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JUSTICE HARLAN AND IMPLIED RIGHTS OF ACTION*

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I. INTRODUCTION

Justice John M. Harlan was one of the Supreme Court's great dissenters. He served during a time when the majority of the Court was determined to use the power of the federal courts to help remedy societal ills. Because Justice Harlan generally opposed this mission,[1] he is sometimes thought to have held a restrictive view of federal court remedial power. Although his conceptions of federalism and separation of powers made him cautious in exercising judicial power, he nonetheless held a very expansive, generous view of federal court authority to grant traditional damage and equitable remedies.

During Justice Harlan's tenure, the Court had many opportunities to imply or create rights of action on behalf of parties seeking relief. Some cases were brought by the government, and some by private parties. Claimants in some cases sought injunctive relief, and others sought damages. Also, litigants sought to imply rights of action both under federal statutes and under the Constitution. Although Justice Harlan did not always vote to create a cause of action, he wholeheartedly endorsed the traditional standards for deciding whether to imply a remedy. After Justice Harlan left the Court, the traditional standards were abandoned and new, restrictive standards were adopted. This article assesses how Justice Harlan would likely have viewed the new standards. My conclusion is that he would not have approved of them.

This article proceeds as follows. Part II briefly traces the evolution of standards for implication of rights of action. Part III discusses Harlan's views on this subject. Part IV explains how the old standards were abrogated and the new standards put in their place. It reviews the reasons offered for the change, and then assesses those reasons in light of Justice Harlan's views of the subject.

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1. *See* J. Harvie Wilkinson III, *Justice John M. Harlan and the Values of Federalism*, 57 VA. L. REV. 1185, 1189-90, 1199, 1208 (1971).

II. THE EVOLUTION OF STANDARDS FOR IMPLICATION OF RIGHTS OF ACTION

To bring suit, a plaintiff must assemble a "competency package" containing several elements. The plaintiff must allege the violation of a right. He must also have standing; that is, the case must present an actual, concrete controversy. In addition, the court must have subject matter jurisdiction over the dispute. And finally, the plaintiff must have a cause of action. A cause of action exists if either a statute or a court decision says, in effect, that if someone violates your right, you can sue them for an appropriate remedy.[2]

For hundreds of years, courts in England and America have grappled with the problem of how to proceed when legislation creates rights and correlative duties, but fails to create a cause of action to enforce those rights.[3] An important early case, *Couch v. Steel*,[4] established general standards. A person could institute an action for damages when he was injured by breach of a statute enacted for his benefit, unless the statute provided a different mode of compensation for plaintiff's injury or specifically denied a damage remedy.[5] The court also distinguished between public and private wrongs. The fact that a statute authorized a public remedy, such as a fine paid to someone other than the plaintiff, did

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2. Justice Brennan offered a somewhat narrower definition of cause of action in this context in Davis v. Passman, 442 U.S. 228 (1979). Essentially, he separated the power to bring suit from the relief sought:

> [C]*ause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and *relief* is a question of the various remedies a federal court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the "preconditions" for such equitable remedies.

Id. at 239 n.18. Although Justice Brennan technically is correct, I prefer to unite the ability to sue and the remedy in defining a cause of action. A cause of action is a claim for relief. As a practical matter, most courts deciding whether to imply a right of action consider the relief the plaintiff seeks.

3. The historical development of implication standards is reviewed in Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 671-77 (1987); *see also* Graham L. Fricke, *The Juridical Nature of the Action upon the Statute*, 76 LAW Q. REV. 240 (1960) (analyzing English theory concerning whether or not an action lies for breach of a statutory duty); Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. PA. L. REV. 1 (1968) (concluding that a federally created remedy in damages is possible, sensible, and necessary).

4. 118 Eng. Rep. 1193 (K.B. 1854).

5. *See id.* at 1196-98.

not prevent a court from implying a private right of action to compensate the plaintiff.[6]

Following the English tradition, American state courts in the late 1800s and early 1900s routinely heard tort actions for violation of statutory duties.[7] Courts granted private remedies for the violation of a statute authorizing other sanctions if the statute was intended for the benefit of a class of persons of which the plaintiff was a member, rather than for the public generally, and if the harm suffered was of a kind the statute generally was intended to prevent.[8] Until recently, the federal courts generally followed the traditional standards in providing remedies for violation of statutory duties.[9] These standards were in effect as late as

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6. *See id.*

7. *See, e.g.*, Osborne v. McMasters, 41 N.W. 543 (Minn. 1889); Schell v. Dubois, 113 N.E. 664 (Ohio 1916); Stehle v. Jaeger Automatic Mach. Co., 69 A. 1116 (Pa. 1908). For extensive citations to such cases, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 220-34 (5th ed. 1984).

