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Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts

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SOME REFLECTIONS ON LEGISLATION, ADJUDICATION, AND IMPLIED PRIVATE ACTIONS IN THE STATE AND FEDERAL COURTS

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The Goodyear Blimp is not often discussed in the standard literature of the law. Nor have commentators explained the connection between the Blimp and the game of football.[1] The reported decisions refer to these subjects on occasion, but the references are fleeting. The reported decisions are usually devoted to larger questions.

Neiswonger v. Goodyear Tire & Rubber Co.[2] is a case in point. On the afternoon of October 29, 1927, the Goodyear Blimp was dispatched from its home port in Akron, Ohio, under instructions to proceed to Alliance, Ohio, a small, football-loving town some twenty-five miles to the southeast. The purpose of the mission was to deliver copies of *The Times Press* of Akron to spectators at the Akron-Mount Union football game. The Blimp proceeded without incident over the tranquil Ohio countryside until, at 4:30 p.m., it reached the field of Thornton F. Neiswonger, a farmer. The unsuspecting Neiswonger was in the field loading a wagon, which was hitched to a team of horses. The horses saw the Blimp as it approached. Being unprepared for the sight of a blimp from Akron, they bolted and ran, throwing Neiswonger under the wagon's wheels.[3]

As a result of these unfortunate events, Neiswonger brought an

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1 The Blimp is shaped like a football. Whether this purely physical similarity accounts for the long and well-documented relationship between the Blimp and the game, no one can safely say. For a discussion of the aerodynamics of oblate spheroids, see R. VON MISES, THEORY OF FLIGHT 102 (1959). For a discussion of the rising fortunes of the Goodyear Blimp, see *Navy and Coast Guard Show Renewed Interest in Blimps*, N.Y. Times, Aug. 6, 1985, at C3, col. 1.

2 35 F.2d 761 (N.D. Ohio 1929).

3 *Id.* at 761-62.

action in federal court against the Goodyear Tire & Rubber Co., the owner and operator of the Blimp. Neiswonger contended that Goodyear had caused the Blimp to pass over his field in a manner contrary to federal law.[4] He alleged that (1) the Blimp had traversed his field at an altitude of no more than 150-200 feet; (2) certain Air Traffic Rules,[5] promulgated by the secretary of commerce under the new Air Commerce Act,[6] required all aircraft, including blimps, to navigate at an altitude of 500 feet or more; (3) if the Blimp had proceeded in accordance with these rules, it would have passed over his field without alarming his horses; and (4) Goodyear, having allowed the Blimp to proceed in violation of the rules, was liable for the resulting injuries. Neiswonger prayed for damages in the amount of $25,000.[7]

Goodyear demurred to these allegations. Goodyear advised the court that its attorneys had examined the Air Traffic Rules and the Air Commerce Act and had found no reference to private actions for damages. The Act and the rules merely imposed certain operating requirements upon persons engaged in the new art of aerial navigation, and the Act provided that a violation of these requirements would subject the violator to a civil penalty of $500,[8] recoverable by the secretary of commerce.[9] These provisions obviously did not authorize Mr. Neiswonger's private claim for $25,000, and his action was therefore subject to dismissal.[10]

The district court disagreed with the defendant. The court held that Neiswonger's case involved a federal statute and a federal administrative rule and therefore arose under the laws of the United States.[11] Moreover, the court held that Neiswonger probably had a federal "right of action."[12] To be sure, the Air Commerce Act and

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4 *Id.* at 762.

5 The court's opinion set forth the relevant portions of the Air Traffic Rules. *Id.* By 1929 it had not yet occurred to anyone that the legislative utterances of federal administrators were important enough to be regularly published in findable, citable form. The *Federal Register* was first published in 1936. *See* M. PRICE, H. BITNER & S. BYSIEWICZ, EFFECTIVE LEGAL RESEARCH 99-101 (4th ed. 1979).

6 Air Commerce Act of 1926, ch. 344, 44 Stat. 568.

7 35 F.2d at 762.

8 Air Commerce Act of 1926, ch. 344, § 11(a)(5), (b), 44 Stat. 574.

9 *Id.* § 11(b).

10 35 F.2d at 762.

11 *Id. See* 28 U.S.C. § 1331 (1982).

12 35 F.2d at 762. The Air Commerce Act and the Air Traffic Rules did not, by their terms, apply only to navigators and aircraft engaged in interstate commerce. But for constitutional reasons, the district court took the view that the applicability of the Act and the Rules to persons not actually engaged in interstate commerce would depend upon proof that it was "necessary" to subject such persons to the new regulations in order to "protect" interstate movement. *Id.* at 763. Inasmuch as the events complained of by Neiswonger appeared to have been confined to northeastern Ohio, at least some question existed concerning the presence of the requisite interstate connection. The

the Air Traffic Rules did not mention such a "right of action," but if Neiswonger's allegations were true, he had been injured by a violation of federal law, and he had an "implicit" right to pursue a federal remedy.[13]

For the student of midwestern culture, Mr. Neiswonger's case raises a number of perplexing questions;[14] but for the diligent student of the law, the case illustrates a phenomenon known to occur in our courts, if not frequently, then at least from time to time. Indeed, one can say that Mr. Neiswonger's case represents a certain class of civil cases, the earmarks of which are clear and unmistakable: the plaintiff institutes a civil action to prevent an injury or to recover damages, and he alleges that he is entitled to relief because of something contained in a legislative text. He says the defendant has acted or proposes to act in a manner contrary to the text. He relies upon the legislation even though the words of the text do not actually state that he has a right to bring an action of this kind, and here the defendant raises a defense. The defendant argues that the legislation does not support the plaintiff's claim because it does not state that the plaintiff is entitled to maintain an action upon it. The court must then decide the issue.

Actions of this kind are sometimes called "implied private actions."[15] They have played an important role in Anglo-American

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district court noted this difficulty and suggested that Neiswonger's "right of action" under the federal legislation ultimately depended upon proof of an interstate connection at trial. *Id.*

13 *Id.* at 762.

14 Why did the Goodyear Tire & Rubber Co. have a blimp in the first place? Why were copies of *The Times Press* being delivered to spectators at a football game? Why were the newspapers being delivered by blimp?

15 The nomenclature is an interesting study in itself. For centuries courts and commentators have used the word "implied" to describe actions of this kind. *See infra* text accompanying notes 69-112. The word "implied" has meant simply that the action, although predicated in some way upon a legal wrong defined by a legislative text, is not expressly authorized by the text.

Frequently, federal legislation in the modern era expressly provided only for actions by public officers or public agencies. During the 1960s the phrases "implied private actions" and "implied private rights of action" came into widespread use. Federal courts used these phrases to describe actions brought under federal legislation by private persons. The word "actions" replaced the traditional word "remedies." The word "private" was added to the designation, apparently for the purpose of suggesting that the private status of the plaintiff was somehow significant.

In state jurisdictions the traditional nomenclature also fell out of use in the modern era. In the nineteenth century actions predicated upon wrongs defined by legislation began to be called actions for "negligence." Originally the word "negligence" indicated only that the defendant had allegedly neglected to perform a statutory duty. In time, however, these actions were associated in name and in theory with other kinds of actions for "negligence," including common law actions based on the allegation that the defendant had breached the duty of "reasonable care." *See infra* text accompanying notes 156-85, 285-301. Many states still use the "negligence" label today.

legal history and have been a source of continuing controversy during this century. Plaintiffs who assert implied private claims are ingenious and aggressive. Defendants who resist such claims are stubborn and resourceful. The courts, constrained to choose between them, occasionally side with the plaintiffs, occasionally with the defendants. The losers are never happy. From case to case the legal explanation of the outcome is rarely so convincing that the winner is utterly confident in victory or the loser utterly chastened in defeat. Room for argument usually remains even after the judgment is in. Indeed, throughout the last eighty years commentators have argued over various judgments and various aspects of the general issue.[16]

The arguments were recently renewed. Between 1975 and 1985 the United States Supreme Court rendered more than a score of decisions that dealt in one way or another with implied private actions and the questions they presented.[17] In most of these decisions a majority of the justices expressed grave misgivings about the theory, the wisdom, and the place of implied private actions in the federal system. A flurry of generally negative commentary ensued.[18]

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16 *See generally* Gamm & Eisberg, *The Implied Rights Doctrine*, 41 UMKC L. REV. 292 (1972); James, *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95 (1950); Joseph, *Civil Liability under Rule 10b-5 — A Reply*, 59 NW. U.L. REV. 171 (1964); Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1 (1968); Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949); Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914); Note, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1932).

17 *See, e.g.*, Eichler v. Berner, 105 S. Ct. 2622 (1985); Daily Income Fund, Inc. v. Fox, 464 U.S. 523 (1984); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983); Bush v. Lucas, 462 U.S. 367 (1983); Herman & MacLean v. Huddleston, 459 U.S. 375 (1983); Nixon v. Fitzgerald, 457 U.S. 731 (1982); Jackson Transit Auth. v. Amalgamated Transit Union, 457 U.S. 15 (1982); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); California v. Sierra Club, 451 U.S. 287 (1981); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981); Transamercia Mortgage Advisers, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Davis v. Passman, 442 U.S. 228 (1979); Burks v. Lasker, 441 U.S. 471 (1979); Cannon v. University of Chicago, 441 U.S. 677 (1979); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977); Cort v. Ash, 422 U.S. 66 (1975); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975).

18 *See, e.g.*, Ashford, *Implied Causes of Action under Federal Laws: Calling the Court Back to* Borak, 79 NW. U.L. REV. 227 (1984); Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1980); Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Moratorium — Civil Rights, Securities Regulation, and Beyond*, 33 VAND. L. REV. 1333 (1980); Maher, *Implied Private Rights of Action and the Federal Securities Laws: A Historical Perspective*, 37 WASH. & LEE L. REV. 783 (1980); Ruder & Cross, *Limitations on Civil Liability under Rule 10b-5*, 1972 DUKE L.J. 1125; Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982); Comment, *Implied Causes of Action: A Product of Statutory Construction of the Federal Common Law Power?*, 51 U. COLO. L. REV. 355 (1980); Comment,

The debate was interesting and informative, but it left a discouraging residue in its wake. No legal question is more straightforward or more worthy of settlement than the question presented in Mr. Neiswonger's case: when does legislation create a private right to proceed in court? But the renewed debate suggests that this elementary question is strangely debatable, even in this, the ninth decade of the twentieth century, a period otherwise marked by a resurgence of order and certainty on all fronts.

Even today, the Neiswongers of the world are alone in their fields, about to be overwhelmed by events. They are about to use badly designed lawnmowers.[19] They are about to eat grapefruit contaminated by pesticides.[20] They are about to purchase securities tainted by fraud.[21] They are about to do any number of things; and in most of their endeavors they are protected by obscure and distant legislation that is sometimes strangely silent about the one thing they will ultimately want—a right of action. Do they have a right of action? Should they have a right of action? These questions continue to amaze the litigants, lawyers, judges, and even the law professors who must deal with them. No one can reasonably expect that the questions will ever be settled. Too much is at stake for that. But one can gain a certain perspective on these questions and the continuing debate over them. Within this perspective the questions themselves begin to lose their power, and the perplexities that surround them begin to disappear. This Article proceeds upon that assumption.

The Article is divided into three parts. Part I discusses certain basic principles of legislative interpretation. These principles are simple and familiar. Although they do not apply to implied private actions alone, they have an important place in the law of implied private actions, and they establish a framework for the discussion that follows.

Part II is a short history of implied private actions from the 1400s to the present day. This Part describes the origin and development of implied private actions and presents a reasonably complete account of the present condition of the law in the state and federal systems. The assumption here is that an ounce of history is worth a pound of speculation. Implied private actions are not the

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Private Rights of Action Under Amtrak *and* Ash: *Some Implications for Implication*, 123 U. PA. L. REV. 1392 (1975).

19 *See* Consumer Product Safety Act, 15 U.S.C. §§ 2051, 2052, 2056, 2058, 2063 (1982); 16 C.F.R. §§ 1205.1-.36 (1985) (safety standards for power lawnmowers).

20 *See* Food, Drug, and Cosmetic Act, 21 U.S.C. § 346a (1982); 40 C.F.R. § 180.375 (1985) (pesticide tolerance standard for grapefruit).

21 *See* Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1982); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a to 78hh-1 (1982).

creatures of logic or theory. They are the creatures of history and of the institutions that give them life.

Part III critiques the modern law as follows. For centuries, wrongs defined by legislative action were not thought to be different from other kinds of legal wrongs. They were implicitly remediable in the courts, in accordance with a salutary principle of Anglo-American justice that promised an adequate remedy for every wrong defined by law. During the last one hundred years, in both state and federal jurisdictions, this ancient principle began to lose its hold on the minds of American judges, and the law of implied private actions fell into a state of confusion. Within the last ten years this confusion has begun to resolve itself, at least in federal jurisdictions. This new development has been praiseworthy, but it has not been accomplished without cost. The United States Supreme Court has recently held that federal plaintiffs have federal judicial remedies for wrongs defined by federal legislation only if Congress has demonstrably intended to provide such remedies. To the extent that this new theory represents a departure from prior law, it is inconsistent with traditional assumptions about the implicit adjudicatory consequences of legislative action and the traditional conception of the role of courts in a government under law.

I

AN INTRODUCTION TO SOME BASIC PRINCIPLES OF LEGISLATIVE INTERPRETATION

One of the functions of law is to provide rules for adjudication. Law has other functions as well,[22] but the adjudicatory function is dear to the hearts of lawyers, and it holds a certain fascination even for members of the public at large.[23] The basic idea is intriguing: a dispute arises, and after a long and sometimes colorful procedure

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22 The belief that law is merely a set of rules for the adjudication of cases is what Judge Hardy Dillard called the "fuss fallacy" in an unpublished lecture given at the University of Virginia in 1972. In fact, law has functions antecedent to the adjudicatory function. Law promotes social organization, not only by providing a means for the settlement of disputes, but also by creating institutions in the first instance and by teaching people how to behave. These are the constitutional and magisterial functions of law.

23 The public fascination with crime and human conflict outside the courtroom cannot entirely explain the continuing popularity of *Perry Mason* and other dramas depicting the judicial process. The viewer is interested in the crime and in Perry's client, but he is also interested in Hamilton Burger, the judge, and the twelve extras in the jury box. He is interested in the judicial process itself. The current popularity of *The People's Court*, a production that apparently has nothing to do with crime and punishment, provides further evidence of this phenomenon. The modern interest in the judicial process has ancient antecedents in the political and literary culture of the West. One is reminded of the ancient Icelandic sagas, dating from the early middle ages, which contained the glimmerings of free goverument. The narrative was given over, not only to a description of crimes against humanity, but also to a detailed account of the legal process which could

the dispute is submitted to a judge or a jury for resolution. Theoretically, the judge or the jury will resolve the dispute on the basis of law—that is to say, on the basis of rules of decision that are applied to the facts. Once the facts of the case are determined, the rules of decision lead on to judgment.

The actual operations of the courts reflect these ideals imperfectly. Judges and jurors are human beings. They are bound to discharge their functions in accordance with law, but they are subject to all of the influences that can affect human thought and action. Moreover, the rules of decision are often indeterminate. In a particular case they may fail to dictate a specific judgment, thus creating a zone of uncertainty within which the decisionmaker is free to maneuver, restrained only by his own sense of fairness or necessity. Some scholars have made much of these points in recent years.[24]

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redress such crimes. The hero of the saga was, of course, the lawyer himself. *See, e.g.*, NJAL'S SAGA (C. Bayerschmidt & L. Hollander trans. 1955).

24 Writers connected with the Critical Legal Studies movement are deeply impressed by the political character of adjudication. They observe that legal rules and legal reasoning are indeterminate and manipulable. *See generally* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973); *see also* Abel, *Torts*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982); Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Griffiths, *Ideology in Criminal Procedure*, 79 YALE L.J. 359 (1970); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984). The interesting thing is that legal scholars give so much attention to these points these days. That "law" is indeterminate and subject to manipulation, that "law" is an apology for the exercise of power, and that those with power use "law" as a tool to oppress the powerless are not new discoveries. They are home truths known to every practicing lawyer. They have been known for centuries. Thomas More knew them. More was the son of a judge. He was a remarkably successful practitioner, Speaker of the House of Commons, and Lord High Chancellor of England. He believed as much in law as any man of his day. He gave up his life for law in the end; and when he wrote, in 1515, that the powerful could manipulate the law to promote their interests, he merely expressed the common wisdom of mankind. In the world as it is, there are many devices by which some people are preferred and others are oppressed; and "rich men, not only by private fraud *but also by common laws*, do pluck and snatch away from the poor some part of their daily living." T. MORE, UTOPIA 132 (Dent & Sons rev. ed. 1962) (emphasis supplied).

Why do scholarly journals now devote hundreds of pages to an examination of these propositions and the theories of those who expound them? *See, e.g., Critical Legal Studies Symposium, supra* (700 pages devoted to subject). Part of the answer is that the Critical Legal Studies movement, in some of its manifestations, is not so much an attack on law itself as it is an attack on law professors and the traditional forms of legal education. Law professors willingly assume that legislators, judges, and lawyers are capable of unprincipled, self-interested, and manipulative behavior, but law professors do not like to be told by their colleagues that they themselves contribute to the problem. They hear about their contribution from some of the persons connected with the Critical Legal Studies movement. When these persons tell their colleagues that they are guilty of bad behavior, an in-house spat predictably results, consuming time, energy, and pages in the law journals.

Persons outside the legal establishment have also assaulted the ideals associated

But law does count for something. Even the most cynical and pragmatic litigator will remind the judge and the jury that the "law" is on the side of his client. He will do this, not because he is fond of the sound of his own voice, but because he knows that the rules of decision have real power. They can influence the thoughts and actions of the men and women who will determine the outcome of the case.

A. The Demise of the Common Law and the Rise of Legislation

The idea that disputes should be settled on the basis of rules did not originate with the English, but they invented an interesting system for carrying the idea into effect. For centuries the English permitted the judges themselves to make the rules that would govern adjudication. When a case arose involving a dispute over a cow or a claim for rent, the presiding judge was permitted to find the applicable law in the reported decisions of other judges in other cases. To be sure, the English believed that law originated outside the courtroom. Judges did not create law; God, nature, or custom did. But as a practical matter the pronouncements of the judges gave authoritative form to the law, and in the heyday of the common law, judicial decisions were an important source of the rules of decision in ordinary cases.[25]

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with the principle of the rule of law. These assaults, coming from the outside, have not generated the interest produced by the recent assaults from within the establishment. *See, e.g.*, Kort, *Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the "Right to Counsel" Cases*, 51 AM. POL. SCI. REV. 1 (1957); Schubert, *The Study of Judicial Decision-Making as an Aspect of Political Behavior*, 52 AM. POL. SCI. REV. 1007 (1958); Ulmer, *Supreme Court Behavior and Civil Rights*, 13 W. POL. Q. 288 (1960).

25 This paragraph is a Blackstonian description of the common law system. The central idea was that English law contained a body of unwritten rules which were created by custom. Blackstone's classic statement of this idea was as follows:

> This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs; which for the most part affect only the inhabitants of particular districts. 3. Certain particular laws; which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction. . . . [A]ll these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support.

1 W. BLACKSTONE, COMMENTARIES *67-68. Blackstone also understood that unwritten, customary English law might have a basis in divine or natural law. *Id.* at *42. Blackstone did not invent these ideas. The notion of an unwritten English law was central to the intellectual history of the English-speaking people. It was found in the earliest books about English law. *See* THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL 2 (Hall ed. & trans. 1965) ("[T]he laws of England are not written . . . ."); 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 19 (G. Woobine ed., S. Thorne trans. 1968) ("Though in almost all lands use is made of the *leges* and the *jus scriptum*, England alone uses unwritten law and custom. There law derives from nothing written [but] from what usage has approved."). *See also* H.C. ROBIN-

Judicial decisions were not, however, the only source of the rules of decision. Kings, prelates, lords, and commons could also make or at least declare law;[26] and the ancient charters, statutes,

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SON, ELEMENTS OF AMERICAN JURISPRUDENCE §§ 224, 227 (1900), *reprinted in* F. MAITLAND & F. MONTAGUE, SKETCH OF ENGLISH LEGAL HISTORY 213 (Colby ed. 1915); F. POLLOCK, FIRST BOOK OF JURISPRUDENCE 252-54 (5th ed. 1923).

The idea that judges could find and declare the unwritten law when adjudicating particular cases and that their decisions might then become sources of information about the unwritten law was a useful idea in the English system, for obvious reasons. What better way could have been found to determine the content of the unwritten law? Blackstone summarized the principle by stating simply that the decisions of the judges were "evidence of what is common law." 1 W. BLACKSTONE, COMMENTARIES *71. Even as early as Bracton's day (circa 1256), a learned writer could refer to as many as 500 judicial decisions for evidence of the unwritten, customary law of England. *See* A. HOGUE, ORIGINS OF THE COMMON LAW 175 (1966).

The modern doctrine of *stare decisis* is sometimes confused with the old idea that the decisions of judges were evidence of the unwritten law. Actually, the two ideas lived uneasily with one another. As long as judges actually believed that an unwritten law existed, they could not easily accept the proposition that they were bound to follow the decisions of judges in previous cases. Other judges were mortal and fallible and might misapprehend or misapply the unwritten law. When another judge made a mistake, the rule of *stare decisis* became an invitation to perpetuate the error. Yet judges were duty-bound to avoid error. As late as 1869, in England, a judge could refuse to follow a previous decision of the Court of Appeal in Chancery by simply saying that he thought the decision was "mistaken" and that he had a duty not to follow it. *See* Collins v. Lewis, 8 L.R.-Eq. 708 (1869).

Improvements in the reporting and publication of judicial decisions made it possible to develop and enforce the doctrine of *stare decisis*. As the doctrine took hold, courts and commentators found it more difficult to defend the ancient theory that common law judges were merely the finders of unwritten law. It became increasingly evident that the ancient theory was a convenient fiction and that common law judges were actually making a form of written law, namely, the written law contained in their own reported decisions. Moreover, the judges made and applied this written law retroactively. Jeremy Bentham saw this point at least as early as 1823:

> It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me.

5 J. BENTHAM, WORKS 235 (Bowring ed. 1843).

[26] Moses did not make the Ten Commandments; God gave them to him. Ever since that day human beings have known that they could stray from the paths prescribed by law, but they did not know until relatively recently that they could actually make law in their own right. Daniel Boorstein has said that, as late as the seventeenth century, some members of Parliament still saw themselves not as lawmakers, but as law-finders. *See* Wall St. J., Nov. 9, 1984, at 1, col. 1 (Eastern ed.). They regarded their legislative utterances as distillations of general, pre-existing principles which they found and applied to specific problems. *Id.* One of the great discoveries of the early modern period was the recognition that human legislative power could be used more freely. Human legislators were not invariably bound to expound and apply settled principles. They could create entirely new structures and principles. They could make law *de novo*. *Id.*

The old idea—that law was inherent in the order of things and that human legislative power was fundamentally limited—suffered a serious and ultimately fatal blow in England during the political revolutions of the seventeenth century. Those revolutions confirmed Parliament's supremacy and its creative powers. Nevertheless, the old idea survived in the American colonies, and it survives in this country even today. American

canons, proclamations, and ordinances of these lawmakers did all of the things that legislative texts do today: they created institutions, defined correct behavior, and made rules for adjudication. It would be wrong to think that the early law of England was found solely in the decisions of judges. It was also found in legislative texts.[27]

One of the immutable principles of government is that legislation tends to proliferate. That principle held true with the English and their American cousins. Over time, English and American legislators addressed more and more subjects, and legislation became increasingly important in adjudication. Indeed, the common law began to decline in relative importance. In America the common law still played a leading role in adjudication at the time of the founding of the nation.[28] But under the legislative onslaught that followed independence, legislative texts began to dominate the fields of constitutional law, criminal law, the law of judicial procedure, the law of

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constitutionalism is not so much the product of the enlightenment as it is the remnant of a very ancient idea about the inherent limitations of human authority. *See generally* J. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY (1955).

Some of the ancient statutes of England, Magna Charta in particular, were "declaratory," or were said to be "declaratory," of the ancient laws and customs of the realm. The usual modern explanation of this phenomenon is political. The powerful subjects of the King were protective of their position and preferred, as against the innovations of the King, the privileges that they had considered theirs under the old regime. For a time, the peers of the realm had the political strength to force the King or the King in Parliament to confirm the ancient law through the exercise of legislative power. *See generally* essays collected in MAGNA CHARTA AND THE IDEA OF LIBERTY (Holt ed. 1982).

This modern explanation is anachronistic. A more accurate explanation would rnn as follows: the King, like any person, could violate the law. But as a legislator he could only declare the law or discover how it applied in particular situations, thereby revealing, through his written declarations and discoveries, how he or others had violated the law or might violate it in the future. So conceived, the "legislative" function of the early English Kings or the Kings in Parliament resembled the "adjudicatory" function of the royal judges. *See generally* C. MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY (1916). For a somewhat different view, see T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 336-37 (5th ed. 1956).

27 By the beginning of the seventeenth century legislative texts had become a major force in the adjudication of cases. The first work designated as the "Statutes at Large" of England was published in 1587. *See* STATUTES AT LARGE (C. Barker printer 1587); *see also* J. BEALE, A BIBLIOGRAPHY OF EARLY ENGLISH LAW BOOKS 7 (1926) (entry S. 31). This early work purported to set forth the whole body of the statutes at large since Magna Charta. Over half of its 1800 folio pages (1000 pages) were devoted to the statutes of Henry VIII and Elizabeth I. Fewer than 500 pages were required for all of the statutes enacted during the reigns of the monarchs of the previous 300 years. The case law soon reflected the explosion of legislative activity under the Tudors. A significant proportion of the cases reported by Coke during the early decades of the seventeenth century involved legislative questions. *See, e.g.*, 77 Eng. Rep. 481-734 (1609-11) (containing reports of some judgments and resolutions of Court of Common Pleas during first decade of reign of James I, 43% of which involved legislative questions).

