Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts

Donald H. Zeigler
New York Law School

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Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts

by

DONALD H. ZEIGLER*

Introduction

The principle that legal rights must have remedies is fundamental to democratic government.¹ In a democracy, legal rights define social relations and promote human well-being in the broadest sense. Justice requires their enforcement. The principle is so obviously correct that assent to it is instinctive.

Nonetheless, rights are not always enforced in the United States. It has become increasingly difficult to enforce legal rights in federal court. In fact, the chief legacy of the Burger Court may be the creation of impediments to the enforcement of rights. Cases that restrict access to the federal courts for the vindication of constitutional rights against state official action are clear examples of such obstructions,² but they are only

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¹ This Article defines a legal right in Hohfeldian terms. A legal right is one that imposes a correlative duty on another to act or refrain from acting for the benefit of the person holding the right. See W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 35-38 (W. Cook ed. 1919).

part of a broader pattern of decisions that impede enforcement of statutory and common-law rights. In most instances, the Court has not diluted the content or substance of rights directly; instead it has created procedural barriers that leave victims without a practical remedy. Congress has not responded to the erection of these barriers, leaving theoretically established legal rights unenforced.

This Article asserts that the federal courts must change this pattern. They must vindicate rights fully and effectively. The Article suggests a new approach to the enforcement of rights that would accomplish this goal, and it provides examples of how the approach should be applied.

Section I demonstrates the importance of the principle that rights must have remedies. It traces the history of this principle, showing its critical role in the development of our legal institutions. Section I also explains why rights should have remedies and discusses some general limitations on the principle.

Section II sets forth the new framework for the enforcement of rights. It argues that courts must begin with a presumption in favor of enforcement that can be overcome only by an affirmative showing that the harm from enforcement is greater than the harm to the plaintiff from the denial of his rights. Section II applies the new approach to two major impediments to the enforcement of rights in the federal courts—the abstention doctrines and the new restrictive standards for implication of private rights of action under federal statutes—and concludes that the Supreme Court should abandon or greatly restrict the abstention doc-


4. This Article does not address Supreme Court decisions that decline to extend legal protection to human or moral rights. Instead, it focuses on impediments to enforcement of established legal rights.
trines and return to the traditional standards for implication of private remedies. Finally, section II suggests steps that Congress should take if the Court fails to make the necessary changes.

I. The Importance of the Principle that Rights Require Remedies

A. The History of the Principle

The ancient idea that rights must have remedies has played a significant role in English and American legal history. This subsection explores a number of areas in which the principle substantially influenced the growth of the law in the past and suggests that the federal courts should give it greater consideration in the future. The areas chosen relate directly to the barriers to the enforcement of rights discussed in section II. Thus, this subsection also provides background that is helpful in analyzing these barriers. Three major developments are discussed: the rise of equity, the merger of law and equity with the corresponding development of new codes of procedure, and the development of tort actions for the violation of statutory rights.

(1) The Rise of Equity

Chancery courts developed because the common-law courts often did not provide complete and effective redress of legal wrongs.\(^5\) Shortcomings in common-law procedure severely limited the capacity of the common-law courts to vindicate rights and necessitated development of a supplementary remedial system. Common-law pleading rules were rigid and technical, and required parties to enforce their rights through prescribed forms of action.\(^6\) If the facts of a case did not fit a form precisely, the plaintiff was remediless.\(^7\) Cases were limited to resolution of a single

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6. 1 W. Holdsworth, supra note 5, at 397, 447; 1 J. Pomeroy, supra note 5, at 22-24; H. Potter, An Historical Introduction to English Law and Its Institutions 497 (1932).

7. G. Bispham, supra note 5, at 9 ("Certain precise and rigid forms of action existed, which were supposed to effectually carry out the great maxim of justice, ubi jus ibi remedium [where the law gives a right, it also gives a remedy], but which . . . were not sufficiently comprehensive to do so."); 1 J. Pomeroy, supra note 5, at 28; H. Potter, supra note 6, at 137 ("If the facts of a particular case were such that [the forms of action were inappropriate] the injured party was without a remedy."); 1 J. Story, supra note 5, at 26.
issue between only two adverse claimants. Judgment was simply for the plaintiff or for the defendant; a common-law court could not grant conditional relief or impose reciprocal duties. In addition, common-law courts awarded only damages. They could not order a defendant to perform an act or fulfill an obligation. The courts thus could not prevent wrongs; at best they could only provide compensation. Finally, common-law judges gave precedent so much weight that change to accommodate new circumstances was difficult.

Suitors unable to obtain justice in the common-law courts turned to the king and his chancellor for assistance. Initially, the chancellor simply invented a new writ and sent the petitioner back to the common-law courts for a remedy. During the fourteenth century, however, the increasingly conservative common-law judges quashed new writs that differed materially from those traditionally used. Chancery, in turn, gradually developed its own, less formal procedures for resolving controversies without resort to the common-law courts. These equity rules were less technical and better able to accommodate varying fact patterns. Equity courts could grant injunctive relief and tailor remedies to balance the rights of the parties. Equity courts allowed more liberal joinder of claims and parties, enabling them to settle all claims arising from a controversy. Equity also provided relief from common-law judgments based on fraud, mistake, or breach of trust.

The equity courts thus enabled the English legal system to provide more complete remedies for violations of legal rights. It became a maxim of equity jurisprudence that "equity will not suffer a wrong to be without

9. G. BISPHAM, supra note 5, at 9-10; G. CLARK, supra note 8, at 4; 1 J. STORY, supra note 5, at 26-27.
10. G. CLARK, supra note 8, at 4-5; W. deFUNIAK, HANDBOOK OF MODERN EQUITY 5 (2d ed. 1956); H. POTTER, supra note 6, at 498; 1 J. STORY, supra note 5, at 29.
11. 1 J. POMEROY, supra note 5, at 20-21. Pomeroy summed up the shortcomings of the common-law system by stating that "the common law furnished a very meager system of remedies, utterly insufficient for the needs of a civilization advancing beyond the domination of feudal ideas." Id. at 31; see also 1 J. STORY, supra note 5, at 53-55.
12. 1 W. HOLDSWORTH, supra note 5, at 399, 401-03; F. MAITLAND, supra note 5, at 4-5.
13. F. MAITLAND, supra note 5, at 5.
14. Id.
15. 1 W. HOLDSWORTH, supra note 5, at 449.
16. 1 J. STORY, supra note 5, at 27.
17. G. CLARK, supra note 8, at 4; H. MCCLINTOCK, supra note 8, at 21.
18. H. MCCLINTOCK, supra note 8, at 5; 1 J. STORY, supra note 5, at 28, 30.
a remedy." The principle expressed in this maxim lay at the heart of equity because it was the very reason for Chancery's existence.

(2) The Merger of Law and Equity and the Development of New Codes of Procedure

During the nineteenth century, law and equity merged and new codes of civil procedure were enacted in England and many American jurisdictions. These changes occurred so that legal rights could be better enforced. Although the Court of Chancery had developed to vindicate rights, in time it had become less able to serve this purpose effectively. As equity became a formal system, with binding precedents, settled procedures, and its own bureaucracy, it lost the discretion and flexibility that enabled it to do justice in individual cases. As Chancery came more to resemble the common-law courts, it developed similar problems. Equity became merely a competing legal system, and thus insured its own downfall.

19. R. Megarry & P. Baker, Snell's Principles of Equity (27th ed. 1973); see also G. Bishpham, supra note 5, at 56; H. McClintock, supra note 8, at 76; 2 J. Pomeroy, supra note 5, at 185. Pomeroy describes the maxim as an equitable application of the more comprehensive legal maxim. Id.

20. See, e.g., G. Bishpham, supra note 5, at 56 ("The principle expressed by this maxim is, indeed, the foundation of equitable jurisdiction, because... that jurisdiction had its rise in the inability of the common-law courts to meet the requirements of justice."); R. Megarry & P. Baker, supra note 19, at 27-28 ("The idea expressed in this maxim... really underlies the whole jurisdiction of equity [because] the common law courts failed to remedy many undoubted wrongs, and this failure led to the establishment of the Court of Chancery."); 2 J. Pomeroy, supra note 5, at 185 ("This principle... is the source of the entire equitable jurisdiction... ").


22. H. Potter, supra note 6, at 511, 528; Pound, The Decadence of Equity, 5 Colum. L. Rev. 20, 24-26 (1905); Severns, Equity and "Fusion" in Illinois, 18 Ch.]-Kent L. Rev. 333, 339 (1940).

23. R. Megarry & P. Baker, supra note 19, at 10; Emmerglick, A Century of the New Equity, 23 Tex. L. Rev. 244, 245 (1945). Serious administrative problems hampered the Court of Chancery during the sixteenth, seventeenth, and eighteenth centuries. The judicial staff was inadequate, the clerks were sometimes corrupt, and the chancellor did not supervise the officials carefully. W. Holdsworth, supra note 5, at 423-28. In addition, the relatively simple procedures of early equity had become highly technical and complex. H. Potter, supra note 6 at 531-32. Potter concludes that, by the beginning of the nineteenth century, the Court of Chancery "was in a state of nearly hopeless confusion." Id. at 530.

24. See Pound, supra note 22, at 25; see also M. Cohen, Law and the Social Order 261 (1967) ("Hence, legal history shows... periodic waves of reform during which the sense of justice, natural law, or equity introduces life and flexibility into the law and makes it adjust-
In both England and America, the existence of two separate court systems caused inconvenience and confusion.\textsuperscript{25} It often was unclear which system should hear an action,\textsuperscript{26} and a wrong choice could defeat the plaintiff's claim, or at least cost time and money.\textsuperscript{27} Moreover, in many instances neither system could give the complete relief that justice required. The common-law courts could give only limited injunctive relief, and the equity courts normally could not award damages.\textsuperscript{28} Consequently, litigants often were forced to use both systems to resolve a single controversy.\textsuperscript{29} A primary purpose of the merger of law and equity was to combine equitable and legal remedies so that litigants could obtain complete relief in a single lawsuit.\textsuperscript{30}

State legislatures also enacted new codes of civil procedure to ensure the vindication of rights. One commentator said of the code movement:

\begin{quote}
Its one great purpose was to bring procedure into a simple and natural relation with substantive law . . . [and] to give a natural and vigorous vitality to a maxim which the law had long placed before itself as the ideal—wherever a right, there a remedy.\textsuperscript{31}
\end{quote}

Common-law pleading requirements had remained technical and abstruse,\textsuperscript{32} and the forms of action continued to complicate and restrict

\textsuperscript{25} Pound, supra note 22, at 23; Taylor, The Fusion of Law and Equity, 66 U. Pa. L. Rev. 17, 23 (1917).

\textsuperscript{26} C. Hepburn, supra note 21, at 45; Field, What Shall Be Done with the Practice of the Courts?, in 1 D. Field, Speeches, Arguments, and Miscellaneous Papers of David Dudley Field 254 (A. Sprague ed. 1884); Taylor, supra note 25, at 23.

\textsuperscript{27} Field, First Report of the Commissioners on Practice and Pleadings, in 1 D. Field, supra note 26, at 266; Severns, supra note 22, at 344, 355.

\textsuperscript{28} C. Hepburn, supra note 21, at 45-46; R. Megarry & P. Baker, supra note 19, at 11-12.

\textsuperscript{29} C. Hepburn, supra note 21, at 45-46; R. Megarry & P. Baker, supra note 19, at 11-12; Field, supra note 26, at 254.


\textsuperscript{31} C. Hepburn, supra note 21, at 21.

\textsuperscript{32} Field, supra note 26, at 235; see C. Hepburn, supra note 21, at 18, 43, 58-59; E. Sunderland, Cases and Materials on Code Pleading 3-4 (2d ed. 1940).
In addition, common-law limitations on joinder of claims and parties often necessitated several lawsuits to settle one controversy. New York led the reform efforts. In 1846 a new state constitution abolished the Court of Chancery and directed the legislature to appoint commissioners to “revise, reform, simplify, and abridge” New York’s procedural rules. In 1847, the legislature appointed the commissioners and instructed them to provide for the abolition of the present forms of actions and pleadings, in cases at common law; for a uniform course of proceedings in all cases whether of legal or equitable cognizance, and for the abandonment of any form or proceeding not necessary to ascertain or preserve the rights of the parties.

New York enacted its new code of civil procedure in 1848. The code merged law and equity, abolished the forms of action, and created one form of action denominated a civil action “for the enforcement or protection of private rights and the redress of private wrongs.” The code also liberalized the rules for the joinder of claims and parties. The New York code subsequently became the prototype for other state codes.

(3) Tort Actions on Statutes

The principle that rights require remedies prompted other important developments in Anglo-American jurisprudence. Tort actions in which courts approved an amount of damages for violation of a statutory duty even though the statute did not explicitly authorize a damage remedy provide a further example of this principle at work. The courts

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33. C. HEPBURN, supra note 21, at 46-51; E. SunderLand, supra note 32, at 4; Field, supra note 27, at 266-67.
34. C. HEPBURN, supra note 21, at 51-57; E. SunderLand, supra note 32, at 4; Field, supra note 27, at 268.
35. N.Y. Const. of 1846, art. VI, § 24.
39. Field, supra note 26, at 267-68.
40. See C. HEPBURN, supra note 21, at 87-152; see also C. CLARK, supra note 21, at 23-31.
reasoned that where there is a right, there must be a remedy.

