficulties with the opinion in *Swift v. Tyson*³¹⁶ is the failure of Justice Story to be convincing that the rule of pre-existing debt as sufficient consideration on negotiable paper is commercially necessary. More important, the connection drawn between the rule and a specific national concern is weak. The only federal concern at all involved in the case was federal power over commerce. But at the time *Swift* was decided, it was well established doctrine that the Court would not fashion rules governing commerce in the face of congressional silence, such silence being construed as an intention to leave the area free of control save for state regulation of essentially local matters.³¹⁷

In *The Osceola*,³¹⁸ the Court sanctioned a seaman's recovery for injuries caused by the unseaworthiness of his ship. The existence of such a basis of liability, the Court said, must be founded "either upon the general admiralty law or upon a local statute of the State."³¹⁹ But admiralty law, not being statutory, must be "gathered from the accepted practice of courts of admiralty, both at home and abroad" ³²⁰ Upon an examination of this "accepted practice," the

³¹⁶ 41 U.S. (16 Pet.) 1 (1842). The analysis here suggested does not contradict the statement of Professor Hart: "Federal law may also provide its own remedies, with or without benefit of an act of Congress—the Supreme Court never having clearly explained when and why such an act is necessary or unnecessary." Hart, *supra* note 297, at 523.

³¹⁷ See, e.g., *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489, 493 (1887), and cases cited therein.

³¹⁸ 189 U.S. 158 (1903).

³¹⁹ *Id.* at 168.

³²⁰ *Id.*

Court found foreign and lower federal courts granting recovery in such cases. "We are not disposed to disturb so wholesome a doctrine by any contrary decision of our own."³²¹

The admiralty label led Justice Holmes to distinguish the power to draw on accepted maritime practice from the accepted practice in courts of common law. In dissenting from *Southern Pacific Co. v. Jensen*,³²² he pointed out that maritime law is not a *corpus juris*, but a "limited body of customs and ordinances of the sea."³²³ He denied the power of federal courts to apply general common law principles to sustain new bases of recovery for maritime personnel. "The only authority available is the common law or statutes of a State. For from the often repeated statement that there is no common law of the United States,"³²⁴ it is to be concluded that in the silence of Congress the supplementary common law must be that of the states.

Mr. Justice Holmes could not accept the existence of common law customs in the federal judiciary, but could accept it if those customs were found in maritime practice. He failed to make the connection between common law tort principles and a national concern with the maritime industry. Furthermore, he never explained why the Supreme Court could not be the "articulate voice of some sovereign"³²⁵ in matters of national concern.

On the other hand, Justice Holmes' position is defensible on the view that *Jensen* (and indeed all exercises of congressional power in admiralty) was a question of federal control over commerce. To avoid making the same mistake as Justice Story, he could well have argued that in the absence of congressional action, the states were free to legislate in matters of local concern. The issue in *Jensen* was whether the state employer's liability law could be applied in maritime cases. Unfortunately, Justice Holmes went much further:

This court has recognized that in some cases different principles of liability would be applied as the suit should happen to be brought in a common-law or admiralty court. . . . But hitherto it has not been doubted authoritatively, so far as I know, that even when the admiralty had a rule of its own to which it adhered, . . . the state law, common or statute, would prevail in the courts of the State.³²⁶

³²¹ *Id.* at 175.

³²² 244 U.S. 205 (1917).

³²³ *Id.* at 220 (dissenting opinion).

³²⁴ *Id.* at 221. *But cf.* *FTC v. Flotill Products, Inc.*, 389 U.S. 179, 183-84 (1967), holding that in the absence of contrary statutory provision, the common law rule that "a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body" applies to a federal agency.

³²⁵ *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

³²⁶ *Id.* at 222-23.