28 For example, in North Carolina, a state with a legislature not noted for its activism, around 70% of the cases reaching the Superior Court of North Carolina during the period 1797 to 1803 involved questions of common law rather than legislation. *See* 2 N.C. (1 Hayw.) 1-292 (1797-1803). By 1983 the number of common law cases reaching

negotiable instruments, and the law of domestic relations.[29]

In the new age of legislative dominance judges still retained important creative functions. They had to interpret and apply the rules of decision that the legislators made for them. But as a practical and theoretical matter, there were important differences between judges who communed primarily with God, nature, and custom, and judges who received their instructions in black and white from other human beings in the political branch of government. The proliferation of legislation brought important changes to the law, changes that marked the passing of the old regime and the rise of a liberal state.[30]

The process continues even today. Recent reports indicate that over ninety percent of the latest federal decisions[31] and around eighty percent of the latest state decisions[32] depend in some important way upon rules of decision with legislative origins. The common law case, as it was known 500 or even 200 years ago, has become an endangered species.

B. The Problem of Determining the Adjudicatory Relevance of Legislative Action

The judicial function has always been intensely practical. A

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the Supreme Court of North Carolina (the successor to the Superior Court) had dropped to around 10%. *See* 308 N.C. 1-804 (1983).

The reported decisions of the United States Supreme Court exhibited a similar trend, although legislation influenced the cases reaching the Court more heavily from the very start. Around 30% of the cases reaching the Court during the period 1801 to 1803 were common law cases. *See* 5 U.S. (1 Cranch) 1-366 (1801-03). Today the Court decides virtually no cases that turn solely upon common law. *See* M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 5, at 10.

29 This list is by no means exhaustive. For a history of the early codification movement in this country, see THE LIFE OF THE LAW 100-45 (J. Honnold ed. 1964).

30 This is not to suggest that the written law is inherently progressive. Justinian was as much a tyrant as any English monarch, and the *ancien regime* lingered as long, if not longer, in countries governed by the civil code as in countries governed by the common law. But in England and America the proponents of reform were able to influence the decisions of judges through legislation. These judges under the common law system were avowedly in the business of upholding the established order, unless otherwise instructed by the legislature. Upholding the establishment was their proper and lawful function, because the common law itself was the law of established custom.

31 For example, in 1984, over 90% of the cases decided by published opinion in the United States Courts of Appeals involved legislative questions of one kind or another. *See, e.g.*, 729 F.2d 1-1584 (1984) (94% including cases involving procedural questions arising under Federal Rules of Civil Procedure and jurisdictional questions under title 28 of United States Code).

32 The *Atlantic Reporter* indicates that in 1984-1985 almost 80% of the cases decided by published opinion in the appellate courts of Connecticut, Delaware, the District of Columbia, Maine, Maryland, New Hampshire, New Jersey, Pennsylvania, and Rhode Island involved legislative questions. *See, e.g.*, 489 A.2d 1-1392 (1985) (80% including cases involving procedural and jurisdictional questions under constitutions, statutes, or legislated rules).

judge may believe that law has an ideal existence outside the courtroom, but his job is to determine how law affects the litigants before him. In light of this obvious and mundane necessity, the common law system was an elegant system indeed. It permitted the presiding judge to find the law in the decisions of other judges and thereby provided him with concrete illustrations of how the law affected the choices to be made between litigants. Thus, in a case involving the interpretation of a deed, he could consult *Shelley's Case*[33] and its progeny. He would find in those cases a statement of an abstract principle—that the words "to *A* and his heirs" were words of limitation, not words of purchase—and he would also find evidence of the adjudicatory significance of that principle. A judgment, resting on the rule in *Shelley's Case,* might disappoint the noble heirs of *A* and gladden the heart of the wealthy but common manufacturer from Manchester, who had purchased *A*'s estate for thirty pieces of silver. That was the beauty of the common law. It was made by judges, for judges. It was made during adjudication, for adjudication. It came into being in circumstances that revealed, not only the rule of law itself, but also the significance of the rule in adjudication.

In an age of legislative dominance judges routinely confront a somewhat different proposition: law originates in legislative texts. Although decades of adjudication may give a judicial gloss to a given text, judges are not present at the creation. Law is born in a legislative document—a document that is cold and unmoving, a document that is political in the best and sometimes the worst sense of the word, a document that may not even refer to adjudication; and when a judge is called upon to make a judicial decision on the basis of such a document, he must first determine the connection, if any, between the legislative judgment embodied in the text and the judgment that he must render in the case before him. In short, he must determine the adjudicatory relevance of the legislative action.

Perhaps it is not obvious that there could ever be a substantial question about the "adjudicatory relevance" of legislative action. Legislative texts routinely create rules of decision for the courts. The transformation occurs so naturally and so frequently in our system that it ordinarily passes almost without notice. A casual observer would assume that when a litigant relies upon a legislative text, the court need only read the text and the legislative history to determine whether the legislation creates a rule for the adjudication of the case. But in truth, the question is far more complicated than that. Sometimes legislative texts create rules of decision for the

33 Wolfe v. Shelley, 76 Eng. Rep. 206 (Q.B. 1581).

courts;[34] sometimes they do not.[35] Sometimes they create rules of decision for some kinds of cases, but not for others.[36] Sometimes their effect is uncertain. Three cases illustrate this elementary point.

1. *Mrs. Smith's Case*

Mrs. Smith lives in an old apartment building near the center of the city. Once gracious and inviting, the building has fallen into disrepair. Inspectors for the city have examined the building and have cited the landlord for numerous violations of the building code. Mrs. Smith has complained of these conditions, but the landlord has not corrected them. Mrs. Smith has informed the landlord that she will withhold her rent payments until the violations are remedied. The landlord has responded by suing Mrs. Smith for eviction and for the rents that are due.

For centuries judges and juries have resolved disputes between landlords and tenants on the basis of common sense and common law. But in Mrs. Smith's case the ancient controversy has acquired a new dimension. It has become entangled in a legislative judgment. In response to the landlord's complaint Mrs. Smith's attorney has alleged that the violations of the building code have created a defense to the landlord's claim. The lease agreement between Mrs. Smith and the landlord contains no provision to this effect, and the building code itself makes no reference to the rights of tenants or to the adjudication of claims for rent. But the attorney contends that the building code creates a public policy forbidding the collection of rent for property threatening the public health and safety. Just as the public policy against gambling or murder prevents the enforcement of a contract for gambling or murder, the public policy of the building code forbids the enforcement of a contract for rent for der-

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34 The Federal Rules of Civil Procedure provide familiar and clear examples of legislative texts that create rules of decision for the federal courts.

35 The "guaranty clause" of the Constitution of the United States provides that the "United States shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. IV, § 4, cl. 2. This is a familiar and important piece of legislation that probably will never be a rule of decision in the adjudication of cases. *See* Baker v. Carr, 369 U.S. 186 (1962) (challenge to state action based on guaranty clause not justiciable).

36 Section 5 of the Federal Trade Commission Act, which declares that "unfair methods of competition in . . . commerce . . . are . . . unlawful," 15 U.S.C. § 45(a) (1982), usually does not become a rule of decision for a court in an action by one competitor against another. Private plaintiffs are not entitled to rely upon § 5, even if they can prove they suffered from the defendant's unfair methods of competition. *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973). On the other hand, § 5 may become a rule of decision when the defendant invokes it in a private case, and it is a rule of decision in an enforcement action brought by the Federal Trade Commission under § 5. *See* Skinner Mfg. Co. v. General Food Sales Co., 52 F. Supp. 432, 444 (D. Neb. 1943).

elict property.[37]

Mrs. Smith's ingenious defense requires the court to determine whether the legislative judgment embodied in the building code has any legal bearing on the judgment to be rendered between Mrs. Smith and her landlord. The issue does not arise because of any ambiguity in the legislative text. The text is clear: it condemns leaky roofs, rickety stairways, and defective plumbing. These conditions are present in Mrs. Smith's building. But the text does not prescribe whether or how the standards created by the building code will affect the adjudication of private controversies involving the conditions to which the standards apply. In Mrs. Smith's case the court must determine the adjudicatory relevance of those standards, and upon that determination the fortunes of the litigants will depend.[38]

2. *Mr. Jones's Case*

Mrs. Smith relies upon legislation to establish a defense; plaintiffs sometimes rely upon legislation to establish claims in the first instance. Consider, for example, the case of Mr. Jones, a commercial fisherman. A statute requires the fishermen in his region to obtain licenses and to fish only in specified territories. The agency that grants these licenses assigns a different territory to each fisherman. The purpose of the system is to protect natural resources by separating the fishermen and rationing the catch. Mr. Jones has obtained a license and has complied with the requirements of the law, but he is now embroiled in litigation. He has brought a civil action against an unlicensed fisherman who fished Mr. Jones's waters during the peak fishing season. Mr. Jones seeks to recover damages for the fish the poacher took.[39]

Mr. Jones's action is essentially an action for conversion. He

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37 Mrs. Smith's case is hypothetical only in the incidental details. *See* Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970); *see also* Shephard v. Lerner, 182 Cal. App. 2d 746, 6 Cal. Rptr. 433 (1960); Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); Boston Housing Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); Berman & Sons, Inc. v. Jefferson, 379 Mass. 196, 396 N.E.2d 981 (1979).

38 Absent the legislation, Mrs. Smith's chances would not be good. The usual rule is that no "implied warranty of habitability" accompanies the demise of real property by lease. The landlord, moreover, has no obligation to repair the premises, absent an express undertaking to do so. Hundreds of reported cases have endorsed these propositions. *See* cases collected at 49 AM. JUR. 2D *Landlord and Tenant* §§ 768, 769 (1970). In Mrs. Smith's case the essential question is whether the building code alters these traditional principles.

39 Mr. Jones's case is also hypothetical only in detail. *Cf.* Stevens v. Jeacocke, 11 Q.B. 731 (1848). Fishermen are notoriously fractious, but the beneficiaries of other kinds of licenses have also been known to sue for conversion of their privileges. *See, e.g.*, Jaffe v. Pacific Brewing & Malting Co., 69 Wash. 308, 124 P. 1122 (1912) (conversion of

asserts that the general law of his jurisdiction gives him a right to recover damages whenever property is wrongfully taken from him and that the poacher's conduct deprived him of valuable property in this case. With regard to the first proposition, Mr. Jones is probably on solid ground; but with regard to the second, he has a problem. He cannot establish a property interest either in the privileges created by his license or in the fish taken from his waters unless the licensing system created such an interest. Yet the licensing system was designed to protect fish, not fishermen, and the underlying legislation makes no reference to private interests or private claims. It merely imposes the licensing requirement and provides that unlicensed fishermen shall be subject to fine.

Mr. Jones must convince the court that the legislative judgment that created the licensing system provides a legal basis for a judgment in his favor. How should a court respond to his claim? The words of the legislation are clear, but they do not address the issue the court must decide. The arguments in Mr. Jones's favor are logical enough. There is nothing wrong with the general proposition that legislative action can implicitly create property interests deserving of protection.[40] Moreover, a judgment for Mr. Jones would promote the objectives of the licensing system by depriving the defendant of the fruits of his offense.[41] On the other hand, absent the legislation, Mr. Jones would have no compensable interest in the fish.[42] He relies upon legislation to establish such an interest, yet the legislation makes no actual reference to private property, private rights, or private claims.

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license for retail liquor business); McLaughlin v. Clementi, 144 Colo. 34, 355 P.2d 100 (1960) (conversion of public utility commission permit).

40 For example, courts sometimes hold that legislation regulating the construction of buildings through a system of licenses (building permits) creates property interests by implication. *See, e.g.*, Dobbins v. Los Angeles, 195 U.S. 223, 241 (1904); City of Buffalo v. Chadeayne, 134 N.Y. 163, 166, 31 N.E. 443, 443-44 (1892). The proposition that licenses may constitute "property" for various purposes has been the subject of much litigation in the last decade or two. *See, e.g.*, Barry v. Barchi, 443 U.S. 55, 64 (1979) (licensed horse trainer, charged with drugging his horse, had "property interest" in his license for purposes of due process clause of fourteenth amendment); *In re* Marriage of Horstman, 263 N.W.2d 885, 891 (Iowa 1978) (certificate of admission to practice law not itself item of property for distribution on divorce of attorney and spouse, but earning potential of attorney, created by certificate of admission, was asset for distribution).

41 The criminality of the defendant's conduct has traditionally helped plaintiffs in conversion cases. *See, e.g.*, National Surety Corp. v. Applied Systems, Inc., 418 So. 2d 847, 850 (Ala. 1982) (plaintiff entitled to sue for conversion of intangible property interest where defendant's conduct violated criminal statute).

42 Fish are animals *ferae naturae*. At common law, generally speaking, a person could not acquire a property interest in animals *ferae naturae* absent actual possession or something akin to it. *See, e.g.*, Young v. Hichens, 6 Q.B. 606 (1844); Ghen v. Rich, 8 F. 159 (D. Mass. 1881).

3. *Mr. Neiswonger's Case*

The third case illustrating the uncertain adjudicatory relevance of legislative action is, of course, Mr. Neiswonger's case. This should come as no surprise. The problem of determining the adjudicatory relevance of legislative action can arise in many contexts. It can arise when a defendant asserts an imaginative legislative defense (as in Mrs. Smith's case) or when a plaintiff relies upon legislation to supply a missing element of an otherwise actionable common law claim (as in Mr. Jones's case). The problem can also arise when a litigant asserts that legislation implicitly creates a right of action in the first instance. The scenario runs as follows: a distant minister, the secretary of commerce, decides that blimps should navigate at 500 feet or more. Thereafter, a man falls under a wagon when a low-flying blimp passes overhead, and he sues the Goodyear Tire & Rubber Co. for $25,000 in damages. The question is whether the judgment of the secretary of commerce has any legal bearing upon the judgment the court must render. How, in principle, can the adjudicatory relevance of such legislation be determined?

Solomon was both a legislator[43] and a judge,[44] as were the English kings in the very early days.[45] In simpler times, when a single authority performed both legislative and judicial functions and lawyers drew no sharp distinctions between the one function and the other, litigants were not troubled by general speculation concerning the adjudicatory relevance of legislative action. If the question ever occurred to them (and for centuries it did not), the omnicompetent authority was in a position to resolve the question in the context of the controversy at hand.[46] But the separation of legislative and judicial functions has altered this state of affairs. It has created new opportunities for ambiguity and an awkward institutional framework for resolving the questions that inevitably arise. Today, as a result, there is an institutional and doctrinal gap between legislative and judicial functions. This gap feeds the uncertainty illustrated by the cases described above. If the legislature cannot hear the case, and if the courts cannot legislate, then litigants such as Mrs. Smith, Mr.

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43 *See* 1 *Kings* 9:15-22.

44 *See* 1 *Kings* 3:16-28.

45 T. PLUCKNETT, *supra* note 26, at 149-55.

46 There is no limit on what can be accomplished when all the powers of the realm are assembled in the same room. An early writer, in the work called *Fleta*, praised the omnicompetence of a government founded upon the principle of integrated governmental power: "For the King has his court in his council, in his parliaments, in the presence of the prelates, earls, barons, nobles and other experienced men, where doubtful judgements are decided, and new remedies are established as new wrongs arise, and where justice is done to everyone according to his deserts." *Id.* at 154 n.1 (quoting FLETA, liber secundus, capitulum 2, § 1 (circa 1290)).

Jones, Mr. Neiswonger, and their adversaries have room to maneuver, and the courts have the unenviable task of developing a principled basis for responding to their claims.

The language and the theories of the law obscure the practical problems that are presented to the courts. One can argue that a building code creates (or does not create) an implied "condition" that is part of a "contract" between a landlord and tenant, that a licensing system implicitly creates (or does not create) a "property interest" in an aggrieved fisherman, or that a federal statute and a federal administrative rule create (or do not create) a "right of action" in favor of a farmer injured by a low-flying blimp. But these arguments conceal the essential similarity of these cases. In each of these cases the practical problem is the same. The court must determine whether a legislative judgment creates a reason for preferring one litigant to another in the adjudication of a dispute. In an age of legislative proliferation this kind of issue can arise in virtually any kind of case, in virtually any field of law.

The problem of determining the adjudicatory relevance of legislative action is central to the law of implied private actions, but it is not unique to such actions. It is a generic problem that pervades the law of legislative interpretation. No inquiry into the law of implied private actions can proceed intelligently unless it proceeds within this larger context. The inquiry must begin with an examination of the general principles that determine the relationship between legislative action and the adjudication of cases in courts. These principles are simple, familiar, and few in number; they are described in the paragraphs below. Mr. Neiswonger's case provides a concrete illustration of each of the relevant points. The discussion focuses on the question of Mr. Neiswonger's right of action, but the analysis would be basically the same in Mrs. Smith's case, or in Mr. Jones's case, or indeed in any case in which a litigant asserts a right grounded upon a legislative text.

C. Analyzing the Adjudicatory Consequences of Legislation

In the Anglo-American system a legislative text can affect the adjudication of a case in various ways. It can create rights, duties, powers, privileges, immunities, disabilities, liabilities, entities, nonentities, presumptions, procedures, rules of evidence, and rules of interpretation. It can create claims, defenses, and forms of relief. The possibilities are numerous and impressive, but in theory they are not unbounded. The text can have consequences for adjudication, but it can have only those consequences that are (1) described in the text, (2) intended by the legislature, or (3) assigued to the

legislation by operation of law.[47] It is possible to speak of the relationship between legislation and adjudication in ways that are more sophisticated than this, but this analysis will suffice.[48] Mr. Neiswonger contends that the Air Commerce Act gives him the right to maintain an action to recover $25,000 from the Goodyear Tire & Rubber Company. His contention has merit if his right of action is (1) described in the legislative text, (2) intended by the legislature, or (3) created by operation of law in consequence of the Air Commerce Act and the Air Traffic Rules. Each possibility is discussed below.

1. *Adjudicatory Consequences Described in the Legislative Text*

Some legislative texts actually refer to adjudication, and some give specific instructions to the courts. Article III of the Constitution of the United States refers to prosecutions for treason and provides that "[n]o Person shall be convicted of treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[49] Other provisions of the Constitution have the same basic form,[50] and large bodies of subordinate legislation are

47 A fourth category might be added to the list. In our system, or indeed in any system that depends on judges, the adjudicatory consequences of a legislative text include those assigned to the text by the judges themselves. One is reminded of Bishop Hoadley's dictum: "Whoever hath an *absolute authority* to *interpret* any . . . laws, it is *he* who is truly the *Law-Giver*. . . ." *See* J. GRAY, THE NATURE AND SOURCES OF THE LAW 102, 125, 172 (2d ed. 1921). But judges are "law-givers" only if they believe and are allowed to believe they have "absolute" authority to interpret laws. In our system most judges do not believe they have such authority, and in principle they are not permitted to believe it.

48 The relationship between legislation and adjudication is a subject that provides ample opportunity for a display of legal sophistication and even literary talent. Justice Frankfurter wrote that "the troublesome phase of [legislative] construction is the determination of the extent to which extraneous documentation and exterual circumstances may be allowed to infiltrate the text on the theory that they are part of it, written in ink discernible to the judicial eye." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947). Judge Frank suggested a comparison between the interpretation of statutes by judges and the interpretation of musical compositions by musical performers. Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947). Other, more mundane comparisons come to mind. The interpretation of statutes by judges resembles the process that occurs late at night in American households during the holiday season, when parents assemble the toys they will give their children on the following day. Under the press of time, the problem lies not so much in reading the cryptic instructions the manufacturer provides as in determining whether these instructions have anything to say about the pieces of plastic and metal that one finds in the box. Sometimes the instructions talk about things that simply are not there. Other times the box contains things obviously beyond the manufacturer's contemplation. What is one to do in such a case? In an age of legislative proliferation this kind of problem arises routinely in the courts. Judges must solve the problem in the light of day, and unlike parents, they can expect few rewards for their trouble.

49 U.S. CONST. art. III, § 9, cl. 2.

50 The sixth and seventh amendments to the Constitution prescribe rules for adjudication: "[T]he accused shall enjoy the right to a speedy and public trial . . . ." U.S.

devoted almost entirely to specific adjudicatory references.[51] Within constitutional limits, if a legislative text actually refers to adjudication and provides a specific instruction for adjudication, the courts are bound to receive the rule and apply it in proper cases, in accordance with the principle of legislative supremacy.[52]

Mr. Neiswonger will have had a right of action under the Air Commerce Act if the text of the Act actually describes such a right. The problem, of course, is that the text is silent.[53] Mr. Neiswonger's case is typical of those in which a substantial question arises concerning the adjudicatory relevance of legislative action. The text refers to some aspect of the controversy—it requires blimps to navigate at 500 feet or more, it condemns leaky roofs or rickety stairways, or it forbids the unlicensed taking of fish—but it does not actually address the issue the court must decide.

Is the silence of the text fatal to Mr. Neiswonger's claim? If our legal system invariably limited the adjudicatory consequences of legislative action to those actually described in the text, the answer to that question would be yes. But in our system there are other possibilities, at least in theory.

2. *Adjudicatory Consequences Actually Intended by the Legislature*

Legislative action sometimes has adjudicatory consequences that are not described in the legislative text but are intended by the legislature. The language of the Employee Retirement Income Security Act of 1974 (ERISA)[54] does not state that private claims under employee benefit plans will be litigated under a body of federal substantive law devised by federal judges, but ERISA has that effect because Congress intended for ERISA to have that effect.[55]

CONST. amend. VI. "In suits at common law . . . the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

51 Subordinate forms of legislation routinely refer to adjudication and prescribe rules of decision for the courts. Treaties do this on occasion. *See, e.g.*, United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) (appellate court must reverse lower court's decree if subsequent treaty makes that decree incorrect). Statutes are sometimes designed solely with this purpose in view. *See, e.g.*, 18 U.S.C. §§ 1-3772 (1982) (defining federal crimes and criminal procedures). But statutes do not always refer to adjudication; nor are they invariably designed for the purpose of creating law that the courts will apply. *See supra* note 36.

52 Article VI, clause 2, provides specifically that the Constitution and laws of the United States and all treaties made under the authority of the United States shall be the supreme law of the land and binding "on the judges" in every state. U.S. CONST. art. VI, cl. 2.

53 *See* Air Commerce Act of 1926, ch. 344, 44 Stat. 568.

54 29 U.S.C. §§ 1001-1461 (1982).

55 Senator Javits, one of ERISA's sponsors, expressly stated the legislative intention during Senate floor debates. "[A] body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 CONG. REC. 29,942 (1974).

The courts have so held.[56] This illustration of the principle is striking and unusual. The text of ERISA makes no direct reference to the underlying legislative intention. In the typical case, the words of the text are not so unexpressive. They usually refer to the underlying intention, but express it imperfectly, and thus the courts must consult other sources to determine what the intention actually was.

Did Congress intend to grant or deny a right of action in Mr. Neiswonger's case? The text of the Air Commerce Act is silent on the point, but in accordance with the principle described above, congressional intentions imperfectly expressed in the text may yet be revealed in the legislative history. That, at any rate, is the hope held out by theory.

Reality deals unkindly with this hope. In Mr. Neiswonger's case, and in most cases involving implied private claims, the legislative history reveals no more than the text itself. The obscurity of the history is not difficult to explain. The silence of the text probably means that the legislature did not consider the issue. The legislative history is "unilluminating"[57] because there is nothing to illumine. To be sure, cases do arise in which the legislative history does contain evidence of actual legislative intentions that have somehow failed to find expression in the text.[58] In such cases the courts can honor the hidden intentions.[59] But on the whole, cases of that sort

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56 *See, e.g.*, Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n.26 (1983); Woodfork v. Marine Cooks & Stewards Union, 642 F.2d 966 (5th Cir. 1981); Reiherzer v. Shannon, 581 F.2d 1266 (7th Cir. 1978); Pinto v. Zenith Radio Corp., 480 F. Supp. 361 (N.D. Ill. 1979), *aff'd mem.*, 618 F.2d 110 (7th Cir. 1980).

57 *See* Cort v. Ash, 422 U.S. 66, 83 n.14 (1975) (extrapolation of legislative intent "entirely unilluminating").

58 *See, e.g.*, Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15 (1982) (right of action denied because explicit legislative history indicated that Congress did not intend to create federal right of action).

59 The general question whether the courts may give legislative intentions, unexpressed in the legislative text, legal effect through the process of "interpretation" is an interesting theoretical question that deserves more attention than it usually gets. The doctrine permitting courts to consult legislative intentions during the process of interpretation is widely accepted. In its traditional form it is a beneficial, substantially unobjectionable doctrine. In some other forms, however, the doctrine assumes a raw and probably unconstitutional character. For example, it is sometimes said that the failure of the legislature to take action to change a particular judicial or administrative interpretation of a statute evidences a legislative "intention" that the interpretation should stand. It is also said that such an "intention" can become a legal reason for accepting or affirming the prior interpretation. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 599 (1983) ("Failure of Congress to modify the IRS rulings . . . make[s] out an unusually strong case of legislative acquiescence in and ratification by implication of the . . . rulings."); Haige v. Agee, 453 U.S. 280, 297 (1981) (absent evidence that Congress intended to repudiate longstanding administrative construction, Congress must have adopted such construction). This reliance upon intentions revealed by the "subsequent legislative history" can give legal force to presumed legislative intentions unexpressed in any actual legislative action taken pursuant to constitutionally prescribed procedures. Courts, however, may not give legal effect to such "legislative intentions." Legislators

rarely occur.