_Ashby v. White_ is an early example. The plaintiff sought damages, claiming that an official had improperly denied him the right to vote in a parliamentary election. Chief Justice Holt noted that an ancient statute gave the plaintiff the right to vote, and concluded that a remedy should be given even though the statute failed to provide one:

A right that a man has to give his vote at the election of a person to represent him in Parliament . . . is a most transcendant thing, and of a high nature . . . . The right of voting [is] so great a privilege, that it is a great injury to deprive the plaintiff of it . . . .

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

Where a new Act of Parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him . . . . [B]y West. 1, 3 Ed. 1, c.5, it is enacted, that for as much as elections ought to be free, the king forbids, upon grievous forfeiture, that any . . . man . . . shall disturb to make free election . . . . [A]nd if the Parliament thought the freedom of elections to be a matter of that consequence, as to give their sanction to it, and to enact that they should be free; it is a violation of that statute, to disturb the plaintiff in this case in giving his vote at an election, and consequently actionable.

Thus, Chief Justice Holt thought that the plaintiff should be allowed to proceed.

_Couch v. Steel_ elaborated on the traditional standards governing actions on statutes. The plaintiff, a seaman on the defendant’s ship, be-
came ill on a voyage from England to Calcutta. He sued, claiming that the defendant had failed to comply with a statute that required all English ships to keep on board "a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages." The statute provided that a shipowner could be fined twenty pounds at the suit of any person, with the fine paid in part to the person who reported the infraction and in part to the Seaman’s Hospital Society, but it made no provision for a damage action to compensate an injured seaman. Nonetheless, the court held that the plaintiff’s action could go forward.

Lord Campbell began his opinion by noting that if the statute had provided no sanctions at all, the plaintiff’s suit plainly could be maintained. The general rule, he stated, was that a person could institute an action when he was injured by breach of a statute enacted for his benefit, and the plaintiff clearly fit within this rule. The legislature’s imposition of a specific sanction, however, raised a question as to whether a court could order a different remedy. In answering the question, Lord Campbell drew a distinction between public and private wrongs. The statutory penalty was imposed for the public wrong, and did not go to the plaintiff. Therefore, the statute did not abrogate the plaintiff’s common-law cause of action to seek compensation for his private or personal injuries. Lord Campbell added some qualifications. If a statute provided one mode of compensation for the private wrong, a court would not authorize another. And if the legislature specifically abrogated a common-law cause of action, a plaintiff could not recover.

Tort actions for violation of statutory duties were common in American state courts in the late 1800s and early 1900s. Courts allowed private remedies for the violation of a statute containing other sanctions

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46. Id. at 1196.
47. Id.
48. Id. at 1198.
49. Id. Lord Campbell cited the Statute of Westminster II, ch. 50, see supra note 41, and J. Comyns, Digest 268 (1762) ("[i]n every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for recompense of a wrong done to him contrary to the said law.").
51. A court also could not provide additional penalties for the public wrong beyond those provided by the statute. Id. Not all English cases from this era are in accord with Ashby and Couch. See, e.g., Stevens v. Jeacocke, 116 Eng. Rep. 647, 652 (Q.B. 1848) (imposition of a penalty precluded a private remedy); Atkinson v. Newcastle Waterworks & Gateshead Co., 2 Ex. D. 441, 444 (1877) (questioning Couch).
52. See, e.g., Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543 (1889); Schell v. Dubois, 94 Ohio St. 93, 113 N.E. 664 (1916); Stehle v. Jaeger Automatic Mach. Co., 220 Pa. 617, 69 A. 1116 (1908). See W. Prosser & W. Keeton, supra note 41, at 220-34, for extensive citations to such cases.
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 pre-
vent.\textsuperscript{53} If these conditions were satisfied, the majority rule was that vio-
lation of the statutory duty was negligence per se, and the plaintiff was en-
titled to have the jury so instructed.\textsuperscript{54} The reason given for this liberal
remedial régime was that where there is a right, there should be a reme-
y.\textsuperscript{55}

Legislative intent played an important role in the early cases. The
requirements that the statute be enacted for the plaintiff’s benefit and
aimed at preventing the sort of harm that actually occurred ensured that
a private remedy was consistent with underlying legislative purposes.
And, as both Lord Campbell and Dean Prosser made clear, a court
would provide a private remedy even if the legislature was silent on the
matter.\textsuperscript{56} A court would refuse a private remedy only if the legislature

\begin{quote}
\textsuperscript{53} W. Prosser & W. Keeton, \textit{supra} note 41, at 192-97. These standards were incorpo-
rated in the \textit{Restatement of Torts} § 286 (1934):

\textit{Violations Creating Civil Liability.}

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:
the intent of the enactment is exclusively or in part to protect an interest of the other
as an individual; and the interest invaded is one which the enactment is intended to
protect; and, where the enactment is intended to protect an interest from a particular
hazard, the violation of the interests results from that hazard; and, 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.

\textsuperscript{54} W. Prosser & W. Keeton, \textit{supra} note 41, at 229-30; Fricke, \textit{supra} note 41, at 242;
of the majority rule, see Thayer, \textit{Public Wrong and Private Action}, 27 Harv. L. Rev. 317, 321-
26 (1914). For criticisms, see Lowndes, \textit{Civil Liability Created by Criminal Legislation}, 16
Minn. L. Rev. 361, 365-76 (1932), and Fricke, \textit{supra} note 41, at 242-44. The development of
the theory that violation of a statutory duty constitutes negligence per se is discussed in Foy,
\textit{Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and

\textsuperscript{55} See, e.g., Parker v. Barnard, 135 Mass. 116, 120 (1883) ("The fact that there was a
penalty imposed by the statute for neglect of duty in regard to the railing and protection of the
elevator well does not exonerate those responsible therefor from such liability."); Stout v.
Keyes, 2 Doug. 184, 186 (Mich. 1845) ("It is a general principle of the common law, that
whenever the law gives a right, or prohibits an injury, it also gives a remedy by action; and,
where no specific remedy is given for an injury complained of, a remedy may be had by special
action on the case."); Martin v. Herzog, 228 N.Y. 164, 171-72, 126 N.E. 814, 816 (1920)
(Cardozo, J.) ("A statute designed for the protection of human life is not to be brushed aside as
a form of words, its commands reduced to the level of cautions, and the duty to obey attenu-
ated into an option to conform.").

\textsuperscript{56} W. Prosser & W. Keeton, \textit{supra} note 41, at 220-21; \textit{see supra} note 49 and accom-
panying text.
\end{quote}
explicitly barred the remedy or made clear its intention to substitute other relief.

Until quite recently, the federal courts generally followed traditional standards in providing remedies for violation of statutory duties. For example, in *Hayes v. Michigan Central Railroad*, the plaintiff was a young boy whose left arm was severed by the defendant's train. He sued for damages in federal court, claiming that the defendant had violated a Chicago ordinance granting the railroad a right of way on the condition that it erect fences along the rail line to protect persons and property from danger. The defendant conceded that it might be sued by the city for breach of the ordinance, but argued that the violation could not be a basis of civil liability to a private plaintiff. The Supreme Court disagreed, holding that because the city had enacted the ordinance to protect people from injury, "each person specially injured by the breach of the obligation is entitled to his individual compensation [by] an action for its recovery." The Court reached a similar result in *Texas & Pacific Railway v. Rigsby*. The plaintiff, a switchman for the Railway Company, was injured while descending from the top of a boxcar when a defective handhold gave way. He sued for damages under a federal statute requiring trains in interstate commerce to have secure handholds. The Court held that the plaintiff could recover under the statute even though it did not contain express language conferring a right of action for injury to employees:

A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed . . . in these words: "So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." (Per Holt, C.J., *Anon.*, 6 Mod. 26, 27.) This is but an application of the maxim, *Ubi jus ibi remedium*. See 3 Black. Com. 51, 123; *Couch v. Steel*, 3 El. & Bl. 402, 411; 23 L.J.Q.B. 121, 125.

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57. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 374-75 (1982) ("[F]ederal courts, following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule.") (footnote omitted). The recent, more restrictive standards are discussed in section II.B., infra.
58. 111 U.S. 228 (1884).
59. Id. at 229-30.
60. Id. at 233.
61. Id. at 240.
63. Id. at 39-40.
After Rigsby, the federal courts often allowed or "implied" remedies for violations of statutory duties when the statute did not explicitly authorize a private right of action.64 A period of particular hospitality to the implication of private rights of action in the 1960s65 was followed by a period of extreme hostility in the late 1970s and early 1980s.66 Historically, however, tort actions on statutes provided a clear example of the common law striving to provide remedies for the violation of rights.67


65. See e.g., Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969) (quoting Rigsby and stating that the "existence of a statutory right implies the existence of all necessary and appropriate remedies" in creating a damage remedy for racial discrimination in violation of 42 U.S.C. § 1982); J.I. Case Co. v. Borak, 377 U.S. 426, 435 (1964) (recognizing a private right of action under § 14(a) of the Securities Exchange Act of 1934 on the grounds that creation of remedies to vindicate federal statutory rights is a proper role for the federal courts).

66. See e.g., California v. Sierra Club, 451 U.S. 287, 298 (1981) (private right of action will be implied only upon a clear showing of congressional intent to create a right of action); Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 24 (1979) (same); Touche Ross & Co. v. Redington, 442 U.S. 560, 579 (1979) (same). The new restrictive standards for implication of private rights of action are analyzed in Section II.B., infra.

67. Supreme Court reliance on the principle that rights should have remedies has not been limited to actions on the statute. For example, in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), petitioner brought a mandamus action to compel the Secretary of State to deliver a commission appointing petitioner to the bench. Chief Justice Marshall cited the "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." Id. at 163 (quoting 3 W. BLACKSTONE, COMMENTARIES 23). He continued: "The government of the United States has been emphatically termed
This experience, as well as the rise of equity, the merger of law and equity, and the code movement, amply demonstrate that the principle that rights require remedies has played an important role in the development of Anglo-American legal institutions.  

B. Why Rights Should Have Remedies, and Some General Limitations on the Principle

The principle that rights require remedies prompted the far-reaching developments in our legal history discussed in the previous subsection. Remarkably, however, the historical sources contain almost no discussion of why rights should have remedies. Perhaps the legislators and judges who relied upon the principle considered the reasons obvious.

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."  

Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838), also was a mandamus action, seeking payment from the Postmaster General for performance of a contract to deliver mail. In granting relief, the Court stated:

It cannot be denied but that congress had the power to command that act to be done; and the power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist.

Id. at 624.

68. One other development demonstrating the importance of the principle in American history deserves brief mention. The constitutions of approximately three-fourths of the states contain a provision requiring that rights have remedies. Note, Constitutional Guarantees of a Certain Remedy, 49 IOWA L. REV. 1202, 1202 (1964); see, e.g., MASS. CONST. art. 11 ("Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."); S.C. CONST. art. 1, § 15 ("All Courts shall be public, and every person shall have speedy remedy therein for wrongs sustained."); TEX. CONST. art. 1, § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.").

Most of the provisions are of ancient origin and little legislative history exists explaining the intentions of the framers. Note, supra, at 1203-04. Not surprisingly, therefore, the states interpret the provisions differently:

The result has been constructions which vary, on the one hand, from those which view the provision's purpose as merely guaranteeing an aggrieved individual his day in court, preventing the legislature from barring from court anyone who possesses a legal right protectable under an established remedy, or assuring that legally recognized wrongs will be remediable, to those which, at the other extreme, see it as compelling a court to create a new remedy for a wrong for which the legislature has provided none.

Id. at 1204 (citations omitted). Despite varying interpretations, the constitutional provisions are further evidence of the importance in American history of the principle that rights must have remedies.

69. In all the materials reviewed, only Chief Justice Holt hinted at a reason when he said
At the risk of belaboring the obvious, this subsection will address the question and will explore some general limitations on the principle.

To begin, a right without a remedy is not a legal right; it is merely a hope or a wish. This follows from the definition of a legal right adopted at the beginning of this Article. In Hohfeldian terms, a right entails a correlative duty to act or refrain from acting for the benefit of another person. Unless a duty can be enforced, it is not really a duty; it is only a voluntary obligation that a person can fulfill or not at his whim. In such circumstances, the holder of the correlative "right" can only hope that the act or forbearance will occur. Thus, a right without a remedy is simply not a legal right.

To understand why it is important for legal claims to be enforceable to be rights—rather than mere requests for favors—it is necessary to explore the purposes of rights. Rights define social relations. They serve as means to very important ends. Rights promote well-being in the broadest sense. They secure the dignity and the integrity of human

"[w]here a man has but one remedy to come at his right, if he loses that he loses his right." Ashby v. White, 92 Eng. Rep. 126, 136 (K.B. 1703).

70. See supra note 1.

71. W. HOHFELD, supra note 1, at 38.

72. As Justice Holmes once remarked, "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." The Western Maid, 257 U.S. 419, 433 (1922).