8. *See* KEETON ET AL., *supra* note 7, § 36, at 220-34. These standards were incorporated in the RESTATEMENT OF TORTS § 286 (1934):

> § 286. VIOLATIONS CREATING CIVIL LIABILITY
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> The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if:
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> (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and
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> (b) the interest invaded is one which the enactment is intended to protect; and
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> (c) where the enactment is intended to protect an interest from a particular hazard, the invasion of the interests results from that hazard; and
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> (d) the violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining an action.

9. *See, e.g.*, Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 553, 569-71 (1930) (holding legally enforceable the right of railway employees to organize and designate representatives, and the duty of railway employers to refrain from interfering with these activities by employees); Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39-40 (1916) (implying a private right of action under a federal statute requiring trains in interstate commerce to have secure handholds); Hayes v. Michigan Cent. R.R., 111 U.S. 228, 239-40 (1884) (implying a private right of action under a city ordinance granting a railroad a right of way on the condition that it erect fences along the rail line to protect persons and property from danger); Fitzgerald v. Pan Am. World Airways, 229 F.2d 499, 501 (2d Cir. 1956) (allowing a private right of action for racial discrimination in violation of the Civil Aeronautics Act). As the Supreme Court has noted, the traditional approach to implication of remedies "prevailed throughout most of our history." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 375 (1982).

1975, when the Supreme Court reaffirmed them in *Cort v. Ash*.[10] In *Cort*, the standards were summarized as follows:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[11]

III. JUSTICE HARLAN'S VIEWS

Justice Harlan embraced the traditional implication rules. His opinion for the Court in *Mitchell v. DeMario Jewelry*[12] is a veritable ode to the power of the federal courts to grant appropriate remedies for violation of a federal statute. In *Mitchell*, the Secretary of Labor brought an action on behalf of employees of DeMario Jewelry seeking wages unpaid in violation of the Fair Labor Standards Act of 1938. DeMario was displeased with the employees for complaining to the Secretary, and they were eventually discharged. Section 15(a)(3) of the Act made it unlawful for an employer to discharge or otherwise discriminate against an employee because the employee filed a complaint under the Act.[13] Section 17 gave the district courts jurisdiction to restrain violations of section 15.[14] The Secretary brought the action for back pay under section 17.[15]

The district court found the discharges unlawful and ordered reinstatement, but did not order reimbursement for lost wages.[16] The

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10. 422 U.S. 66 (1975). The plaintiff in *Cort* was a shareholder in Bethlehem Steel. He sought to imply a private right of action for damages against corporate directors who allegedly violated a federal criminal statute prohibiting corporations from using corporate funds in connection with a presidential election. The Court refused to create a right of action, but it explicitly approved the traditional standards for implication. *See id.* at 77-78.

11. *Id.* at 78 (citations omitted) (quoting Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916)).

12. 361 U.S. 288 (1960).

13. *See* Fair Labor Standards Act of 1938 § 15(a)(3), 29 U.S.C. § 215(a)(3) (1988).

14. *See id.* § 17, 29 U.S.C. § 217.

15. *Mitchell*, 361 U.S. at 288.

16. *See Mitchell*, 180 F. Supp. 800 (M.D. Ga. 1957).

court of appeals held that the district court could not order payment of lost wages because a provision of the Act prohibited courts in section 17 actions from awarding "unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages."[17] The issue before the Supreme Court was whether this provision also forbade courts from ordering payment of wages lost by unlawful discharge.[18]

Justice Harlan gave federal equitable power a very broad sweep. He quoted at length from *Porter v. Warner Holding Co.*,[19] a case where the Court implied a power to order landlords to return excessive rents collected in violation of the Emergency Price Control Act of 1942. In *Porter*, the Court noted that the jurisdiction granted by the 1942 Act was an equitable one, and said:

> [A]ll the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. . . . [T]he court may go beyond the matters immediately underlying its equitable jurisdiction . . . and give whatever other relief may be necessary under the circumstances. . . .
>
> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command.[20]

After quoting this passage, Justice Harlan himself then said:

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, "there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature."[21]

In deciding the case, Harlan borrowed the standards for implication of private rights of action for damages. This seems appropriate. Although the action was brought by a public official and sought a form of equitable restitution, the result, if the Secretary was successful, was that the

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17. *Mitchell*, 260 F.2d 929, 931-32 (5th Cir. 1958).