If the text and the legislative history do not speak to the issue, how does one determine the adjudicatory effect of the legislation? Experience teaches that the proponents and opponents of implied private claims are not easily discouraged. They are relentless and clever, and they are usually unwilling to abandon the search for controlling intentions even when they are confronted with a stone wall of legislative silence. They may argue, by turns, that the very silence of the legislative text and legislative history (1) indicates that the legislature actually intended to *create* private rights of action,[60] (2) indicates that the legislature actually intended to *deny* private rights of action,[61] or (3) raises an inference that the legislature actually intended either to create or to deny private rights of action, if the legislature broke its silence in other contexts when it intended either to deny or to create private rights.[62]

One can sympathize with persons who make arguments of this kind, but not with the arguments themselves. For the reasons set forth in the margin, these arguments are usually flawed as a matter of legal logic, and occasionally they are lawless.[63] Nor should these

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may intend to end the war, reform the criminal code, or affirm or reverse judicial or administrative determinations, but these intentions can have no more legal force than the editorial page of the *The Times Press* of Akron, Ohio, unless they are put to a vote in both houses of the legislature and survive or override an executive veto. *See, e.g.*, INS v. Chadha, 462 U.S. 919 (1983).

60 *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) (although legislation was silent on question of private right of action, congressional action indicated affirmative legislative intention to grant private right of action where it was available under predecessor legislation); Cannon v. University of Chicago, 441 U.S. 677 (1979) (despite absence of any express authorization in title IX, plaintiff had private right of action under it because Congress so intended).

61 *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677, 740-42 (1979) (Powell, J., dissenting) (failure of Congress expressly to grant private right of action in various statutes suggests "decision of Congress not to create" one because it "defies reason to believe that in each of these statutes Congress absentmindedly forgot to mention an intended private action").

62 This argument is merely an application of the principle *expressio unius est exclusio alterius*. *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560, 571-74 (1979) (where legislative history is silent, conclusion that Congress did not intend to create private right of action under § 17(a) of Securities Exchange Act of 1934 is supported by explicit grant of private rights of action in other sections of Act).

63 Consider, for example, the argument that legislative silence indicates a legislative intention to *create* a right of action. This argument usually runs as follows. The legislature presumably knows the law and therefore presumably intends the consequences that will normally result from its actions by operation of law. Accordingly, whenever a right of action will result from a given piece of legislation by implication of law, one may presume that the legislature actually intended to create the right of action. Stated in this way, this affirmative argument from legislative silence is either gratuitous or wrong. Whenever a right of action will result from legislation hy implication of law, one may speculate about the actual intentions of the legislature, but if one wants to affirm the right of action, speculating about actual intentions is wholly unnecessary. If the right results by implication of law, it results by implication of law. On the other

arguments be permitted to obscure the reality of the situation. These arguments are not about actual legislative intentions; they are designed for cases in which there is no hard evidence of legislative intentions. These legal arguments masquerade as arguments about legislative facts. At bottom, they are legal arguments about the adjudicatory consequences that *should* be assigned to legislative silence by operation of law.

3. *Adjudicatory Consequences Assigned to Legislative Action by Operation of Law*

In our system, adjudicatory consequences are occasionally assigned to legislative action by operation of law. *Gibbons v. Ogden*[64] provides a classic, if somewhat formidable, illustration of this principle. The early acts of Congress regulating the coasting trade[65] did not actually state that the exclusive privileges that had been given to

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hand, if the right does *not* result by implication of law, it simply does not exist unless the legislature intended to create it. But if the right does *not* result by implication of law, no basis exists for presuming that the legislature, through its silence, intended to *create* the right. The basis for the presumption is gone. Now you see it; now you don't.

An argument of this kind makes sense only when the courts attempt to change the ambient law to deny the implied right of action. A situation of this sort has arisen recently in federal jurisdictions. *See infra* text accompanying notes 263-84. If legislation was enacted at a time when a right of action would normally result from the legislation by implication of law, then the legislature may well have intended to create the right, even though it made no mention of the right in the relevant legislative materials. If the courts later change the ambient law to prevent such implied rights of action, then surely the responsible and sensible course in interpreting legislation enacted under the old regime is to evaluate actual legislative intentions in light of the assumptions that the legislature would probably have made, given the law as it was. *See, e.g.*, Leist v. Simplot, 638 F.2d 283, 307 (2d Cir. 1980), *aff'd sub nom.* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) (given congressional awareness of judicial recoguition of private rights of action under Commodity Exchange Act, Congress's failure to change relevant provisions in 1974 amendment indicate intent to maintain current law).

Occasionally an argument is made that legislative silence indicates a legislative intention to *deny* a right of action. But this argument is simply the mirror image of the affirmative argument from silence, and it suffers from the same deficiencies. Either it is gratuitous or it is simply wrong. One need not argue that the legislature intended to *deny* a right of action, unless one believes that the plaintiff would *have* a right of action, absent a legislative denial. In other words, unless an implied right of action arises in consequence of the legislation (notwithstanding the silence of the legislation), one need not prove that the legislature intended to deny the right of action. But if something about the legislation or the ambient law would provide a legal basis for the plaintiff's action (notwithstanding the silence of the legislation), then the silence of the legislation cannot be evidence of a legislative intention to *deny* the right of action. If anything, in that situation, silence evidences an intention to *grant* a right of action. To be sure, silence is not conclusive evidence of anything. The legislature, in its silence, may actually have intended to *deny* the right of action; but if it intended to deny the plaintiff something he would otherwise have had, given the law as it was, then the legislature was not entitled to remain silent. If it wanted to change the law, it was obligated to break its silence. It could not change the law simply by taking thought.

64 22 U.S. (9 Wheat.) 1 (1824).

65 *See, e.g.*, Act of Feb. 18, 1793, ch. 8, 1 Stat. 305.

Robert Livingston and his steamboat by the state of New York were invalid and unenforceable in court. Nor was there any hard evidence that Congress had intended to render those privileges invalid and unenforceable. But to a legal mind an arguable inconsistency existed between the acts of Congress and the privileges created by the New York law. Upon that basis an able advocate, Daniel Webster, convinced Chief Justice Marshall that the federal legislation rendered the New York law inoperative by virtue of a constitutional principle extrinsic to the legislation itself.

In other less glamorous cases other kinds of legal principles assign adjudicatory consequences to legislative action as a matter of law. One such principle is the familiar rule of interpretation that authorizes courts to consider the ultimate purposes of the legislature and to enforce legislation in accordance with those purposes when the words of the text and the demonstrable intentions of the legislature do not prescribe a specific judgment in a particular case. Learned Hand gave a name to this rule: the "proliferation of purpose."[66] The "proliferation of purpose" is the central principle of legislative interpretation when the actual prescriptions of the legislature are inadequate or irrelevant to the accomplishment of the ultimate legislative objective.[67] In other situations, quite apart from the "proliferation of purpose," hardened rules of law occasionally assign adjudicatory consequences to legislation, apart from the consequences actually described in the text or in the legislative history.[68]

In Mr. Neiswonger's case or any similar case the proponent of the implied private claim will surely attempt to take advantage of this elementary principle. He will admit, perhaps, that the legislative text does not actually describe the right he asserts. He will admit, perhaps, that no convincing evidence exists of an actual legislative intention that he should have such a right. He will argue, in the end, that textual references and demonstrable intentions are unnecessary and that his right is established by larger principles extrinsic to the legislation itself. His opponent will argue, in opposition, that a "right of action" cannot exist under the legislation unless the legislation actually describes such a right or unless the legislature actually intended to create it. The opponent's argument will likely be, and probably should be, as simple as that.

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66 *See* Frankfurter, *supra* note 48, at 529.

67 *Id.*

68 *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) (housing regulations are implied-in-law warranty of habitability in all leases even though legislation was silent).

4. *A Preface to the History of Implied Private Actions*

The history of implied private actions is an interesting history indeed. One can accept the argument that legislative "rights of action" depend entirely upon the language of legislative texts or the demonstrable intentions of the legislature, or one can accept the argument that larger principles can create legislative "rights of action"; but a judge cannot accept the one argument or the other without revealing basic philosophical preferences; and thus, to some extent, as the subsequent discussion will show, the history of implied private actions has been a history of larger things. It has been a history of changing conceptions about the nature of legislation, the role of the courts, and the rights of citizens in a government under law.

II

A Concise History of Implied Private Actions from the Fifteenth Century to the Present Day

The history of implied private actions can be divided into three periods. In the early period, dating from the fifteenth century to the middle of the nineteenth century, the law was coherent and relatively stable. During the transitional period, dating from the middle of the nineteenth century to the early decades of the twentieth century, the law began to change. During the modern period, dating from the 1930s to the present day, the law assumed its present form. Each period is discussed below.

A. The Early Period

In his commentaries upon the ancient statutes of England, Sir Edward Coke laid down the following proposition: "[E]very Act of Parliament made against any injury, mischiefe, or grievance doth either expressly, or impliedly give a remedy to the party wronged, or grieved [by any violation of Act]."[69] This statement was remarkable. Today it seems overbroad in its unguarded affirmation of private rights. Even in Coke's day the statutes at large of England consumed over 1,800 folio pages,[70] and this massive legislative *corpus* was part of a complex and sophisticated legal system. A modern lawyer, contemplating such a system, would not readily accept without proof the unqualified assertion that every act of Parliament gave "a remedy to the party wronged."[71] Yet this was an accurate statement of the law in Coke's day, and it continued to be an accu-

69 E. Coke, Second Part of the Institutes of the Laws of England 55 (1642).

70 *See supra* note 27.

71 E. Coke, *supra* note 69, at 55.

rate statement of the law, both in England and America, until the middle of the nineteenth century. Coke's statement thus provides a convenient point of departure for a discussion of the early law of implied private actions.

Coke asserted, first, that every act of Parliament gave rise to a *private* remedy—a remedy "to the party wronged." He did not describe this remedy in detail, but as the subsequent discussion will show, he was referring to a judicial remedy. Second, Coke asserted that the judicial remedy was given either by the express terms of the act of Parliament or by implication of law in consequence of the act. He found it unnecessary to elaborate upon either point.

Express statutory remedies were well known in Coke's day.[72] Parliament routinely provided that persons harmed by conduct in violation of the acts of Parliament were entitled to institute judicial proceedings to recover penalties or forfeitures.[73] Parliament occasionally provided that such persons were entitled to institute judicial proceedings to recover "damages"—monetary awards commensurate with the extent of the plaintiff's injury.[74] Occasionally Parliament provided for double or treble "damages."[75]

Implied judicial remedies were equally common. The courts of law and of equity were open to persons aggrieved by conduct in contravention of the acts of Parliament even when the acts did not expressly provide for private remedies. An implied private remedy could take the form of an action at law for damages,[76] or an action or suit to obtain some other form of relief.[77] A few early cases, set

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72 Private remedies under statutes otherwise penal in character were an essential feature of the late medieval and early modern criminal process. That process relied heavily on private prosecution. The express private remedy encouraged the private initiation of criminal proceedings. Indeed, although the private award was ordinarily payable to the aggrieved party, it occasionally lost its remedial character entirely and was payable, essentially as a reward, to any private citizen ("common informer") who successfully prosecuted the offender. *See* 3 W. BLACKSTONE, COMMENTARIES *160.

73 For provisions typical of those contained in ancient statutes prescribing a fixed penalty payable to aggrieved parties or common informers, see 1 & 2 Phil. & M., ch. 12, §§ 1, 2 (1545) (codified at 1 J. CAY, AN ABRIDGEMENT OF PUBLIC STATUTES 417 (2d ed. 1762)); 18 Eliz., ch. 5, § 4 (1576) (codified at J. CAY, *supra*, at 3); 29 Geo. 2, ch. 30, § 6 (1756) (codified at J. CAY, *supra*, at 541); 31 Hen. 6, ch. 9 (1452) (codified at 2 J. CAY, *supra*, at 855-56).

74 For provisions typical of ancient statues giving damages to parties aggrieved by illegal acts, see 3 Jac. 1, ch. 13, § 2 (1605) (codified at 1 J. CAY, *supra* note 73, at 410); 5 Eliz. 1, ch. 21, § 2 (1562) (codified at J. CAY, *supra* note 73, at 635); 15 Car. 2, ch. 2, § 4 (1663) (codified at 2 J. CAY, *supra* note 73, at 860); 37 Hen. 8, ch. 6 § 4 (1545) (codified at J. CAY, *supra* note 73, at 778).

75 *See* 37 Hen. 8, ch. 6, § 4 (1545) (codified at 2 J. CAY, *supra* note 73, at 778).

76 *See infra* text accompanying notes 79-112.

77 *See infra* text accompanying notes 113-21.

forth below, illustrate these basic points.[78]

1. *Implied Private Actions for Damages*

In 1470 the Prior of Bruton instituted an action against Richard Ede, a mercer.[79] The Prior alleged that Ede had forcibly entered the Prior's dwelling house and lands. The Prior prayed for damages on that account. The record of the case does not indicate why a mercer would have made a forcible entry into the house of a prior, but the legal theory of the case was simple and clear: by making a forcible entry, Richard Ede had violated an ancient penal statute, dating at least from the time of Richard II (circa 1381),[80] which imposed a sanction of imprisonment, with ransom at the King's will.[81] The statute made no mention of private actions for damages, but the justices held that the Prior's action for damages was properly grounded upon it.[82]

In 1578 Lord Cromwell brought an action against the Vicar of Northlinham alleging that the Vicar had violated a statute which forbade the speaking of "false news, lies, or other such false things of the prelates, dukes, earls, barons, and other nobles, and great men of the realm . . . ."[83] The Vicar had allegedly accused Lord Cromwell of sedition. The facts were the following: Lord Cromwell had supplied the parish church with two puritanical preachers who had preached against the new *Book of Common Prayer*, the Queen's pet project. The Vicar had voiced his disapproval of these preachers in the very yard of the parish church. He had also stated that Lord Cromwell, having procured the preachers, probably sympathized with them and with other persons who "maintain[ed] sedition against the Queen's proceedings."[84] Lord Cromwell, offended by these words, sought damages from the Vicar upon the theory that the statute condemned them. As in the *Prior of Bruton's Case*, the statute was penal in character and made no provision for a private

78 For a useful discussion of early actions upon statutes and the general theory of implied remedies, see Katz, *supra* note 16, at 13-31.

79 Prior of Bruton v. Ede, Y.B. Pasch., 10 Edw. 4, f. 31, pl. 7 (Q.B. 1470), *reprinted in* 47 SELDEN SOCIETY 31 (N. Neilson ed. 1931).

80 47 SELDEN SOCIETY, *supra* note 79, at 35-36.

81 5 Rich. 2, ch. 7 (1381), *reprinted in* 1 STATUTES AT LARGE 352 (O. Ruffhead ed. 1863).

82 Prior of Bruton v. Ede, Y.B. Pasch. 10 Edw. 4 (Q.B. 1470), *reprinted in* 47 SELDEN SOCIETY, *supra* note 79, at 31-35.

83 Lord Cromwell's Case, 76 Eng. Rep. 877, 877 n.A. (K.B. 1578). The statute in this case, 2 Rich. 2, ch. 5 (1378), *reprinted in* 1 STATUTES AT LARGE, *supra* note 81, at 342, was traditionally attributed to the spleen of the Duke of Lancaster (John of Gaunt), who was much hated by the common folk and was "singled out as a principal object of their fury" at the time of an insurrection among them. *See* 76 Eng. Rep. at 878 n.A. This statute produced a long line of implied actions. *See id.*

84 76 Eng. Rep. at 879.

action for damages. But in *Lord Cromwell's Case* the justices again held that a private action for damages could be maintained in consequence of the statutory violation.[85]

The *Prior of Bruton's Case* and *Lord Cromwell's Case* are instructive. They involved fields of law (trespass and defamation) which the modern lawyer tends to associate with common law. But the modern lawyer forgets that judges alone did not invent these fields of law. They were brought into being, at least in part, by legislative authority. In the *Prior of Bruton's Case* and in *Lord Cromwell's Case* the theory of recovery was grounded firmly in the parliamentary pronouncement. The allegation of the statutory violation triggered the action; and a statute, not the common law, defined the substantive law of the case. Proof of the statutory violation entitled the plaintiff to relief. Moreover, in each instance, the court held that the statute supported a private action even though it was silent on the question of damages and expressly provided for a public remedy (a criminal sanction). These cases illustrate Coke's general proposition that under early English law the acts of Parliament created private remedies by implication. The private action for damages was an implicit legal consequence of the statutory prohibition, and the existence of the express public remedy did not alter this result.[86]

What was the reason for the private remedy? The judges and commentators had little to say on this point. They merely stated the rule without defending it: the private remedy was "a consequent thing implied in everything prohibited by any statute."[87] As early as the reign of Edward III machinery had been established to permit the origination of actions based on statutory complaints,[88] and the notion that plaintiffs might prosecute such actions even in the absence of express statutory authorization was apparently so consistent with fundamental principles of English justice that it required no explanation; the validity of the principle was self-evident. The writings of Coke himself confirm this view. For example, in his commentary upon chapter 29 of Magna Charta, Coke noted that any person imprisoned contrary to the provisions of that chapter was entitled to a private remedy in accordance with the rule that every legislative act gave a remedy to the party wronged.[89] In a further

85 *Id.* at 880.

86 For additional examples of early actions upon statutes, see Symond v. Hillyngton, Y.B. Hilary 1 Hen. 6, f. 11, pl. 2 (1422), *reprinted in* 50 SELDEN SOCIETY 10 (C.H. Williams ed. (1933); Bevyne v. Wodecokke, Y.B. Pasch. 10 Edw. 4 (1470), *reprinted in* 47 SELDEN SOCIETY, *supra* note 79, at 50; Waterhouse v. Bawde, 79 Eng. Rep. 116 (K.B. 1605).

87 Case of the Marshalsea, 77 Eng. Rep. 1027, 1037 (K.B. 1612).

88 36 Edw. 3, ch. 9 (cited in E. COKE, *supra* note 69, at 55).

89 E. COKE, *supra* note 69, at 55.

discussion of the same chapter of Magna Charta, he stated the premise upon which the remedial function of the royal courts was based: "[E]very subject of this realme, for injury done to him in bonis, terris, vel persona, by any other subject . . . without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him . . . ."[90] The conjunction of the two statements was revealing. The first proposition was clearly a corollary of the second. Why did a person always have a *judicial* remedy for a statutory wrong? The answer was deceptively simple: people were entitled to remedies for the legal wrongs done to them, and the English courts were in the business of providing such remedies.

At this point it may be helpful to remember the elementary principles set forth in Part I. In Coke's system the right to maintain a private action under a statute did not depend on the text of the statute or the demonstrable intentions of Parliament. The implied right of action depended instead upon a general legal principle extrinsic to the legislation itself. Coke stated that every English subject had a right to a remedy for things done to him contrary to English law, including the acts of Parliament, and he argued that the royal courts were obligated to provide such remedies. Could Parliament ever deny a private remedy in a particular case, by providing expressly, in the statute itself, that there would be no private remedy? Coke did not admit such a possibility. In his system it was unthinkable that Parliament would do a thing so contrary to basic English principles.

Coke's view of the relationship between legislative action and private actions in courts was not eccentric or short-lived. It continued to be the prevailing view long after his death. Consider, for example, the famous case of *Ashby v. White*,[91] decided in 1703. In *Ashby* the plaintiff brought an action at law against a "returning officer" who had disallowed the plaintiff's vote in a parliamentary election. The plaintiff wanted damages, but the Court of King's Bench initially held that the action would not lie. The majority believed that the plaintiff was entitled to a remedy, but not to a remedy in the courts of law. He was bound to refer his complaint to the parliamentary "committee of elections," where he might find some relief.[92] Chief Justice Holt dissented. In his view the legislative remedy was not enough. Under the relevant statutes the plaintiff had an undoubted right to vote. Deprivation of that right entitled him to maintain an action at law for damages. As the Chief Justice

90 *Id.* at 55-56.

91 92 Eng. Rep. 126 (K.B. 1703).

92 *See id.* at 130 (opinion of Powys, J.); *id.* at 132 (opinion of Powell, J.).

put it, "every man that is injured ought to have his recompence."[93]

Chief Justice Holt's opinion reflected his conception of English justice and of the role of the courts in the English legal system. It carried forward the views that Coke had expressed 100 years before. Under the law of England rights and remedies were reciprocal.[94] This was not a theoretical proposition. It was a practical statement about the nature of English government and the business of the royal courts.[95] If an Englishman had a right to vote, he had a right to maintain an action in the courts of law to recover damages for any deprivation of that right. Nor did the opinion of the Chief Justice yield for long to the opinions of the majority. The plaintiff in *Ashby,* emboldened perhaps by Holt's dissent, took his case to the House of Lords, which reversed the judgment of the King's Bench and set the case upon the footing prescribed by the Chief Justice.[96]

The essential notion, then, was that persons suffering legal wrongs were entitled to judicial remedies. What is more, they were entitled to adequate remedies. An adequate remedy was one that made "recompense." It compensated the plaintiff for the injury sustained.[97] Emerging as it does from early and general discussions of the English remedial system, this proposition, in all its simplicity, explains and reconciles the reported decisions in actions upon statutes dating from Coke's day to the middle of the nineteenth century.

The operation of the principle of remedial adequacy was most evident in cases in which the plaintiff brought an action upon a statute that expressly provided a private remedy. In such a case the troublesome question was whether the plaintiff was entitled only to the remedy that the statute provided. In *Rowning v. Goodchild,*[98] for example, the plaintiff brought an action against the deputy postmaster of Ipswich. The plaintiff alleged that he had been injured because the deputy postmaster had failed to deliver a letter, as a statute required him to do. The postmaster denied the violation,

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93 *Id.* at 137.

94 *Id.* at 136.

95 "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." *Id.* The Chief Justice also rejected the argument that the action would not lie because there had been none like it before. *See id.* at 138.

96 *Id.* at 138. *See also* Turner v. Sterling, 86 Eng. Rep. 287 (Q.B. 1683) (plaintiff allowed to maintain action at law to recover damages against city mayor for mayor's failure to comply properly with city's law and custom for election of bride-masters).

97 "[F]or where-ever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute . . . ." Anonymous, 87 Eng. Rep. 791 (K.B. 1703). *See also* Ewer v. Jones, 91 Eng. Rep. 360 (K.B. 1703) ("[W]here a statute . . . give[s] a right, the party by consequence shall have an action at law to recover it.").

98 96 Eng. Rep. 536 (1773).

but he also argued that the plaintiff was not entitled to damages even if the violation had occurred. The statute provided a penalty for any violation. This penalty was the plaintiff's only remedy. The court disagreed. The penalty, a small fine, did not compensate the plaintiff. It was therefore an "accumulative" remedy, and it did not prevent the plaintiff from recovering actual damages in the traditional action at law.[99]

The Queen's Bench reached a similar result in *Couch v. Steel*.[100] In that case the plaintiff, a seaman, brought an action against the owner of the ship upon which the plaintiff had served. The plaintiff alleged that the owner, contrary to statute, had failed to maintain a proper supply of medicines on board the ship. He further alleged that he had become sick aboard ship and had suffered as a consequence of the owner's failure to maintain a proper supply of medicine. The statute imposed a fine for any violation, recoverable at the suit of a common informer.[101] The defendant maintained that the plaintiff could sue only to recover this penalty. The Queen's Bench disagreed. Speaking for the court, Lord Campbell conceded that "if the statute had prescribed a particular mode by which a person sustaining actual damage by reason of a breach of the duty imposed by the statute was to recover compensation, undoubtedly that mode only could be adopted . . . ."[102] But in this case, Lord Campbell reasoned, the express statutory remedy bore no relation to actual damage. Accordingly, the remedy applied only to the "public wrong,"[103] and it did not impair the plaintiff's traditional right to bring "an action for special damage arising from the breach of a public duty."[104]

By contrast, *Stevens v. Jeacock*[105] represented a line of cases in which the existence of an express statutory remedy had the effect of preventing an action at law for damages.[106] In *Stevens* the plaintiff proceeded under a statute that defined the boundaries of fishing stations in certain streams. The statute provided that a fishing boat

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99 *Id.* at 538. *See also* North v. Musgrave, 82 Eng. Rep. 410 (K.B. 1639) (plaintiff allowed to recover damages in addition to penalty expressly provided by statute).

100 118 Eng. Rep. 1193 (Q.B. 1854).

101 7 & 8 Vict., ch. 112, §18 (1844).

102 118 Eng. Rep. at 1197.

103 *Id.*

104 *Id. Cf.* Shepherd v. Hills, 25 L.J. Ex. 6, 10 (1856) ("Where an act of parliament creates a duty or obligation to pay money, the money may be recovered by action unless some provision to the contrary is contained in the act. Here the power of distress . . . is merely a cumulative remedy.").

105 116 Eng. Rep. 647 (Q.B. 1848).

106 *See* Underhill v. Ellicombe, 148 Eng. Rep. 489 (Ex. 1825); Doe dem. Murray v. Bridges, 109 Eng. Rep. 1001 (K.B. 1831); Stevens v. Evans, 97 Eng. Rep. 761 (K.B. 1761).

transgressing the territory of another should forfeit its catch and pay a penalty in addition.[107] Under a procedure prescribed by statute, the aggrieved owner of the boat could recover both the forfeiture and the penalty. The plaintiff alleged that the defendant had invaded his territory. The defendant admitted the offense, but argued that the plaintiff was not entitled to damages because the statute expressly provided his only remedy. The court agreed, holding that the statutory remedy was the exclusive remedy in the circumstances of the case.[108]

The judgment in *Stevens* was consistent with the compensatory principle identified by Lord Campbell in *Couch v. Steel*.[109] As Coke had maintained, a person injured by statutory misconduct was entitled to a remedy; and a proper remedy, as Chief Justice Holt had suggested in *Ashby*,[110] was one that compensated the plaintiff for the injury sustained. When the statute expressly provided such a remedy, the implied action for damages was unavailable.[111] One ade-

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107 4 & 5 Vict., ch. 57, § 60 (1841).