73. A number of jurisprudential scholars accept this conclusion. See, e.g., T. BENDITT, RIGHTS 51 (1982) ("[O]ne can't say that he has a right, then and there, to do something if he is not permitted, then and there, to do it. Another way of putting this is to say that a right doesn't exist if one can't act on it (or insist on it)."; J. FEINBERG, RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 141 (1980) ("Why is the right to demand recognition of one's rights so important? The reason, I think, is that if one begged, pleaded, or prayed for recognition merely, at best one would receive a kind of beneficent treatment easily confused with the acknowledgement of rights, but in fact altogether foreign and deadly to it."); J. GRAY, THE NATURE AND SOURCES OF LAW 8 (1938); I. JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW 254-55 (1980) ("The doctrine of legal rights teaches us that declarations of rights are vain without an effective apparatus to implement them.").

74. M. GINSBERG, supra note 73, at 76.

75. I. JENKINS, supra note 73, at 243.

76. M. GINSBERG, supra note 73, at 75; I. JENKINS, supra note 73, at 243; A. WHITE,
beings. They enable people to grow, to develop, to fulfill their aspirations, and to accumulate necessary material goods. Rights give people control over their lives and are essential to self-respect. Theories of rights often are considered to conflict with social utility because recognizing rights is sometimes inefficient. Nonetheless, legal rights plainly serve some utilitarian purposes. They assist society in treating people equally. They also promote order and predictability, thus enabling people to act upon reasonable expectations in managing their affairs.

Having described the purposes of rights, it is relatively easy to envision the consequences of their inadequate enforcement. The dignity of the individual is diminished and people are less able to achieve their goals. People feel insecure and they lose self-respect. If the legal system tells a person that it is acceptable for his rights to be violated, the implicit message is that the person lacks worth. And, when the system vindicates another person’s rights in similar circumstances, the message is that the other person has greater worth. When denial of rights occurs systematically over time, the result is alienation, isolation, anger, and disadvantage. Thus, no society can afford to neglect the enforcement of legal rights.

Rights 100 (1984); MacCormick, Rights, Claims and Remedies, 1 LAW & PHIL. 337, 338 (1982).


78. I. Jenkins, supra note 73, at 243; McCloskey, supra note 77, at 126.

79. C. Fried, Right and Wrong 110 (1978); Kelsen, The Law as a Specific Social Technique, 9 U. Chi. L. Rev. 75, 81 (1941); Ryan, Utility and Ownership, in UTILITY AND RIGHTS, supra note 77, at 175.

80. N. MacCormick, Legal Rights and Social Democracy 41 (1982); Griffin, Towards a Substantive Theory of Rights, in UTILITY AND RIGHTS, supra note 77, at 140.

81. J. Feinberg, supra note 73, at 142, 148; N. MacCormick, supra note 80, at 39-41; Buchanan, What’s So Special About Rights?, in LIBERTY AND EQUALITY 63 (E. Paul, F. Miller & J. Paul eds. 1985); Dworkin, supra note 77, at 105.

82. Frey, Utilitarianism and Persons, in UTILITY AND RIGHTS, supra note 77, at 3; Mackie, Rights, Utility, and Universalization, in UTILITY AND RIGHTS, supra note 77, at 86.

83. M. Ginsberg, supra note 73, at 79-80; Dworkin, supra note 77, at 105. Griffin, supra note 80, at 143, 150; Lyons, Introduction to RIGHTS, supra note 77, at 12-13. Equal regard and equal treatment are, of course, “notoriously indeterminate.” Griffin, supra note 80, at 143. Despite disagreement as to what equality of treatment should entail in various contexts, it is an important purpose of rights.

84. Scanlon, Rights, Goals, and Fairness, in THEORIES OF RIGHTS 144 (J. Waldron ed. 1984) (“One common view of the place of rights, and moral rules generally, within utilitarianism holds that they are useful as means to the co-ordination of action.”); Wasserstrom, Rights, Human Rights, and Racial Discrimination, in RIGHTS, supra note 77, at 49 (“To live in a society . . . in which rights are generally respected is to live in a society in which the social environment has been made appreciably more predictable and secure.”).

85. J. Feinberg, supra note 73, at 142; Buchanan, supra note 81, at 63.

86. J. Feinberg, supra note 73, at 151; Dworkin, supra note 77, at 105-06.
fear. In extreme cases, the result is totalitarianism or chaos.

Fortunately, the United States is not the extreme case. Most of our rights are not violated most of the time. The threat of sanction deters violations and people often voluntarily fulfill their legal duties. Additionally, many rights are enforced; they have remedies. Although enforcement is never absolute, total nonenforcement is relatively rare.

Despite the importance of the enforcement of rights, in some situations rights cannot have remedies. When two rights conflict, vindication of one necessarily entails limitation of the other. Rights must be balanced and thus circumscribed. In some circumstances enforcing rights would seriously harm individuals or interfere with a compelling governmental interest. For example, the right to freedom of speech cannot encompass a right to cry "Fire" in a crowded theater. Similarly, a person's right to notice and an opportunity to be heard before governmental seizure of his property cannot be enforced if immediate seizure is necessary to protect the public health, as in the case of misbranded drugs or contaminated food. In addition, the legal system has its own limits and may afford a defendant an affirmative defense, such as res judicata or the statute of limitations. Thus, even though a plaintiff's right was violated, if he previously litigated the matter and lost, the legal system will preclude relitigation in the interest of finality. Or, if a person waits too long to seek a remedy, the system will extinguish the right in fairness to the defendant and to satisfy society's interest in repose.

Additionally, the legal system is inherently limited in its capacity to vindicate rights. Application of law in individual cases is necessarily imperfect. The legal process cannot always accurately ascertain objective fact. A trial may distort the past or reconstruct it incompletely. Witnesses may misperceive, or forget, or lie. Courts and juries may apply

88. Cf. I. Jenkins, supra note 73, at 22 ("Order is never absolute, and disorder is never total. These terms represent segments along a continuum . . . .").
89. T. Benditt, supra note 73, at 34; A. Melden, Rights and Persons 1-2 (1977); R. Pound, The Task of Law 76-77 (1944); Buchanan, supra note 81, at 67; Dworkin, supra note 77, at 100-01.
90. Schenck v. United States, 249 U.S. 47, 52 (Holmes, J.) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theatre and causing a panic.").
the law to the facts incorrectly. Moreover, damages, criminal sanctions, and injunctions are all imperfect tools for vindicating rights. Damages cannot restore a severed limb, and imprisonment of a murderer cannot bring the victim back to life. And, as anyone familiar with institutional reform litigation knows, injunctive relief often entails substantial compliance problems.93

The fact that rights cannot always be enforced does not diminish the importance of the principle that rights should have remedies. Although enforcement of rights may sometimes be difficult or controversial, courts must strive to provide adequate remedies. Section II suggests a means of accomplishing this goal.

II. Developing a New Approach to the Enforcement of Legal Rights

Because rights serve critical purposes, the fabric of society is threatened when rights are not adequately enforced. This section of the Article suggests a new approach that would enable the federal courts to enforce rights as fully and effectively as possible. It begins with a general outline of the suggested approach, and then applies that approach to two major impediments to the enforcement of rights in the federal courts: the abstention doctrines, and the new restrictive standards for implication of private rights of action under federal statutes. The section concludes that the abstention doctrines must be abandoned or substantially restricted, and that the federal courts should return to the traditional standards for implication of private rights of action. It also suggests steps that Congress should take if the Supreme Court fails to make the necessary changes.


Indeed, some commentators have questioned whether the common-law system has the capacity to vindicate individual rights in an urban industrial economy. Professors Stewart and Sunstein, for example, suggest four reasons why modern economic conditions undermine common-law remedies. They argue that mass markets create disparities in information and bargaining power, thus making common-law rules of exchange inadequate. In addition, complex and collective harms such as pollution tax the common law’s ability to define private entitlements. Because many new harms affect a large number of people but the injury to each individual is small, private damage actions often fail to deter lawbreakers. Finally, equality of treatment is difficult to achieve through decentralized private litigation. Stewart & Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193, 1235-36 (1982).
To give proper weight to the principle that rights should have remedies, federal courts must begin with a presumption in favor of enforcement of legal rights. An allegation that a right has been violated should constitute a prima facie case for enforcement if the plaintiff prevails on the merits. The burden should then shift to the defendant to demonstrate that the right should not be enforced. The more fundamental the right, the heavier the burden on the defendant.

If the defendant asserts a recognized doctrine or important policy that would deny the plaintiff's right, the court must then determine whether the purposes underlying the doctrine or policy are of sufficient importance to overcome the presumption of enforcement. In making this determination, the federal court should assess the harm the plaintiff will suffer if the litigation does not go forward. A court may consider the availability of alternate means of enforcing the right, such as proceeding in a state forum. But if alternate means might fail to vindicate the plaintiff's right fully and effectively, the case should go forward unless the defendant can advance reasons that are sufficiently compelling to rebut the presumption. To meet this burden, the defendant should have to show that enforcement of the plaintiff's right would seriously harm others or would substantially interfere with important governmental policies or programs. Moreover, the harm to others or to important governmental interests must be greater than the harm to the plaintiff if his right is not enforced.

This approach has several advantages over current practice. By creating a presumption favoring enforcement, it recognizes at the outset the importance of the principle that rights must have remedies. It also requires a court to consider the specific harm the plaintiff will suffer if his right is not enforced in federal court. A doctrine or policy that would deny enforcement cannot be considered in the abstract. It cannot be applied simply because it has been used in the past or because it has important general purposes. Instead, the defendant must affirmatively demonstrate that the potential harm from enforcement in federal court is sufficiently grave that enforcement would be unjust.

A. The Abstention Doctrines

Many technical requirements must be satisfied to state a claim cognizable in federal court. Satisfaction of all of these requirements, how-

94. Several commentators have made this general suggestion. See, e.g., T. Benditt, supra note 73, at 34; Buchanan, supra note 81, at 67; Lyons, supra note 83, at 5-6; Vlastos, Justice and Equality, in Theories of Rights, supra note 84, at 47.

95. The plaintiff must allege violation of a right and at least nominal injury. He must also
ever, does not ensure that a federal court will hear a case. In certain circumstances the court may invoke an abstention doctrine to dismiss or postpone the suit. Courts abstain most often in cases alleging violations of federal constitutional rights, but they also abstain in diversity cases seeking vindication of state-created rights. Abstention is invoked primarily in cases seeking equitable relief, yet equity developed to ensure a fuller, more effective vindication of rights. By denying enforcement of established rights in injunctive actions, the abstention doctrines conflict with the principle underlying the development of equity—that rights should have remedies.

The abstention doctrines are complex and interrelated. Little consensus has been achieved on how they should be grouped or even on how many different doctrines exist. In *Colorado River Water Conservation District v. United States*, the Supreme Court identified three general categories of abstention associated with well-known abstention cases: *Younger*, *Pullman*, and *Thibodaux-Burford*. These categories will be used here.

have standing. A plaintiff has standing to sue if he has a sufficient stake in the dispute and is sufficiently adversarial to a defendant to raise an article III case or controversy. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972); *Baker v. Carr*, 369 U.S. 186, 204 (1962). In addition, the plaintiff must have a cause of action. As the previous discussion makes clear, this condition is satisfied if either a statute or a court decision authorizes him to seek judicial relief for violation of a right. The Supreme Court recently suggested a further refinement of the concept by separating a cause of action from the relief sought.

Thus it may be said that... *cause 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.


97. See infra notes 181-96 and accompanying text.

98. State forums generally do not provide adequate remedies. See infra notes 114-24, 152-58, 192-93 & 206-15 and accompanying text.


100. 424 U.S. 800, 814-17 (1976).


104. *Colorado River* created a limited fourth category of abstention used in cases involving
(1) The Doctrine of Younger v. Harris

In Younger v. Harris the Supreme Court held that a federal court may not enjoin a pending state criminal proceeding unless the moving party has no adequate remedy at law and will suffer great and immediate irreparable harm if denied relief. Plaintiff Harris had been indicted under California's Criminal Syndicalism Act for distributing political leaflets. Although the Act was vulnerable to serious first amendment challenge, District Attorney Younger pursued the case. Harris moved unsuccessfully in the California trial and appellate courts to have the case dismissed, and then sought a federal injunction against further prosecution. A three-judge court granted the injunction, but the Supreme Court reversed, citing concerns of equity, comity, and federalism. Despite Harris' ordeal and the merit of his case, he was required to present his constitutional claims in his defense of the state prosecution. The Court observed that "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be parallel federal and state court proceedings. 424 U.S. at 817-21. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 13-16 (1983), reaffirmed that Colorado River abstention is appropriate only in rare cases, and the lower federal courts generally have exercised jurisdiction in post-Cone cases despite the pendency of parallel state proceedings. See 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4247, at 187 n.70 (Supp. 1986) for extensive citation to such cases. Consequently, this form of abstention will not be addressed further. For discussion of Colorado River abstention, see generally M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 249-55 (1980); C. Wright, supra note 99, at 315-19; C. Wright, A. Miller & E. Cooper, supra.