18. *See Mitchell*, 361 U.S. at 288.

19. 328 U.S. 395 (1946).

20. *Id.* at 398, *quoted in Mitchell*, 361 U.S. at 291.

21. *Mitchell*, 361 U.S. at 291-92 (quoting Clark v. Smith, 38 U.S. (13 Pet.) 195, 203 (1839)).

defendant would pay money to the individual employees. Harlan appeared to presume that sections 15 and 17 of the Act were enacted for the benefit of people like the employees in this case. In addition, since Congress relied on information and complaints from employees to enforce the Act, effective enforcement could occur only if employees felt free to approach officials with their grievances.[22] From this it followed, according to Harlan, that reimbursement for lost wages was necessary to achieve congressional purposes. If all that complaining employees could receive was prospective relief reinstating them, employees would doubtless be reluctant to complain about violations of the Fair Labor Standards Act because they would not be able to afford to lose their pay during the period while they sought reinstatement.[23]

Finally, Justice Harlan looked at the legislative history of the Act and found no indication that Congress would not want a court to order payment of lost wages caused by an unlawful discharge. Harlan thought that the provision of section 17 relied upon by the court of appeals to deny relief simply did not encompass this situation. Instead, the provision prohibited only recoupment of underpayments of statutorily prescribed rates for persons still employed, since it was phrased only in terms of unpaid minimum wages and overtime.[24]

In 1964, Justice Harlan joined a unanimous opinion by Justice Clark in the well-known case of *J.I. Case Co. v. Borak*.[25] *Borak* also applied the traditional standards for implication of a private right of action for damages. The plaintiff in this case was a stockholder of J.I. Case Co. He charged that a merger between Case and another company had been effected through the circulation of a false and misleading proxy statement. One count of the complaint alleged that this conduct violated section 14(a) of the Securities Exchange Act of 1934.[26] Section 27 of the Act gave the federal district courts exclusive jurisdiction of all suits in equity and actions at law brought to enforce the Act, but it did not explicitly create a private right of action for damages.[27]

The Supreme Court decided to imply such a right. The Court reasoned that one purpose of section 14(a) is to protect investors such as the plaintiff in this case.[28] In addition, private enforcement of the proxy rules provides a necessary supplement to action by the Securities and Exchange

22. *See id.* at 292.

23. *See id.* at 292-93.

24. *See id.* at 294-96.

25. 377 U.S. 426 (1964).

26. *Id.* at 427.

27. *See* Securities Exchange Act of 1934 § 27, 15 U.S.C. § 78aa (1988).

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

Commission, since time constraints do not allow the Commission to examine the facts underlying all of the proxy statements it reviews.[29] The Court concluded: "We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."[30]

Another notable example of Justice Harlan's remedial generosity is his finely reasoned concurring opinion in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[31] *Bivens* held that a private right of action for damages against federal officials could be implied directly under the Fourth Amendment of the United States Constitution.[32] For Harlan, this followed *a fortiori* from two lines of authority. First, he reviewed the *Borak* decision approvingly and concluded that it would be "at least anomalous" to hold that the federal judiciary could create a private cause of action to enforce legislatively created rights, but could not accord a damage remedy for violation of rights sufficiently fundamental to be included in the Constitution.[33] Second, because the general grant of federal question jurisdiction is thought adequate to empower a federal court to grant injunctive relief for the areas of subject matter jurisdiction enumerated therein, it follows that the same general grant is sufficient to empower a federal court to grant a traditional remedy at law.[34] Finally, Justice Harlan noted that, assuming Bivens's innocence of the crime charged, the exclusionary rule provided no relief.[35] Thus, "[f]or people in Bivens' shoes, it is damages or nothing."[36]

Mitchell, *Borak*, and *Bivens* all demonstrate Justice Harlan's willingness to fashion complete remedies to redress violations of rights. He did not, however, vote to imply public or private rights of action in all cases where the issue arose. Where he felt the traditional requirements were not satisfied, he counseled against implication of a remedy.

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29. *See id.*

30. *Id.* at 433. Justice Clark did not canvas the legislative history of the Act to determine whether there was any indication of legislative intent to create or deny private rights of action. It seems a reasonable inference that the Court did not find any indications of legislative intent to deny such a remedy.