108 116 Eng. Rep. at 652. *See also* cases cited *supra* note 106. The language used in some of these case is misleading. Sometimes the courts said that the express statutory remedy was the exclusive remedy while in the very process of holding that a plaintiff was implicitly entitled to relief in consequence of the defendant's noncompliance with a statute. *See, e.g.*, Doe dem. Murray v. Bridges, 109 Eng. Rep. 1001 (K.B. 1831). This view was consistent with *Couch* and the other cases in the mainstream. Sometimes the courts said that the express statutory remedy was the exclusive remedy where the plaintiff was a public official or the crown. *See, e.g.*, Stevens v. Evans, 97 Eng. Rep. 761 (K.B. 1761) (tax collector's statutory remedy against representative of intestate taxpayer is exclusive). *Cf.* Rex v. Robinson, 97 Eng. Rep. 568 (K.B. 1759) (in criminal cases, prescribed statutory penalty and procedure precluded indictment at common law); Stephens v. Watson, 91 Eng. Rep. 44 (K.B. 1701) (keeping unlicensed ale-house is punishable only by statute, not by common law indictment); Castle's Case, 79 Eng. Rep. 555 (K.B. 1622) (statute prohibiting unqualified men from acting as justice of the peace punishable only by statute, not by common law indictment). This view was not inconsistent with the notion that *private* remedies might be available by implication of law to provide recompense to a private party wronged.

109 118 Eng. Rep. 1193 (Q.B. 1854).

110 92 Eng. Rep. 126 (K.B. 1703).

111 Professor Katz discovered a "judicial reluctance to allow actions upon statutes for the recovery of money awards" developing between the sixteenth and eighteenth centuries. *See* Katz, *supra* note 16, at 21. He attributed this development to the rise of Parliament as the supreme lawmaker and to the notion that the "intent" of Parliament was of primary significance in determining the effect of statutory law. Thus, where Parliament had not expressly authorized (intended) a private money award, the courts were reluctant to add to what Parliament had done. *Id.*

With regard to Professor Katz's thoughtful interpretation, two things must be said. First, it is not apparent from the reports themselves that the royal courts were concerned about encroaching upon the authority of Parliament or about making unseemly additions to laws enacted by Parliament. In the decisions antedating 1870 little reference was made to the will of the legislature. Second, to say that the cases reveal a "judicial reluctance to allow actions upon statutes for the recovery of monetary awards" is somewhat misleading. No one ever doubted that the plaintiff should have a remedy. The only dispute arose in cases in which the statute gave the plaintiff something, but he wanted more. On some occasions the courts held that he was entitled to more, on other

quate remedy, express or implied, was enough. But where, as in *Couch v. Steel,* the express statutory remedy did not compensate the plaintiff adequately, it did not impair his right to maintain "an action for special damage arising from the breach of a public duty."[112]

2. *Implied Private Actions for Other Kinds of Relief*

Under early English law the action for damages was not the only remedy available to an aggrieved plaintiff as an implicit consequence of legislative action. For example, under the Statute of Wills[113] a devisee of money to be paid out of lands was implicitly entitled to maintain an action of debt to recover the specific legacy as against the terretenant.[114] Similarly, if a debtor transferred property to a third person for the purpose of defrauding his creditors, the creditors, in the wake of the passage of the Statute of Elizabeth,[115] could proceed directly against the property and recover it from the third person. This remedy was available under the Statute of Elizabeth even though the statute expressly authorized only a penalty and forfeiture of the property, which the Crown and the aggrieved creditors were to divide equally. The courts held at an early date that the aggrieved creditors were not bound by the express remedy, but were implicitly entitled to seek writs of execution to recover the property itself for their sole benefit.[116] This result was consistent with the principle of remedial adequacy identified in the preceding paragraphs.

Implied remedies did not always involve money or property. When the right or wrong defined by statute demanded more than recompense or the recovery of a thing of value, an extraordinary remedy was available. Early English law provided many extraordinary remedies. The writ of mandamus, administered by the courts of law, and the decree in equity, administered by the courts of equity, were two remedies of general application and enduring impor-

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occasions they held that he was not. But the cases can be reconciled. As Professor Katz himself suggested, the plaintiff was never denied a remedy by implication of law where the express statutory remedy was not, in some sense, adequate to right the wrong. Conversely, the courts generally denied an implied remedy when the statutory remedy adequately compensated the plaintiff. *See id.* at 28-29.

112 118 Eng. Rep. at 1197. Blackstone summarized the traditional law by saying that every public offense was also a private wrong. 4 W. BLACKSTONE, COMMENTARIES *5. For an early American discussion of the adequacy principle, see Dudley v. Mayhew, 3 N.Y. 2, 15-17, 1 N.Y.S. 359, 361 (1849).

113 32 Hen. 8, ch. 1 (1540), *reprinted in* 2 STATUTES AT LARGE, *supra* note 81, at 272.

114 *See* 1 J. COMYNS, A DIGEST OF THE LAWS OF ENGLAND 321 (1793) ("[F]or in all cases, where a man has an advantage given to him by force of an act of parliament, he shall have a remedy for it by common law . . . .").

115 13 Eliz., ch. 5 (1570).

116 *See, e.g.,* Mannocke's Case, 73 Eng. Rep. 661 (1571). *See generally* D. EPSTEIN & J. LANDERS, DEBTORS AND CREDITORS 121 (2d ed. 1982).

tance.[117] These remedies, like the writ of trespass in the *Prior of Bruton's Case,*[118] the action *qui tam* in *Lord Cromwell's Case,*[119] the action of debt under the Statute of Wills,[120] and the action of trespass on the case in *Couch v. Steel,*[121] were available to persons aggrieved by statutory wrongs, even where the statute itself did not expressly provide for them. They were available as a necessary consequence of the fundamental principle that in civilized society there should be an adequate remedy for every wrong defined by law.

3. *American Law in the Early Federal Period*

English law came to the New World when the English planted their colonies here, and it continued in force in the United States after independence. During the early federal period, when American judges confronted questions about the relationship between legislative action and private rights in court, they routinely gave expression to the principles espoused by Coke and Chief Justice Holt on the other side of the Atlantic.

In 1817 Justice Story, riding the circuit in New Hampshire, was called upon to determine, in *Bullard v. Bell,*[122] whether an action of debt would lie to enforce a liability created by a New Hampshire statute. The statute had established a commercial bank, the Bank of Hillsborough, and it provided that the original stockholders of the bank would incur personal liability for the obligations of the bank if the bank dishonored them. In due course, the bank defaulted on one of its notes, and the holder of the note brought an action of debt against the original stockholders.

The principal issue in the case was whether "debt" was the

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117 Mandamus was a prerogative writ administered by the Court of King's Bench to ensure the due administration of the laws of the realm. The writ issued in the name of the King to require the performance of clear legal duties, including those imposed by statute. *See* 5 J. COMYNS, *supra* note 114, at 21 (citing Rex v. Wheeler, 95 Eng. Rep. 61 (K.B. 1735)). The writ of prohibition, which the law courts also administered, was available in proper cases to prevent the breach of statutory requirements. *See* E. COKE, *supra* note 69, at 118. The courts of equity, for their part, were more chary with their remedies, but they too would provide remedies for statutory wrongs. For example, injunctions were generally unavailable to assure the quiet possession of real property; but in certain cases, upon "the equity" of the statutes against forcible entry, an injunction was available to an aggrieved suitor if a trespasser violated those statutes. *See* Scrafton v. Quincey, 28 Eng. Rep. 264, 265 (Ch. 1752). Moreover, certain specialized bodies of law, such as the law of corporations, evolved largely in consequence of the Chancellor's power to provide implicit equitable remedies for statutory wrongs. *See, e.g.*, Beman v. Rufford, 61 Eng. Rep. 212 (1851) (injunction against corporation and directors for taking action contrary to act of parliament that created corporation).

118 *See supra* text accompanying notes 79-82.

119 *See supra* text accompanying notes 83-85.

120 *See supra* text accompanying note 113.

121 *See supra* text accompanying notes 100-04.

122 4 F. Cas. 624 (C.C.N.H. 1817) (No. 2,121).

proper form of action to enforce the statutory liability.[123] This issue was purely technical, but Justice Story took advantage of the opportunity to instruct the local bar concerning the fundamental legal principles operative in the field. Justice Story began his opinion by stating the basic rule established by six centuries of English practice: when a statute created a liability, a private remedy would be given to the party wronged, either by the express terms of the statute or by implication of law. He said:

> It is very correctly laid down by Chief Baron Comyn . . . that upon every statute made for the remedy of any injury, mischief, or grievance, an action lies by the party grieved, either by the express words of the statute or by implication; and that such action shall be recompense to the party.[124]

Here Justice Story was quoting *Comyns's Digest,* an important eighteenth century authority that summarized the basic English law on the subject. Justice Story also found support in Coke's commentary on chapter 29 of Magna Charta,[125] and he cited numerous examples of ancient statutory actions (some express, some implied) in which debt, trespass, or trespass on the case had been the proper form of action.[126] Ultimately, Justice Story (1) condemned the plaintiff's lawyer for having drawn the complaint "with great inaccuracy and unskillfullness";[127] (2) praised the defendant's lawyer for his ingenuity;[128] and (3) held that "debt" was a proper form of action under the New Hampshire statute."[129]

The notion that an adequate private remedy existed for every statutory wrong played an important role in another early case, *Marbury v. Madison.*[130] Indeed, Justice Marshall devoted the largest part

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123 *Id.* at 639.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.* Justice Story had a habit of criticizing lawyers from New England. Consider, for example, his published remarks about the defects he found in a bill in equity filed by a hapless provincial Maine lawyer, who, in the famous case of Wood v. Dummer, had the misfortune to come into Justice Story's court:

> I advert to these defects, not in the spirit of censure, (for I am well aware, that an apology is found in the fact, that chancery proceedings have, hitherto, but in a slight degree engaged the attention of the bar in this district), but in the spirit of regret, because they have been most embarassing to the court in every step of its progress, and distressed it be creating a perpetual struggle between the desire to do justice to the parties, after so prolonged and expensive a controversy, and the difficulty of overcoming technical principles.

Wood v. Dummer, 30 F. Cas. 435, 438 (C.C. Me. 1824) (No. 17,944). With Justice Story for an apologist, who needed a censor?

128 4 F. Cas. at 642.

129 *Id.*

130 5 U.S. (I Cranch) 137 (1803).

of his opinion in that celebrated controversy (the part that is usually omitted from the edited casebook versions of the opinion) to a painstaking discussion of the connection between statutory rights and judicial remedies,[131] a point that had little to do with the question of judicial review of the acts of Congress.

Justice Marshall began his analysis by asking whether William Marbury had a right to receive his commission as a justice of the peace, an office that had been created and partially conferred upon him by the defeated Federalists in the wake of the election of 1800.[132] Justice Marshall held that the act of Congress passed in February 1801 entitled Marbury to the commission.[133] The next question was whether Marbury had a judicial remedy for a deprivation of that right.[134] Here, Justice Marshall recurred to the fundamental principles that traditionally had linked the actions of legislatures with the business of the courts:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury . . . . "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded. . . ." The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[135]

Justice Marshall then catalogued various recent acts of Congress that had created various rights without expressly providing for remedies. He inquired, rhetorically, whether American law would create these rights while providing no remedy for their violation.[136] Justice Marshall's answer, of course, was no.[137] If a statute did not expressly provide for a remedy, a remedy would be provided by implication of law. Accordingly, William Marbury, having legal title to his office, had "a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for which the laws of his country afford him a remedy."[138]

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131 *See id.* at 154-73.

132 *Id.* at 154.

133 *Id.*

134 *Id.* at 162.

135 *Id.* at 163. The internal quotation was from 3 W. BLACKSTONE, COMMENTARIES *23.

136 5 U.S. (1 Cranch) at 164-65.

137 *Id.* at 165.

138 *Id.* at 168. In view of Justice Marshall's ultimate holding that the Supreme Court could not entertain an original action to compel the delivery of Marbury's commission, some have suggested that Marshall's words were empty. *See* Nixon v. Fitzgerald, 457 U.S. 731, 755 n.37 (1982) (Powell, J., dissenting). Where, indeed, was Marbury to find

B. The Law of the Transitional Period

John Marshall died in 1835. Joseph Story died in 1845. In the decades that followed, the theory of the relationship between legislative action and private rights in court began to change. The results were new and sometimes strange. The change probably began in England, but soon it was under way in this country as well. The roots of the modern American law of implied private actions can be traced to this transitional period.

The transition can best be understood if one recalls the essential features of the old law. The old law focused on the wrong suffered by the plaintiff and on the duty of the courts to provide a remedy. If the legislation expressly gave an adequate remedy, all was well and good. If the legislation did not expressly give an adequate remedy, the courts would provide an adequate remedy by implication of law.

Under the old approach the adjudicatory relevance of legislative action did not depend upon the intentions or purposes of the legislature in a particular case. Indeed, to the modern reader, the most interesting feature of the early decisions is that the judges rarely referred to legislative will. Also, in the early decisions, whether the defendant would have been liable to the plaintiff at common law, absent the statute, did not matter. That question simply did not enter into the calculation. The implied statutory remedy was not a redundant remedy for conduct that would have been actionable at common law. Instead, it was a remedy for a statutory wrong, available in all cases.[139] Nor was the implied remedy justified on the ground that the statutory violation involved a breach of a common law duty. The theory of the action was that the defendant had breached a rule made by legislators, not by judges, and the plaintiff was entitled to a remedy in consequence.

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the remedy that the laws of his country afforded him? The answer, surely, was that he could find a remedy by way of action in the Circuit Court of the District of Columbia. *See, e.g.*, Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838) (lower court had power to issue writ of mandamus to Postmaster General commanding him to pay sums owed plaintiff under contract).

139 Even when the statutory action dealt with a subject that the common law comprehended, the statutory action sometimes differed significantly from the comparable common law action. For example, the implied action for defamation under *scandalum magnatum*, 2 Rich. 2, ch. 5 (1378), *see supra* text accompanying notes 83-85, was maintainable even when the defendant's defamatory words were too vague and indefinite to support an action at common law, and the defendant's right to justify the words, by way of defense, was sharply curtailed. *See* T. PLUNCKNETT, *supra* note 26, at 486-87. The statute against fraudulent conveyances, *see supra* text accompanying notes 115-16, actually altered the common law and implicitly expanded the remedies available to creditors. In *Mannocke's Case*, the statute was enacted during the pendency of the case and made property in the hands of a third party subject to the creditor's writ of execution. 73 Eng. Rep. 661 (1571).

During the transitional period, in the latter half of the nineteenth century, some courts began to reject the idea that a general legal principle governed the relationship between legislative action and private actions in court. Some of them began to hold that private remedies for statutory wrongs depended upon legislative purposes and intentions.[140] Not all jurisdictions immediately accepted this new theory, but as the subsequent discussion shows, this new theory eventually became the prevailing theory in federal jurisdictions.[141] On the other hand, in an intriguing parallel development, some courts began to hold that the principle of negligence, not the principle of remedial adequacy, linked legislative action with private actions in court. These courts began to equate implied private actions with common law actions for negligence;[142] and this equation became the basis for much of the modern law of implied private actions in state jurisdictions.[143] The paragraphs that follow discuss the origins of these two new ideas.

1. *The Discovery of Legislative Intent*

In *Atkinson v. Newcastle & Gateshead Waterworks Co.*[144] the plaintiff sued a private company that had undertaken to supply water to a municipality. The plaintiff sought to recover for losses caused by a fire that had destroyed his timber yard. He alleged that his efforts to quell the fire had been hampered by low water pressure in fire plugs serviced by the company. The parties did not dispute that the company was bound by statute to maintain a minimum level of pressure in the fire plugs and that it had failed to do so. The question was whether the company was liable on that account. The statute made no provision for a private remedy, although it imposed a small fine for any violation, recoverable by a common informer.[145]

Traditionally, the absence of an adequate express remedy would have cleared the way for an action at law for damages. But the court did not take the traditional approach. The court said that in this case the question of the availability of the implied remedy would turn, not upon the general rule laid down in *Couch v. Steel*,[146] but upon "the purview of the legislature in the particular statute, and the language which they have there employed."[147] What, then, was

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140 *See infra* text accompanying notes 144-55.
141 *See infra* text accompanying notes 263-84.
142 *See infra* text accompanying notes 156-85.
143 *See infra* text accompanying notes 285-301.
144 2 Ex. D. 441 (1877).
145 *Id.* at 445-446.
146 118 Eng. Rep. 1193 (Q.B. 1854), discussed *supra* notes 100-04 and accompanying text.
147 2 Ex. D. at 446.

the "purview of the legislature" in the circumstances of this case? Parliament had merely engaged a private company to supply water to a municipality; it was improbable,[148] in the court's view, that Parliament had structured this arrangement in such a way as to make the water company a "gratitious insurer of the safety from fire, so far as water is capable of producing that safety, of all the houses within the district" served by the company.[149] Thus, the plaintiff's claim was inconsistent with "the purview of the legislature in the particular statute" involved in the case, and the plaintiff's claim could not be allowed.[150]

Atkinson, decided in 1877, was one of the first English decisions to hold that a plaintiff injured in consequence of a statutory violation was not entitled to an adequate remedy, and a new theory emerged to justify the result. The new theory was remarkable, given the six centuries of jurisprudence that had gone before. Victoria was now upon the throne, and in the modern era the availability of private remedies under public statutes would depend, not upon a mere rule of law, but upon the purposes or concerns of the legislature in the circumstances of the case.[151]

In a line of cases beginning in the 1870s, courts used the new theory in a number of ways. Sometimes they referred to legislative intentions when they denied the private claim, as in *Atkinson.* Sometimes they relied upon legislative intentions when they allowed the private claim, as in *Groves v. Wimborne,*[152] a case involving a claim by an industrial worker against an employer who had breached a statutory duty to fence industrial machinery. Sometimes they invoked legislative intentions when they limited the scope of the implied remedy, as in *Gorris v. Scott.*[153] In *Gorris* the court held that a legislative intention to prevent a certain kind of injury barred an implied private action to recover damages for an injury of another kind—an injury apparently not contemplated by the legislature at the time of the enactment of the legislation but caused by the very conduct the

148 *Id.* at 445.

149 *Id.* at 446.

150 *Id.*

151 For a discussion of *Atkinson* and the related English cases, see CRAIES ON STATUTE LAW 238-43 (S. Edgar 7th ed. 1971). *Atkinson* departed dramatically from prior law. Lord Cairns's judgment reversed the judgment for the plaintiff given by the Court of Exchequer below, a judgment that had been "altogether free from doubt" in the mind of the Chief Baron. *See* Atkinson v. Newcastle & Gateshead Waterworks Co., 6 Ex. 404 (1871). On the other hand, the reliance upon legislative purposes and intentions in *Atkinson* was not utterly unprecedented. *See, e.g.,* Lane v. Cotton, 92 Eng. Rep. 981 (1701) (in implied statutory action against Postmaster General, Parliament did not intend to make defendant vicariously liable for default of his deputy).

152 [1898] 2 Q.B. 402.

153 9 L.R.-Ex. 125 (1874).

legislation condemned.[154]

What provoked this talk about legislative purposes and intentions? A review of the cases reveals that the new theory was not a response to a change in legislative practice. No evidence suggests that Victorian parliaments were more expressive or purposeful than earlier parliaments. In Victoria's time, as in the time of Coke, Parliament sometimes expressed intentions with regard to private remedies; sometimes it did not. The Victorian courts began talking about legislative intentions and purposes in cases in which the legislation did not differ in form from the legislation that had traditionally given rise to private remedies as a matter of course.

Even so, the new theory was clearly appealing. Consider the *Atkinson* case. The court was obliged either to grant relief in accordance with the traditional rule or to uphold what surely must have seemed a paramount public necessity: the development and expansion of a new and beneficial technology in an industrial age. Parliament had endeavored to establish a scheme to supply a municipality with water. If the private company responsible for the administration of this scheme were saddled with liability for its transient failure, Parliament's policy would be defeated, or so the court plainly believed. The court theorized that a rational legislature, if it had considered the issue, would probably have insulated the company from liability. The court might have said, more candidly, that the court itself had considered the issue and had reached the same conclusion.

Thus, the new theory tended to appear in cases in which the traditional rule collided with arguments based on necessity. The judges' responses were not wholly unprincipled. Sometimes, as in *Atkinson,* the defendant had injured the plaintiff in the course of performing an act that resembled a municipal function.[155] In such a case, if the plaintiff's claim was inconsistent with the "purview" of the legislature, it was also inconsistent, in spirit, with the traditional doctrine of sovereign immunity. In other cases the competing pol-

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154 The legislation in question was an order of Privy Council under the Contagious Diseases Act of 1869, 32 & 33 Vict., ch. 70. The order required certain animals to be kept in pens while being transported by ship. The plaintiff's sheep were transported on the defendant's ship, but some of them were washed overboard during the voyage. They had not been kept in pens, as required by the order. The plaintiff contended that the sheep would not have been washed overboard if they had been kept in pens. The court held, however, that the underlying legislation sought to keep animals free from disease, not to prevent them from being washed overboard. Thus, the plaintiff had no statutory action. 9 L.R.-Ex. at 129-31.

155 *See, e.g.,* Saunders v. Holborn District Bd., [1895] 1 Q.B. 64 (failure to clean streets); Cowley v. Newmarket Local Bd., 1892 A.C. 345 (poor highway maintenance); Glossop v. Heston & Isleworth Local Board, 12 Ch. D. 10 (1879) (improper sewage disposal).

icy probably could not have been equated with a recognized legal principle. Perhaps in some cases the courts were simply reluctant to redistribute the losses generated by an increasingly complex nineteenth century economy. The new theory gave them doctrinal leeway to adjust private remedies and to deny private remedies where the redistribution of the losses generated outside the courtroom seemed unwarranted, unwise, or simply unfair in the circumstances.

2. *The Discovery of Negligence*

During the transitional period the talk about legislative purposes and intentions was not the only new development in the law of implied private actions. During the latter part of the nineteenth century a second new theory emerged, one that developed along an entirely different path: under this theory legislative action was held to affect a plaintiff's claim implicitly and beneficially because (1) a general common law principle required people to behave reasonably, (2) the common law obligated courts to entertain actions in which plaintiffs proceeded against defendants who had behaved unreasonably, and (3) a plaintiff could sometimes prove that the defendant had behaved unreasonably if he could prove that the defendant had breached a duty defined by legislation. In short, in a case of this kind, the legislation benefited the plaintiff because it established or helped to establish the defendant's negligence.

The origin of this second theory lay hidden in the history of the action of trespass on the case. That form of action, as Lord Mansfield once described it, was law's answer to a bill in equity.[156] It was a remedy for a multitude of wrongs, contractual and tortious; it was available whenever an aggrieved plaintiff, in a meritorious case, could not properly rely upon other, more rigid forms of action. "Case" was flexible and amorphous, amenable to scores of controversies. It was a mother of actions and of substantive law.[157]

The diversity of "case" created problems for people who wanted to make sense out of the law, and at an early date the legal writers, in an attempt to bring order out of chaos, began to subdivide and classify the law of the action. They discovered that various kinds of actions on the case existed, and they gave a name to each. Thus, there were actions on the case for assumpsit, deceit, or defamation, among other things.[158] By the end of the eighteenth cen-

156 *See* Bird v. Randall, 97 Eng. Rep. 866, 870 (K.B. 1762).

157 *See generally* Dix, *The Origins of the Action of Trespass on the Case*, 46 YALE L.J. 1142 (1937).

158 *See, e.g.*, 1 J. COMYNS, *supra* note 114, at 184-223, 230-45, 246-80 (4th ed. 1793); 2 N. DANE, A GENERAL ABRIDGMENT & DIGEST OF AMERICAN LAW 481-736 (1823); 3 *id.* at 1-280.

tury there were actions on the case for negligence.[159]

What were these actions on the case for negligence? In truth, they were a strange assortment. Some of them were old actions that did not conveniently fit into any other category. Others were new actions that had not yet generated enough case law to merit their own classification.[160] But they fell into a common pattern. Case for negligence would lie whenever the plaintiff could prove that he had sustained an injury because the defendant had neglected to perform a legal duty. The duty could arise from almost any source: a voluntary undertaking,[161] a custom,[162] a prescription,[163] a common calling,[164] or, most importantly, a *statute*.[165]

In other words, under the old law, trespass on the case was a proper form of action when a plaintiff sought damages from a defendant who had neglected to perform a statutory duty, especially where the statute made no express provision for a private remedy.[166] Implied private actions for damages properly took the form of actions on the case for negligence. Moreover, legal writers placed these actions within a larger category of actions on the case for negligence. This placement occurred at a relatively early date, and it had nothing to do with the law of the reasonable man. Indeed, the reasonable man had not yet appeared on the scene. In the early days a parson (a minister) was negligent if he was bound by prescription to find a bull to increase the cattle within his parish, but failed to do so;[167] and a magistrate was negligent if he deliberately refused to count the vote of an elector entitled to vote by statute.[168] Derelictions of this sort had nothing to do with reasonableness, prudence, or simple carelessness. Yet they were actionable, and the proper form of action was trespass on the case for negligence.

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159 *See* 1 J. COMYNS, *supra* note 114, at 291-303.

160 *See, e.g.*, 3 N. DANE, *supra* note 158, at 31 ("A few cases will also be here collected of actions on the case for negligence, which cannot be brought conveniently under more particular heads."). *See generally* 1 J. COMYNS, *supra* note 114, at 291-303.