A matter of potential national concern was not totally absent in *Erie*. It may be supposed that, under the commerce power, Congress could define the status of persons walking along a railroad right of way. Congress had not done so. Could the court fashion a rule to govern the case? Should it do so? Justice Brandeis' opinion for the Court seems to answer the first question in the negative and thereby dispose of the second. Given the Court's abrogation of primary law making in the area of interstate commerce, and its reading of congressional silence as permitting state regulation of essentially local matters, Justice Brandeis was quite right. If the problem of railroad trespassers is a local matter, the question of connection with a national concern is answered. It would indeed be unconstitutional not to apply state law in such a case. On the other hand, if one accepts the proposition that Congress could have governed the activity in *Erie* as a function of its article I power, the obligation to apply state law as the rule for decision is otherwise founded. On this hypothesis, it is necessary to ask whether a federal rule regarding railroad trespassers is necessary to protect the federally regulated utility from overly harsh rules of tort liability.³²⁷

This principle of political concern can be, and has been, applied in various contexts.³²⁸ That it was central to the disposition in *Erie* was made clear in 1942. In *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*,³²⁹ the Court refused to decide whether the *Klaxon* rule³³⁰ (a federal court in an *Erie* case should apply the law that the court of the state in which the federal court is sitting would apply) applied in federal-question cases. "For we are of the view that the liability of petitioner on the note involves decision of a federal, not a state, question."³³¹ The court of appeals had applied general conflicts principles in determining the applicable law, rather than selecting either Missouri or Illinois choice-of-law rules. In a frequently cited concurring opinion, Justice Jackson commented on the role of the common law in federal question adjudication.

³²⁷ Professor Stason's analysis of the *Erie* problem in the light of recent decisions is unsound to the extent it overemphasizes the significance of the tenth amendment and underemphasizes the relevance of congressional power over the business of article III courts. "Under no circumstances must federal law be applied in significant derogation of rights created under power reserved to the states by the tenth amendment. It follows that where such rights are involved, federal policy considerations are constitutionally irrelevant." Stason, *Choice of Law Within the Federal System: Erie Versus Hanna*, 52 CORNELL L. REV. 377, 394 (1967); see Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 99-108 (1966).

³²⁸ See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

³²⁹ 315 U.S. 447 (1942).

³³⁰ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

³³¹ 315 U.S. at 456.

The federal courts have no *general* common law, as in a sense they have no general or comprehensive jurisprudence of any kind, because many subjects of private law which bulk large in the traditional common law are ordinarily within the province of the states and not of the federal government. But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all the source materials of the common law, or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law. . . .³³²

Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.³³³

. . . Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common law technique of decision and to draw upon all the sources of the common law in cases such as the present. . . .³³⁴

The law which we apply to this case consists of principles of established credit in jurisprudence, selected by us because they are appropriate to effectuate the policy of the governing Act.³³⁵

It is unfair to read Justice Jackson's opinion as implying that *Erie* was limited to diversity cases.³³⁶ It would be more accurate to say that he recognized *Erie* did not apply to questions primarily of national concern. This, I take it, was his purpose in citing the language from Justice Brandeis' opinion in a case³³⁷ decided the same day as *Erie*:

[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either state can be conclusive.³³⁸

The *Clearfield Trust*³³⁹ opinion has been so well treated elsewhere³⁴⁰ that I will not deal with its details here save to examine the

³³² *Id.* at 469.

³³³ *Id.* at 470.

³³⁴ *Id.* at 472.

³³⁵ *Id.*

³³⁶ Friendly, *supra* note 28, at 103 n.122; see *Maternally Yours, Inc. v. Your Maternity Shop*, 234 F.2d 538, 540 n.1 (2d Cir. 1956).

³³⁷ *Hinderlider v. La Plata Co.*, 304 U.S. 92 (1938).

³³⁸ 315 U.S. at 470; cf. Morgan, *The Future of a Federal Common Law*, 17 ALA. L. REV. 10, 27 (1964).

³³⁹ *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

³⁴⁰ Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 828-33 (1957).

process of reasoning. This was the first of a series of opinions Justice Douglas was to write on the question of federal common law. He first established the federal concern in the case:

The authority to issue the check had its origin in the Constitution and the statutes of the United States. . . . The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources.³⁴¹

He then dealt with the necessity of fashioning a federal rule and its connection with a national concern:

The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.³⁴²

Professor Mishkin has doubted whether the desirability is "plain" in this case.³⁴³ But he does not dispute the central proposition that it is entirely within the province of the federal courts to determine, as a matter of policy, whether varying state laws should apply, whether a single state rule should be uniformly adopted and applied, or whether a new rule should be created and applied as a matter of federal law.