Subsequently, Justice Harlan joined in a unanimous opinion affirming a lower court holding that a private right of action could be implied under § 10(b) of the Securities Exchange Act of 1934. *See* Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 & n.9 (1971).

31. 403 U.S. 388, 398 (1971) (Harlan, J., concurring).

32. *See id.* at 397.

33. *See id.* at 402-04 (Harlan, J., concurring).

34. *See id.* at 405.

35. *See id.* at 410.

36. *Id.*

For example, in *T.I.M.E. Inc. v. United States*,[37] Justice Harlan wrote the majority opinion declining to create a right of action on behalf of a shipper against an interstate motor carrier that allegedly had charged unreasonable rates. In examining the legislative history of the Interstate Commerce Act, Harlan noted that Congress explicitly created a cause of action against shippers charging unreasonable rates by either *rail* or *water* carriers, but it omitted these provisions from the portion concerning *motor* carriers.[38] In addition, Congress had twice considered and rejected attempts to amend the statute to grant shippers a cause of action against motor carriers.[39] In light of this clear congressional intent to deny a private right of action, the Court declined to create one. This accorded with traditional practice. Justice Harlan's opinion indicates no disagreement with the governing implication standards; he simply believed they were not satisfied.

Justice Harlan also voted to deny the government a right of action for injunctive relief in *United States v. Republic Steel Corp.*[40] The government sought to enjoin several steel companies from discharging water filled with particles that were accumulating on the bottom of the Calumet River and reducing its depth. The majority held that the remedy could be implied under the 1899 Rivers and Harbors Appropriation Act, but Justice Harlan, joined by three other Justices, dissented.[41] His main argument was that Congress did not intend to prohibit this sort of discharge.[42] Thus, quite apart from the question of remedy, Justice Harlan thought that the supposed wrongdoing simply was not covered by the legislation. He went on to contend, however, that even if a violation of the Act had been shown, injunctive relief should not be authorized. He said: "[W]here, as in this statute, Congress has provided a detailed and limited scheme of remedies, it seems to me the Court is precluded from drawing on any source outside the Act."[43]

This portion of the opinion arguably is inconsistent with Justice Harlan's generous approach to the implication of equitable remedies in *Mitchell v. DeMario Jewelry*.[44] There is, however, an interesting postscript to this case. Seven years later in *Wyandotte Transportation Co.*

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37. 359 U.S. 464 (1959).

38. *See id.* at 470-71.

39. *See id.* at 471-72.

40. 362 U.S. 482 (1960).

41. *See id.* at 493 (Harlan, J., dissenting). Justices Frankfurter, Whittaker, and Stewart joined Harlan's dissent in this case. *See id.*

42. *See id.* at 498-506.

43. *Id.* at 507.

44. 361 U.S. 288 (1960); *see also supra* text accompanying notes 12-24.

v. United States,[45] Justice Harlan concurred in a decision implying rights of action on behalf of the government in two cases under the Rivers and Harbors Act. He, in effect, repudiated his discussion of remedies in *Republic Steel*:

> I have not been unmindful of the view stated by me in dictum in my dissenting opinion in *United States v. Republic Steel Corp.* to the effect that the courts are precluded from supplying relief not expressly found in the Rivers and Harbors Act. Insofar as that dictum might be taken to encompass the present case, where, contrary to my view in *Republic Steel*, I do believe that the relief afforded by this Court is fairly to be implied from the statute, candor would compel me to say that the dictum was ill-founded.[46]

In sum, Justice Harlan had a generous view of the power of the federal courts to imply rights of action. He willingly accepted the traditional standards. Although he did not always vote to create rights of action when statutes failed to provide them, he consistently applied the established rules in deciding whether remedies should be created by the federal courts.

IV. JUSTICE HARLAN AND THE CURRENT LAW

In three cases decided in 1979, the Supreme Court drastically restricted the traditional standards for implication of rights of action from federal statutes. In *Cannon v. University of Chicago*,[47] the plaintiff alleged that she had been denied admission to medical school because she was a woman. She brought an action under a federal statute that prohibited sex discrimination by educational institutions that received federal funds.[48] The statute did not, however, create a specific right of action in favor of a person injured by violation of the law.

Although the Court implied a private right of action, the Justices' opinions revealed dissatisfaction with the traditional rules. The majority recast *Cort v. Ash*[49] by framing the issue as one of "statutory construction" and stating that "before concluding that Congress intended

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45. 389 U.S. 191 (1967).