161 *See* J. COMYNS, *supra* note 114, at 294 (neglect to do that which he has undertaken).

162 *Id.* at 295-97 (neglect in caring for dog, horse, cattle, fire).

163 *Id.* at 292-94 (negligence in a man's trust).

164 *Id.* at 297-302 (negligence of common innkeepers or common carriers).

165 *Id.* at 292-94 (neglect in doing that which by law he ought to do).

166 Notably, the defendant in Bullard v. Bell, 4 F. Cas. 624 (C.C.N.H. 1817) (No. 2,121), *see supra* text accompanying notes 122-29, had argued that trespass on the case was the proper form of action to enforce the liability created by the New Hampshire statute in that case. *Id.* at 631. Justice Story did not disagree. He simply held that debt would also lie. *Id.* at 640, 642. The propriety of "case" where a statute created the liability, but gave no express remedy, had been clear since Ashby v. White, 92 Eng. Rep. 126, 137 (K.B. 1703). *See supra* text accompanying notes 91-96.

167 *See* 1 J. COMYNS, *supra* note 114, at 293.

168 *See id.* at 293 (citing Ashby v. White, 92 Eng. Rep. 126 (K.B. 1703)).

In time the word "negligence" began to acquire a new meaning. In legal discourse it came to mean imprudence,[169] and it referred, not so much to neglect of specific legal duties, as to a general failure to exercise ordinary care in the circumstances. This change in the meaning of negligence was one of the significant developments in the law of torts during the nineteenth century, and in time it affected the law of implied private actions. Under the old law implied private actions for damages had taken the form of actions on the case for negligence, and as the century wore on, some courts, both in this country and abroad, began to speak of them as if they were actions for negligence in the new, modern sense. Indeed, some courts went so far as to hold that proof of the statutory violation was nothing more than evidence that the defendant had behaved unreasonably.[170] Other courts did not go that far but adopted the modern theory of negligence to explain six centuries of judicial practice. They held, anachronistically, that the statutory violation was implicitly actionable because the defendant was liable generally for the proximate consequences of his unreasonable conduct, and conduct in violation of a statute was unreasonable in itself. This was the doctrine of negligence per se.[171] By the end of the nineteenth century the modern law of negligence had begnn to displace the traditional notion that statutory wrongs were remediable in the courts as a matter of course.

One can only speculate about why this happened. Conceivably, at some point in the middle of the nineteenth century the judges simply became confused. Consider, for example, the remarkable English case, *Blamires v. Lancashire & Yorkshire Railway*.[172] The plaintiff brought an action against a railway company to recover damages

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169 For an early discussion of the development of the modern concept of negligence, see T. STREET, FOUNDATIONS OF LEGAL LIABILITY 183-90 (1906). Street traces the fundamental concept of negligence to cases dating from the fourteenth century. *See also* Ehrenzweig, *A Psychoanalysis of Negligence*, 47 NW. U.L. REV. 855 (1953) (describing development of "fault" rule and possibilities of new approach).

170 *See, e.g.*, Knupfle v. Knickerbocker Ice. Co., 84 N.Y. 488, 489 (1881) (violation of ordinance not sufficient by itself to constitute negligence); Rainey v. New York Cent. & Hudson R.R., 75 N.Y. Sup. Ct. 495, 23 N.Y.S. 80, 82 (1893) ("Proof of the violation of a city ordinance does not establish a cause of action against the violator, but it is evidence bearing upon the question of negligence."); Blamires v. Lancashire & Yorkshire Ry., 8 L.R.-Ex. 283, 289 (1873) (violation of safety statute is "some evidence of what is due and ordinary care"). *See also* T. SHEARMAN & A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 13a (2d ed. 1870) ("The failure of any person to perform a duty imposed upon him by statute . . . should always be considered evidence of negligence . . . .").

171 *See, e.g.*, Seimers v. Eisen, 54 Cal. 418, 421 (1880) (violation of any legal regulation is sufficient evidence of negligence); Platte & Denver Canal & Milling Co. v. Dowell, 17 Colo. 376, 385, 30 P. 68, 72 (1892) (failure to perform statutory duty is negligence per se), *dismissed mem.*, 154 U.S. 512 (1893). *See also* Thayer, *supra* note 16 (citing cases so holding).

172 8 L.R.-Ex. 283 (1873).

for injuries he had sustained in a train wreck. The plaintiff had been a passenger on the defendant's excursion train, and the carriage in which the plaintiff had been riding had separated from the train, rolled down an embankment, and crashed. Prior to this separation, the carriage had sustained several violent shocks. The plaintiff contended that the accident would not have occurred if the passengers in the carriage had been able to notify the engineer of these shocks. If the engineer had known of them, he could have stopped the train, examined the carriage, and discovered the defective tire, which had apparently caused the accident. Thus, the plaintiff contended that the failure of the railway company to provide a means of communication between the carriage and the locomotive was actionable negligence, and in this connection the plaintiff relied upon a statute[173] that required the railway company to maintain an "efficient means of communication between the passengers and the servants of the company in charge of the train."[174] This statute was penal in nature. It made no mention of general civil liability.

The plaintiff prevailed at trial, and the case went up on appeal. At issue was the effect of the statute upon the defendant's liability. This issue was neither remarkable nor new, but the court had difficulty with it. All of the justices eventually agreed that the statutory violation was evidence of negligence and that the case had been properly submitted to the jury on that basis.[175] But beneath this superficial accord, confusion reigned. Amidst this confusion lay clues to the dynamics of the nineteenth century transition from the old law of implied liability to the new law of evidence of negligence and negligence per se.

The court was closely divided. Two justices approached the question from the standpoint of the old law.[176] In their view the statute imposed a duty. If the defendant's neglect of that duty had caused the accident, liability would follow as a matter of course. The only question was one of causation: Would the engineer have been able to stop the train and discover the defective tire if the defendant had established an effective means of communication? These two justices thought that if the legislature had concluded that an efficient means of communication between passengers and employees would promote the discovery of dangers, and if the legislature had enacted the statute upon that basis, then the jury was entitled to consider the legislature's action in determining whether a lack of communication had actually caused the accident in this case.

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173 Regulation of Railways Act of 1868, 31 & 32 Vict., ch. 119, § 22.

174 8 L.R.-Ex. at 284.

175 *Id.* at 286.

176 *See id.* at 288 (opinions of Blackburn, J., and Keating, J.).

The statute itself was evidence that the defendant's neglect had caused the plaintiff's injury.[177]

The three other justices took a different view.[178] In accordance with modern principles, they concluded that the defendant would be liable to the plaintiff if, but only if, the defendant had failed to do what a railway company of ordinary prudence would have done in similar circumstances. The statute was relevant to that issue, but only insofar as it afforded some evidence of what a railway company of ordinary prudence would have done. The violation of the statute was not actionable in itself. The question for the jury was whether the defendant had acted reasonably in the circumstances.[179]

Although all the justices agreed that the statute was evidence of something, they disagreed over its precise effect. Two justices, in accordance with traditional principles, believed that the defendant would be liable to the plaintiff if it had violated the statute and had caused the plaintiff's injury. The legislature's judgment as to the need for an efficient means of communication constituted some evidence of causation. The other three justices thought that the statute was evidence of what a reasonably prudent railway company would have done in similar circumstances. All of the justices emerged from their deliberations speaking the same language—evidence of negligence—and in this single expression ancient notions about the relationship between public duty and private liability merged with modern notions about reasonableness and nonstatutory fault.

Blamires, decided in 1873, was one of the first decisions in England or America in which judges used the phrase "evidence of negligence" to describe the implicit effect of legislative action upon the system of private remedies. The case reflected law in transition, illustrating the analytic and semantic confusion produced by the collision of two very different ideas: the old idea that neglect of legal duty, including statutory duty, was actionable negligence, and the new idea that negligence was conduct that a jury found to be unreasonable. One would be mistaken, however, to assume that *Blamires* stood only for this: the defendant in *Blamires* was a railway company, and therein lies another tale.

Some years ago Professor Gregory described the rise of the modern concept of negligence. He traced the intrusion of concepts of reasonableness and moral fault into a field of the law in which private liability had once rested upon a different ground.[180] He ex-

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177 *Id.*

178 *See id.* at 288-89 (opinions of Brett, J., Grove J., and Archibald, J.).

179 *Id.*

180 Gregory, *Trespass to Negligence to Absolute Liability,* 37 VA. L. REV. 359, 362 (1951) (defendant liable for trespass if plaintiff showed "a physical contact on his person or

plained this intrusion in economic terms. Nineteenth century judges wanted to protect the agencies of economic growth from the inflexible and potentially oppressive rules that had governed certain fields of law—especially the law of torts. Accordingly, these judges began to work changes in the law. Because of these changes the defendant's liability, which had once turned upon the application of inflexible, prescriptive standards, now turned upon a retrospective determination by the jury, governed by nothing more than the quasi-law embodied in the amorphous concept of reasonable care. As a result, some defendants, once liable, were liable no more.[181]

Professor Gregory described a change in the common law. A similar change occurred in the law of implied private actions. In the late 1800s courts used the negligence theories to limit the private liability that followed, under traditional principles, from the violation of legislated rules. The limiting effect was clear in cases in which the court adopted the concept of evidence of negligence, or prima facie evidence of negligence.[182] The application of these concepts reduced the statute's efficacy to a minimum, and the court delivered the issue of liability into the hands of the jury. But the limiting effect was also evident in cases in which the court adopted the concept of negligence per se. If the defendant's liability turned ultimately on the unreasonableness of his refusal to obey the law, the unreasonableness of the plaintiff's conduct was potentially a bar to recovery, and the plaintiff's assumption of the risk created by the defendant's statutory violation was another potential defense.[183]

To a remarkable degree, the early history of negligence theory in the law of implied private actions is a history of litigation involving heavy industry in critical sectors of the nineteenth century economy. The incidence of railroad cases among the leading decisions is wonderfully high.[184] Surely there was a relationship between the industrial reality of these cases and the new theories they produced. For centuries the old law had maintained a direct and fairly inflexible connection between private liability and the violation of legis-

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property, due to the activity of another" and either intent to cause such contact or actual damage).

181 *See id.* at 365.

182 *See, e.g.*, Meek v. Pennsylvania Co., 38 Ohio St. 632 (1883) (violation of city ordinance insufficient to constitute negligence per se but was evidence of negligence).

183 *See, e.g., id.* (city ordinance competent to indicate degree of care required of plaintiff to avoid injury); Howenstein v. Pacific R.R., 55 Mo. 33 (1874); Williams v. Chicago, M. & St. P. Ry., 64 Wis. 1, 24 N.W. 422 (1885) (defendant not liable if plaintiff's negligence also contributed to injury). *See also* J. BISHOP, COMMENTARIES ON NON-CONTRACT LAW 57 (1889).

184 Consider the cases cited at 2 E. JAGGARD, HANDBOOK ON THE LAW OF TORTS 924 n.483, 925 n.485 (1895). In Jaggard's discussion of the effects of legislation upon tort liability, 80-90% of the cases cited involved railroads.

lated rules. When the modern theory of negligence entered this system, it severed that connection and limited the effect of legislation upon the rights of plaintiffs. This development, in the opinion of this writer, was another manifestation of the general movement that Professor Gregory described so colorfully and so well. As noted above,[185] the negligence theory was one of two new theories that entered the law of implied private actions during the transitional period. The legislative intent theory, like the negligence theory, provided judges with flexibility that was impossible under the old law. With these two theories courts could deny or at least limit implied private remedies. The negligence theory and the theory of legislative intent were two elements of a single nineteenth century movement, the effect of which was to limit the availability and the effectiveness of private actions for damages under public legislation.

3. *A Summary of the Law in Transition*

At the close of the nineteenth century the law of implied private actions lay in a fragmented and confused state. The movement that had begun some years before had worked lasting changes in the law, but the movement had not swept all before it. Some courts remained faithful to the principles of Coke, Chief Justice Holt, and Justices Story and Marshall,[186] while others relied upon newly discovered legislative purposes and intentions. Still others spoke the language of negligence per se,[187] prima facie evidence of negligence,[188] or evidence of negligence.[189] Manifestly, the law had yet to settle upon a single course.[190]

Into this confusion came Ezra Ripley Thayer, who wrote an important article on the subject.[191] The article summarized the developments that had occurred during the transitional period, and it became a point of reference for the modern analysis. Thayer argued for a particular theory of implied private liability, the theory of negligence per se, and he gave eloquent, if unintended, testimony to the power of theory over a scholarly mind. Thayer loved order and symmetry, and he attempted to bring order and symmetry into the law of implied private remedies. Thayer attempted to demonstrate

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185 *See supra* text accompanying notes 144-55.

186 *See, e.g.*, Parker v. Bernard, 135 Mass. 116 (1883); Aldrich v. Howard, 7 R.I. 199 (1862). *See also* Stehle v. Jaeger Automatic Mach. Co., 220 Pa. 617 (1908).

187 *See, e.g.*, Maney v. Chicago, B. & O. Ry., 49 Ill. App. 105 (1892); Correll v. Burlington, C.R. & M. R.R., 38 Iowa 120 (1874).

188 *See, e.g.*, McRickard v. Flint, 114 N.Y. 222, 21 N.E. 153 (1889).

189 *See, e.g.*, Vandewater v. New York & New England R.R., 135 N.Y. 583, 32 N.E. 636 (1892). *Cf.* Cook v. Johnston, 58 Mich. 437, 25 N.W. 388 (1885).

190 *See generally* 2 E. JAGGARD, *supra* note 184, at 918-30.

191 *See* Thayer, *supra* note 16.

that the implicit adjudicatory consequences of legislative action could be explained by the basic principles of nonstatutory tort liability.

Thayer began his article by criticizing the modern judges who, in the manner of Coke, Chief Justice Holt, and Justices Story and Marshall, merely stated the rule that statutory violations implicitly gave rise to civil liability. This rule, in Thayer's view, explained nothing.[192] He then criticized the judges who relied upon legislative purposes and intentions. These judges were trafficking in legal fiction. In most cases the legislature simply had not formulated an intention that was determinative of the issue of civil liability.[193] Finally, Thayer criticized the judges who adopted the rule of evidence of negligence or prima facie evidence of negligence. This approach invited the jury to reopen a question that had been foreclosed by the legislature—the question of the danger or unreasonableness of the defendant's conduct. The jury should not be permitted to exonerate the defendant when the defendant had done what no reasonable man would do.[194] What was the correct theory of implied statutory liability? Thayer believed that the essential principle of tort liability was the principle of negligence, which required every man to comport himself with reasonable care and prudence. He argued that this principle should determine the implicit adjudicatory consequences of legislative action. A person acted unreasonably when he violated a statute.[195] Therefore, a statutory violation should nearly always give rise to civil liability, whether the statute provided for civil liability or not. The statutory violation was negligence per se.[196]

For present purposes it is sufficient to make two observations about Thayer's article and its siguificance for the modern law. First, the article marked the end point in a development that had begun many years earlier, a development in which two principles of civil liahility had converged. One principle, the old principle, held that civil liability was a necessary consequence of a statutory wrong, because every wrong must have its remedy. The other principle, the new principle, held that civil liability resulted from unreasonable be-

192 *Id.* at 318-19. Of course, the traditional rule could never explain anything to Thayer's satisfaction. Thayer was unwilling to believe that mere illegality was a sufficient basis for liability in a court of law. Something more subtle was required. On the other hand, for the modern reader, Thayer's assertion that the defendant was liable to the plaintiff if he acted unreasonably explains the imposition of civil liability no more convincingly than the traditional rule.

193 *Id.* at 320.

194 *Id.* at 323-26.

195 *Id.* at 334 ("whenever due care is the issue, the breach of the statute supplies the legal equivalent of negligence").

196 *Id.* at 326-28.

havior. In Thayer's article these principles met, and the new principle, the principle of negligence, emerged victorious.

Second, Thayer's article focused exclusively on implied private actions for damages. Under the old law, however, the implied private action for damages was not the only remedy available by implication of law as a consequence of a statutory wrong.[197] The plaintiff was entitled to an adequate remedy; and when damages were inadequate or inappropriate, he was entitled to some other kind of remedy, including mandamus, injunction, prohibition, or restitution. During the transitional period, the Victorian judges began to lose their faith in the principle of remedial adequacy, but they lost their faith only when confronted with claims for money. They began to speak of legislative intent and reasonable care in cases in which the plaintiff wanted damages.[198] They did not develop new theories in cases in which the plaintiff wanted nonmonetary relief. If the plaintiff wanted an injunction or mandamus, the law was unchanged. On this issue a scholar had no controversy to consider, and in that sense Thayer's article reflected the tenor of the time. It was a time when money was a sensitive point.

C. The Modern Period

Three theories, then, were the legacy of the transitional years, and each of them had a role to play in the modern American law. The first was the traditional theory, the simplest of the three. The plaintiff was entitled to an adequate remedy for legal wrongs, including wrongs defined by legislation. As we shall see, this ancient principle enjoyed continuing vitality throughout much of the twentieth century in the decisions of some of the federal courts, especially the lower federal courts. By degrees, however, the second theory supplanted the ancient principle in the federal system. The second theory held that the adjudicatory consequences of legislation depended upon demonstrable legislative purposes and intentions. This theory gained acceptance as federal legislation became more complex and as administrative agencies began to play a larger role in the creation and enforcement of federal law. Indeed, as this theory developed and ultimately triumphed, the federal courts themselves began to resemble administrative agencies, and they began to look less like courts in the traditional sense. The third theory, the negligence theory, found a home in the law of the states, where it may be found today. The paragraphs that follow discuss each theory and its placement in the modern American law.

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197 *See supra* text accompanying notes 113-21.

198 *See, e.g.*, cases cited *supra* notes 145-55 and accompanying text.

1. *The Development of the Modern Federal Law*

From the very beginning, the Constitution and the politics of the new nation limited the power of the federal government. For most of our national history there was little federal legislation that touched the day-to-day affairs of the citizens of the United States. The law that regulated the rights and wrongs of everyday life was the law of the states. Moreover, if federal legislative power was limited, federal judicial power was also limited. In the beginning the lower federal courts were given jurisdiction only of diversity cases and certain other cases arising under an odd assortment of federal statutes. The lower federal courts were given no general jurisdiction of cases arising under the laws of the United States until 1875.[199]

In a system as strange as this, it was inevitable that the ancient principle honored by Justices Story and Marshall would encounter rough sledding. In the early days, because of the limited scope of federal legislative and judicial power, the federal courts were not often called upon to provide implied private remedies for wrongs defined by federal legislation. The development of the federal law of implied private remedies was largely a post-New Deal phenomenon. It awaited and accompanied the expansion of federal legislative power during the mid-twentieth century.[200]

Theoretical difficulties also existed. If wrongs defined by legislation were supposed to give rise to private remedies by implication of law, where was this "law" to be found in the federal system? Ordinarily, federal law was found in the texts of the acts of Congress. State law, by contrast, was the repository of the great unwritten principles that had governed the adjudication of human controversies, in England and America, since time immemorial. Only the state courts were in the business of dispensing justice generally. Where did the principles of Coke, Chief Justice Holt, and Justices Marshall and Story belong in such a system?

Ironically, during the mid-twentieth century, at the very time when the proliferation of federal legislation created the first real opportunity for the development of the federal law of implied private remedies, the federal judges were becoming increasingly sensitive to questions of the kind described in the preceding paragraph. Even as federal legislative power was expanding, federal judicial power was contracting, at least in certain fields. For example, the federal courts began to defer to federal legislative judgments in the

199 For a concise history of the relevant juridictional statutes, see H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 727-30 (1953).

200 *See infra* text accompanying notes 232-62.

field of economic regulation.[201] They began to accept and defer to the legislative, executive, and quasi-judicial judgments of the new administrative agencies created to make and enforce federal law. They also began to reject some of the traditional doctrines under which they themselves had previously asserted federal power. If this was the era of *NLRB v. Jones & Laughlin Steel Corp.*,[202] it was also the era of *Erie Railroad v. Tompkins*.[203] Even as the federal courts discovered that no fundamental constitutional principles prevented them from upholding and enforcing the acts of Congress in the field of economic regulation, they also discovered that there was no federal general common law.[204] With this discovery the federal courts came to view their role in American government as one of upholding and enforcing the specific decisions of federal legislative authority, and their stature as courts, in a traditional sense, diminished accordingly. Indeed, the key to the development of the modern federal law of implied private actions lay in this curious realignment of legislative and judicial power within the federal system.

A fascinating series of cases illustrates this development. They arose out of one of the first federal efforts to promote safety in American industry. The targets of the effort were the railroad companies, of course. The Federal Safety Appliance Act was enacted in 1893,[205] and it was amended several times thereafter.[206] It required the railroad companies to equip their cars with modern devices conducive to safe operation—automatic couplers, for example. It provided that the Interstate Commerce Commission would enforce these new safety standards by lodging complaints against violators of the Act, with a view to prosecution. The Act provided a statutory penalty for any violation.[207] The Act did not authorize private actions, but it did contain a provision that seemed to suggest that Congress had considered the possibility that the new safety standards would become entwined in private litigation. Section 8 of the Act provided that any employee injured by any car or train "in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned."[208]

In the wake of passage of the Act, people began to bring actions

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201 *See, e.g.*, United States v. Darby, 312 U.S. 100, 115 (1941) ("The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction.").

202 301 U.S. 1 (1937).

203 304 U.S. 64 (1938).

204 *Id.* at 78.

205 Act of Mar. 2, 1893, ch. 196, 27 Stat. 531.

206 *See* Act of April 1, 1896, ch. 87, 29 Stat. 85; Act of March 2, 1903, ch. 976, 32 Stat. 943; Act of April 14, 1910, ch. 160, 36 Stat. 298.

207 Act of Mar. 2, 1893, ch. 196, § 6, 27 Stat. 532.

208 *Id.* § 8.

against railroad companies in state and federal courts to recover damages for injuries caused by violations of the Act. These actions forced the courts to determine the effect of the Act upon the rights and liabilities of the parties. The problem resembled the one that had vexed the English court in *Blamires,* under similar legislation, some twenty years before.[209] It raised all of the usual issues: Did the statutory violation create a basis for civil liability? To what extent was the defendant's liability dependent upon proof of the defendant's negligence? Did the plaintiff's own negligence bar recovery? The courts wrestled with these issues and others as the twentieth century dawned.[210] It was not their finest hour.[211]

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209 *See supra* text accompanying notes 172-79.

210 *See* Johnson v. Southern Pac. Co., 196 U.S. 1 (1904) (unnecessary to decide whether contributory negligence is defense to implied private right of action under Safety Appliance Act); Schlemmer v. Buffalo, R. & P. Ry., 205 U.S. 1 (1906) (reversing state court nonsuit because of plaintiff's contributory negligence when trial court's reasoning suggested that real basis of lawsuit was plaintiff's assumption of risk, which Safety Appliance Act made inapplicable); St. Louis, Iron Mtn. & S. Ry. v. Taylor, 210 U.S. 281 (1908) (Safety Appliance Act supplants qualified common law duty with absolute duty; defendant's liability not based on negligence); Minneapolis, St. P. & S. Ste. M. Ry. v. Popplar, 237 U.S. 369 (1915) (Safety Appliance Act does not preclude defense of contributory negligence).

211 Consider, for example, the decisions of the various courts in Schlemmer v. Buffalo, R. & P. Ry., 205 U.S. 1 (1906). In that case the decedent was ordered to step between two cars to couple them. The cars were moving towards one another at the time. The decedent stepped between them, but at the critical moment he was unable to join the couplers. The cars continued to move towards one another, and, unjoined and unrestrained by the couplers, they collided, crushing the decedent's head. Although this dangerous operation would have been unnecessary if the cars had been equipped with automatic couplers, as the Safety Appliance Act required, the Pennsylvania trial court nonsuited the decedent's administrator at the close of the evidence in an action for wrongful death. Schlemmer v. Buffalo, R & P. Ry., 11 Pa. D. 677 (1902). The court held that the decedent had failed to hold his head below the level of the beds of the converging cars and bad therefore been guilty of contributory negligence as a matter of law. *Id.* at 678-79. The Supreme Court of Pennsylvania affirmed. Schlemmer v. Buffalo, R & P. Ry., 207 Pa. 198 (1903). The Supreme Court of the United States reversed, but only narrowly. In a five-to-four decision, in an opinion written by Justice Holmes, the Court held that in substance if not in form the trial court's action had been inconsistent with section 8 of the Safety Appliance Act, which forbade the common law defense of assumption of the risk. *Schlemmer,* 205 U.S. at 14.

Congress was so dissatified with the judicial track record in the administration of the Safety Appliance Act that it repeatedly amended and supplemented the Act to underscore its basic points, *see supra* note 206, and in 1908 Congress enacted a separate statute addressed specifically to the question of civil liability. *See* Act of April 22, 1908, ch. 149, 35 Stat. 65 (codified as amended at 45 U.S.C. §§ 51-60 (1982)). This Act, the Federal Employers' Liability Act, stated that railroad companies would be civilly liable for neglect of their duties under the Safety Appliance Act or for any other negligence and tbat the contributory negligence of their employees should not bar recovery in any case of actual statutory neglect. *Id.* §§ 3-5. This Act was good news for plaintiffs who previously had been obliged to sue under the Safety Appliance Act alone, but the FELA did not benefit all plaintiffs injured by violations of the Safety Appliance Act. The FELA applied only if the plaintiff was an employee of the defendant and was himself engaged in interstate commerce at the time of his injury. *See id.* § 1.

The Act presented at least one additional question that could *not* have arisen in England. In this country it was necessary to determine whether civil actions under the Safety Appliance Act were state or federal law actions. For a period of years courts muddled through without resolving this issue definitively; but in our peculiar federal system this issue had to be resolved, and it was eventually confronted and resolved by the Supreme Court.