*Anderson v. Abbott*³⁴⁴ was an action to recover assessments from the shareholders of a bank-stock holding company under the Federal Reserve and National Bank Acts. Justice Douglas, for the five-man majority, reasoned that the shareholders could no more escape liability through the holding company form than by transferring their shares to one legally irresponsible. "That follows because of the policy underlying these statutes."³⁴⁵ Though Delaware limited the liability of shareholders, and its limitation rules were enforceable under *Erie*, no such statutory rule could apply to defeat federal policy.³⁴⁶ Justice Jackson, for the dissenters, disagreed with the majority's reading of the legislative policy. But assuming the latter was correct, the majority's justification for formulating the doctrine leading to share-

³⁴¹ 318 U.S. at 366.

³⁴² *Id.* at 367.

³⁴³ Mishkin, *supra* note 340, at 830.

³⁴⁴ 321 U.S. 349 (1944).

³⁴⁵ *Id.* at 356.

³⁴⁶ *Id.* at 365.

holder liability in *Anderson* was consistent with Justice Jackson's concurring opinion in *D'Oench Duhme*:

If the judicial power is helpless to protect a legislative program from schemes for easy avoidance, then indeed it has become a handy implement of high finance. Judicial interference to cripple or defeat a legislative policy is one thing; judicial interference with the plans of those whose corporate or other devices would circumvent that policy is quite another. Once the purpose or effect of the scheme is clear, once the legislative policy is plain, we would indeed forsake a great tradition to say we were helpless to fashion the instruments for appropriate relief.³⁴⁷

Several months later, a unanimous Court held federal question jurisdiction proper in an action by a member against his union for equitable and legal relief alleging failure of fair representation.³⁴⁸ The plaintiff, *Tunstall*, claimed that the union was discriminating in its representation of Negroes. Both lower federal courts dismissed the suit on the grounds that, insofar as the action was based on the wrongful acts of the union, it did not "arise under" the laws of the United States. But the Supreme Court disagreed.

We also hold that the right asserted by petitioner which is derived from the duty imposed by the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct.³⁴⁹

The connection with an object of national concern is clear in both these cases. As for necessity, the creation of a rule of federal law in *Anderson* was needed to prevent avoidance of a federal policy. Likewise, in *Tunstall*, the creation of a federal remedy implied from a federally created duty was necessary if the duty was to be enforced at all, because "the petitioner is without available administrative remedies."³⁵⁰ In the absence of a federally created right of recovery, the federally imposed duty would be practically unenforceable.

Holmberg v. Armbrecht,³⁵¹ was a suit in federal equity to enforce a liability created by the Federal Farm Loan Act. One of the defenses set up in the case was the New York statute of limitations. Writing for a unanimous Court, Justice Frankfurter said:

³⁴⁷ *Id.* at 366-67.

³⁴⁸ *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944).

³⁴⁹ *Id.* at 213.

³⁵⁰ *Id.*

³⁵¹ 327 U.S. 392 (1946).

And so we have the reverse of the situation in *Guaranty Trust Co. v. York, supra*. We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights.³⁵²

The issue before the Court in *Wolf v. Colorado*³⁵³ was whether the exclusion in state criminal cases of unconstitutionally seized evidence was necessary to implement the guarantee of the fourth amendment. Justice Frankfurter, speaking for the Court, expressed the element of national concern in a case of fourth amendment violation. "But the ways of enforcing such a basic right raise questions of a different order."³⁵⁴ The *Weeks* exclusionary rule

was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication.³⁵⁵

The immediate question in the case was whether the right "demands" the application of the exclusionary rule. Justice Frankfurter's failure to recognize such a demand was due in part to his belief in the availability and efficacy of state remedies, and in part to his sense of the justness of the defendants' claims.

Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford.³⁵⁶

In an almost pleading dissent, Mr. Justice Murphy disagreed about the necessity of a federally created remedy to enforce the con-

³⁵² *Id.* at 395.

³⁵³ 338 U.S. 25 (1949).

³⁵⁴ *Id.* at 28.