105. 401 U.S. 37, 43-44 (1971). The Younger abstention doctrine predates the Younger case. The Supreme Court first addressed the propriety of federal court intervention in state criminal proceedings in In re Sawyer, 124 U.S. 200, 209-10, 219-20 (1888), and declined to intervene. The Court has taken a flexible approach to this form of abstention over the years. During some periods it has been read narrowly or ignored, while at other times it has been asserted vigorously. See Zeigler, An Accommodation of the Younger Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process, 125 U. Pa. L. Rev. 266, 270 (1976). For reviews of the historical development of the doctrine, see Wechsler, Federal Courts, State Criminal Law and the First Amendment, 49 N.Y.U. L. Rev. 740 (1974); Whitten, Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion, 53 N.C.L. Rev. 591 (1975); Zeigler, supra, at 269-83.

106. In 1969, one year after the lower court decision in Younger, the Supreme Court held a similar Ohio statute unconstitutional. See Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969). Brandenburg gave short shrift to Whitney v. California, 274 U.S. 357 (1927), which had upheld the California law, stating "Whitney has been thoroughly discredited by later decisions." 395 U.S. at 447.


109. Id. at 45.
considered ‘irreparable’ . . . harm.”\textsuperscript{110}

The Supreme Court soon extended \textit{Younger} to bar interference with state-initiated civil proceedings.\textsuperscript{111} Simultaneously, the Court expanded \textit{Younger} to preclude cases seeking systemic reform of state practices and procedures, even though the plaintiffs did not seek to enjoin any pending state court proceedings.\textsuperscript{112} The Court also made plain that the exceptions to the doctrine are to be very narrowly construed.\textsuperscript{113}

\textsuperscript{110} Id. at 46. In Samuels v. Mackell, 401 U.S. 66 (1971), decided the same day as \textit{Younger}, the Court refused to permit federal declaratory relief that had “virtually the same practical impact as a formal injunction.” Id. at 72. In Perez v. Ledesma, 401 U.S. 82 (1971), another companion case, the Court overturned a lower court decision ordering return of materials illegally seized by state officials. The \textit{Perez} Court reasoned that the federal suppression order would effectively terminate the state prosecution, and thus would have the same effect as a direct injunction against the prosecution. \textit{Id.} at 84-85.

\textsuperscript{111} See Moore v. Sims, 442 U.S. 415, 423-35 (1979) (ordering the lower federal court not to interfere with a pending state court proceeding in which the State of Texas had taken custody of the federal plaintiffs’ children to protect them from alleged child abuse); Trainor v. Hernandez, 431 U.S. 434, 440-47 (1977) (holding \textit{Younger} applicable in a federal action by welfare recipients challenging attachment of their assets by the State of Illinois without notice or other procedural safeguards).


\textsuperscript{113} M. REDISH, supra note 104, at 305. Virtually any theoretically available state remedy will be deemed adequate, even if it is futile in practice. For example, in Hicks v. Miranda, 422 U.S. 332 (1975), plaintiffs argued that resort to the California state courts was futile because those courts had recently upheld the constitutionality of the obscenity statute involved in the federal action. The Court responded: “But \textit{Younger v. Harris} is not so easily avoided. State courts, like other courts, sometimes change their minds.” \textit{Id.} at 350 n.18. In O'Shea v. Littleton, 414 U.S. 488 (1974), the Court suggested a variety of possible state remedies for plaintiffs' claim that local police, judges, and prosecutors were intentionally engaged in a systematic and continuing program of racial discrimination in the administration of criminal justice. \textit{Id.} at 502. However, some of the remedies probably could be granted only by the judges who were allegedly a part of the conspiracy, while others, such as federal criminal prosecutions, could not be initiated by the plaintiffs. As Professor Owen Fiss has observed, the “adequacy of [the] alternative remedies [in O'Shea] was evidently presumed from the fact that Justice White was able to think of them.” Fiss, \textit{Dombrowski}, 86 YALE L.J. 1103, 1154 (1977). Furthermore, once a federal court dismisses a case on \textit{Younger} grounds, plaintiffs do not have the opportunity to return to federal court to demonstrate that the state remedies were unavailing. The presumption of the adequacy of state remedies is irrebuttable. Zeigler, \textit{A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction}, 1983 DUKE L.J. 987, 1030.

As noted above, \textit{Younger} itself refused to consider the cost, anxiety, and inconvenience of defending against a criminal prosecution to be irreparable injury. \textit{Younger} did suggest that bad faith on the part of state officials could be a special circumstance warranting federal intervention, 401 U.S. at 49, but bad faith is difficult to prove. See, e.g., Kugler v. Helfant, 421 U.S. 117, 126 n.6 (1975) (rejecting plaintiff's bad faith claim and defining bad faith to mean “that a
Younger abstention routinely results in the denial of fundamental constitutional rights. With their federal suits dismissed, the plaintiffs are relegated to the tender mercies of the state courts. There often are disadvantages to litigating federal constitutional claims in state rather than federal court. State judges are not uniformly well qualified. They may lack expertise in federal law or be subject to majoritarian political pressure. They also may be biased in reviewing actions of other state officials.

Moreover, many constitutional claims cannot be effectively raised in defending criminal or civil charges in individual cases. A person such as the defendant in Younger who raises a constitutional challenge to the statute under which he is charged must first present his claim to a busy trial judge. A trial judge will be very reluctant to overturn a state statute from his position in the state judicial hierarchy, and state law may discourage interlocutory appeals in criminal cases. If a criminal defendant fails to comply with state procedural requirements for preserving his constitutional claim, the federal courts will not hear it. If the defendant chooses to plead guilty to a reduced charge, the claim is waived.

Reform of unconstitutional state practices and procedures is virtu-
ally impossible to achieve by defending charges in an individual case.120 A court may dismiss the charges, but it generally cannot extend relief to the class of people subjected to similar constitutional deprivations.121 State law may provide other means of seeking systemic reform, for example by civil suit or mandamus, but many states limit class actions,122 and in other states judicial hostility to the class device restricts its utility.123 In sum, while federal constitutional rights can sometimes be vindicated in state courts, in many cases they cannot.124

Proponents of Younger abstention cite concerns of comity, federalism, and equity in support of the doctrine. Traditional considerations of comity suggest that a court should not attempt to wrest a case from another judicial system that has assumed jurisdiction.125 Intervention in pending state proceedings reflects negatively upon a state court's ability to enforce constitutional rights.126 As the Younger Court stated, federalism requires

a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.127

120. See Zeigler, supra note 93, at 77-85.
123. See Zeigler, supra note 93, at 49 n.94.
124. In some instances defendants in criminal cases can seek eventual federal review of their constitutional claims in the Supreme Court by way of federal habeas corpus. But the Supreme Court can review only a few such cases each year, and federal habeas corpus has legal and practical limitations. See Zeigler, supra note 93, at 79-83. See generally Zeigler & Hermann, The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts, 47 N.Y.U. L. REV. 157 (1972).
According to this view, the federal courts should respect a state's interest "in not having its judicial process grind to a halt while the federal courts decide constitutional questions."\(^{128}\) The equity strand of the Younger rationale is based on the traditional maxim that a court of equity could act only when the moving party was without an adequate remedy at law and would suffer irreparable injury if denied equitable relief.\(^{129}\)

Although these concerns are important, they hardly are sufficient to overcome the presumption in favor of enforcement of fundamental constitutional rights that is denied by Younger abstention.\(^{130}\) Comity is discretionary, not mandatory.\(^{131}\) It is largely a matter of courtesy and politeness. A case alleging denial of fundamental rights should not be dismissed out of hand simply because the relief sought might make a state judge feel bad.\(^{132}\)

Vague ideas of federalism also are insufficient to rebut the prima facie case for enforcement of legal rights. Arguments that rely on states' rights as a basis for denying federal constitutional rights should always be viewed with suspicion. The phrase "states' rights" has sometimes been a mere code expression supporting a thinly veiled policy of repression. In the 1940s and 1950s, for example, segregationists asserted "states' rights" to block federal integration efforts.\(^{133}\) The state right asserted was in fact the "right" to continue to discriminate on the basis of race.

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130. Younger itself concerned the first amendment. Criminal prosecutions implicate a host of important constitutional protections, including the fourth, sixth, and eighth amendments' procedural guarantees, as well as due process and equal protection. *See* Zeigler, supra note 93, at 40-41. In addition, incarceration takes away rights to move freely and to associate with persons of one's own choice. *Id.* at 41.

131. Hilton v. Guyot, 159 U.S. 113, 163-66 (1895). In the international sphere, comity is extended by one nation to the judicial actions of another nation only with "due regard . . . to the rights of its own citizens." *Id.* at 164.

132. Michael Wells is strongly critical of the Supreme Court's use of comity when balancing a state's interest in adjudicating cases in state court with an individual's interest in a federal forum. *See* Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C.L. REV. 59 (1981). He concludes that "the Court, desiring to accommodate both interests, makes arbitrary distinctions because it cannot find good ones. It employs comity as a vague abstraction in order to avoid having to choose between these interests as a general guide to decision making." *Id.* at 60.

The United States adopted a federal governmental structure to enhance freedom and to ensure that no level of government became tyrannous. Consequently, it is inappropriate, and even ironic, to argue that federalism concerns should lead to the denial of rights. Instead, federalism issues generally should be resolved in a way that fosters the vindication of rights. Federalism concerns clearly do not justify blind deference to state courts when those courts deny federal constitutional rights.

Equity concerns likewise do not support Younger abstention. Equity developed to enforce rights, not to deny them. Equity is flexible; Younger abstention is rigid. Principles of equity support dismissal of a case if the requirements for equitable relief are not satisfied, but they do not support automatic dismissal of a case with no consideration of the plaintiff's claims. Moreover, equitable principles require a court to deny injunctive relief only when the plaintiff has an adequate remedy at law. As demonstrated above, however, alternate state court remedies often are inadequate to protect the plaintiff's rights. Therefore, an automatic dismissal that creates an irrebuttable presumption of adequacy hardly accords with traditional equitable principles.

None of the reasons offered in support of Younger abstention are sufficient to overcome the presumption of enforcement of rights. Younger abstention therefore should be abandoned.


135. See Redish, supra note 96, at 86. As Professors Soifer and Macgill state: The considerations of equity and comity developed through decades by the Court to accommodate the tensions among state power, federal power, and individual rights, have been turned into a single, rigid commandment of federal judicial inaction that violates even such rules as equity and comity could be said to have contained. As the Court declared recently, "where a case is properly within [the scope of the Younger doctrine], there is no discretion to grant injunctive relief." [quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816 n. 22 (1976)]. This rigidity has eliminated the discretionary balancing at the heart of equity.

136. See supra notes 114-24 and accompanying text.

137. See supra note 113.

138. This is not a new suggestion, although the argument advanced here is almost certainly more direct and fundamental than other arguments for the doctrine's abandonment. Commentators have advocated abandoning Younger on a wide variety of grounds. See, e.g., Redish, supra note 96 (contending that abstention doctrines ignore the dictates of valid jurisdictional and civil rights statutes and thus usurp legislative authority in violation of separation of powers principles); Shreve, Federal Injunctions and the Public Interest, 51 GEO. WASH. L. REV. 382, 405-19 (1983) (arguing that the Supreme Court has obscured and denigrated the meaning of federal equity doctrine and overstepped its authority to refuse injunctions); Soifer & Macgill, supra note 135, at 1143-44, 1185-88 (contending that the Younger doctrine has
(2) The Pullman Doctrine

Pullman abstention originated in Railroad Commission v. Pullman.139 In Texas, on trains with only one sleeping car, the car was in the charge of a porter rather than a conductor. Porters were black; conductors were white. The Texas Railroad Commission ordered that all sleeping cars be in the charge of a conductor. The Pullman Company and the affected railroads brought suit in federal court contending that the order violated state law and the equal protection, due process, and commerce clauses of the United States Constitution. The porters intervened and raised similar objections. A three-judge district court enjoined enforcement of the order, but the Supreme Court ordered the lower court to abstain.140

The Court noted that the Texas statute establishing the authority of the Railroad Commission imposed a duty on the Commission “to correct abuses and prevent unjust discrimination in the rates . . . of such railroads . . . and to prevent any and all other abuses in the conduct of their business.”141 The Court thought that the Commission’s order might violate this provision, thus entitling the plaintiffs to relief under state law and avoiding the need to determine the federal constitutional questions.142 It was unclear, however, whether the general language of the statute should be construed to invalidate the Commission’s order. Because the final word on the meaning of the state statute could be supplied only by the Supreme Court of Texas, the district court was ordered to retain jurisdiction of the case while the plaintiffs sought a determination of the state-law issue in the state courts.143

Pullman thus established three criteria for abstention. The case must present both state-law and federal constitutional issues, state law on

139. 312 U.S. 496 (1941).
140. Id. at 497-98.
141. Id. at 499 n.1.
142. Id. at 501.
143. Id. at 501-02.
the state issue must be unclear, and it must be possible that resolution of
the state-law issue will obviate the need to reach the federal constitutional question.\footnote{144} The \textit{Pullman} doctrine also allows the plaintiff to re-
turn to federal court for a ruling on the federal constitutional issue if the
state ruling on the state issue is unfavorable.\footnote{145} The Supreme Court or-
dered \textit{Pullman} abstention frequently during the 1940s and 1950s.\footnote{146} The
doctrine fell from favor during the 1960s,\footnote{147} but was vigorously reas-
serted by the Burger Court.\footnote{148}

In theory, \textit{Pullman} abstention is very different from \textit{Younger} ab-
stention. Under \textit{Pullman} a federal court may \textit{decline} to exercise juris-
diction only in limited circumstances, while under \textit{Younger} a federal court
may \textit{exercise} jurisdiction only in special circumstances.\footnote{149} Furthermore,
under \textit{Pullman} the federal court retains jurisdiction pending resolution
in the state court, while under \textit{Younger} the case is dismissed. Thus, \textit{Pull-
man} abstention in theory merely postpones federal court consideration of
a constitutional issue, while \textit{Younger} abstention requires the federal con-
stitutional issue to be adjudicated in the state courts.\footnote{150} Indeed, the pur-
pose of \textit{Pullman} abstention is unobjectionable. It contemplates that state
courts will decide the state issues and that federal courts will decide the
federal constitutional issues if necessary, thus obtaining the most correct
possible resolution of all issues in the case.\footnote{151}

In practice, however, \textit{Pullman} abstention often causes the same de-
eral claim, it may be said not to violate separation of powers principles, assuming that the delay is not great. Redish, supra note 96, at 90.