The case was *Texas & Pacific Railway v. Rigsby*.[212] On September 4, 1912, in Marshall, Texas, a switchman employed by the railroad fell from a boxcar as he descended a ladder attached to the side of the car. He fell because of a defective grab-iron, which formed a rung on the ladder.[213] The ladder and its grab-irons were among the safety appliances subject to the regulation of the ICC under the Safety Appliance Act. The Act, as supplemented, provided specifically that all cars equipped with ladders were to have "secure" ladders, as well as "secure" grab-irons.[214] Accordingly, following the accident, the switchman sued the railroad and sought to recover damages for the injury he had sustained as a result of the railroad's failure to maintain its ladder in a safe and secure condition, as required by the Act.

At trial the switchman's undisputed evidence showed that he had fallen and sustained an injury because of a defective grab-iron.[215] But the defendant did not admit liability. The defendant asserted that its liability depended on modern principles and that the plaintiff had presented no evidence of negligence. The grab-iron had simply broken. Such incidents, however unfortunate, were bound to occur even in the conduct of the most prudent and reasonable enterprise. On general legal principles a broken grab-iron did not give rise to civil liability.[216]

The trial judge disagreed with the defendant's contentions. He directed a verdict for the plaintiff, and the court of appeals affirmed.[217] The Supreme Court granted certiorari. The issue before the Court was essentially one of strict statutory liability versus negligence, but it was also one of state versus federal law.

The trial court had rendered judgment upon a theory that the federal statute created an actionable federal liability, a liability that did not depend on the general law of negligence. The defendant attacked that theory in the High Court, contending that the Act it-

212 241 U.S. 33 (1916).
213 *Id.* at 36.
214 *See* Act of Apr. 14, 1910, ch. 160, § 2, 36 Stat. 298.
215 241 U.S. at 36.
216 *Id.* at 36-37.
217 222 F. 221 (1915).

self created no actionable federal liability and that the judgment below could not otherwise be reconciled with the principles of general law.[218] The Court responded to these contentions in a clear and succinct opinion that both affirmed the principles that for six centuries had linked legislative action with private actions in court and explained how these principles operated in the federal system.[219] The Court held, first, that the Act implicitly created a federal right of action for damages in favor of persons injured by violations of the Act.[220] The Court then held that the implied federal remedy was within the power of Congress under the commerce clause.[221] This was true even in a case in which the plaintiff himself had not been engaged in interstate commerce at the time of his injury. Rigsby had suffered an injury in a fall from a boxcar that was part of an interstate system, and for constitutional purposes this connection with interstate commerce was sufficient to sustain the federal safety standard and the implied federal remedy.[222] Moreover, the Court held that in the federal system state law did not affect the rights and liabilities created implicitly by the federal statute.[223] As a matter of principle, the adjudicatory consequences of the federal statute were properly subject to federal determination. Indeed, without the express leave of Congress, the states were without *power* to make laws that would have determined the adjudicatory consequences of the Act.[224] The Court held, finally, that the defendant's negligence was irrelevant to the disposition.[225] The defendant's liability arose from a violation of a federal statute, which imposed an absolute and unqualified duty to maintain ladders and grab-irons in a secure condition. The defendant's negligence in the common law—state law sense simply did not enter into the case. The defendant had violated the statute and was therefore liable to the plaintiff. The trial judge had properly directed the verdict for the plaintiff.[226]

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218 241 U.S. at 42-43. Although *Rigsby* arose after passage of the Federal Employers' Liability Act, the FELA did not protect the switchman because he was not engaged in interstate commerce at the time of his injury. *See supra* note 211. Thus, his action was brought under the Safety Appliance Act alone. As amended and supplemented by the Act of March 2, 1903, and the Act of April 14, 1910, *see supra* note 206, the Safety Appliance Act was not limited in its application to employees engaged in interstate commerce. The Safety Appliance Act, however, did not expressly impose civil liability upon the employer as a matter of federal law. The absence of an express provision for civil liability forced the Court to face the issue addressed in *Rigsby*.

219 The Court actually cited the old law. *See* 241 U.S. at 39-40.

220 *Id.* at 39.

221 *Id.* at 41-42.

222 *Id.*

223 *Id.*

224 *Id.*

225 *Id.* at 43.

226 *Id.*

Justice Pitney wrote for the Court in *Rigsby,* and the year was 1916. Justices Story or Marshall could have written the opinion. Indeed, Coke or Chief Justice Holt could have written it. *Rigsby* looked to the past, not to the future. It assumed that even in the peculiar federal system the federal courts could and should perform the function traditionally performed by courts in adjudicating cases involving wrongs defined by legislation. They could and should give effect to legislative judgments, and they could and should give effect to those judgments in accordance with the ancient principle of remedial adequacy. *Rigsby* held simply that in the federal system this ancient principle promised a *federal* judicial remedy for wrongs defined by *federal* law. This vision of American government was so symmetrical and pure that it could scarcely be challenged in 1916. Indeed, it was not challenged. The decision in *Rigsby* was rendered without a dissent.

But *Rigsby* did not last. During the next three decades a revolution occurred in federal law. *Rigsby* lost its constituency on the Court. Judicial conservatives who, in 1916, raised no objection to the general proposition that federal courts were supposed to give remedies for federal wrongs learned much during the 1930s and 1940s. They learned that Congress could do almost anything. What Congress could do expressly seemed bad enough, but in an age of federal legislative innovation it was alarming to think that congressional action might have implicit consequences that went beyond the innovations actually prescribed in black and white. Nor did the ancient doctrine of *Rigsby* appeal to the judicial progressives. In the 1930s and 1940s, progressives believed strongly in federal judicial self-restraint.[227] The federal courts were courts of limited jurisdiction; they acted principally to carry out the directives of the political branch. They had no roving commission to go about righting the wrongs perceived by nine or even 200 old men.[228] Commissions of that sort could be used for bad purposes as well as good. No one could object on policy grounds to the general proposition that the beneficiaries of federal legislation should have private rights of action in court; but if the federal courts were to entertain such actions, they would have to do so upon a basis that was consistent with their limited and modest function within the federal system.

The question decided in *Rigsby*—whether an implied federal right of action existed under the Safety Appliance Act—came before the Court again in 1934, on the eve of the revolution in federal law.

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227 For a lucid and uplifting account of the career of judicial self-restraint during the 1930s and 1940s, see A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956).

228 Approximately 200 federal judges were on the bench in 1934. That number is derived from the Federal Reporter's listing of federal judges. 74 F.2d at v-x (1935).

The case was *Moore v. Chesapeake & Ohio Railroad Co.*[229] Franklin Roosevelt resided in the White House, and the New Deal was taking shape. *Erie Railroad v. Tompkins* was only three terms away. In *Moore* Chief Justice Hughes, writing for a unanimous Court, miscited *Rigsby* and held that the Safety Appliance Act created no implied federal right of action.[230] In his view, if an implied private right of action existed under the Act, state common law would have to provide it. Insofar as federal law was concerned, the adjudicatory consequences of the Act were limited to those expressly prescribed by Congress. The Act created no federal right of action because it contained no express provision for a federal right of action.[231]

Rigsby's demise was not widely advertized. *Rigsby* and *Moore* were railroad cases, and for a period of years it was possible to believe that they were nothing more than that. *Moore* relieved the federal courts of some unwanted business in the field of railroad law. There was no reason to think that *Moore* undermined the general principle that federal judicial remedies were implicitly available to rectify federal wrongs. As late as 1947, a federal judge as rigorous and precise as Learned Hand could still express his fidelity to the traditional law.[232] In Hand's view federal legislation implicitly created actionable "civil rights" in persons protected by the legislation, absent contrary implications. If a federal defendant eavesdropped on the telephone conversations of his brother in violation of federal communications law, the brother implicitly had a federal right of action to recover damages for the violation.[233] Thus, despite *Moore* the traditional law survived, and in the 1940s, 1950s, and 1960s, the

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229 291 U.S. 205 (1934).

230 *Id.* at 215, 217. *Rigsby* held that the private right of action under the Safety Appliance Act was a federal right of action within the legislative competence of Congress under the commerce clause. In the words of the *Rigsby* court, "the right of private action . . . has so intimate a relation to the operation of the Act . . . that it is within the constitutional grant of authority over that subject." 241 U.S. at 42. Moreover, *Rigsby* held that the states had no power to make laws affecting this private federal right of action. *Id.* at 41-42. In *Moore* Justice Hughes cited *Rigsby* as if *Rigsby* were consistent with his holding that the right of action under the Safety Appliance Act was not a federal right of action but was created by the common law of the states. *See* 291 U.S. at 215.

Rigsby continues to be miscited. For example, in Justice Powell's dissent in Cannon v. University of Chicago, 441 U.S. 677 (1979), he argued that *Rigsby* involved a "common-law negligence claim brought in federal court," in which the Court had adopted the practice of referring to a legislatively determined standard to establish the existence of the defendant's negligence. *Cannon,* 441 U.S. at 732 (Powell, J., dissenting). In fact, *Rigsby* held explicitly that the question of the defendant's negligence was "immaterial." *Rigsby,* 241 U.S. at 43.

231 291 U.S. at 217. *Moore* is still good law. *See* Crane v. Cedar Rapids & I.C. Ry., 395 U.S. 164, 166-67 (1969) (citing *Moore* for the proposition that Safety Appliance Act did not create federal cause of action for persons seeking damages for injuries resulting from railroad's violation of Act).

232 *See* Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947).

233 *Id.* at 694.

lower federal courts occasionally cited the traditional law as justifying the recognition of implied private actions under various federal statutes.[234]

But the traditional law was never again accepted by the justices of the Supreme Court. They did not openly repudiate it; they simply forgot it; and they embarked upon a course that ultimately led to an entirely new conception of the relationship between federal legislative action and the adjudication of private controversies in the federal courts. This new conception emerged after a gradual doctrinal development, a development that began in the 1940s and culminated only recently. In the course of this development the Court, by turns, abandoned the ancient and elementary assumption that courts should provide adequate remedies for wrongs defined by legislation, accepted the proposition that implied private actions could be maintained in the federal system where such actions promoted the policies or purposes of Congress, rejected this new position, and ultimately accepted the paradoxical proposition that implied private rights of action existed in the federal system only where Congress had actually intended to create them. This passage was remarkable. It curtailed the adjudicatory consequences of federal legislative action. It led the Court from a venerable philosophical position, under which implied private rights resulted from basic principles of Anglo-American justice, to a new position, under which implied private rights probably did not, and probably cannot, exist. Indeed, this development now calls into question much of the

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234 The following federal cases, arranged under the appropriate legislative headings, adopted the ancient law, or something very much like it, in upholding implied private actions during this period. Air Commerce Act of 1926, ch. 344, 44 Stat. 568 (repealed 1958): Roosevelt Field, Inc. v. North Hempstead, 84 F. Supp. 456, 459 (E.D.N.Y. 1949). Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973: Fitzgerald v. Pan Am. World Airways, 229 F.2d 499, 501 (2d Cir. 1956). Federal Communications Act of 1934, ch. 652, tit. VI, § 605, 48 Stat. 1103 (codified as amended at 47 U.S.C. § 605 (1982)): Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947); Huff v. Michigan Bell Tel. Co., 278 F. Supp. 76 (E.D. Mich. 1967); KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp., 264 F. Supp. 35, 43 (C.D. Cal. 1967). Investment Company Act of 1940, ch. 686, 54 Stat. 789 (codified as amended at 15 U.S.C. §§ 80a-1 to 80b-20 (1982)): Brown v. Bullock, 194 F. Supp. 207, 246 (S.D.N.Y.), *aff'd*, 294 F.2d 415 (2d Cir. 1961); Taussig v. Wellington Fund, Inc., 187 F. Supp. 179, 216-17 (D. Del. 1960), *aff'd*, 313 F.2d 472 (3d Cir.), *cert. denied*, 374 U.S. 806 (1963); Cogan v. Johnston, 162 F. Supp. 907, 909 (S.D.N.Y. 1958). Title I of the Public Utility Act of 1935, ch. 687, tit. I, 49 Stat. 803 (codified as amended at 15 U.S.C. §§ 79a-79z (1982)): Goldstein v. Groesbeck, 142 F.2d 422, 426-27 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944). Securities Exchange Act of 1934, ch. 404, tit. I, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78kk (1982)): Ellis v. Carter, 291 F.2d 270, 272-73 (9th Cir. 1961); Dann v. Studebaker-Packard Corp., 288 F.2d 201, 208-09 (6th Cir. 1961); Baird v. Franklin, 141 F.2d 238, 244-45 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944); Remar v. Clayton Sec. Corp., 81 F. Supp. 1014, 1016-17 (D. Mass. 1949); Kardon v. National Gypsum Co., 69 F. Supp. 512, 513-14 (E.D. Pa. 1946).

law of implied private actions in the federal system. The paragraphs below describe the principal stages of this development.

a. *Federal Remedies Implied from Congressional Policies and Purposes.* If the railroads provided a vehicle for the affirmation of the ancient law (in *Rigsby*) and for the abandonment of the ancient law (in *Moore*), the railroads also provided a vehicle for the further development of the law during the mid-twentieth century. *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*[235] was an early leading case. It arose in the 1940s, at a time when the civil rights movement gained support within the federal government. The plaintiff, a black employee of the Norfolk & Southern Railway, sued his union in federal court, alleging that the union had entered into a racially discriminatory contract with the railway in violation of the Railway Labor Act's[236] requirement that the union bargain fairly on behalf of all of its members. The plaintiff sought injunctive relief and damages. The Railway Labor Act made no provision for actions of this kind. The district court dismissed the complaint, and the Fourth Circuit affirmed.[237]

On petition for certiorari, the Supreme Court reversed. The Court held that the Railway Labor Act did indeed impose a duty upon the union to bargain fairly[238] and that the union had violated that duty. The only question, in the Court's view, was whether the case was within the jurisdiction of the district court. The Court held that it was. The parties were not diverse, but the "right asserted by petitioner" was "a federal right implied from the [Railway Labor Act] and the policy which it has adopted."[239] Federal law therefore governed the remedy for that right: "The extent and nature of the legal consequences of [the statutory] condemnation [of the defendant's conduct], though left by the statute to judicial determination, are nevertheless to be derived from [the statute] and the federal policy. . . ."[240] In short, speaking the language of jurisdiction and relying upon nothing more exotic than the general power of the federal courts to decide cases arising under the laws of the United States, the Court recognized that Tunstall had an implied federal remedy for an implied federal statutory right, a remedy "left by . . . statute to judicial determination" but derived from federal "policy."[241]

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235 323 U.S. 210 (1944).

236 Ch. 691, 48 Stat. 1185 (1934) (codified as amended at 45 U.S.C. §§ 151-161 (1982)).

237 140 F.2d 35 (4th Cir. 1944).

238 323 U.S. at 213.

239 *Id.*

240 *Id.* (quoting Deitrick v. Greaney, 309 U.S. 190, 200-01 (1940)).

241 *Id.*

In the 1940s the idea that Congress might "leave" certain matters to the federal courts to be determined by them in accordance with congressional policies offered a congenial justification for an implied private action. It was far more congenial than the ancient proposition that a judicial remedy existed for every wrong defined by law. The new idea conformed with the notion that federal courts carried forward the policies and purposes of Congress. It was also consistent with the emerging law of federal administration. If Congress could leave certain matters to federal administrative agencies to be determined by them in accordance with congressional policies, presumably Congress could also leave certain matters to the federal courts. In effect, the theory of *Tunstall* was the theory of delegation.

It was essentially a Frankfurterian theory. The *Tunstall* opinion adopted language that Justice Frankfurter had used in 1937 in *Board of Commissioners v. United States,*[242] an implied action brought by the United States on behalf of an Indian to recover certain county taxes that the Indian had been forced to pay, contrary to federal law. The same language appeared again in the majority opinion in *Sola Electric Co. v. Jefferson Electric Co.,*[243] and it appeared yet again in Justice Frankfurter's classic dissent in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*:[244]

> A duty declared by Congress does not evaporate for want of a formulated sanction. When Congress has "left the matter at large for judicial determination," our function is to decide what remedies are appropriate in the light of the statutory language and purpose and of the traditional modes by which courts compel performance of legal obligations. . . . If civil liability is appropriate to effectuate the purposes of a statute, courts are not denied this traditional remedy because it is not specifically authorized.[245]

Justice Frankfurter assumed that the federal courts could give implied remedies; however, he did not assume that federal courts should give implied remedies in every case, and he did not maintain that implied remedies had anything to do with private justice. For him, the central inquiry was whether the implied remedy was "appropriate to effectuate the purposes of a statute."[246] His analysis focused on the legislative act, and he viewed the implied remedy as a

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242 308 U.S. 343, 349 (1939) ("Congress has not specifically provided for the present contingency . . . . It has left such remedial details to judicial implications.").

243 317 U.S. 173, 176 (1942) ("When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.").

244 341 U.S. 246, 255 (1951) (Frankfurter, J., dissenting).

245 *Id.* at 261.

246 *Id.*

device to "compel performance" of the obligations created by the act, the better to advance the purposes of Congress.

It is instructive to contrast Justice Frankfurter's theory with the traditional law, as it was then remembered. The traditional formula focused, not on the policies or purposes of Congress, but on the plaintiff's injury and his need for relief. Every person was entitled to a remedy for the wrongs done to him, and a person injured by conduct in violation of a statute was wronged in that sense—he was deprived of his "civil right," as Judge Hand had put it.[247] In such a case, if the statute gave no express remedy, a remedy arose by implication of law as a matter of justice. Legislative purposes were relevant to the adjudication only insofar as the court was obliged to inquire whether the statute manifested a purpose contrary to the implication of the implied remedy.

The Frankfurterian theory, a theory suited to the times, was sophisticated and flexible and not wholly inhospitable to implied private actions. During the 1940s, 1950s, and 1960s, the federal law of implied private actions began to flower. During that golden age, in the lower federal courts, if plaintiffs could not rely upon the ancient law, they could sometimes persuade federal judges that implied private actions would effectuate the policies and purposes of Congress. Either theory allowed them to maintain implied private actions under numerous federal statutes.[248] The Supreme Court did not intervene.[249] But the inquiry into congressional policies and purposes complicated the analysis and put the entire question on a rather difficult footing. Even as the federal law of implied private actions began to flower, it also began to die at the roots.

The dynamics of the process were evident in *J.I. Case Co. v. Borak*,[250] a celebrated case that arose in 1964, near the end of the first stage in the development of the new federal law. The plaintiff, Borak, owned J.I. Case Company (Case) stock. He brought an action in federal court to enjoin a merger between Case and the Amer-

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247 Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947).

248 *See* cases cited *supra* note 234; *see also* Errion v. Connell, 236 F.2d 447, 453 (9th Cir. 1956) (purposes of Securities Exchange Act of 1934 furthered by allowing private right of action under § 10); Laughlin v. Riddle Aviation Co., 205 F.2d 948, 949 (5th Cir. 1953) (private right of action implied and intended under Civil Aeronautics Act of 1938); Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 786-89 (2d Cir. 1951) (§ 10b of Securities Exchange Act of 1934); Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 363-64 (S.D. Cal. 1961) (implied private right of action fulfills major purpose of Civil Aeronautics Act of 1938).

249 The Supreme Court did intervene occasionally to allow the action. *See, e.g.*, Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84, 87-89 (1962) (reversing lower court's refusal to allow shipper private right of action against motor carrier for excess charges resulting from misrouting in violation of federal law).

250 377 U.S. 426 (1964).

ican Tractor Company. He claimed that the management of Case had breached its fiduciary duty to stockholders, engaged in self-dealing, and misrepresented certain facts when it solicited proxies from stockholders. Borak contended that these misrepresentations had violated the Securities and Exchange Commission's proxy rules and that he was entitled to injunctive relief.[251] The district court did not issue a preliminary injunction.[252] Thereafter, Case management voted the proxies that it had solicited, and the merger was approved. Borak then amended his complaint and prayed for (1) a declaration that the merger was void, (2) damages for himself and all stockholders similarly situated, and (3) further equitable relief (i.e., rescission of the merger).[253] The district court held that federal law did not support the claims for damages and equitable relief. These were state law claims, subject to the Wisconsin statute requiring the plaintiff to post security for costs. In the district court's view, federal law did not provide a private right of action for damages or equitable relief in consequence of a merger procured through a violation of the proxy rules.[254]

The Seventh Circuit reversed, holding that the district court did have power to award damages and equitable relief as a matter of federal law and that the Wisconsin statute did not apply.[255] After granting certiorari, the Supreme Court affirmed the Seventh Circuit, holding that the Securities Exchange Act created a private, federal cause of action for damages or rescission in consequence of a merger procured through a violation of the proxy rules.[256]

Borak was an interesting case. Section 27 of the Securities Exchange Act stated specifically that the federal courts were to have "exclusive jurisdiction" over "*all* suits in equity and actions at law brought to enforce any liability or duty created by" the Act or the rules promulgated under it.[257] One could have argued, in 1964, that these words were purely jurisdictional and that Borak had no right to bring an action in federal court to obtain relief from a merger procured through a violation of the proxy rules. But this kind of argument was hard to explain to a layman. It appealed only to persons thoroughly conversant with the mysteries of the law. If section 27 did not mean that Borak and persons like him were entitled to bring "suits in equity and actions at law" in the federal courts to enforce the duties created by the Act and the rules, what did it

251 *Id.* at 427, 429-30.
252 *Id.* at 429.
253 *Id.* at 430.
254 *Id.*
255 Borak v. J.I. Case Co., 317 F.2d 838 (7th Cir. 1963).
256 *Borak*, 377 U.S. at 435.
257 15 U.S.C. § 78aa (1982) (emphasis added).

mean? Had Congress deliberately given the federal courts "exclusive jurisdiction" over an enormous body of private actions that private plaintiffs could never win?

Thus, the interesting thing about *Borak* was not the disposition of the issue presented by Borak's claim. The interesting thing was that the Court considered the issue to be serious enough to warrant plenary consideration. If the same issue had come before the Court twenty-five years earlier, it would have been summarily resolved in the plaintiff's favor as a matter of statutory interpretation under section 27. Indeed, the issue *had* come before the Court twenty-five years earlier, and the Court had resolved it precisely that way.[258] But when the issue arose again in *Borak,* the wheels of the law had turned; the calculation had become far more complicated. The words of section 27 did not state specifically that Borak could bring suits in equity or actions at law to enforce the proxy rules. Therefore the Court had to make a sophisticated, Frankfurterian inquiry into the larger policies and purposes of Congress and the role of the federal courts in the implementation of the legislative scheme.[259] The federal courts were in no position to supply a private remedy for a wrong defined by federal legislation, not even on the basis of statutory language as supportive as that of section 27, unless there was some indication that the private remedy would further the larger policies and purposes of legislative authority. Thus, Justice Clark devoted the bulk of his opinion in *Borak* to a painstaking exploration of the policies and purposes of the Act and the proxy rules, an examination of the effectiveness of SEC enforcement of the proxy rules, and an assessment of the probable value of private enforcement as a supplement to public enforcement. On that basis, Justice Clark concluded that Borak's claim had merit.[260] Private enforcement of the proxy rules would provide a "necessary supplement" to public enforcement by the SEC.[261] Therefore, federal law permitted Borak to maintain his action.[262]

Missing from Justice Clark's opinion was any suggestion that Borak had suffered a federal wrong and that the federal courts had a role to play in the case for that reason alone. By 1964, ideas of that sort were quaint and archaic. They had been relegated to the legal past.

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258 *See* Deckert v. Independence Shares Corp., 311 U.S. 282, 287-88 (1940) (implied private action sustained under § 22 of Securities Act of 1933, 15 U.S.C. § 77v(a) (1982), which contains language identical to § 27 of Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1982)).

259 *See Borak,* 377 U.S. at 431-35.

260 *Id.* at 431-34.

261 *Id.* at 432.

262 *Id.* at 435.

b. *Federal Remedies Authorized by Unexpressed but "Affirmative" Legislative Intentions.* The legislative purpose theory contained the seeds of its own destruction. On the one hand, it denied that implied private remedies had anything to do with fixed rules of law or private justice. On the other hand, it denied that implied private remedies resulted from actual legislative authorization. It invited the courts to occupy a middle ground, to consider the problem from a legislative standpoint, and to determine whether a private remedy would effectuate the policies and purposes of Congress in the circumstances of the case. How could such a determination be characterized as anything but judicial legislation? And even if one were willing to assume that Congress had "left" the matter to the courts to be determined by them in accordance with the general policies and purposes of Congress, how could this quasi-delegation be squared with the constitutional separation of legislative and judicial power? Moreover, the legislative purpose theory invited harried federal judges to entertain new categories of litigation in fields of law that were traditionally the domain of the state courts, and it invited them to do this at their own discretion, on their own hook. In an age of crowded federal dockets and new concerns about "our federalism," how long could such a theory retain its appeal?

During the 1970s and 1980s the Court became increasingly sensitive to the implications of the Frankfurterian theory. This new sensitivity probably reflected the changing composition of the Court. The Justices who came to the Court during the terms of Presidents Nixon, Ford, and Reagan were not much inclined to occupy the ground that *Borak* had laid out for them; and when the time came, the Court could move in only one direction.

Cort v. Ash,[263] decided in 1975, was a bellwether. Ash, a stockholder, alleged that the management of the Bethelem Steel Corporation had authorized illegal corporate expenditures for political advertisements during the 1972 presidential election campaign. These expenditures had allegedly violated a federal statute that prohibited corporate expenditures for political purposes in connection with presidential elections.[264] Ash sought injunctive relief and damages (for the corporation) on the basis of the alleged violation.[265] The statute made no mention of private rights of action, but it declared that campaign expenditures by corporations were unlawful, and it provided penalties for any violation.

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263 422 U.S. 66 (1975).