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 30-31.

stitutional policy. The dissenters³⁵⁷ saw the only alternative to exclusion as "no sanction at all."³⁵⁸

But what an illusory remedy this [trespass action for damages] is, if by "remedy" we mean a positive deterrent to police and prosecutors tempted to violate the Fourth Amendment. The appealing ring softens when we recall that in a trespass action the measure of damages is simply the extent of the injury to physical property. If the officer searches with care, he can avoid all but nominal damages—a penny, or a dollar. Are punitive damages possible? Perhaps. But a few states permit none, whatever the circumstances. In those that do, the plaintiff must show the real ill will or malice of the defendant, and surely it is not unreasonable to assume that one in honest pursuit of crime bears no malice toward the search victim. . . . Is it surprising that there is so little in the books concerning trespass actions for violation of the search and seizure clause?³⁵⁹

Twelve years later the Court was to change its mind about the necessity of the exclusionary rule. Mr. Justice Clark's opinion for the majority in *Mapp v. Ohio*,³⁶⁰ while recognizing the need for the rule, failed to see necessity as an essential methodological factor in the process of adjudication. Thus the following non-sequitur:

The Court's reasons [in *Wolf*] for not considering essential to the right to privacy . . . that which decades before had been posited as part and parcel of the Fourth Amendment's limitation upon federal encroachment of individual privacy, were bottomed on factual considerations.

While they are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the states by the Due Process Clause, we will consider the current validity of the factual grounds upon which *Wolf* was based.³⁶¹

Justice Clark then showed that many of the states which had rejected the *Weeks* rule at the time of *Wolf* later accepted it. He also found weighty the determination by the California Supreme Court in *People v. Caham*,³⁶² that the other means of protection cited in *Wolf* had

³⁵⁷ Justice Rutledge joined Justice Murphy's dissent, and Justice Douglas expressed his agreement with it. *Id.* at 40-41.

³⁵⁸ *Id.* at 41 (dissenting opinion).

³⁵⁹ *Id.* at 42-44 (citations omitted); cf. *Pierson v. Ray*, 386 U.S. 547, 557 (1967). See also the suggestion in Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 *COLUM. L. REV.* 1205, 1229 (1966).

³⁶⁰ 367 U.S. 643 (1961).

³⁶¹ *Id.* at 650-51.

³⁶² 44 Cal. 2d 434, 282 P.2d 905 (1955).

“completely failed to secure compliance.”³⁶³ I do not see how Justice Clark’s disavowal of the relevance of factual matters can be taken seriously. As we have seen, from *Clearfield Trust* through and including *Wolf*, just such factual matters determined whether a federal rule protective of a national concern was to be judicially created.

Justice Douglas, who had dissented from *Wolf* on the ground that absent exclusion the amendment would have no sanction,³⁶⁴ concurred in *Mapp*:

Without judicial action making the exclusionary rule applicable to the States, *Wolf v. Colorado* in practical effect reduced the guarantee against unreasonable searches and seizures to a “dead letter,”³⁶⁵

Although the decision in *Mapp* was consistent with the line of cases following *Clearfield Trust*, it is unfortunate that the Court in the former case dealt with a constitutional issue as though it differed in kind from other questions involving matters of national concern.³⁶⁶ Such treatment might be justified when the question is whether a particular activity violates some command of the Constitution, but certainly not when the question is whether there is a need for a remedy to protect against admittedly unconstitutional actions.

Between *Wolf* and *Mapp*, the Court had decided several cases of importance to the question of federal common law rules. In *Wilburn Boat v. Fireman’s Fund Insurance Co.*,³⁶⁷ Mr. Justice Black, writing for the Court, declined to formulate a federal rule governing the effect on recovery of the breach of a provision in a maritime insurance contract. Texas law provided that breach would bar recovery only where it contributed to the loss, while the federal district court had found the “literal performance rule” to be established in admiralty practice.

The Supreme Court did not agree that the literal performance rule had been so established. The question for decision was whether to accept divergent state rules or formulate a uniform rule on the effect of breach. The Court found the difficulty of choosing among the various state rules preclusive of a federal rule. Furthermore, it saw no indication of a strong connection between the necessity of a uniform rule and a significant national concern.

Congress has been exceedingly cautious about disturbing this system, even as to maritime insurance where con-

³⁶³ 367 U.S. at 651.

³⁶⁴ 338 U.S. at 40-41.

³⁶⁵ 367 U.S. at 670.

³⁶⁶ But not so in *Chapman v. California*, 386 U.S. 18 (1967). See *id.* at 21 (Black, J., concurring).

³⁶⁷ 348 U.S. 310 (1955).

gressional power is undoubted. We, like Congress, leave the regulation of marine insurance where it has been—with the States.³⁶⁸

Mr. Justice Frankfurter, pointing out that the case before the court involved “a houseboat yacht brought to Lake Texacoma for private recreation,”³⁶⁹ was dubious even about the national concern in the case.