152. Given the enormous delays in civil cases in many state courts, even a simple state declaratory judgment action may take a very long time. See Field, supra note 99, at 1144-45 n.20. If the plaintiff loses at the trial level, he must appeal in an attempt to obtain a definitive ruling by the highest state court. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1006 (2d ed. 1973) [hereinafter HART & WECHSLER].

153. Pullman abstention is ordered not so much because state court judges are innately better able to resolve local issues, but rather because a state supreme court interpretation of state law is by definition the correct interpretation. Field, The Abstention Doctrine Today, 125 U. Pa. L. Rev. 590, 604 (1977).


certify an issue directly to the highest state court for decision. But even the certification process can entail substantial delay, and some states impose restrictions that limit its utility.

**Pullman** abstention is said to serve four important purposes. First, it furthers the policy that courts should avoid constitutional issues when a case can be disposed of on other grounds. Second, it guards the independence of state governments by avoiding intrusive or disruptive constructions of state law or other interference with important state interests by federal courts. Third, **Pullman** abstention avoids the danger that a federal constitutional decision will be undermined or displaced by a different state court interpretation of state law. Finally, abstention helps ease federal court congestion.

Of these four purposes, only the second may properly overcome the presumption of the enforcement of legal rights. The first purpose, the desire to avoid constitutional decisions, is only a policy, not an ironclad command. The Supreme Court recently recognized the limits of this policy in *Pennhurst State School and Hospital v. Halderman*. The *Pennhurst* Court held that the eleventh amendment bars a federal court from adjudicating claims that state officials violated state law in carrying out

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157. For example, after the Supreme Court ordered abstention in 1976 in Bellotti v. Baird, 428 U.S. 132, 146-47 (1976), the district court certified several questions to the Massachusetts Supreme Judicial Court for resolution. The state court answered the questions, the district court again held the statute unconstitutional, and the Supreme Court affirmed. Bellotti v. Baird, 443 U.S. 622, 651 (1979). Three years elapsed, however, between the decision to abstain and the final judgment in the case. See Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 274-75 (5th Cir. 1976) (recognizing the significant delays in certification and the possible inability to frame the issue so as to produce a helpful response on the part of the state court); see also American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 293-94 (1969).

158. See, e.g., Holden v. NL Indus., 629 P.2d 428 (Utah 1981) (holding that certification rule violated a state constitutional provision); In re Certified Question, 549 P.2d 1310 (Wyo. 1976) (holding that the Wyoming Supreme Court will not answer a certified question unless nothing is left for the federal court to do but apply the answer to the question and enter judgment).

159. Harrison v. NAACP, 360 U.S. 167, 177 (1959); Railroad Comm'n v. Pullman, 312 U.S. 496, 498, 501 (1941); C. Wright, supra note 99, at 305; Redish, supra note 96, at 95.

160. **Pullman**, 312 U.S. at 500-01; M. Redish, supra note 104, at 234.

161. M. Redish, supra note 104, at 234; Field, supra note 99, at 1095.

162. **Pullman**, 312 U.S. at 500-01; M. Redish, supra note 104, at 234.

163. C. Wright, supra note 99, at 303.

164. Field, supra note 99, at 1097.

their official duties. The plaintiffs argued that such a rule would cause a federal court to reach federal constitutional issues in cases that might properly be disposed of by granting relief on a pendent state claim. The Supreme Court rejected this argument, referring to avoidance of constitutional decisions as a policy consideration. Thus, Pennhurst establishes that a federal court cannot avoid reaching constitutional issues if it is unable to resolve a case on state law grounds. Similarly, a federal court should not invoke Pullman abstention if practical considerations preclude a plaintiff from obtaining a prompt and definitive determination of state law issues in the state courts. In such cases, the policy of avoiding constitutional decisions must yield so that the controversy can be heard promptly and resolved.

The second Pullman justification seeks to promote two different sorts of state independence interests. The first is simply a state's desire to construe its own laws. Federal court decision of state-law issues can cause friction, particularly if the decision misconstrues state law. This interest is akin to the comity concerns cited in support of Younger abstention. It is a very amorphous consideration, and hardly a persuasive justification for refusing to enforce constitutional rights. The constitutional and statutory grants of diversity jurisdiction demonstrate the relative unimportance of this interest. Federal judges routinely construe state law in diversity cases. Diversity jurisdiction exists because of fear that out-of-state litigants will be unfairly deprived of their rights under state law. It follows a fortiori that fear of denial of federal constitutional rights in federal question cases is sufficient to overcome the state interest in unimpeded interpretation of state law.

The second interest is the state's desire to avoid federal interference with substantive state policies or programs. A serious and wrongful interference of this sort may occur in at least two circumstances: (1) if a federal court orders relief on a state-law claim based on an erroneous interpretation of state law and does not reach the federal constitutional issue; (2) if a federal court upholds the constitutionality of state action

166. Id. at 106.
167. Id. at 123 ("In any case, the answer to [plaintiffs'] assertion is that such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State.") (emphasis added). Pennhurst has other interesting implications for Pullman abstention. See infra note 175 and accompanying text.
168. Pullman, 312 U.S. at 500-01.
169. See supra notes 125 & 131-32 and accompanying text.
170. One of the criticisms of diversity jurisdiction, however, is that it forces federal judges to determine difficult issues of state law. C. WRIGHT, supra note 99, at 132.
based on an erroneous interpretation of state law. An example illustrates how these harms can occur. Assume that a bank owning land in an arid California county brings a federal suit to prevent the County Water District from carrying out a new water-allocation system that reduces the bank's allocation and gives priority to single families. Assume further that the bank alleges violation of both state land use and water law and the fourteenth amendment, and that state law on the state-law issues is unclear.\footnote{172}

If the federal court hears the case, it has two options in deciding the state-law claims: it can find the allocation system invalid under state law or it can find that state law authorizes the plan. If the court correctly finds the system invalid under state law, the court has vindicated state interests. Single families may go thirsty, but this result presumably accords with broader state policies and goals. If the court wrongly invalidates the plan, however, it may impair state interests by allowing a commercial user to obtain water at the expense of families. In addition, the mistake will be hard to correct. It may be some time before the same issue reaches the California Supreme Court in another case, and by then the harm will be done. The state legislature may enact legislation declaring such plans valid, thus giving families additional water, but such action may also come too late to avoid the harm.

\textit{Pennhurst} should reduce the likelihood of this sort of harm because it forbids a federal court from granting relief against state officials for violation of state law.\footnote{173} Thus, if state rather than county officials had promulgated the new water-allocation plan, the federal court would be precluded from ruling on its validity under state law. \textit{Pennhurst}, however, does not preclude federal relief against county or local officials because the eleventh amendment does not apply to counties or other state subdivisions.\footnote{174} Consequently, the sort of harm described in the hypothetical may still occur.\footnote{175}

\footnote{172. The facts of the example are drawn from Bank of Am. Nat'l Trust & Sav. Ass'n v. Summerland County Water Dist., 767 F.2d 544 (9th Cir. 1985). The court conducted a straightforward \textit{Pullman} analysis and approved the lower court's decision to abstain.}

\footnote{173. \textit{Pennhurst}, 465 U.S. at 106.}


\footnote{175. It is difficult to predict whether \textit{Pennhurst} will result in more or less \textit{Pullman} abstention in cases brought against state officials. Before \textit{Pennhurst}, a federal court contemplating \textit{Pullman} abstention might abstain, decide the case on state grounds, or decide the case on federal constitutional grounds. After \textit{Pennhurst}, the court has only two options. It can abstain or reach the constitutional issue. Since a court can no longer hear the case while avoiding the constitutional issue, it may be more likely to find the \textit{Pullman} criteria met and send the plaintiff to state court, particularly if the plaintiff's state-law claim appears strong. On the other
The court's other option in deciding the state-law issue is to hold the water-allocation plan valid under state law. If it makes this decision, it must reach the federal constitutional questions. If the finding of validity is correct under state law, decision of the federal constitutional issues will not improperly interfere with state water allocation. If the court finds the allocation system constitutional, the decision will vindicate the state's interest in providing more water for families. If the court finds the allocation system unconstitutional, that state interest properly must give way. If the court has wrongly found the plan valid under state law, however, decision of the federal constitutional issues may improperly interfere with state interests. If the federal court finds the allocation system unconstitutional, no harm to state interests occurs because the plan is invalid under state law. If the federal court finds the allocation plan constitutional, however, its judgment will affirm a plan that should have been found invalid under state law. Thus, the federal court may harm state interests by wrongly denying sufficient water for commercial development. And the incorrect decision that the plan is valid as a matter of state law will be as difficult to correct as an incorrect decision that the plan is invalid.\footnote{176}

An incorrect reading of state law by a federal court thus may result in serious harm to important state policies or programs. As the example makes clear, however, such harm is not inevitable. Nonetheless, the possibility of such harm must be carefully assessed by a district judge and is an important concern supporting \textit{Pullman} abstention.

The third purpose of \textit{Pullman} abstention is to avoid the danger that a federal court's decision will be undermined or displaced by a different interpretation of state law by the state's courts. This purpose is insufficient to overcome the presumption favoring enforcement of rights. Some federal judicial resources may be wasted if a federal ruling is mooted, but
a decision to abstain and the possible appeal of that decision may take as much or more time and effort as a decision on the merits.\textsuperscript{177} Again, if it is worth risking displacement of a federal decision in diversity cases, it seems worth risking displacement to enforce federal constitutional rights.\textsuperscript{178}

In cases in which a misconstruction of state law leads to improper interference with important state policies, displacement of the federal ruling by a state decision that corrects the error would presumably be welcomed by the federal court. When an incorrect interpretation of state law does not result in serious interference with state policies, it is hard to see any great harm to either state or federal interests if the federal decision is subsequently displaced. In the water-allocation case, for example, if the federal court erroneously found the new county water plan valid under state law but went on to hold it unconstitutional, the federal decision would be undermined if the state supreme court later found such plans to be invalid under state law. But the federal court would have arrived at the correct result, even though the federal constitutional decision could have been avoided.

The final reason advanced in support of \textit{Pullman} abstention is the need to ease federal court congestion. This justification can hardly overcome the presumption favoring enforcement of rights. Even if some restrictions on federal jurisdiction prove necessary, actions seeking vindication of constitutional rights are the least appropriate cases to exclude. And, as noted above, \textit{Pullman} abstention often does not save federal court resources.

Ultimately, it is a very close case whether \textit{Pullman} abstention should be retained. The only compelling argument supporting this form of abstention is that in some cases an erroneous federal court interpretation of state law may interfere with important state interests. Thus, if \textit{Pullman} abstention is retained, it should be invoked only when federal court error is substantially likely to harm state interests. Moreover, the strong presumption in favor of enforcement of constitutional rights requires a substantial likelihood that the federal court will misinterpret state law. The state issues must be genuinely novel and ambiguous, and

\begin{itemize}
\item \textsuperscript{177} A \textit{Pullman} abstention determination can be extremely complex, as the discussion of the water-allocation hypothetical showed. A decision to abstain under \textit{Pullman} is appealable. See, \textit{e.g.}, Bank of Am. Nat'l Trust \& Sav. Ass'n v. Summerland County Water Dist., 767 F.2d 544 (9th Cir. 1985); Pietzsch v. Mattox, 719 F.2d 129 (5th Cir. 1983).
\item \textsuperscript{178} The federal decision being displaced in a diversity case concerns state law; in a federal question case the displaced federal decision concerns federal law. In either case, however, the harm to federal interests seems to result mainly from the waste of judicial resources.
\end{itemize}
state precedents or legislative records must be insufficient for the federal court to make a reasoned interpretation of state law.