264 18 U.S.C. § 610 (1970 & Supp. III) (*quoted in Cort,* 422 U.S. at 68 n.1). The statute was later repealed. *See* Act of May 11, 1976, Pub. L. No. 94-283, § 201(a), 90 Stat. 475, 496 (1976).

265 *Cort,* 422 U.S. at 71-72. Ash also alleged that the management breached its state law fiduciary duties. *Id.* at 71.

The district court granted summary judgment for the defendants.[266] The Third Circuit reversed, holding that "a private cause of action, whether brought by a citizen to secure injunctive relief or by a stockholder to secure injunctive or derivative damage relief" arose from a violation of the statute.[267] After the Third Circuit decision, Congress enacted the Federal Election Campaign Act Amendments of 1974,[268] which provided, inter alia, that the Federal Election Commission could receive citizen complaints concerning election campaign violations and could itself request the Attorney General to seek injunctive relief.[269] Complicated by this late legislative development, the case came before the Supreme Court.

Under the ancient law,[270] or even under the law of Justice Pitney in *Rigsby*[271] or Judge Hand in *Reitmeister,*[272] there would have been little doubt about the validity of Ash's claim for damages. Admittedly, his claim for injunctive relief stood upon a different footing. The complaint procedure established by the Federal Election Campaign Act Amendments of 1974 was arguably an adequate express remedy, or at least an adequate primary remedy, insofar as prospective relief was concerned. But the complaint procedure did not provide compensation, and thus the question of damages for the injured corporation remained open. Even under the Frankfurterian theory, one could have made a fairly persuasive argument in favor of the private remedy. A private federal damage remedy would not have interfered with anything that Congress had done, and it probably would have advanced the purposes of Congress by providing corporate management with an additional incentive to obey the law. The world of litigation holds no fury like that of a scorned stockholder in a derivative suit. Although state law has traditionally governed relations between corporate executives and their stockholders, if the federal law defines the wrong, federal law should define the remedy as well.

But in *Cort v. Ash,* argnments of that sort did not move the Court. In a concise opinion rendered without a dissent, the Court identified four factors relevant to the question whether the plaintiff was entitled to maintain an action for damages arising from an unlawful campaign expenditure.[273] First, was the plaintiff " 'one of the

266 Ash v. Cort, 350 F. Supp. 227 (E.D. Pa. 1972).

267 Ash v. Cort, 496 F.2d 416, 424 (3d Cir. 1974).

268 Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified in scattered sections of 2, 5, 18, 26 & 47 U.S.C. (1982)).

269 *See* 2 U.S.C. § 437g (1982).

270 *See supra* text accompanying notes 122-38.

271 *See supra* text accompanying notes 212-26.

272 *See supra* text accompanying notes 232-34.

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

class for whose *especial* benefit the statute was enacted' "?[274] Second, was there "any indication of legislative intent, explicit or implicit, either to create . . . or to deny" a private remedy?[275] Third, was it "consistent with the underlying purposes of the legislative scheme to imply such a remedy"?[276] Finally, was the plaintiff's cause of action one that was "traditionally relegated to state law . . . so that it would be inappropriate to infer a cause of action based solely on federal law"?[277] The Court addressed each of these questions and concluded that little could be said for the plaintiff's claim.[278] The four factors did not help him, and some hurt him. Congress had enacted the statute primarily to protect the general public against political corruption; Congress had not enacted it for the special benefit of corporations or corporate shareholders. Moreover, Congress had provided no indication that it intended to create a private right of action, nor would the damage remedy aid the "primary" congressional goal. Finally, state law governing the fiduciary obligations of corporate management could properly determine the civil liabilities of management in cases such as this. In short, the Third Circuit had erred, and the judgment had to be reversed.[279]

The opinion in *Cort v. Ash* contained elements that were consistent with prior law, but from a plaintiff's point of view it contained some disquieting new elements as well. The suggestion that a court should determine the civil adjudicatory consequences of a federal penal statute by consulting state law would have bothered federal judges at the turn of the century. In *Rigsby*,[280] for example, the thought that states might enforce the Safety Appliance Act through common law negligence actions was so appalling that it militated in favor of the implied federal remedy, not against it. Moreover, what was the role of the second factor in the four-factor *Ash* analysis—the inquiry into congressional intent? The patient was on the table. He was anesthetized and ready for the operation, yet the surgeon was asking whether he was really sick. The question was fair, but it seemed to reflect a certain skepticism about the entire procedure. If *Cort v. Ash* really did involve an implied private claim, why was it

274 *Id.* (quoting Texas & Pacific Ry. v. Rigsby, 241 U.S. 33, 39 (1916)) (emphasis in original).

275 *Id.*

276 *Id.*

277 *Id.*

278 *Id.* at 80-85.

279 *Id.*

280 241 U.S. 33 (1916). See *supra* notes 212-26 and accompanying text for an extended discussion of *Rigsby*.

necessary to ask whether Congress had actually intended to grant or deny the private remedy?

The inquiry into congressional intent was probably not decisive in *Cort v. Ash* itself, but it became increasingly important in the years that followed. In several decisions in the late 1970s and early 1980s the Court rearranged, restated, or simply ignored the other three factors of the *Cort v. Ash* analysis.[281] Congressional intent became the primary, and the ultimate, concern.[282] In retrospect the emphasis on congressional intent in *Cort v. Ash* was a harbinger. In the subsequent decisions, for a majority of the justices, the question whether the plaintiff had an implied right to action under federal legislation resolved itself into the question whether Congress had intended for the plaintiff to have a right of action, at least with regard to the claim for damages. The "controlling consideration" was whether Congress had "affirmatively intended to create a damages remedy."[283]

The inquiry into congressional intent did not mean that the plaintiff invariably lost his case. In some circumstances plaintiffs could still show that an affirmative legislative intention favored them, even when the legislative text did not actually mention the private remedy.[284] But after *Cort v. Ash,* the Court reshaped and redefined the implied remedy so radically that the remedy lost its essential character. If the controlling consideration was whether Congress had affirmatively intended to create a private remedy, then the implied remedy ceased to be a remedy that was implied in law. It became, instead, a remedy that was implied in the legislative facts. It rested upon affirmative legislative intentions that Congress had somehow failed to express in the legislative text. Absent affirmative intentions, express or implied, the private remedy simply did not exist.

The emergence of this new federal theory marked the final stage of the development that had begnn forty years earlier. The Court had abandoned the traditional law and had moved, with increasing assurance, into territory inhospitable to implied private claims. This development affected one of the fundamental relation-

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281 *See* cases cited *supra* note 17.

282 *See, e.g.,* California v. Sierra Club, 451 U.S. 287, 293 (1981) (ultimate issue whether Congress intended to create private right of action, factors specified in *Cort* being criteria through which intent could be discerned).

283 Harlow v. Fitzgerald, 457 U.S. 800, 820 n.36 (1982).

284 *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 387 (1982) (Congressional action indicates affirmative intention; "Congress could have made its intent clearer only by expressly providing for a private cause of action in the statute."); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (statutory language itself fairly implies private remedy although providing private remedy is not expressly mandated by language or legislative history).

ships in the federal system—the relationship between federal legislative action and private rights in court. In terms of legal theory, it was one of the significant developments in modern federal law.

2. *The Stasis in the Law of the States*

Our complex federal system creates a multitude of possibilities within which more than one social or legal experiment can proceed simultaneously. Justice Harlan rightly emphasized the value of that aspect of our system,[285] and the history of implied private actions illustrates the point. During this century, American judges, in state and federal jurisdictions, interpreted and applied the traditional law in different ways. The result, in federal jurisdictions, was the doctrinal development delineated above.[286] In state jurisdictions, judges working within the same tradition took an entirely different approach to the question and came to identify the implied statutory action with modern tort actions based on the law of the reasonable person.[287]

The broad outlines of the negligence theory are familiar. In the manner of Ezra Ripley Thayer, Dean Prosser has said that the standard of conduct expected of the reasonable person can be defined by the legislature.[288] A majority of the states and the American Law Institute apparently agree with Dean Prosser in principle.[289] Thus, conduct that violates legislated rules is negligent, and the actor is civilly liable for injuries flowing proximately from the breach. The existence of an express public remedy does not alter this result; the effect of an express private remedy is less certain.[290] Engrafted onto this theory is the familiar rule of *Gorris v. Scott*—the rule that a statutory violation is implicitly actionable only when it produces an injury of the kind that the legislature had in mind when it enacted the stat-

285 *See* Roth v. United States, 354 U.S. 476, 505 (1957) (Harlan, J., dissenting) ("[W]e have, in the forty-eight states, forty-eight experimental social laboratories.").

286 *See supra* text accompanying notes 263-84.

287 *See supra* text accompanying notes 156-85.

288 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 35, at 191 (3d ed. 1964). The most recent edition of Dean Prosser's hornbook contains a fuller and more complex treatment of the subject. *See* PROSSER AND KEETON ON THE LAW OF TORTS § 37, at 220-34 (W. Page Keeton 5th ed. 1984).

289 *See* RESTATEMENT (SECOND) OF TORTS §§ 285, 286 (1964) (Section 285 states that legislative enactment may establish standard of conduct of reasonable person, and § 286 states criteria by which court may adopt legislative enactment as standard of conduct of reasonable person). *See generally* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 17.6 (1956) (covering legislative intent where civil remedy not expressly provided). The recently published sections of the *Restatement* also acknowledge the possibility that tort liability for violations of legislative provisions may be visited upon defendants in actions that are not denominated as negligence actions. *See* RESTATEMENT (SECOND) OF TORTS § 874A (1982 & 1984 Supp.).

290 W. PROSSER, *supra* note 288, at 192-93.

ute.[291] Of course, if the law of negligence is the true basis of liability in these cases, it is difficult to understand why the defendant's conduct is any more reasonable simply because the resulting harm is not what the legislature had in mind when it enacted the statute. But this theoretical difficulty has not bothered the courts or, apparently, the commentators.[292]

In any event, when one turns from the hornbook law and considers the cases, the world of state jurisprudence begins to look considerably more complex. Relying on a rule that appears to be generously remedial, state plaintiffs have sometimes met with spectacular unsuccess. They have been foiled by diverse defenses. They have been told that the statute upon which they relied imposed no duty in their favor,[293] or that it created no private right.[294] They

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291 9 L.R.-Ex. 125 (1874). In *Gorris* the court denied the plaintiff, a sheep owner, recovery for defendant's failure to fence in plaintiff's sheep on a ship. The sheep were subsequently swept overboard. Although a statute required pens for livestock, the court held that the legislature intended the statute to protect livestock from disease, not from drowning. *See also* 2 F. HARPER & F. JAMES, *supra* note 289, § 17.6, at 1003 (discussing *Gorris* rule).

292 In approving the rule in *Gorris v. Scott,* Professors Harper and James suggested that

> the specific obligations which a jury may impose under the reasonable man standard are themselves owed only to those likely to be harmed by their breach and with respect only to injuries from a source which the fulfillment of the obligation is likely to prevent. So there seems to be no reason why a similar limitation should not be imposed upon a legislative determination of what due care requires.

2 F. HARPER & F. JAMES, *supra* note 289, § 17.6, at 1003. With deference, this argument makes little sense. The class of injuries within the legislature's contemplation at the moment the duty is created may be more or less comprehensive than the class of injuries likely to flow from a breach of the duty in the contemplation of a reasonable person. Thus, in banning the pesticide DDT, the legislature may have known about the carcinogenic risks created by the use of the compound; such risks may be wholly unforeseeable to an ordinary user of the pesticide. On the other hand, in requiring manufacturers to fence dangerous machinery, the legislature may have been concerned about the safety of employees only, but it may have imposed a duty that will inevitably and foreseeably protect anyone who wanders near the plant (children or spouses, for example). If the common law of negligence is the true basis of liability in these cases, why should the defendant's liability turn on the vagaries of legislative contemplation? In terms of fault, a user of pesticide may reasonably be iguorant of the grave risks that his conduct creates, while the operator of a dangerous machine may be perfectly aware of the general danger created by the absence of a fence. But the effect of the rule in *Gorris v. Scott* is to impose liability in the first case, not in the second. This result is inconsistent with the basic principles of common law negligence. The truth is that the rule in *Gorris v. Scott* did not, in the beginning, have anything to do with common law negligence. It was a rule developed as one phase of the theory which held that implied private actions were created (and limited) by legislative purposes and intentions. *See supra* text accompanying notes 152-54.

293 *See, e.g.,* Akers v. Chicago, St. P., M. & O. Ry., 58 Minn. 540, 544, 60 N.W. 669, 670-71 (1894) (statute not intended to extend defendant's duty to trespassers).

294 *See, e.g.,* Taylor v. Lake Shore & Mich. S.R. Co., 45 Mich. 74, 78, 7 N.W. 728, 729-30 (1881) (statute requiring property owners to remove ice from sidewalk did not create private right of action).

have been frustrated by their failure to establish a causal relationship between their injury and the statutory breach.[295] They have been informed that an express statutory remedy, public or private, was the only remedy available under a statute.[296] They have sometimes been told that the question of remedy is for the legislature.[297] State courts seem to have special difficulty with cases that lack the usual earmarks of negligence cases. The plaintiff did not slip and fall, and he is not complaining about mere carelessness. He is complaining, for example, that he lost his job because he filed a worker's compensation claim and his employer fired him in retaliation, contrary to manifest legislative policy. The negligence theory simply does not fit a case like that; and state courts, reared on the negligence theory, are sometimes at a loss to deal with such a case. Absent an express private remedy, sometimes the courts allow the plaintiffs to win such cases;[298] sometimes they do not.[299]

Remembering the simplicity of the hornbook rule, the student who reads the cases in the state reports begins to suspect that something else is abroad in the land. It is impossible to describe any coherent movement or pattern in the law of the states; but obviously this is not a field in which perfect order and harmony prevail. This is a field of conflict, but the conflict has produced stasis rather than creative change. The law that emerged 100 years ago during the transitional period has survived in the states, but it has bred confusion.

One further point needs to be made with respect to state law. In light of the new theory that the Supreme Court of the United States has adopted, it now appears that the implicit effects of federal

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295 *See, e.g.*, Falk v. Finkelman, 268 Mass. 524, 527, 168 N.E. 89, 90 (1929) (parking car illegally did not cause plaintiff's injuries); Marland Refining Co. v. Duffy, 94 Okla. 16, 22, 220 P. 846, 851 (1923) (citing "general rule" that unlawful act must cause plaintiff's injury).

296 *See, e.g.*, Flores v. Los Angeles Turf Club, Inc., 55 Cal. 2d 736, 747-48, 361 P.2d 921, 13 Cal. Rptr. 201, 207-08 (1961) (statute only provided for administrative remedy); Bame v. Lipsett, 172 Neb. 623, 628, 111 N.W.2d 380, 383 (1961) (legislature can set limitations period on worker's compensation); Plevy v. Schaedel, 44 N.J. Super. 450, 454-55, 130 A.2d 910, 913 (1957) (courts will not imply civil remedy from criminal statute). *See generally* 3 T. COOLEY, A TREATISE ON THE LAW OF TORTS 351 n.28 (4th ed. 1932).

297 *See, e.g.*, Dockery v. Lampart Table Co., 36 N.C. App. 293, 299, 244 S.E.2d 272, 276 (1978) (court does not have adequate resources to define remedies for actions that violate spirit of legislative act).

298 *See* Wetherton v. Growers Farm Labor Ass'n, 275 Cal. App. 2d 168, 79 Cal. Rptr. 543 (1969) (state labor law claim); Kelsay v. Motorola, 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (worker's compensation); Leach v. Lauhoff Grain Co., 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (1977) (worker's compensation).

299 *See* Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956) (worker's compensation); Raley v. Darling Shop of Greenville, Inc., 216 S.C. 536, 59 S.E.2d 148 (1950) (worker's compensation).

legislative action upon the fortunes of plaintiffs in civil cases will be determined primarily by state law. This is a strange and disquieting prospect, but the cases are already beginning to appear in the reports.[300] Thus, if Congress did not intend for the plaintiff to have a federal right of action under the relevant federal regulations, nonetheless the regulations may—or may not—implicitly support the plaintiff's state law claim, depending on the law of the state.[301] As if determining the adjudicatory consequences of *state* legislative action were not difficult enough (given the confusion in the law of the states), the nation is now confronted with an arrangement in which the implicit adjudicatory consequences of *federal* legislative action will be determined or obscured by the rules of the fifty states, whatever they may be.

III
A CRITIQUE OF THE MODERN LAW

Some legal questions ought to remain open and debatable for the sake of good government.[302] Other legal questions ought to be settled. The question of the effect of legislative action upon the rights of plaintiffs to proceed in court belongs to the second category. This simple question is subject to the control of the legislature within constitutional limits, and it should be settled for the sake of sound legislative practice. Legislators ought to know whether a legislative text, silent as to the question of private rights of action, will create or deny private rights of action, or leave the question somehow in limbo. With respect to this elementary point at least, legislators ought to be able to select intelligently among the various forms of legislation, with an eye to selecting a form that will accomplish their purposes, whatever their purposes may be. If legislators cannot know and do these things, the legislative process cannot function as it should in a system of government founded upon the principle of legislative supremacy.

Traditional law, for six centuries or more, provided a relatively high degree of certainty with regard to the question of the relation-

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300 *See, e.g.*, Lowe v. General Motors Corp., 624 F.2d 1373, 1380 (5th Cir. 1980) (look to state law to determine if violation of statute is negligence per se); Lukaszewicz v. Ortho Pharmaceutical Corp., 510 F. Supp. 961, 964, *amended*, 532 F. Supp. 211 (E.D. Wis. 1981) (look to state law to determine if violation of federal regulation is negligence per se).

301 *See* Lowe v. General Motors Corp., 624 F.2d 1373, 1379 (5th Cir. 1980) (violation of federal statute is evidence of negligence per se in state court); Lukaszewicz v. Ortho Pharmaceutical Corp., 510 F. Supp. 961, 965, *amended*, 532 F. Supp. 211, 213 (E.D. Wis. 1981) (state considers violation of federal safety regulation negligence per se).

302 The definitions of "fraud" and "due process" belong in this category of legal questions.

ship between legislative action and private rights in court. Legislative action defined legal wrongs, and courts provided remedies. This relationship was implicit in the very fabric of the law. It was a necessary consequence of the function of courts and the fundamental rights of citizens in civilized society. On this side of the Atlantic, however, the last 100 years have left a legacy of uncertainty that has infected both federal and state law. The recent debate over implied private actions in the federal courts evidences this uncertainty and illustrates the regrettable condition into which the law has fallen.[303]

A. Praiseworthy Elements of the Recent Trend of Decision in the United States Supreme Court

In recent decisions the United States Supreme Court has finally begun to reestablish the certainty that had been lost. If the trend continues, a time will come when lawyers, judges, legislators, and ordinary people will be able to determine whether federal legislative action creates a private right to proceed in court. Federal legislative action will create such a right if Congress demonstrably intends that it should.

Certainty has great value. The tyrannical Emperor Caligula wrote the law in high and obscure places, so that the people could not read it and thereby know the law. In a free government clarity and predictability are central principles. If the people dislike the law as it is, they can change it; but they must know what the law is before they can act intelligently. Accordingly, whatever one may think of the wisdom or legitimacy of recent Supreme Court decisions in this field, one must admit that the decisions promote these central values. They clarify the ground rules for determining the adjudicatory consequences of legislative action in important fields of statutory law. If the members of Congress want their legislative actions to create or deny private rights of action, they now know what they must do to achieve their objectives.

Future decisions could do even more to promote certainty. As yet, the Court has stopped short of saying that private rights of actions must be described in legislative texts. Private rights of action may still be created by affirmative legislative intentions that are expressed in other places, some of which are high and obscure. For example, the recent decisions suggest that courts can find affirmative legislative intentions, supporting private rights, in legislative histories or in the structure of a given statutory scheme.[304] More-

303 *See supra* text accompanying notes 16-18.

304 *See* Merill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Cannon v. University of Chicago, 441 U.S. 677 (1979). I ignore here the important theoretical question

over, the Court has apparently accepted the interesting proposition that legislative action taken under the old regime, when private rights were sometimes available by implication of law, may still give rise to private rights. The Court believes that Congress may have intended to create private rights if it did not expressly deny such rights in the text of a statute passed at a time when private rights were available by implication of law.[305] The Court has also suggested that private actions for injunctive or nondamage relief may rest upon a different footing altogether.[306] Finally, the Court has apparently assented to the general proposition that state law may determine, in a proper case, the implicit adjudicatory effects of federal legislative action.[307] These generous concessions threaten to bring most of the old uncertainty back into the law through the back door.

If the Court persists in the view that private rights of action in the federal system are created only by affirmative legislative intentions, then it should not be content with half a loaf. The new theory cannot be held without cost. The Court should insist upon obtaining full value for it. The Court abandoned the traditional law; it should complete the process. It should resolve some of the lingering uncertainties by holding in the future that if federal legislators wish to create private rights of action, they must express their intentions in the legislative text itself.

Moreover, the state courts should follow the road taken by the Supreme Court to resolve the confusion that exists in those jurisdictions. The rule in state jurisdictions would simply be that neither state nor federal legislation would benefit plaintiffs as a matter of state law unless the legislature had affirmatively intended that it would. Legislation would not create rights of action or standards of care in actions for negligence, absent a demonstrable legislative intention to that effect. Nothing about the difference between federal law and state law, or the difference between federal courts and state courts, makes such a rule appropriate in one context but not the other.

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whether courts can ever legitimately give legal effect to legislative intentions not reflected in some way in the actual text of a legislative action. *See supra* note 59.

305 *See Curran*, 456 U.S. 353 (1982). *See also supra* note 63.

306 The shorthand formulations of the new theory carefully link the requirement of affirmative legislative intent with the damages remedy. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 820 n.36 (1982) (citing *Curran* for proposition that "controlling question in implication of statutory causes of action is whether Congress affirmatively intended to create a damages remedy").

307 *See* Cort v. Ash, 422 U.S. 66, 84 (1975).

B. The Costs of the New Theory

Almost everything has a cost, including the theory that private rights of action must be founded upon affirmative legislative intentions. These costs are intangible, but important. They result from the demise of ideas that have played a valuable role in Anglo-American government for hundreds of years.

The theory that private rights of action must be founded upon affirmative legislative intentions collides with two beneficial principles. First, it collides with the traditional assumption that legislative action can have adjudicatory consequences not described in the legislative text or demonstrably intended by the legislature. Second, it collides with the Anglo-American belief that courts are in business to provide remedies for legal wrongs. The conflict between the new theory and these two venerable principles is discussed in the paragraphs that follow.

1. *Adjudicatory Consequences Not Prescribed or Demonstrably Intended by the Legislature*

Legislative action can sometimes have adjudicatory consequences not described in the legislative text or demonstrably intended by the legislature. This elementary proposition,[308] which was discussed in Part I, was the starting point for our analysis of the law of implied private actions. It is also a standard against which one can judge the modern law of implied private actions.

Consider the Sherman Act. The Act declares that contracts in restraint of trade are illegal.[309] It does not describe the adjudicatory consequences of this condemnation, except that it authorizes the government to sue persons who violate the Act.[310] The Act gives voice to few actual legislative intentions with regard to a multitude of legal issues that can arise in cases involving contracts in restraint of trade. For example, the Act does not express an actual intention with regard to the question whether a defendant in a civil case, who has breached a patent license, can escape liability under the license on the theory that the license violates the Act.[311] But despite the silence of the statute on that point, the courts have held that the defendant can escape liability on that basis, even in a case in which the applicable contract law would otherwise deny the defense.[312]

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308 *See supra* text accompanying notes 47-63.

309 15 U.S.C. § 1 (1982).

310 *Id.* § 4.

311 Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 177 (1942) ("anyone sued upon a contract may set up as a defense that it is in violation of the Sherman Act").

312 *See id.* ("Local rules of estoppel . . . must yield to the Sherman Act's declaration that such agreements are unlawful. . . .").

The famous *Portal-to-Portal* case provides another illustration of the implicit adjudicatory effect of legislative action.[313] Before Congress enacted the Fair Labor Standards Act (FLSA),[314] the owners of iron mines calculated the wages of their miners on the basis of the time the miners spent on the "working face" of the mine.[315] This calculation did not take into account the time that the miners spent traveling within the mine to and from the "working face" at the beginning and the end of each day. After the passage of the FLSA, a dispute arose between miners and mine owners concerning the legality of this pay practice. The FLSA provided that employees were to be paid a minimum wage for each hour of their "workweek" and that they were to be paid time-and-one-half if their "workweek" exceeded forty hours.[316] The question in the *Portal-to-Portal* case was whether the time the miners spent within the mine traveling to and from the "working face" of the mine constituted part of the miners' "workweek" under the FLSA.

The issue came before the Supreme Court in 1944. The country was still suffering from the effects of the Great Depression. Millions of dollars were at stake. The interesting feature of the case was that the FLSA and its legislative history said essentially nothing about the issue to be decided.[317] Despite the absence of any evidence that Congress had actually made a legislative judgment on the question whether travel time had to be included in the determination of a "workweek," the Court did not hold the statute irrelevant to the adjudication. On the contrary, the Court held that the statute governed this dispute and that it required the owners to calculate wages on a portal-to-portal basis.[318] The practical effect of this holding upon the fortunes of the litigants could not have been more dramatic, or more "implicit," if the Court had held that the miners had an "implied right of action" under the FLSA to recover wages for travel time.

Multiple examples are unnecessary. The books contain many cases in which legislative words and policies affect the adjudication of disputes in ways not actually described in legislative texts or legislative histories. The phenomenon is so pervasive and profound that the illustrations given here seem almost trivial by comparison.[319]

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313 Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944).

314 29 U.S.C. §§ 201-219 (1982).