46. *Id.* at 211 (Harlan, J., concurring) (citation omitted).

47. 441 U.S. 677 (1979).

48. *See id.* at 680-83. Plaintiff brought the action under Title IX of the Education Amendments of 1972 § 901, 20 U.S.C. § 1681 (1988).

49. 422 U.S. 66 (1975); *see also supra* notes 10-11 and accompanying text.

to make a remedy available to a special class of litigants, a court must carefully analyze the four factors that *Cort* identifies as indicative of such an intent."[50] This language suggests that the second *Cort* factor—whether Congress intended to create or deny a private right of action—is the primary factor, and that the others are simply secondary aids to consider in deciding the relatively narrow question of statutory construction posed by the second factor. A concurring and a dissenting opinion expressed even plainer disagreement with the traditional rules.[51]

The Court adopted the restrictive approach suggested in *Cannon* in two subsequent cases. In *Touche Ross & Co. v. Redington*,[52] the Court declined to imply a right of action under section 17(a) of the Securities Exchange Act of 1934 on behalf of customers of a brokerage firm against accountants who conducted a faulty audit of the firm's records. The Court stated that "our task is limited *solely* to determining whether Congress intended to create the private right of action asserted" by the plaintiffs, and thus any argument for implication based on tort principles was "entirely misplaced."[53] The Court also explicitly stated that the four *Cort* factors are not to be weighed equally, and that the central inquiry is whether Congress intended to create a private right of action.[54] The Court reaffirmed this new approach in *Transamerica Mortgage Advisors v. Lewis*.[55] There the Court implied a private right of action under one section of the Investment Advisors Act of 1940, but refused to do so under another section.[56] The Court clearly stated the standards it applied:

> [W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. *Touche Ross & Co. v. Redington*; *Cannon v. University of Chicago*. We accept this as the

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

51. Justice Rehnquist, in a concurring opinion joined by Justice Stewart, attempted to put Congress on notice that creation of rights of action is Congress's responsibility. *See id.* at 717 (Rehnquist, J., concurring). He stated that it is far better for Congress to specify "when it intends private litigants to have a cause of action, [and] for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch." *Id.* at 718. Justice Powell filed a lengthy dissenting opinion attacking the *Cort* test as a violation of separation of powers principles. *See id.* at 730 (Powell, J., dissenting).

52. 442 U.S. 560 (1979).

53. *Id.* at 568 (emphasis added).

54. *See id.* at 575.

55. 444 U.S. 11 (1979).

56. *See id.* at 16-24 (implying a private right of action under § 215 of the Act, but refusing to do so under § 206).

> appropriate inquiry to be made in resolving the issues presented by the case before us.[57]

Thus, the new rule was firmly in place.[58]

It is difficult to overstate the importance of the change in implication standards made in 1979. The Court brushed aside hundreds of years of common law tradition and dealt a severe blow to the vindication of rights. Very few private rights of action have been implied from federal statutes under the new standards. If a statute does not explicitly authorize a private remedy, the legislative record rarely shows that Congress intended to create one but somehow forgot. And without a remedy, the correlative duties imposed by the statute become merely voluntary obligations.

It is intriguing to ponder what Justice Harlan would have thought of the new standards. The answer may be easy. Justice Harlan had a profound respect for precedent, particularly precedent of long standing.[59] As he remarked in *Fay v. Noia*, "a decision which finds virtually no support in more than a century of this Court's experience should certainly be subject to the most careful scrutiny."[60] He thus would have been extremely reluctant to overturn the traditional implication standards without very good reason. In addition, he wrote or joined in ten or more

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57. *Id.* at 15-16 (citations omitted).

58. Subsequent Supreme Court cases have followed the new rule, although some opinions continue to consider the factors listed in Cort v. Ash, 422 U.S. 66 (1975), as a means of determining whether Congress intended to create the asserted right of action. *See, e.g.*, Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804, 810-11 (1986) (stating that the four-part test is the means by which congressional intent to create a cause of action is discerned); Daily Income Fund v. Fox, 464 U.S. 523, 535-36 (1984) (utilizing the four *Cort* factors); Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981) (utilizing *Cort* test to determine congressional intent). The Supreme Court recently refused to imply a right of action in a case brought by a federal employee seeking to enforce a statutory right of fair representation by his labor union. *See* Karahalios v. National Fed'n of Fed. Employees, 489 U.S. 527 (1989). The Court noted that implication issues are "being resolved by a straightforward inquiry into whether Congress intended to provide a private cause of action." *Id.* at 536.