Delay in hearing constitutional claims can be justified only if it is substantially likely, both analytically and practically, that decision of the state-law issues will dispose of the case. Otherwise, the possible harm to the state from misconstruction of its law cannot outweigh the harm the plaintiff will suffer from nonenforcement of his rights. Analytically, there must be a good chance that the state-law issue will be determined in the plaintiff’s favor by the state courts. Practically, there must be a substantial likelihood that the state courts will render a dispositive decision promptly. In addition, abstention probably should not be ordered unless a state has a procedure for certifying unclear issues of state law to the highest state court.¹⁷⁹ An original action in state court is simply too cumbersome because of its inherent delay and the uncertainty that a definitive ruling can be obtained. If a state wants a federal court to be solicitous of its interests, the state should be solicitous of federal interests as well. If a state is unwilling to facilitate decisions of state issues, then the federal court should decide them itself to ensure vindication of federal constitutional rights.

In addition, a federal court should not certify issues to the highest state court unless the process is likely to produce a prompt decision. If the state court has been slow to respond to certification requests in the past, the federal court should hesitate to abstain. And if the wait for a state court ruling becomes long enough to jeopardize a plaintiff’s constitutional rights, the federal court should impose a deadline after which it will decide the case itself.¹⁸⁰

(3) Thibodaux-Burford Abstention

a. Thibodaux Abstention

Thibodaux abstention originated in Louisiana Power & Light Co. v.

¹⁷⁹. Field, supra note 153, at 592; see supra note 156 and accompanying text.

¹⁸⁰. The federal court should consider granting interim relief to protect the plaintiff’s rights while awaiting answers to the certified questions if it can do so without causing serious harm to state interests. See, e.g., Catrone v. Massachusetts State Racing Comm’n, 535 F.2d 669, 672 (1st Cir. 1976) (“[C]onsiderations of equity and fairness . . . strongly suggest the propriety of granting preliminary injunctive relief during the period that the district court, retaining jurisdiction, awaits the state outcome.”); see also Babbitt v. United Farm Workers Nat’l Union, 442 U.S. 289, 312 n.18 (1979). In the water-allocation hypothetical, for example, the court might have directed the county to give the bank the water due to it under the old allocation system while awaiting a state determination of the validity of the new plan. If the state supreme court decided the issue quickly, dangerous depletion of the county water supply would be unlikely to occur.
City of Thibodaux. The city began a condemnation proceeding against the power company in state court. The parties were diverse, and the company removed the case to federal court. A state statute appeared to authorize the city's action, but it had not been construed by the state courts. An opinion by the state attorney general in a similar case suggested that the statute did not authorize the taking. The district court stayed the action so that the parties could seek an interpretation of the statute by the state supreme court, and the United States Supreme Court affirmed.

The Court cited Pullman for the policy that a federal court should obtain a definitive ruling on state law rather than risk a tentative forecast. The Court also stressed as part of its abstention rationale that eminent domain is "intimately involved with sovereign prerogative . . . [and] concerns the apportionment of governmental powers between City and State." Although the Thibodaux decision on its face is fairly straightforward, the contours of Thibodaux abstention are unclear. Thibodaux conflicts with other decisions holding that federal courts must hear diversity cases even though they involve difficult or uncertain issues of state law. The Thibodaux Court also did not address whether other state interests might be sufficiently important to warrant abstention in diversity cases. In addition, another case decided the same day confused matters by undercutting the eminent domain rationale. Subsequent

182. Id. at 30.
183. Id. at 26, 30-31.
184. Id. at 27.
185. Id. at 28.
186. See, e.g., Meredith v. Winterhaven, 320 U.S. 228, 236 (1943) ("Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine."); see also Propper v. Clark, 337 U.S. 472, 489-90 (1949); Williams v. Green Bay & W.R.R., 326 U.S. 549, 553-54 (1946). But see Pennsylvania v. Williams, 294 U.S. 176 (1935) (ordering abstention in diversity cases); Hawks v. Hamill, 288 U.S. 2 (1933) (same).
187. In County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959), the Court declined to permit abstention in a case raising state eminent domain issues. Allegheny County condemned land owned by Mashuda for the purpose of enlarging an airport but subsequently leased the land to another company for private business use. Mashuda then began a federal diversity action seeking return of its property alleging that the county had violated established Pennsylvania law forbidding the use of eminent domain powers to condemn land for private use. Id. at 187-88. The district court abstained, but the court of appeals reversed and the Supreme Court affirmed the reversal. Id. at 188, 198. While Thibodaux appeared to stress the important state interest in unimpeded exercise of eminent domain powers, the Mashuda Court stated: [T]he fact that a case concerns a State's power of eminent domain no more justifies

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Supreme Court decisions have not clarified the scope of the doctrine, and lower court decisions are inconsistent.\textsuperscript{188} Thibodaux abstention is very similar to Pullman abstention. In both instances federal courts abstain when state law is unclear; the federal court retains jurisdiction while the parties seek a definitive ruling on the state-law issues in state court. Both doctrines seek to avoid erroneous interpretations of state law that might improperly interfere with important state policies, and both contemplate additional federal court action to resolve the dispute if necessary.\textsuperscript{189} The doctrines are not identical, abstention than the fact that it involves any other issue related to sovereignty. Surely eminent domain is no more mystically involved with "sovereign prerogative" than . . . a host of other governmental activities carried on by the States and their subdivisions . . . .\textsuperscript{190}

\textit{Id.} at 191-92. Although the opinions are difficult to reconcile, the different outcomes can be harmonized on the grounds suggested by Justice Stewart in his concurring opinion in Thibodaux. He noted that while the Thibodaux district court only stayed the federal case, the Mashuda district court ordered dismissal. In addition, while state law was unclear in Thibodaux, state law was clear in Mashuda, and only factual issues needed resolution. See Thibodaux, 360 U.S. at 31 (Stewart, J., concurring).

\textsuperscript{188} See, e.g., Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976) (citing Thibodaux as a case presenting "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"); Harris County Comm'r's Court v. Moore, 420 U.S. 77, 83-84 (1975) (stating the Court's inclination to apply Thibodaux abstention "when the state-law questions have concerned matters peculiarly within the province of the local courts"). In Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968), the Court abstained in a diversity case involving the state's power to condemn private land to secure water for a private business. The Court reasoned that the state courts should resolve the "truly novel" state-law issue that was of "vital concern" in arid New Mexico. \textit{Id.} at 594.

\textsuperscript{189} Some lower court decisions construe the doctrine narrowly. See, e.g., Miller-Davis Co. v. Illinois State Toll Highway Auth., 567 F.2d 323, 326 (7th Cir. 1977) (holding that abstention is appropriate in a diversity case only when the state issues are unclear and complex, and when an incorrect resolution would threaten an important state policy); Thompson v. Board of Educ. of Romeo Community Schools, 519 F. Supp. 1373, 1382 (W.D. Mich. 1981) ("[T]o hold that a federal court should generally abstain from considering state law issues because that precise issue has not yet been decided by the highest possible state court would do serious damage to considerations in federal forums of state claims through pendent jurisdiction and diversity jurisdiction. There must be some additional compelling circumstances presented to the court before it should defer such state law questions.").\textsuperscript{191} rev'd on other grounds, 709 F.2d 1200 (6th Cir. 1983). Other lower court decisions have ordered abstention in diversity cases simply because state law was unclear, even though no official state action or regulatory policy was involved. See, e.g., United Serv. Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir.) (en banc) (court ordered abstention because state law was unclear as to whether a pilot was a "passenger" within the meaning of an insurance policy), cert. denied, 377 U.S. 935 (1964); Richey v. Sumoge, 257 F. Supp. 32 (D. Or. 1966) (federal diversity proceeding stayed so defendant could apply to Oregon court for a determination of validity of service of process under Oregon declaratory judgment act).\textsuperscript{192}

\textsuperscript{190} Litigants in Pullman abstention cases can return to federal court if the state decision on the state issues does not resolve the dispute. In Thibodaux, the Supreme Court explicitly assumed that the district court order only postponed federal resolution of the case.
however, because Pullman cases involve an underlying federal constitutional issue while Thibodaux cases do not. 191 Thibodaux abstention thus does not have as a purpose avoiding constitutional questions.

It might be argued that Thibodaux abstention is less objectionable than Pullman abstention because Pullman threatens to obstruct the vindication of fundamental constitutional rights while Thibodaux interferes only with the enforcement of state-created rights that are better pursued in a state forum. But the congressional grant of diversity jurisdiction entitles diverse litigants to a federal forum for vindication of state rights. Moreover, state-created legal rights are important rights and should enjoy a presumption favoring their full and prompt enforcement. Any doctrine that delays enforcement should be viewed with suspicion and invoked only for very important reasons.

As with Pullman abstention, Thibodaux abstention would be unobjectionable if it worked in practice as intended in theory. 192 If a federal court could obtain a prompt, definitive ruling on the state issue, abstention would not interfere with the plaintiff’s right to a federal forum and would help ensure that the federal judgment was correct and final. But Thibodaux abstention entails financial cost and substantial delay in the vindication of rights, with no assurance that the highest state court will either hear the case or resolve the state issues. 193

Given the presumption favoring enforcement of rights, Thibodaux abstention should be retained only if substantial restrictions are placed

Thibodaux, 360 U.S. at 29 ("Eventually the District Court will award compensation if the taking is sustained.").

191. Pullman cases invoke federal question jurisdiction, while Thibodaux cases proceed under diversity jurisdiction. As noted above, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984), reinforced the policies underlying Pullman abstention by forbidding a federal court in a federal question case from granting relief against state officials for violation of state law. See supra notes 165-67 and accompanying text. Prior to Pennhurst, federal courts could grant such relief through the exercise of pendent jurisdiction. The Pennhurst Court held that this practice violated the eleventh amendment. 465 U.S. at 106. Pennhurst will not work any change in diversity cases, however. The fiction of Ex parte Young, 209 U.S. 123 (1908), allowing unconstitutional state action by state officials to be considered the individual actions of state officers for eleventh amendment purposes, has not been applied in diversity cases. See Eure v. NVF Co., 481 F. Supp. 639, 641-42 (E.D.N.C. 1979); National Market Reports v. Brown, 443 F. Supp. 1301, 1305 n.7 (S.D.W.Va. 1978). Consequently, diversity actions against state officials for acts undertaken in their official capacity have long been considered barred by the eleventh amendment. See Great N. Ins. Co. v. Read, 322 U.S. 47, 51 (1944); O'Neill v. Early, 208 F.2d 286, 288 (4th Cir. 1953).

192. See supra notes 149-58 and accompanying text.

193. The decision on the merits by the Fifth Circuit in the Thibodaux litigation came eight years after the Supreme Court ordered abstention. See Thibodaux v. Louisiana Power & Light Co., 373 F.2d 870 (5th Cir. 1967).
on its use.\textsuperscript{194} As with \textit{Pullman} abstention, state law must be genuinely ambiguous. There must be a strong chance that the federal court will misconstrue state law and that the erroneous construction will seriously jeopardize important state interests.\textsuperscript{195} Finally, \textit{Thibodaux} abstention should be considered only if a state has a certification process,\textsuperscript{196} and the federal court should monitor the process and decide the case itself if unreasonable delay develops.

b. \textit{Burford} Abstention

\textit{Burford} abstention, sometimes called administrative abstention,\textsuperscript{197} originated in \textit{Burford v. Sun Oil Company}.\textsuperscript{198} Sun Oil brought a federal suit against Burford and the Texas Railroad Commission to enjoin execution of a Commission order granting Burford the right to drill four wells on a small plot of land in a Texas oil field. Sun Oil claimed that the order violated state law and the due process clause of the fourteenth amendment. Jurisdiction was asserted on both diversity and federal question grounds.\textsuperscript{199} The district court dismissed the case, but the court of appeals reversed. The Supreme Court, by a five to four vote, held that the district court had properly abstained.\textsuperscript{200}

The majority stressed several special and unusual factors supporting abstention in the case. All drilling operations were interrelated, so that an erroneous federal court decision in one case could adversely affect the entire oil field.\textsuperscript{201} In addition, Texas had concentrated judicial review of

\textsuperscript{194} Some commentators have suggested that this form of abstention be abolished. \textit{See}, e.g., Redish, \textit{ supra} note 96, at 98 (arguing that separation of powers principles and the problems of applying \textit{Thibodaux}'s "broad and nebulous criteria" dictate abandonment of the doctrine unless Congress authorizes it).

\textsuperscript{195} Such potential harm arguably was present in \textit{Thibodaux}. If the federal court had erroneously decided that state law did not authorize condemnation, the city would have been wrongly denied the use of the land for public purposes.

\textsuperscript{196} The Supreme Court indicated its approval of certification in diversity cases in \textit{Lehman Bros. v. Schein}, 416 U.S. 386, 391 (1974) (Certification "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.") (footnote omitted).

\textsuperscript{197} \textit{See}, e.g., Field, \textit{ supra} note 99, at 1153-55.

\textsuperscript{198} 319 U.S. 315 (1943).

\textsuperscript{199} \textit{Id.} at 316-17.

\textsuperscript{200} \textit{Id.} at 334.