315 "The 'working face' is the place in the mine where the miners actually dull and load ore." *Tennessee Coal,* 321 U.S. at 592 n.2.

316 29 U.S.C. §§ 206(a), 207(a)(1).

317 *See* 321 U.S. at 603-04 (Frankfurter, J., concurring).

318 *Id.* at 603.

319 Constitutional law provides an impressive illustration of the same phenomenon. Courts have created the imposing edifice of American constitutional law largely upon

In a system of government based upon the principle of separation of powers, it is paradoxical that legislative action can have adjudicatory consequences that the legislature neither prescribed nor even contemplated. But the paradox is useful. One could imagine a different system, in which legislative action would be irrelevant to adjudication unless hard evidence indicated that the legislature had actually intended to affect the adjudication in a certain way. But experience suggests that such a system would not long endure. Even in civil law countries, where the dominance of the legislative text was a first principle of adjudication, legislatures and courts developed doctrines and procedures to make it possible to adjudicate cases for which the code made no provision.[320] The code could not become irrelevant to the adjudication simply because the case fell within the interstices of the text. The same phenomenon occurred in the Anglo-American system. Anglo-American courts developed many of our traditional rules of statutory interpretation or construction to fill gaps in legislative texts and to prevent legislation from becoming irrelevant to the adjudication of cases. These rules of interpretation sometimes enabled the courts to establish a relationship between the text and the case when the legislation itself did not actually delineate such a relationship.

Why did this happen? It happened because of the mundane necessity of adjudication, the necessity of choosing between one litigant and another in accordance with law. Cases arose in which the courts simply could not ignore the text. The legislation was so tightly entwined in the litigation that it could not be disregarded if the rule of law was to be preserved. Mrs. Smith refused to pay her rent. Mr. Jones lost his catch. The hapless Neiswonger fell beneath a wagon after a blimp passed overhead. These cases, and others like them, forced the courts to determine the adjudicatory effect of legislation, even when the legislature itself had not done so.

Within constitutional limits, the law in this country probably always was that if the legislature intended for a litigant to have a right of action, he would have one, and if the legislature did not intend for him to have such a right, then he would not. The new theory adopted by the Supreme Court has not changed this principle. What it has done, at least with regard to claims for damages, is to remove the right of action from the category of legal things that can exist in the absence of demonstrable legislative intentions. The

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the assumption that a legislative text, the Constitution itself, can have adjudicatory effects that are not actually described in the text or demonstrably intended by legislative authority. *See infra* notes 340-41 and accompanying text.

320 For a lucid and interesting discussion of the various procedures and doctrines that have been adopted in civil law countries to solve the problem of the case that falls between the cracks, see J. MERRYMAN, THE CIVIL LAW TRADITION 40-49 (1969).

Court has placed this right in a category of legal things for which demonstrable legislative intentions are indispensable. Today, federal rights of action are very nearly on a par with crimes. They cannot be created by implication.[321] The question is whether this new alliance is justified.

Legal theory cannot easily justify the alliance. The plaintiff in *Cort v. Ash* has difficulty understanding why he lost his case[322] when he reads *Sola Electric Company*.[323] The plaintiff in *Cort v. Ash* was aggrieved by a corporate expenditure that a federal criminal statute made "unlawful." The patent licensee in *Sola Electric Company* was aggrieved by a commercial contract that the Sherman Act made "illegal." In each case a citizen suffered economic injury because of a transaction that Congress had proscribed. Yet in *Cort* the citizen who relied upon the statute lost, and in *Sola Electric Company* the citizen who relied upon the statute won. What explains the different results? Do federal statutes implicitly benefit defendants but not plaintiffs? After giving due consideration to such questions, the plaintiff in *Cort v. Ash* could reasonably conclude that the deciding factor in his case, and in the subsequent decisions by the Supreme Court, was a simple, but clear, anti-plaintiff bias.

This suggestion is not a cynical one. Plaintiffs and defendants are different. Plaintiffs, not defendants, bring law suits, and federal judges are surely the most overworked officers in the federal government. Facing an overabundance of meritorious cases, federal judges can hardly be blamed for their temperamental disinclination to encourage the bringing of lawsuits in cases in which Congress has expressed no intention that lawsuits should be brought. Nonetheless, the anti-plaintiff bias is difficult to defend in theory, and already there are indications that the Supreme Court cannot maintain the new theory consistently.

In *Transamerica Mortgage Advisors, Inc. v. Lewis*,[324] for example, the Supreme Court determined the implicit adjudicatory consequences of two sections of the Investment Advisers Act of 1940 (the Act).[325] Section 215 of the Act provides that certain advisory contracts whose performance would violate the Act are "void . . . as

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321 *See, e.g.*, United States v. Laub, 385 U.S. 475, 487 (1967) ("Crimes are not to be created by inference."); Smith v. United States, 360 U.S. 1, 9 (1959) ("traditional canon of construction . . . calls for the strict interpretation of criminal statutes"); United States v. Bathgate, 246 U.S. 220, 225 (1918) (particular defendant's case "must be plainly and unmistakably within the statute"); United States v. George, 228 U.S. 14, 22 (1913) ("Where the charge is of crime, it must have a clear legislative basis.").

322 *See supra* text accompanying notes 263-79.

323 *See supra* text accompanying notes 309-12.

324 444 U.S. 11 (1979).

325 15 U.S.C. §§ 80b-1 to -21 (1982).

regards the rights" of the violator.[326] Section 206 of the Act declares "unlawful" certain deceptive devices and schemes.[327] In this case the plaintiff was a stockholder of a real estate investment trust, and the defendants were the trust's managers, trustees, and investment advisers. The plaintiff sued derivatively, alleging that the advisory contract between the investment advisers and the trust was "void" under section 215 and that the defendants had engaged in various practices that were "unlawful" under section 206.[328] The Act, however, made no provision for private actions. The district court denied relief on the theory that the Act created no private right of action,[329] but the court of appeals vacated the decision. The court of appeals concluded that under the theory of *J.I. Case Co. v. Borak*,[330] "implication of a private right of action for injunctive relief and damages under the Advisers Act in favor of appropriate plaintiffs is necessary to achieve the goals of Congress in enacting the legislation."[331]

The Supreme Court affirmed in part and reversed in part.[332] Writing for the majority, Justice Stewart said that the ultimate question was "whether Congress intended to create the private remedy asserted" by the plaintiff.[333] On that basis, the Court held that the plaintiff had no right of action under section 206 because Congress did not intend to create such a right of action.[334] However, the Court concluded that the result differed under section 215. The Court held that the plaintiff had a right to proceed under section 215 to recover a judicial declaration that the advisory contract was "void." Justice Stewart wrote that the plaintiff had this right because the legal consequences of "voidness" ordinarily included a right to go into court to have a contract declared "void";[335] Congress must therefore have intended to create such a right when it enacted section 215.[336]

The Court's argument that the plaintiff's right of action under section 215 was a normal legal consequence of statutory "voidness" and that Congress must therefore have intended to create such a right of action when it enacted the section was simplistic.[337] More-

326 *Id.* § 80b-15(b).
327 *Id.* § 80b-6.
328 444 U.S. at 13-14.
329 *Id.* The "pertinent orders" of the district court are unreported. *Id.* at 14 n.3.
330 377 U.S. 426 (1964).
331 Lewis v. Transamerica Corp., 575 F.2d 237, 239 (9th Cir. 1978).
332 444 U.S. at 24-25.
333 *Id.* at 15-16.
334 *Id.* at 24.
335 *Id.* at 18.
336 *Id.*
337 *See supra* note 63.

over, this argument created a difficult analytical problem for the Court. What was the difference between section 215 and section 206? If one section implied a right of action, why did the other not do so? The four dissenters believed that the majority could give no convincing explanation for the distinction between the implicit effects of the two sections, and they termed the majority's result anomalous.[338] A rational and disinterested observer would surely agree.

The *Transamerica Mortgage Advisors* case illustrates how difficult it is for judges trained in the Anglo-American legal tradition to adhere to the view that courts can give judgments for plaintiffs only in cases in which the legislature demonstrably intends that plaintiffs should have a right of action. Because of the normal implicit adjudicatory consequences of legislation, situations arise in which this theory simply does not make legal sense. Assume, for example, that a statute such as section 215 of the Investment Advisers Act declares that certain contracts are "void," a court finds such a contract to be present in a case that comes before it, and the legislature has given the court jurisdiction of the case. In this situation, is there any reason why the court should not say that the contract is "void" and render judgment on that basis? Indeed, one could argue that the court is *obligated* to render such a judgment. If the defendant challenges the contract, there can be objection to a judgment in his favor, the contract being legally "void." If the plaintiff challenges the contract, the result should be the same. To argue that the court cannot render an equivalent judgment for the plaintiff, absent evidence of an affirmative legislative intention, is to argue that in the plaintiff's case the court is entitled to behave like a bad child: it is entitled to be told, not once, but twice to do its duty. That kind of argument is not, or should not be, a winner. The *Transamerica Mortgage Advisors* majority had no choice but to reject it, at least with regard to the claim under section 215.

But what can be said of "voidness" can also be said of "unlawfulness." Assume that a statute such as section 206 of the Investment Advisers Act declares that something is "unlawful," a court finds that the "unlawful" thing is present in a case that comes before it, and the legislature has given the court jurisdiction of the case. What prevents the court from declaring the thing to be "unlawful" and rendering a judgment on that basis? And if the parties, as citizens, can be expected to obey the law, what prevents the court from ordering them to obey the law, absent another adequate remedy? Equity jurisdiction was created for the very purpose of ensuring that

338 444 U.S. at 26 (White, J., dissenting).

an adequate judicial remedy would be available in cases in which the law did not specifically authorize an adequate remedy. The federal courts have long recognized that federal plaintiffs have a right to seek equitable relief for violations of federal law even in cases in which federal legislation creates no express right of action on their behalf.[339] Furthermore, if the defendant might, in theory, be enjoined from violating the legislation, what reason could be given for denying the plaintiff the less intrusive remedy of damages?

These rhetorical questions do not suggest that courts must invariably resolve implied private claims in the plaintiff's favor, but they do suggest that the Supreme Court's new theory is not easily reconciled with traditional assumptions about the implicit adjudicatory consequences of legislative action. To argne that a plaintiff has no right of action absent a showing of an affirmative legislative intention to create such a right is to argne that courts cannot give judgments for plaintiffs in cases within their jurisdiction, even where legislation condemns what the defendant has done, absent some further indication of a legislative preference for the plaintiff's side of the case. But a jurisdiction which invariably requires the legislature to speak twice in favor of plaintiffs is a strange jurisdiction in-

339 This tradition created federal administrative law. Before Congress passed the Administrative Procedure Act, 60 Stat. 237, ch. 324 (codified at 5 U.S.C. §§ 551-76, 701-06, 3105, 3344 (1982)), implied private actions for equitable relief were an important vehicle by which aggrieved persons could obtain what is now called "judicial review" of federal administrative action. To be sure, a few early statutes actually authorized review proceedings in special cases, but the "nonstatutory review" proceedings (original actions in federal trial courts, usually for injunctive relief) played a crucial role in the development of early federal administrative law. These proceedings were implied private actions in every sense of the word. *See, e.g.*, American School of Magnetic Healing Co. v. McAnnulty, 187 U.S. 94 (1902) (injunction granted against withholding of plaintiff's mail by Postmaster General's order); Noble v. Union River Logging Co., 147 U.S. 165, 171 (1893) (act or refusal to act by head of department subject to review by courts where act is "purely ministerial"). *See generally* K. DAVIS, ADMINISTRATIVE LAW §§ 213-215 (1951).

Implied private actions against federal officers were not the only kind of actions in which federal courts awarded federal plaintiffs implied equitable remedies. The courts allowed implied private actions for equitable relief against private persons. *See, e.g.*, Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488 (1928) (lessees allowed to sue homestead patent owner for injunction to protect rights of entry and mining). Moreover, the cases show an interesting tradition of hybrid actions in which private persons could sue in federal court to prevent others from complying with allegedly unconstitutional federal laws. *See, e.g.*, Ashwander v. TVA, 297 U.S. 288 (1936) (shareholder suit to prevent allegedly illegal contract between corporation and government agency); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) (shareholder suit to enjoin corporation from complying with allegedly unconstitutional income tax law). Finally, the cases show a tradition of implied *public* actions in which the government sometimes obtained equitable relief against private persons for violation of public law, even absent express legislative authorization. *See, e.g.*, *In re* Debs, 158 U.S. 564 (1895) (government suit to prevent boycotting union from constructing railroads); United States v. American Bell Tel. Co., 128 U.S. 315 (1888) (government suit to set aside patents).

deed. It is dramatically different from the kind of jurisdiction that Anglo-American courts have actually exercised over the years.

I have already referred to the collision between the new theory and traditional federal equity jurisdiction. The new theory also collides with traditional assumptions about the implicit adjudicatory consequences of the highest form of legislation, the Constitution itself. That the Constitution implicitly creates rules for the adjudication of cases in federal and state courts is a well-settled proposition. The Constitution can implicitly support the claims of plaintiffs, and it can support various kinds of implied judicial remedies. In small cases, such as *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[340] and in great cases, such as *Youngstown Sheet & Tube Co. v. Sawyer*,[341] plaintiffs have been able to obtain remedies for constitutional wrongs, wholly in the absence of any demonstrable or specific legislative intention that they should have a remedy. The present Supreme Court has not yet repudiated these cases, but it has not adequately explained how one form of federal legislation can have implicit remedial effects in the absence of demonstrable, affirmative legislative intentions, while other forms of federal legislation cannot.

The Court has attempted to explain the distinction, to be sure. In *Davis v. Passman*,[342] a congressman's female employee alleged that he had discriminated against her because of her sex, in violation of the fifth amendment of the United States Constitution. Neither the Constitution nor any statute of the United States stated that she had a right to bring an action for this alleged discrimination, and the question of the existence of her right of action became the principal issue in the case.[343] When the case came before the Supreme Court, the Court faced the problem of reconciling the principles of *Cort v. Ash*,[344] which had been decided only a few years earlier, with the well-settled principles of constitutional adjudication that traditionally had allowed plaintiffs to obtain remedies for constitutional wrongs, absent a showing of affirmative legislative intentions to that effect. The *Passman* Court upheld the plaintiff's implied private claim under the fifth amendment and distinguished *Cort v. Ash*, stating simply that constitutional cases differed from statutory cases. The Court said that statutory rights and obligations, such as those involved in *Cort v. Ash*, were created by Congress and were often embedded in complex regulatory schemes, which sometimes pro-

340 403 U.S. 388 (1971).
341 343 U.S. 579 (1952).
342 442 U.S. 228 (1979).
343 *Id.* at 230.
344 422 U.S. 66 (1975).

vided "alternative mechanisms" for enforcement.[345] Congress could "appropriate[ly]" determine who would enforce these statutory rights and obligations. In the statutory context, the ultimate issue was simply one of legislative intent.[346] In the constitutional context, however, the same reasoning did not apply. The Constitution did not exhibit the "prolixity" of a statutory code;[347] it did not contain alternative mechanisms for enforcement; and its provisions were therefore implicitly enforceable by the courts. In other words, affirmative legislative intentions were a necessary predicate for rights of action in the statutory context but not in the constitutional context.[348]

The *Passman* Court did not suggest that the distinction between statutory and constitutional cases had anything to do with differences in judicial power as between the one category of cases and the other. Indeed, federal judicial power over cases arising under the statutes of the United States and federal judicial power over cases arising under the Constitution of the United States derive from the same constitutional and statutory sources: article III, section 2, clause 1 of the Constitution and 28 U.S.C. § 1331.[349] The Court would have had difficulty arguing that the language or history of these legislative provisions created fundamentally different judicial functions as between the two types of cases. The argument in *Davis v. Passman* was not, in fact, an argument about judicial power. It was an argument about prudence, or a rule of interpretation arguably required by prudence. The Court held that in the statutory context it was prndent to consult congressional intentions and to recoguize private rights only where they were affirmed by congressional intentions. In the constitutional context prudence did not require the same restricted approach.

To the extent that the holding in *Davis v. Passman* was based upon a rule of interpretation, it was inconsistent with the traditional law of implied private actions in the statutory context and with the traditional law governing the implicit effects of legislative action generally. The Constitution is not the only form of legislation that has implicit adjudicatory effects, and the argument that implied private rights are available under the Constitution but not under statutes cannot be defended on that basis. Moreover, to the extent that the holding in *Davis v. Passman* was based on the principle of judicial self-restraint, that principle applies in constitutional cases as well as

345 442 U.S. at 241.
346 *Id.*
347 *Id.*
348 *Id.* at 241-42.
349 U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1331 (1982).

in cases involving subordinate forms of legislation. With regard to the latter, judicial excesses are immediately and obviously subject to correction in the next session of Congress. Remedial excesses in some constitutional cases may also be subject to legislative correction, but if the need for judicial self-restraint militates against the implied private action, then the argument against the implied private action is even stronger in constitutional cases than in statutory cases.[350] The argument for self-restraint does not prove what the Court sought to prove in *Davis v. Passman*. It proves the reverse.

2. *The Function of Courts in a Government Under Law*

The right to seek a judicial remedy for a legal wrong is not the greatest blessing that can befall a citizen of this country. Some people would say it is not a blessing at all. But on the whole, the cynics are wrong. This right has value. Even today, as one reads Coke's ancient words, one can sense the pardonable pride that he took in the laws of his country, and one can hear the sound of freedom being born in the West: "[E]very Subject of this Realme, for injury done to him in bonis, terris, vel persona, by any other Subject . . . without exception, may take his remedy by the course of the Law, and have justice, and right for the injury done to him . . . ."[351] The idea that human beings did not have to suffer in silence, the idea that people did not have to wait upon divine judgments or upon the operations of nature or the marketplace, the idea that in civilized society people were entitled to have justice for the wrongs done to them, these were important ideas in Coke's day. They were important then, not because they had anything to do with the laws of God, the laws of nature, or the laws of commerce, but because they had something to do with human dignity and the workings of free government. They are important today for the same reasons.

Courts are in the business of providing remedies for legal wrongs. This conception of the judicial function is old-fashioned. More fashionable conceptions exist, to be sure: the courts are in the business of suppressing conflict, generating conflict, reforming institutions, preserving institutions, protecting the interests of dominant economic classes, protecting minorities, carrying out the policies of the legislature, reviewing the policies of the legislature, protecting society from dangerous individuals, redistributing losses, monitoring the conduct of government officials, disposing efficiently of the cases that come before them, and allocating economic resources in ways that maximize utility. But for this writer at least, the old-fashioned conception is as sensible, as factual, as valuable, and

350 *Cf.* Ashwander v. TVA, 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring).
351 E. COKE, *supra* note 69, at 55-56.

as valid as any of these more fashionable theories. Moreover, it is far less pretentious. As well as any of them, the old formula describes what courts actually do, and it describes what they should do in a system of free government. Courts do not decide what is right or wrong from a legal standpoint; that task is for the legislature. But courts do provide remedies for the wrongs that the law defines. Courts do not have to be told to provide these remedies. They do it because they are courts.

The idea that courts cannot provide remedies for wrongs defined by law, absent proof of an affirmative legislative intention that they should do so, is at odds with this old-fashioned conception of the judicial function. The Supreme Court itself has acknowledged the inconsistency.[352] The conflict exists, and it cannot be explained away. The Constitution is not in jeopardy. The nation will survive. But it is fair to inquire into the reasons for this self-inflicted wound.

The traditional law was modest and unassuming. It did not interfere with any actual majoritarian process because the legislature could freely affirm or deny the private right. Nor did the traditional law require the courts to provide a remedy if the plaintiff already had an adequate remedy in some other forum or through some other procedure.[353] The traditional law provided for the middle case: if the legislature had decided neither that the plaintiff should have an adequate remedy nor that he should be without one, then the courts could supply an adequate remedy by implication of law, in accordance with Coke's principle. Courts resolved doubts in favor of the proposition that the wrong should be righted. The doors of the courts were open unless the legislature had determined that they should be closed. The Supreme Court's new theory has reversed this presumption. Today, the doors of the federal courts are closed unless the legislature has determined that they should be open. What were the reasons for this change?

The historical reasons for the change were discussed above, but they do not justify the change in a philosophical sense. Some of the individual justices have explained their new position with clarity and precision, but the majority opinions have been more concerned with stating the position than with explaining or defending it. The obvious and considerable virtue of the new position—its tendency to promote certainty and good legislative practice—does not appear to have played an important role in its development. The difficulties presented by crowded dockets and sloppy legislative draftsmanship, on the other hand, are pragmatic concerns. They engender sympa-

352 *See* Nixon v. Fitzgerald, 457 U.S. 731, 754 n.37 (1982).

353 *See supra* notes 98-112 and accompanying text.

thy and understanding, but they do not justify the abandonment of an honored and valuable legal tradition.

Nor do the peculiarities of the federal system provide a convincing justification for this change. The federal doctrine of separation of powers does not require judicial remedies to be predicated upon affirmative legislative intentions. If it did, an enormous body of federal law would simply go out the window. Nor does the doctrine of *Erie Railroad v. Tompkins*[354] have anything to do with the question of implied private remedies. If Congress has authority to define the wrong, then the federal courts are competent to provide a remedy. Similarly, the creation and proliferation of federal administrative agencies did not require the courts to abandon the traditional law. The traditional law did not interfere with express remedies. It authorized implied remedies only where no other remedy was adequate to right the wrong.

Federalism, too, fails to justify the new position. Federalism is a legitimate concern, but it is a two-way street. Admittedly, an implied federal remedy may enable a plaintiff to prevail in a federal court, as a matter of federal law, in a case that might otherwise have been governed by the law of the states. In such a case the implied federal remedy trenches on state power. On that basis, one can argue that actual federal legislative authorization should be required before a federal remedy can be provided. But consider the alternative *Cort v. Ash* suggested: if federal law does not determine the adjudicatory consequences of federal legislation, they may be determined by state authorities under state law. A sincere and even-handed proponent of federalism should be troubled as much by that prospect as by the infringement on state power represented by the implied federal remedy. If one can argue, in the name of federalism, that federal judicial remedies should not be given for federal legislative wrongs absent actual federal legislative authorization, then one can argue with equal force that the adjudicatory consequences of federal legislative action should be determined by federal courts as a matter of federal law, and should not be left to the states absent actual federal legislative authorization. In this context arguments based on federalism run as easily in the one direction as the other.

In the end, having considered the theory, the history, and the arguments that might be made on one side and the other, the critic is left with a feeling of vague dissatisfaction. He has witnessed, in the last forty years, what can only be described as a metamorphosis

354 304 U.S. 64 (1938).

in the federal law. Yet he is at a loss to justify the change or even to understand fully the reasons for it.

Summary and Conclusion: A Question of Values

The adjudicatory consequences of legislative action are those described in the legislative text, intended by the legislature, or assigned to the legislation by operation of law. For centuries, private rights of action could belong to any one of these three categories, depending on the content of the legislation in question and the circumstances of the case. The right of action could belong to the third category in any case in which the legislature had made no provision for an adequate private remedy and had manifested no intention that the plaintiff should be without a remedy. The legal reason for the implied right in such a case was a deceptively simple legal principle: in civilized society people were entitled to have adequate remedies for the wrongs that were done to them. This principle was consistent with the general idea that a legislative text could have adjudicatory consequences not actually described in the text or demonstrably intended by the legislature. It was also consistent with the traditional conception of the function of courts in a government under law. The courts were presumptively open, and their job was to provide adequate remedies for the wrongs the law defined.

During the latter half of the nineteenth century the traditional law began to break down. In federal jurisdictions at least, the confusion resulting from this degenerative process began to resolve itself within the last decade, as the Supreme Court began to withdraw the right of action from the category of legal rights that could result from legislative action by operation of law. Today, at least with respect to claims for damages, the federal right of action must be predicated upon actual textual references or demonstrable legislative intentions in favor of the plaintiff. This new rule departs from traditional law to the extent that it precludes the right of action in the middle case—the case in which the legislature has manifested no intention either to grant or to deny the remedy claimed by the plaintiff.

In an age in which legislation touches virtually every field of human endeavor, it is important to be clear about the circumstances in which legislative action will affect the rights of plaintiffs. The Supreme Court's new approach to the interpretive problem presented by implied private claims is praiseworthy to the extent that it clarifies the rules for determining this effect. Moreover, because the legislature controls the right of action in any event, the new rule is, in one sense, a relatively conservative cure for the malady of confusion. It simply requires that the legislature control the

issue, and affirm the right, at the threshold. The same rule could be adopted in state jurisdictions to clarify the effect of state and federal legislative action upon the claims of plaintiffs under state law.

Today, and in any period, the small choices that are made in doubtful cases disclose the spirit of the law. Cases involving implied private claims are doubtful in that sense. They tend to arise when the legislature has manifested no actual intention concerning the right in question, and the courts must resolve these cases by making a small choice at the margin. The Supreme Court now says that the federal courts must make this choice in accordance with the safe and certain proposition that private rights of action do not exist unless they are based upon affirmative legislative intentions. But in the past, Anglo-American courts have made this choice in accordance with larger principles.

In the end, it is simply a question of values. In the development of governmental institutions in the West, it was a great day when people came to see and to believe that there could be an institution of last resort, where men and women could go to find remedies for legal wrongs. The courts eventually became that institution, at least in theory. The courts were presumptively open, even in the marginal cases, unless legislative authority had determined that they should be closed. This was not an efficient or a convenient idea in an economic sense, but it was, and is, a powerful and valuable political principle. If one believes in this principle, one is inclined to believe that legislative action should have implicit effects in private litigation and that courts should give remedies for wrongs defined by legislation unless the legislature has actually determined that they should not. One is also inclined to believe that a theory which invariably predicates rights of action upon affirmative legislative intentions encroaches at the margin on one of the central principles of goverument under law.