59. *See* Henry J. Bourguignon, *The Second Mr. Justice Harlan: His Principles of Judicial Decision Making*, 1979 SUP. CT. REV. 251, 277-81; Norman Dorsen, *John Marshall Harlan*, *in* 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 2803, 2809 (Leon Friedman & Fred L. Israel eds., 1969).

60. 372 U.S. 391, 463 (1963) (Harlan, J., dissenting); *see also* Cheff v. Schnackenberg, 384 U.S. 373, 383 (1966) (Harlan, J., concurring in part and dissenting in part) (criticizing the Court for "improvis[ing] a rule necessarily based on pure policy that largely shrugs off history").

opinions that applied and reaffirmed the traditional standards.[61] It seems unlikely, then, that Harlan would have said "Oh, forget all that; let's change the rule."

The problem with the easy answer is that it ignores Justice Harlan's willingness to depart from precedent when he was convinced that past decisions were clearly wrong or when careful scrutiny convinced him that they were ill-suited to contemporary American needs. He said of stare decisis in *Williams v. Florida*:[62]

> It is a solid foundation for our legal system; yet care must be taken not to use it to create an unmovable structure. It provides the stability and predictability required for the ordering of human affairs over the course of time and a basis of "public faith in the judiciary as a source of impersonal and reasoned judgments." . . . Woodenly applied, however, it builds a stockade of precedent that confines the law by rules, ill-conceived when promulgated, or if sound in origin, unadaptable to present circumstances. No precedent is sacrosanct and one should not hesitate to vote to overturn this Court's previous holdings—old or recent—or reconsider settled dicta where the principles announced prove either practically . . . or jurisprudentially . . . unworkable, or no longer suited to contemporary life . . . .[63]

Consequently, determining whether Justice Harlan would have voted to overrule the traditional implication standards requires assessing whether he would have accepted the arguments offered in support of the change.

The Court has offered two main justifications for the new standards. One is based on policy concerns and the other is constitutional. Justices favoring the new standards argue that Congress is much better able than a court to gather facts, establish priorities, and accommodate varying viewpoints in setting the enforcement provisions of modern regulatory legislation.[64] Intricate policy choices may be necessary to adjust and coordinate the enforcement mechanisms of complex legislation. Judicial

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61. *See supra* part III.

62. 399 U.S. 78 (1970).

63. *Id.* at 127-28 (Harlan, J., dissenting) (citation omitted) (quoting Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970)). For examples of cases where Justice Harlan voted not to follow precedent, see Oregon v. Mitchell, 400 U.S. 112, 218 (1970) (Harlan, J., dissenting); Lear, Inc. v. Adkins, 395 U.S. 653, 671 (1969); Swift & Co. v. Wickham, 382 U.S. 111, 124 (1965).

64. *See* Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804, 811-12 (1986); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 374, 377-79 (1982); Carlson v. Green, 446 U.S. 14, 36 (1980) (Rehnquist, J., dissenting).

creation of rights of action may disrupt a delicate balance.[65] Moreover, traditional implication standards may invite Congress to avoid resolution of controversial enforcement issues by leaving them to the courts.[66]

Several Justices also believe that the traditional standards for implication of private rights of action violate the separation of powers mandated by the Constitution.[67] According to this view, Congress alone has the power to create causes of action. Judicial creation of a right of action is undemocratic because it bypasses the political process.[68] It also improperly expands the subject matter jurisdiction of the federal courts by extending judicial power to a dispute that Congress has not granted the courts power to resolve.[69]

What would Justice Harlan have thought of these arguments? As to the practical arguments, neither he nor most observers would disagree that Congress generally is better situated than the courts to make law.[70]

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65. *See Merrill Lynch*, 456 U.S. at 408 (Powell, J., dissenting); *see also* Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 570-84 (1981) (arguing that private compensatory actions are ill-suited to the deterrence system of the securities laws and may hamper the central purposes of those statutes); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1206-07 (1982) (asserting that judicial creation of private rights of action may usurp an administrative agency's responsibility for enforcement of a statute and decrease legislative control over enforcement activity).

66. Justice Powell made this argument in Cannon v. University of Chicago, 441 U.S. 677 (1979). The traditional implication standards, he said, invite Congress

> to avoid resolution of the often controversial question whether a new regulatory statute should be enforced through private litigation. Rather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide. When this happens, the legislative process with its public scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned.