*Bank of America v. Parnell*³⁷⁰ was a diversity action to recover for the conversion of government bonds. The court of appeals had agreed with Parnell’s claim that *Clearfield Trust* compelled the application of federal law to the whole case. Mr. Justice Frankfurter, and a majority of the Court, disagreed. The case, he noted, did not involve the United States as a party, but was a strictly private transaction. Of course federal law controlled the obligations and rights created by the paper. But on the question of burden of proof of good faith, in a case of conversion involving private parties, Justice Frankfurter could find no national concern requiring the application of a federal rule.

The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of Government paper between private persons, is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter. This is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern.³⁷¹

Justices Black and Douglas dissented on two points: the rights created by government paper should not distinguish between public and private parties to transactions. “If the rule of the *Clearfield Trust* case is to be abandoned as to some parties, it should be abandoned as to all and we should start afresh on this problem.”³⁷² Second, the dissenters disapproved of the uncertainty arising from a situation in which parts of disputes are covered by federal, and others by state law. They found the primary national concern in the “convenience, certainty, and definiteness in having one set of rules.”³⁷³

³⁶⁸ *Id.* at 321; cf. Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1090 (1964).

³⁶⁹ 348 U.S. at 322.

³⁷⁰ 352 U.S. 29 (1956). For a full analysis of this case see Mishkin, *supra* note 340, at 824.

³⁷¹ 352 U.S. at 33-34.

³⁷² *Id.* at 35 (dissenting opinion).

³⁷³ *Id.*

The highly significant *Lincoln Mills*³⁷⁴ case was decided a few months later. The majority opinion by Justice Douglas is consistent with the views he had expressed in earlier cases. The grant of jurisdiction in section 301 of the Labor Management Relations Act, he said,

expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.³⁷⁵

However, the statute itself made no reference to an applicable body of substantive law or remedial incidents. Justice Douglas nevertheless concluded that the purpose of the statute was "to provide necessary legal remedies."³⁷⁶

Some [problems] will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.³⁷⁷

Furthermore, the substantive law to be applied "is federal law, which the courts must fashion from the policy of our national labor laws."³⁷⁸ "It is not uncommon for federal courts to fashion federal law where federal rights are concerned."³⁷⁹ Justices Burton and Harlan, concurring, agreed that the federal courts were "not powerless to fashion an appropriate federal remedy."³⁸⁰ But they did not agree that therefore all substantive law subject to adjudication under section 301 would be federal: "*some* federal rights may necessarily be involved in a § 301 case."³⁸¹

Mr. Justice Frankfurter's dissent in the case is consistent with my analysis. He did not find judicial legislation necessary in this situation:

[T]he meaning of collective bargaining for labor does not remotely derive from reliance on the sanction of litigation in the courts.³⁸²

³⁷⁴ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). A full discussion of the intricate problems of federal jurisdiction raised in this case are beyond the scope of my immediate concern with judicial creation of substantive and remedial common law.

³⁷⁵ 353 U.S. at 455.

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 457.

³⁷⁸ *Id.* at 456.

³⁷⁹ *Id.* at 457.

³⁸⁰ *Id.* at 460 (concurring opinion).

³⁸¹ *Id.* (emphasis added).

³⁸² *Id.* at 462 (dissenting opinion).

Furthermore, Justice Frankfurter felt that the specific national concern here was far too vague to require judicially created protection:

There are severe limits on "judicial inventiveness" even for the most imaginative judges. The law is not a "brooding omnipresence in the sky," . . . , and it cannot be drawn from there like nitrogen from the air.³⁸³

The essence of Justice Frankfurter's position here is not that there was an absence of judicial power, but a call for sound management of that power. He was less inclined than the majority to find a national concern that would require the fashioning of federal law, and more reluctant to be protective of a national concern where Congress had not given some indication of its nature and significance.