\textsuperscript{201} It is important to understand why federal court review of a Commission order affecting a single well operator could have such serious consequences, because the dangers imply some strict limits on the scope of \textit{Burford} abstention. The oil field covered a large area, and over 900 operators drew oil from it. \textit{Id.} at 318-19. Texas regulatory policy sought to ensure that each landowner withdrew only the oil under his surface area. \textit{Id.} at 322. Careful supervision was necessary to achieve this goal because individual operators could obtain more than their fair share by drawing oil from other parts of the field. In addition, too many wells and
all Commission orders in the state district courts of one county to avoid having different courts of equal dignity reach conflicting conclusions concerning the same rules.\textsuperscript{202} The majority reasoned that federal court intervention would almost certainly result in the conflicting interpretations of state law that the state sought to avoid.\textsuperscript{203} Concentration of judicial review also enabled the state judges to develop expertise on the complex issues involved.\textsuperscript{204} Finally, the Court judged the Texas review procedures to be "expeditious and adequate,"\textsuperscript{205} thus reducing the risk of harm to the plaintiff from abstention.

\textit{Burford} abstention is similar to \textit{Thibodaux} abstention in that both seek to avoid interference with important state policies and programs.\textsuperscript{206} There are significant differences in the doctrines, however. In \textit{Thibodaux} the federal court abstained so that the plaintiff could seek state court clarification of an uncertain issue of state law.\textsuperscript{207} In \textit{Burford} the court abstained because of the complexity of the state regulatory program and to avoid inconsistent rulings from different forums.\textsuperscript{208} \textit{Thibodaux} was a diversity case involving no federal issues, while \textit{Burford} involved both state and federal claims. In \textit{Thibodaux} the district court retained jurisdiction so that the parties could return for final resolution of the case, while in \textit{Burford} the Supreme Court ordered dismissal.\textsuperscript{209} Thus, \textit{Burford} does not merely postpone federal resolution of the case, but instead requires the plaintiff to litigate both his state and federal claims in a state forum.\textsuperscript{210} In some ways, \textit{Burford} abstention resembles \textit{Younger} abstention more than \textit{Thibodaux} abstention. Both \textit{Burford} and \textit{Younger} rely on the disruptive effect of federal court intervention per se to justify abstention, and both deny the plaintiff a federal forum for resolution of his federal claims.\textsuperscript{211}

\cite{Redish:2000} careless drilling practices dissipated the natural gas that forced the oil to the surface. If gas pressure was insufficient, expensive pumping procedures were required to extract the oil, and some portion of it was lost. \textit{Id.} at 319. Consequently, an order allowing one landowner to drill new wells automatically affected the entire oil field. \textit{Id.} at 324.

\textsuperscript{202} \textit{Id.} at 326-27.
\textsuperscript{203} \textit{Id.} at 327, 334.
\textsuperscript{204} \textit{Id.} at 327.
\textsuperscript{205} \textit{Id.} at 334.
\textsuperscript{206} M. REDISH, supra note 104, at 246.
\textsuperscript{207} See supra notes 183-85 and accompanying text.
\textsuperscript{208} The dissent argued that the applicable rules were relatively clear, thus making abstention inappropriate. \textit{Burford}, 319 U.S. at 339-42 (Frankfurter, J., dissenting).
\textsuperscript{209} \textit{Id.} at 334.
\textsuperscript{210} Field, supra note 99, at 1153.
\textsuperscript{211} There are also significant differences between \textit{Burford} and \textit{Younger} abstention. \textit{Burford} is invoked in diversity cases to avoid resolution of significant state-law claims, while \textit{Younger} cases almost always involve predominant federal constitutional issues. \textit{Younger} ab-
As with the other forms of abstention, plaintiffs face significant costs when a federal court invokes Burford abstention. If the parties are diverse, an out-of-state plaintiff loses the right to litigate his claim in a federal forum free of local bias. The state courts presumably do not have greater expertise than the federal courts as to any federal issues involved, and the state courts may be hostile to the vindication of federal rights. In addition, the federal courts have not limited Burford abstention to cases exhibiting Burford's unusual characteristics. Lower federal courts have abstained without any reference to whether federal relief would disrupt state policies. Furthermore, many courts have not re-

stention generally is not applied in the absence of a pending state proceeding, see Steffel v. Thompson, 415 U.S. 452 (1974), while Burford has no such requirement.


213. The Supreme Court encouraged this result by its decision in Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951). The Alabama Public Service Commission had denied Southern Railway's application to discontinue an uneconomical rail service on the grounds that the public needed the service and Southern had not attempted to reduce its losses by cutting costs. Southern then began a federal diversity action, alleging that the Commission's order confiscated its property without due process of law in violation of the fourteenth amendment. A three-judge court enjoined the Commission from enforcing its order, but the Supreme Court reversed and ordered abstention. Id. at 342-44, 351.

The Court cited Burford and listed a number of factors in support of abstention. The case involved "the essentially local problem of balancing the loss to the railroad from continued operation of trains . . . with the public need for that service." Id. at 347-48. In addition, Alabama had concentrated judicial review of Commission orders in the circuit court of Montgomery County, and appellate review of circuit court decisions was relatively broad under Alabama law. Id. at 348. The Court ended with a sweeping endorsement of abstention:

As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for protection of federal rights. Equitable relief may be granted only when the District Court . . . is convinced that the asserted federal right cannot be preserved except by granting the "extraordinary relief of an injunction in the federal courts."

Id. at 349-50 (quoting Railroad Comm'n v. Rowan & Nichols Oil Co., 311 U.S. 614, 615 (1940) (footnotes omitted).

Although Alabama Pub. Serv. Comm'n bears a superficial resemblance to Burford, several critical differences directly affect the propriety of abstention. In Burford, federal involvement was said inevitably to involve serious disruption of state efforts to regulate the East Texas oil field. In Alabama Pub. Serv. Comm'n, however, the Court said only that the issue was local and did not discuss whether federal review of Commission orders would impinge on important state interests. In Burford, concentration of judicial review was important because it fostered expertise and reduced the chances of inconsistent decisions, but Alabama Pub. Serv. Comm'n claimed no such results from concentration of judicial review. Finally, the Court's sweeping statement seems to authorize abstention in virtually any case seeking review of a state administrative order so long as the plaintiff's federal claims can be pursued in state court. This suggestion plainly goes well beyond the holding of Burford. For other assessments critical of Alabama Pub. Serv. Comm'n, see M. REDISH, supra note 104, at 245-46; Field, supra note 99, at 1154-59; Wells, supra note 132, at 75-76; Comment, supra note 212, at 976-78.

214. See, e.g., Garrett v. Bamford, 582 F.2d 810, 819 (3d Cir. 1978); Gray-Taylor, Inc. v.
quired concentration of state judicial review or special knowledge on the part of state judges as preconditions for abstention. In these circumstances, federal courts deny rights or defer their enforcement simply because federal judges do not feel like deciding cases properly before them.

If Burford abstention is retained at all, it should be sharply curtailed to apply only in circumstances that can overcome the presumption favoring enforcement of rights. Federal review of a state administrative decision must pose a substantial likelihood of serious harm to important state interests. As in Burford, the harm must result from federal court involvement per se. State remedies must be genuinely fair and adequate, as evidenced by concentration of state judicial review in a special forum or by other special circumstances. Even if these conditions are satisfied, however, Burford abstention probably violates separation of powers principles because a federal court refuses to hear a case properly assigned to it by Congress. This problem might be circumvented if a court retained jurisdiction as in Pullman and Thibodaux abstention. But significant delay in exercising jurisdiction also violates separation of powers principles, and delay is inevitable in Burford cases because a federal court cannot realistically use a certification process to obtain a speedy determination of key issues by the highest state court. Federal courts might better accommodate the plaintiff's interest in enforcement of rights and the state's interest in avoiding disruptive interference by exer-


216. See Redish, supra note 96 (contending that abstention doctrines ignore the dictates of valid jurisdictional and civil rights statutes and thus usurp legislative authority in violation of separation of powers principles).

217. Id. at 90, 98.

218. Certification is helpful when a specific provision of state law is ambiguous and can be clarified by the highest state court. However, courts in Burford cases abstain because they are uncertain how a complex state regulatory scheme should apply in the case at hand. Certification in these circumstances would require sending the whole dispute to the state supreme court for review of the state administrative agency's fact-finding and decision. Instead of clarifying an uncertain state law, the state high court would be performing the function normally performed by the state court with original jurisdiction over the case.
cising jurisdiction but proceeding with caution. If federal court review of a particular kind of state administrative ruling would have an unsettling effect per se, the court might impose a higher burden on the party seeking review. Such a course would reduce the threat of disruption while providing for vindication of rights in egregious cases.

(4) Conclusion

The Supreme Court should reevaluate all of the abstention doctrines in light of a presumption favoring enforcement of rights. Younger abstention should be abandoned and Burford abstention probably should be discarded as well. Pullman and Thibodaux abstention should be sharply limited as suggested above. The purposes underlying the doctrines should be recast as factors to consider in the wise exercise of equitable discretion. The federal courts should proceed with caution and care when federal relief might interfere with important state policies or programs. In many cases, of course, no interference will occur because the plaintiff will lose on the merits or otherwise fail to satisfy the requirements for equitable relief. In cases in which an injunction is necessary to enforce a plaintiff’s rights, the courts should structure relief in a way that causes as little interference with state interests as possible.

It would be preferable for the Supreme Court itself to revoke or restrict the abstention doctrines because the Court created them. But if the Supreme Court fails to act, Congress should overrule Younger and Burford abstention legislatively, and codify Pullman and Thibodaux abstention as properly limited. Given its power to regulate the jurisdiction of the lower federal courts, Congress certainly can enact such legislation without running afoul of separation of powers principles. Congress has the power to open the federal courts to certain kinds of cases within article III limits. If the courts refuse to hear those cases, Congress can legitimately reaffirm its earlier directives.

219. The four dissenting justices in Burford thought this an adequate means of protecting state interests. Burford, 319 U.S. at 345 (Frankfurter, J., dissenting).

220. Institutional reform litigation has spawned an extensive literature on techniques for minimizing the intrusive effects of federal injunctions on state institutions. See generally Zeigler, supra note 93, at 85-110; Special Project, supra note 93; Note, supra note 93.


222. Congress might lack the power to abrogate or modify the abstention doctrines if the doctrines are constitutionally required, but it is unlikely that they are. The Court characterized its reasons for abstention in Pullman only as “important considerations of policy in the administration of federal equity jurisdiction.” Pullman, 312 U.S. at 501 (emphasis added).
Precedent exists for congressional rejection of court-created abstention doctrines. In *Banco Nacional de Cuba v. Sabbatino*, a diversity case, a Cuban governmental agency brought suit against a New York corporation that refused to pay for a shipment of sugar. The defendant instead proposed to pay American citizens who owned the sugar before it was expropriated by the Cuban government. The lower federal courts held that the expropriation violated international law and thus did not convey good title to the plaintiff. The Supreme Court reversed and granted judgment for the plaintiff, relying on the Act of State doctrine, which “precludes the courts of this country from inquiring into the validity of public acts of a recognized foreign sovereign power committed within its own territory.” Shortly after the Supreme Court decision, Congress enacted legislation restricting the doctrine to limited circumstances. The legislation was held to be retroactive and, following the congressional mandate, the Second Circuit denied Cuba’s claim to the sugar when the case was remanded.

Codification might limit *Pullman* and *Thibodaux* abstention to appropriate cases. However, a statute defining the narrow circumstances

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224. *Id.* at 400-01.


227. The American Law Institute suggested codification of a number of abstention doctrines in 1969, see *American Law Institute*, *supra* note 157, at 48-51, 282-98, but the proposals were not adopted by Congress. Bills also were introduced in the late 1970s to overturn Supreme Court decisions that extended *Younger* abstention to state-initiated civil proceedings in situations in which the state proceeding was filed after a federal case had been initiated. These bills also were unsuccessful. For discussion of these bills, see Committee on Civil
in which abstention is appropriate necessarily will contain imprecise lan-
guage and could thus be subject to manipulation by federal courts seek-
ing to avoid cases properly brought before them. As Justice Frankfurter
once stated, however, "[i]t would imply an unworthy conception of the
federal judiciary to give weight to the suggestion that acknowledgement
of th[e] power [to abstain] will tempt some otiose or timid judge to shuffle
off responsibility." Thus, if the Supreme Court fails to act, codification
should be tried.

This subsection has applied the new approach to the enforcement of
rights to the abstention doctrines. With some limited exceptions, it con-
cludes that the purposes underlying abstention are insufficient to over-
come the presumption in favor of enforcement of rights. The following
subsection applies the new approach to the new restrictive standards for
the implication of private rights of action under federal statutes.

B. The Restrictive Standards for Implying Private Rights of Action Under
Federal Statutes

The traditional rules for implying a private remedy from a statute
were set forth in the first Restatement of Torts. If a person breached a
statutory duty, a court would provide a remedy for the injured party if he
was a member of the group for whose benefit the statute was enacted and
if the harm suffered was of a kind the statute generally was intended to
prevent, unless the legislature indicated that it did not intend a private
remedy under the circumstances. The federal courts have generally
abided by these standards throughout our history. As recently as
1975, in Cort v. Ash, the Court used a four-part test for implication of
a private right of action essentially restating the traditional criteria.