Id. at 743 (Powell, J., dissenting).

67. Justice Powell first presented this argument in a lengthy dissent in *Cannon*. *See id.* at 730. When Justice Powell dissented on this ground in *Merrill Lynch*, 456 U.S. at 395 (Powell, J., dissenting), Chief Justice Burger and Justices Rehnquist and O'Connor joined in his opinion.

68. *See Cannon*, 441 U.S. at 743 (Powell, J., dissenting).

69. *See id.* at 745-46.

70. Harlan opined, in Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960), that "because of the Court's inherent incapacity to deal with the problem in the comprehensive and integrated manner which would doubtless characterize [Congress's] legislative treatment . . . [the Court] should heed the limitations on [its] own capacity and authority." *Id.* at 572-73 (Harlan, J., dissenting). For more on Harlan's views in this respect, see Stephen M. Dane, *"Ordered Liberty" and Self-Restraint: The Judicial Philosophy of the Second Justice Harlan*, 51 U. CIN. L. REV. 545, 563 (1982); Wilkinson, *supra* note 1, at 1206-07, and cases cited therein.

Congress can legislate comprehensively and prospectively. But a court does not legislate at large when it creates a right of action. Instead, it makes the relatively narrow determination to supply a judicial remedy to enforce a right that Congress has already created. At this point in the law-making process, a court's perspective often will be superior because Congress cannot foresee all of the situations in which a law may apply. Thus, Congress cannot necessarily specify in advance the precise remedy that justice requires.[71] A court, on the other hand, can assess whether creation of a private right of action in a specific case would further or interfere with congressional purposes.

In *Mitchell v. DeMario Jewelry*,[72] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[73] and other cases, Harlan appeared to express great confidence in the capacity of judges to consider and craft remedies. In *Bivens*, he specifically rejected the argument that implication a private right of action under a statute "involves a resolution of policy considerations not susceptible of judicial discernment."[74] In his view, implication of remedies in a case like *J.I. Case Co. v. Borak*[75] refers "to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law."[76] Thus, Justice Harlan did not appear to believe that deciding whether to create a right of action is intrinsically more sensitive or complex than other interpretive tasks courts undertake, or that courts are unable to perceive when creation of a private remedy might undercut rather than foster congressional goals.

There is some merit to the argument that the traditional implication standards encourage Congress improperly to leave controversial remedial issues to the courts. Proponents of a statute may be tempted to omit language explicitly creating a private right of action to gain support for its passage, while creating legislative history that encourages courts to imply a private remedy. As Justice Powell has argued, this sort of buck-passing leaves those subject to the legislative constraints no "opportunity to forestall through the political process potentially unnecessary and disruptive litigation."[77]

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71. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947); Kent Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991, 1004 (1977).

72. 361 U.S. 288 (1960); *see also supra* text accompanying notes 12-24.

73. 403 U.S. 388 (1971); *see also supra* text accompanying notes 31-36.

74. *Bivens*, 403 U.S. at 402 (Harlan, J., concurring).

75. 377 U.S. 426 (1964); *see also supra* text accompanying notes 25-30.

76. *Bivens*, 403 U.S. at 403 n.4 (Harlan, J., concurring).

77. Cannon v. University of Chicago, 441 U.S. 677, 743 (1979) (Powell, J.,

There is some indication in Justice Harlan's writings that he might have agreed with this argument. He once expressed opposition to the view that the Supreme Court should review legislation to nullify acts that seemed unwise or out of date:

> Such a course would . . . denigrate the legislative process, since it would tend to relieve legislators from having to account to the electorate. The outcome would inevitably be a lessening, on the one hand, of judicial independence and, on the other, of legislative responsibility, thus polluting the blood stream of our system of government.[78]

Of course, there is a difference between implying a private right of action and abrogating unwise or outdated legislation. Under the traditional standards, a private right of action is implied only to effectuate substantive congressional policies. Abrogating legislation substitutes the Court's judgment for Congress's on substantive matters. Justice Harlan clearly understood the distinction between statutory construction that effectuated legislative policy and that which changed it. As he said in *Welsh v. United States*:[79]

> It is Congress' will that must here be divined. In that endeavor it is one thing to give words a meaning not necessarily envisioned by Congress so as to adapt them to circumstances also uncontemplated by the legislature in order to achieve the legislative policy; it is a wholly different matter to define words so as to change policy.[80]

Justice Powell's argument may be based on an unrealistic, or at least incomplete, view of the legislative process, as Justice Harlan's statement in *Welsh* suggests. Thus, while Congress may sometimes try to leave the hard remedial choices to the courts, in other instances Congress simply is not able to anticipate the plaintiff's situation. To refuse to grant a remedy because Congress was not able to foresee a particular wrongdoing thus may undercut broad legislative purposes. It is hard to understand how the refusal will serve to induce Congress to avoid the human inability to fully and accurately foretell the future.