These cases serve as background for the mystifying³⁸⁴ majority opinion by Mr. Justice Douglas in *Wheeldin v. Wheeler*.³⁸⁵ The petitioner there had been served with a subpoena to appear before the House Un-American Activities Committee. His name had been inserted on a blank subpoena, allegedly without authorization, by the Committee investigator. The complaint also alleged malicious motives on the part of the investigator, as well as the unconstitutionality of the congressional resolution authorizing the Committee to act and subpoena witnesses.³⁸⁶ The district court had denied injunctive relief on the ground that "mere apprehension that a federal right might be infringed at some future time did not warrant declaratory or injunctive relief at the present time."³⁸⁷ The petitioner's appearance before the Committee did not seem likely.

On the authority of *Bell v. Hood*³⁸⁸ and *Bock v. Perkins*,³⁸⁹ Justice Douglas held that the complaint stated sufficient claims to warrant federal jurisdiction. He denied the existence of any constitutional issue in the case on the ground that no violation of the fourth amendment appeared from the facts. However, the petitioner had argued that the failure of the investigator to comply with the statute authorizing subpoenas gave rise to a cause of action in damages. Justice Douglas' response was extraordinary:

As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the

³⁸³ *Id.* at 465.

³⁸⁴ *Cf.* Friendly, *supra* note 28, at 105 n.142: "Curiously the opinion was by Mr. Justice Douglas, the leader in the development of 'federal common law.'"

³⁸⁵ 373 U.S. 647 (1963). The counsel who handled the *Bell* case were attorneys for the plaintiff here as well.

³⁸⁶ *Cf.* *Stamler v. Willis*, 371 F.2d 413 (7th Cir. 1966).

³⁸⁷ 373 U.S. at 648-49. The court of appeals dismissed the claim for injunctive relief as moot. 280 F.2d 294 (9th Cir. 1960).

³⁸⁸ 327 U.S. 678 (1946).

³⁸⁹ 139 U.S. 628 (1891).

free-wheeling days ante-dating *Erie*. . . . The instances where we have created federal common law are few and restricted.³⁹⁰

Clearfield Trust was explained on the basis of the need for "a uniform rule in that area."³⁹¹ "But even that rule was qualified in . . . *Parnell*."³⁹² Citation to *Holmberg*, Justice Douglas said, was "singularly inapposite." That case "was a suit to enforce a liability created by a federal statute, and the question was what remedies the federal courts should apply."³⁹³ This effort to distinguish *Holmberg* is intelligible only on the basis of Justice Douglas' reading of the subpoena statute as one "which only grants [a] power."³⁹⁴ He does not explain how this distinguishes the statute in question from the "power" of the federal officers in *Land v. Dollar*, where he had said: "But public officers may become tortfeasors by exceeding the limits of their authority."³⁹⁵ Perhaps there is only the difference that the action here is "usually governed by local law" with federal law supplying a defense.³⁹⁶ *Lincoln Mills* was distinguished on the ground that Congress had there (but not here) "left to federal courts the creation of a federal common law for abuse of process."³⁹⁷ "Congress could, of course, provide otherwise, but it has not done so."³⁹⁸ What had Congress done in *Lincoln Mills* that it did not do here? It had simply given the federal courts jurisdiction that would not have otherwise existed. In *Wheeldin* such action was not necessary—jurisdiction already existed under the authority of *Bell v. Hood*.

Justice Douglas did not defer to Congress in *Mapp*; rather, he was more than willing to note the factual necessity of providing a remedy for "those upon whose person or premises something incriminating has been found."³⁹⁹ Granted that there was no constitutional issue in *Wheeldin*, the only remedy available was a state action for abuse of process—the very kind of remedy that Justice Douglas had found to leave the fourth amendment a "dead letter."⁴⁰⁰

³⁹⁰ 373 U.S. at 651. *But see* text accompanying note 379 *supra*.

³⁹¹ 373 U.S. at 651.

³⁹² *Id.*

³⁹³ *Id.* at 651 n.5.

³⁹⁴ *Id.* at 651. *See* text accompanying notes 205-09 *supra*.

³⁹⁵ *Land v. Dollar*, 330 U.S. 731, 738 (1947); *see* note 271 *supra*.

³⁹⁶ 373 U.S. at 652. *But cf.* Friendly, *supra* note 28, at 85: "I am not at all sure that what the majority considered obvious distinctions between the plaintiff's right and the defendant's defense or between acts within and without the perimeter [of the officer's line of duty] will prove viable."

³⁹⁷ 373 U.S. at 652. *But cf.* Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 165 (1953).

³⁹⁸ 373 U.S. at 652.

³⁹⁹ *See* text accompanying note 356 *supra*.

⁴⁰⁰ *Id.* at 670.

But the most discouraging aspect of the case is its tautology: the argument purports to demonstrate the exclusiveness of state law on the facts alleged because the action if brought in a state court would be removable under section 1442(a)(1).⁴⁰¹ If that is true, the decision of the Supreme Court in *Bell* is either not understood or seriously questioned. If the allegations in *Wheeldin* were sufficient to confer original jurisdiction, and Justice Douglas said they were,⁴⁰² removal would be possible under section 1441⁴⁰³ as well. That the case is removable under section 1442(a)(1) is in no way an argument against the necessity of a federal cause of action. If relevant at all, the removal provision is indicative of a sufficient national concern to permit all such cases to be heard in a federal forum. The national concern manifested by removal statutes is of course directed toward defendants.⁴⁰⁴ But it was Justice Douglas himself who said that when federal officers act unlawfully, "[t]he dominant interest of the sovereign is then on the side of the victim."⁴⁰⁵ In *Wheeldin*, for the first time in over twenty years, Justice Douglas was moved to conclude "it is not for us to fill any *hiatus* Congress has left in this area."⁴⁰⁶

The Court could hardly have failed to see that the national concern with the activities of federal officers is not different in kind from that involved in the "activities" of federal commercial paper. The decision can only be explained as a failure to appreciate the necessity for a federal remedy—a necessity grasped in *Wolf*, *Mapp*, *Lincoln Mills*, *Parnell*, *Tunstall* and *Clearfield Trust*.⁴⁰⁷

The problem of determining necessity is not a simple one. On the other hand, it must be admitted that whether or not a federal

⁴⁰¹ 28 U.S.C. § 1442(a)(1) (1964).

That state law governs the cause of action alleged is shown by the fact that removal is possible in a nondiversity case such as this one only because the interpretation of a federal defense makes the case one "arising under" the Constitution or laws of the United States.

³⁷³ U.S. at 652.

⁴⁰² 373 U.S. at 649.

⁴⁰³ 28 U.S.C. § 1441 (1964).

⁴⁰⁴ Cf. Wechsler, *supra* note 233, at 233-34.

⁴⁰⁵ *Land v. Dollar*, 330 U.S. 731, 738 (1947).

⁴⁰⁶ 373 U.S. at 652.

⁴⁰⁷ *Wheeldin* remains the only case in which Justice Douglas took a position against the creation of a federal common law. See *United States v. Yazell*, 382 U.S. 341, 359 (1966). Ironically, it is also the only such case involving what might be called a question of civil liberties. Twelve months after *Wheeldin*, he was to write: "The duty of common carriers to carry all regardless of race, creed or color was in part the product of the inventive genius of judges. . . . We should make that body of law the common law of the Thirteenth and Fourteenth Amendments so to speak. Restaurants in the modern setting are as essential to travelers as inns and carriers." *Bell v. Maryland*, 378 U.S. 226, 255 (1964). See also his dissenting opinion in *Pierson v. Ray*, 386 U.S. 547, 558 (1967).

remedy should be created raises much less serious and difficult problems than the creation of rules defining primary duties.⁴⁰⁸ The question of necessity should depend on the relevance of uniformity,⁴⁰⁹ the extent to which a federal rule would undermine a state interest or policy,⁴¹⁰ the extent to which a body of federal regulations already has had significant impact on the area in question,⁴¹¹ whether or not the entity relations of the United States are involved,⁴¹² the extent to which the question may be resolved by reference to state law, and the adequacy of that resolution in light of any federal concern.⁴¹³

No evidence of the need for a damage remedy to protect against abuses of federal power which invade constitutionally defined interests is more persuasive than the arguments of the Justices themselves. Within the last fifteen years, seven members of the Court have spoken on the inadequacy of existing state tort law for the protection of constitutional interests.⁴¹⁴ Justice Harlan, concurring in *Monroe v. Pape*, pointed up the problem:

There will be many cases in which the relief provided by the state to the victim of a use of state power which the state either did not or could not constitutionally authorize will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right. I would venture only a few examples. There may be no damage remedy for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools? Even the remedy for such an unauthorized search and seizure as *Monroe* was allegedly subjected to may be only the nominal amount of damages to physical property allowable in an action for trespass to land. It would indeed be the purest coincidence if the state remedies for violation of common law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.⁴¹⁵

⁴⁰⁸ See H. M. HART & A. SACHS, *supra* note 204. For other examples of the employment of a federal common law, see Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 HARV. L. REV. 817, 828 (1960).