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dissenting).

78. John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A. J. 943, 944 (1963).

79. 398 U.S. 333 (1970).

80. *Id.* at 346-47 (Harlan, J., concurring) (citation omitted).

Another problem with Justice Powell's argument is that it exhibits an uncooperative, almost peevish attitude toward Congress. Under Powell's approach, which prevails today, the Supreme Court says to Congress, in effect, "the whole responsibility in formulating remedies is yours, and you can expect no help from us." I think Harlan would have been bothered by that. Justice Harlan was a gracious man. As Judge Edward Lumbard, who once worked for Justice Harlan, remarked, Harlan thought "conduct should be guided by self-restraint and unruffled courtesy."[81] He exhibited great respect for the coordinate branches of government,[82] and plainly sought to establish good working relationships with them. His conservatism flowed from deeply held positive, rather than cynical, values. The traditional criteria for implication of remedies foster a sympathetic, cooperative effort by the courts to work with Congress in effectuating underlying congressional purposes and goals. It was this sort of approach that typified Harlan's work on the Court.

The responses that I think Justice Harlan might have given to the practical arguments offered to support the new standards also are relevant in answering the separation of powers argument. Justice Harlan certainly was as sensitive as any Justice to Court invasion of legislative prerogatives.[83] And yet, he plainly believed that the federal courts should be willing to fill statutory interstices to ensure completeness and consistency in providing appropriate remedies. When Justice Harlan repeatedly applied the traditional implication standards and voted to create causes of action, he must have seen this exercise of judicial power not as a usurpation of legislative authority, but rather as a necessary supplement to it.[84]

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81. J. Edward Lumbard, *Of Mr. Justice Harlan*, 16 BULL. N.Y. COUNTY LAW. ASS'N 93, 95 (1958).

82. *See* Dorsen, *supra* note 59, at 2814-16; Wilkinson, *supra* note 1, at 1186, 1199-1200.

83. *See* Dorsen, *supra* note 59, at 2814-16; Wilkinson, *supra* note 1, at 1186, 1199-1200.

84. The founding fathers recognized that separation of powers could not be rigid or absolute. Instead, they viewed some blending of powers as necessary for effective government. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."); *see also* JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 18 (1978) (stating that separation of powers does "not preclude one branch of government from participating in functions assigned primarily to another"). The view that separation of powers forbids a court from creating a cause of action establishes the sort of rigid separation that the founders cautioned against.

Finally, the argument that creation of a cause of action impermissibly expands the subject matter jurisdiction of the federal courts technically is incorrect. It involves a misconception about the meaning of jurisdiction. The existence or nonexistence of a remedy does not affect a court's subject matter jurisdiction. When a plaintiff alleges denial of a right created by federal law, the case plainly arises under that law within the meaning of Article III and 28 U.S.C. § 1331. Moreover, jurisdiction entails the power to grant appropriate remedies. As Justice Harlan said in *Bivens*, "a court of law vested with jurisdiction over the subject matter of a suit has the power—and therefore the duty—to make principled choices among traditional judicial remedies."[85]

V. CONCLUSION

Justice Harlan held an expansive, generous view of the power of the federal courts to grant traditional damage and equitable remedies. He endorsed the traditional standards for implication of remedies from legislation, and voted often to imply remedies when he thought those standards were satisfied. The Court's new implication standards require Congress not only to create a right in a person's favor, but also to say explicitly that he or she can enforce that right. As Professor Foy has noted, "a jurisdiction which invariably requires the legislature to speak twice in favor of plaintiffs is a strange jurisdiction indeed. It is dramatically different from the kind of jurisdiction that Anglo-American courts have actually exercised over the years."[86] Although one cannot speak with certainty, I do not believe that Justice Harlan would have approved of the new implication standards.

85. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 408 n.8 (1971) (Harlan, J., concurring).

86. H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 578-79 (1986).