⁴⁰⁹ See Hart, *supra* note 297, at 535.

⁴¹⁰ See *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958).

⁴¹¹ See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

⁴¹² See *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

⁴¹³ See *Wolf v. Colorado*, 338 U.S. 25 (1947). See also the dissenting opinion of Mr. Justice Harlan in *Chapman v. California*, 386 U.S. 18, 45 (1967).

⁴¹⁴ See text accompanying note 359 *supra*.

⁴¹⁵ 365 U.S. 167, 196 n.5 (1961). Cf. Foote, *supra* note 274. See also Sax & Hiestand, *supra* note 102, where the authors overlook the significance of cases like *Bell v. Hood* and *Wheeldin v. Wheeler*: "Of course, recovery in cases of the sort mentioned above ordinarily turns upon a statute granting a right to substantial civil damages, but, for our purposes, it is irrelevant whether the source of the right is in a statute or in the common law, as the identical results in the American (statutory) and English (common law) voting rights cases demonstrate." 65 MICH. L. REV. at 880.

Unfortunately it is not true that only state officials can cause such injuries—federal officials can also. Monroe was just lucky: had Pape been a federal officer he would have recovered nothing.

Finally, in *Wheeldin v. Wheeler* itself, Justice Brennan, joined by Justice Black and Chief Justice Warren, dissented from the majority opinion.

If this provision be interpreted to prohibit respondent from issuing the Committee's subpoenas on his own, may a right of action in damages be implied in favor of one injured as a direct consequence of respondent's unlawful use of such a subpoena? I see no reason why not. "Implied rights of action are not contingent upon statutory language which affirmatively indicates that they are intended. On the contrary, they are implied unless the legislation evidences a contrary intention."⁴¹⁶

"[A]ctions against federal officials . . . are necessarily of federal concern." Wechsler, [*Federal Jurisdiction and the Revision of the Judicial Code*, 13 *Law & Contemp. Prob.* 216, 220 (1948)]. This is not to say that federal law is necessarily implicated whenever the defendant is a federal officer. . . . But where, as here, it is alleged that a federal officer acting under color of federal law has so abused his federal powers as to cause unjustifiable injury to a private person, I see no warrant for concluding that state law must be looked to as the sole basis for liability. Under such circumstances, no state interest is infringed by a generous construction of federal jurisdiction, and every consideration of practicality and justice argues for such a construction.⁴¹⁷

Little can be added to the force of these words. Yet how much stronger the case when the injury to the private person is of constitutional import. Nevertheless, a citizen abused by federal officers will find that the Constitution, which once protected only against federal and not state action,⁴¹⁸ now only protects against state and not against federal action. I cannot but be reminded of the significant words of de Tocqueville:

It must not be forgotten that it is especially dangerous to enslave men in the minor details of life. For my own part, I should be inclined to think freedom less necessary in great things than in little ones, if it were possible to be secure of the one without possessing the other. Subjection in minor affairs breaks out every day, and is felt by the whole com-

⁴¹⁶ 373 U.S. at 661, quoting *Brown v. Bullock*, 194 F. Supp. 207, 224 (S.D.N.Y. 1961), *aff'd on other grounds*, 294 F.2d 415 (2d Cir. 1961).

⁴¹⁷ 373 U.S. at 664.

⁴¹⁸ *United States v. Cruikshank*, 92 U.S. 542, 551-52 (1875).

munity indiscriminately. It does not drive men to resistance, but it crosses them at every turn, till they are led to surrender the exercise of their will. Thus their spirit is gradually broken and their character enervated; whereas that obedience, which is exacted on a few important but rare occasions, only exhibits servitude at certain intervals, and throws the burden of it upon a smaller number of men. It is vain to summon a people, which has been rendered so dependent on the central power, to choose from time to time the representatives of that power; this rare and brief exercise of their free choice, however important it may be, will not prevent them from gradually losing the faculties of thinking, feeling, and acting for themselves and thus gradually falling below the level of humanity.⁴¹⁹

⁴¹⁹ 2 A. DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 334-35 (rev. ed. 1951).