Rights, Imposing Liability upon Governments for Civil Rights Violations and Imposing Limits
N.Y. 141 (1978); Koury, Section 1983 and Civil Comity: Two for the Federalism Seesaw, 25
LOY. L. REV. 659, 700-01, 708 (1979); Maroney & Braveman, "Averting the Flood": Henry J.
Friendly, The Comity Doctrine, and the Jurisdiction of the Federal Courts (pt. 2), 31 SYRACUSE

228. Thibodaux, 360 U.S. at 29.
230. Id. §§ 286-287. Section 286 is quoted supra note 53.
231. See supra notes 57-67 and accompanying text.
233. The test is as follows:
First, is the plaintiff "one of the class for whose especial benefit the statute was en-
acted," that is, does the statute create a federal right in favor of the plaintiff? Sec-
ond, 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
*Cort v. Ash* was the last Supreme Court case to apply the traditional rules. Three cases decided in 1979 signalled a change to a far more restrictive standard. In *Cannon v. University of Chicago*, the plaintiff alleged that she had been denied admission to medical school because of her sex. She brought suit under a federal statute that prohibited sex discrimination by educational institutions receiving federal funds. The statute did not, however, specifically create a private right of action enforceable by 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 standards. With little fanfare, the majority recast *Cort* by framing the issue as one of "statutory construction" and stating: "[B]efore concluding that Congress intended 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." This language suggests that the relatively narrow question of statutory interpretation posed by the second *Cort* factor—whether Congress intended to create or deny a private right of action—is the predominant inquiry, and that the other factors are only aids to con-

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?

*Id.* at 78 (quoting Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916)) (citations omitted) (emphasis added in *Cort* opinion).


234. The story of the demise of traditional standards for implication of private rights of action in the federal courts has been told in detail many times, so only a very brief account of the central cases is presented here. For more detailed accounts, see Brown, supra note 233, at 629-35; Foy, supra note 54, at 556-66; Mezey, *Judicial Interpretation of Legislative Intent: The Role of the Supreme Court in the Implication of Private Rights of Action*, 36 RUTGERS L. REV. 53, 63-76 (1983).


236. *Id.* at 680-83. The statute was 20 U.S.C. § 1681 (1982).

sider in answering that question. In a concurring opinion, Justice Rehnquist sought to put Congress on notice that creation of rights of action is Congress' responsibility. He warned that in the future the Court might be extremely reluctant to imply a cause of action without explicit evidence that Congress intended this result.238 Justice Powell filed a lengthy dissenting opinion attacking the Cort test as a violation of separation of powers principles.239

The Court adopted the restrictive approach suggested in Cannon in two subsequent cases. In Touche Ross & Co. v. Redington,240 the Court refused 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. Citing Cannon, 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.241 The plaintiffs' argument for implication based on tort principles therefore was "entirely misplaced."242 The Court also explicitly stated that the four Cort factors are not of equal weight, and that the central inquiry was whether Congress intended to create a private right of action.243 Transamerica Mortgage Advisors v. Lewis244 reaffirmed the new approach. In a complex opinion, the Court implied a private right of action under one section of the Investment Advisors Act of 1940 and declined to do so under another section. But the standards the Court applied were clearly stated:

[What 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 appropriate inquiry to be made in resolving the issues presented by the case before us.245

Thus, the new standard was firmly in place.246

238. Id. at 717-18 (Rehnquist, J., concurring). Justice Stewart joined in this opinion.
239. Id. at 730-49 (Powell, J., dissenting). This theory is discussed infra notes 272-77 and accompanying text. Justice White, joined by Justice Blackmun, also dissented, arguing that the legislative history showed Congress did not intend to create a private right of action. Cannon, 441 U.S. at 718-30.
241. Id. at 568 (emphasis added).
242. Id.
243. Id. at 575. The Court refused to consider the plaintiffs' argument that the third and fourth Cort factors favored implication, stating that "such inquiries have little relevance to the decision of this case." Id.
245. Id. at 15-16.
246. Some subsequent Supreme Court opinions have suggested that the four-part Cort test still has vitality. The determinative factor, however, is whether Congress intended to create the asserted right of action. See, e.g., Merrell Dow Pharmaceuticals v. Thompson, 106 S. Ct.
It is difficult to overstate the importance of the change made in Cannon, Touche Ross, and Transamerica. The Court brushed aside hundreds of years of common-law tradition and dealt a severe blow to the vindication of rights. Few private rights of action will be implied from federal statutes under the new standards. If a statute does not explicitly authorize a private remedy, the legislative record rarely will show that Congress intended to create one. Without this positive showing, the Court will decline to provide a private right of action.247 Without a remedy, the correlative duties imposed by the statute become mere voluntary obligations.248

Only two possible avenues exist for private enforcement of federal statutory rights in cases in which the federal courts will not imply a cause of action under the new test. The plaintiff might attempt to proceed in federal court if an appropriate state cause of action can be coupled with the substantive federal right. Alternatively, the plaintiff might attempt to enforce the federal right in state court.

The Supreme Court recently closed the first avenue in Merrell Dow Pharmaceuticals v. Thompson.249 The plaintiffs sued Merrell Dow in state court alleging that their children had suffered birth defects from defendant’s drug. The plaintiffs relied upon several common-law theories of liability, including negligence. The plaintiffs also alleged that the drug was misbranded in violation of the federal Food, Drug, and Cosmetic Act250 because its label did not provide adequate warnings, and that the violation of the federal statute was evidence of negligence. Merrell Dow removed the case to federal court, arguing that the court had subject matter jurisdiction because the presence of the federal issue made


247. See Foy, supra note 54, at 556 (The Court has gone "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.").

248. See supra notes 70-73 and accompanying text. This does not mean, of course, that the statute is a dead letter. In some instances the plaintiff's rights may be enforceable by an administrative agency. In addition, the statute may contain criminal sanctions that will deter others from violating plaintiff's rights. The plaintiff may not be able to convince the agency to act, however, and criminal sanctions do nothing to compensate the plaintiff for violations of his rights.


the case one arising under federal law. The Supreme Court disagreed, and ordered the case remanded to state court.

The parties agreed that a private right of action could not be implied under the federal Act. Based on this stipulation, the Court assumed that the *Touche Ross-Transamerica* standards for implication could not be met. The Court treated this assumption as the equivalent of a finding that Congress did not intend to create a private right of action. The Court then concluded that it would flout, or at least undermine, congressional intent to exercise federal question jurisdiction to provide a private remedy by use of a state cause of action.

The *Merrell Dow* Court's reasoning is subject to challenge on several grounds. Denial of subject matter jurisdiction in this instance is inconsistent with decisions upholding federal jurisdiction when an important issue of federal law is central to a case. In addition, it does not necessarily follow that Congress affirmatively intended to withhold a private remedy simply because the *Touche Ross-Transamerica* standards are not met. A private right of action cannot be implied under those standards unless a party can point to specific proof in the legislative history that Congress intended to create such a remedy. But the legislative record may be silent on the matter. If the record is silent, Congress may not have considered whether it wanted to create a private right of action. It may have had no intent one way or the other. Consequently, allowing the case to go forward in federal court on a state cause of action does not necessarily contradict congressional intent. Moreover, as Justice Brennan pointed out in dissent, even if Congress did not intend a private federal cause of action under the federal Act, it does not necessarily follow that Congress meant to prohibit federal jurisdiction over a state cause of action that incorporates federal law. Congress granted federal question jurisdiction to promote correct and uniform decision of federal issues, and that purpose would be furthered by exercising jurisdiction in cases such as *Merrell Dow*. Justice Brennan also noted that all express remedies provided by the Act must be pursued in federal

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252. Id. at 3234-35.
254. As the Supreme Court has noted, the record will often be silent because the legislation in question concededly does not provide an explicit right of action. *See Transamerica*, 444 U.S. at 18; *Cannon*, 441 U.S. at 694.
256. Id. at 3243 (Brennan, J., dissenting).
court. This preference for federal enforcement undercut the majority's conclusion that Congress intended private remedies for violations of the Act to be pursued in state court.\footnote{257}

Despite its questionable logic, \textit{Merrell Dow} is the new law of the land, and it prevents a party from enforcing a federal statutory right in federal court by means of a state cause of action when the \textit{Touche Ross-Transamerica} standards do not allow implication of a private federal cause of action.\footnote{258} If a federal statutory right is to have any private remedy when Congress does not make plain that it intends to create a private right of action, the plaintiff must seek to enforce the federal right in state court. A state judge should not imply a cause of action directly under the federal statute unless a federal judge would do the same. Federal law governs that issue, and the supremacy clause presumably requires a state judge to follow the \textit{Touche Ross-Transamerica} standards.\footnote{259} However, a

\footnote{257. \textit{Id.} at 3244-45 (Brennan, J., dissenting).}

\footnote{258. \textit{Merrell Dow} did not address whether a federal court should proceed if subject matter jurisdiction is based on diversity of citizenship instead of federal question. The answer to this question is of more than academic interest; some federal courts have allowed federal rights to be enforced by means of a state-created cause of action in diversity cases factually similar to \textit{Merrell Dow}. See, e.g., \textit{Lowe v. General Motors Corp.}, 624 F.2d 1373, 1379-81 (5th Cir. 1980) (applying Alabama law, court reinstated verdict based on violation of federal National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (1982), in negligence action despite lower court determination that no federal private right of action should be implied from the federal act under the \textit{Cort v. Ash} test); \textit{Lukaszewicz v. Ortho Pharmaceutical Corp.}, 510 F. Supp. 961, 964-65 (E.D. Wis. 1981) (court used Wisconsin standards based on § 286 of the \textit{Restatement (Second) of Torts} (1965) in deciding that violation of labelling requirements of the federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 352-353 (1980), established negligence per se).

The majority in \textit{Merrell Dow} reasoned that it would undermine congressional intent for a federal court to provide a private remedy using a state cause of action when Congress had not intended to create a federal private cause of action. 106 S. Ct. at 3234. This rationale would seem to apply regardless of the ground of subject matter jurisdiction. On the other hand, \textit{Merrell Dow} presented a genuinely close question as to whether federal question jurisdiction existed under traditional jurisdictional standards, and this appeared to be an important factor in the Court's decision. The Court stated:

\textit{We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal question jurisdiction.} \textit{Id.} at 3236. Diversity cases, by contrast, generally do not present close jurisdictional questions. If diversity of citizenship existed between the parties, it would be difficult for the Supreme Court to hold that it lacked jurisdiction. Of course, the Court might nonetheless decline to hear the case on the policy grounds stated in \textit{Merrell Dow}. Perhaps we are about to witness the creation of yet another abstention doctrine.

\footnote{259. \textit{Cf.} M. REDISH, \textit{ supra} note 104, at 124 ("If the federal system is to function properly, a state court cannot be permitted to ignore federal constitutional and statutory principles that conflict with state law. The supremacy clause does not appear to permit any other result.").}
state court may be able to adopt the standard of conduct contained in the federal statute and enforce the federal statutory right by using a state cause of action. In traditional parlance, violation of the federal statute would be evidence of negligence or negligence per se under state common law.260

Federal law would not require a state court to allow this tactic. If Touche Ross and Transamerica compel the conclusion that Congress did not intend to create a private remedy, it is hard to argue that Congress meant to require the state courts to provide private remedies.261 Federal law also might prohibit a state court from providing a private remedy if Congress intended to preempt state enforcement. But if preemption was not intended, a state court should be free to enforce federal rights by means of a state cause of action.262

Whether a plaintiff who is denied a federal remedy by the doctrine of Touche Ross and Transamerica may enforce his federal right in state court depends, of course, on the vagaries of local practice.263 Furthermore, after Merrell Dow, state courts may be less willing to enforce federal rights by means of a state cause of action. Since Merrell Dow held

260. The majority in Merrell Dow did not discuss this possibility. By remanding the case to the state court, however, the Court appeared to contemplate that the plaintiffs would enforce the federal right in state court. The plaintiffs could benefit from the federal standard in state court only by coupling the federal right with a state cause of action because the Court held that no federal cause of action existed.

261. Indeed, some question remains as to whether state courts must always enforce federal causes of action that Congress has explicitly created. See M. Redish, supra note 104, at 124-38; C. Wright, supra note 99, at 268-73.

262. Frankel, supra note 233, at 564 n.64. Some cases support this practice. See, e.g., Lowe v. General Motors Corp., 624 F.2d 1373, 1379-80 (5th Cir. 1980) (holding that violation of federal National Traffic and Motor Vehicle Safety Act (MVSA), 15 U.S.C. §§ 1381-1431 (1982), is negligence per se under Alabama law); Nevels v. Ford Motor Co., 439 F.2d 251, 255-58 (5th Cir. 1971) (holding that violation of MVSA was evidence of negligence under Georgia law); Larsen v. General Motors Corp., 391 F.2d 495, 503 n.5 (8th Cir. 1968) (stating that breach of MVSA may constitute negligence per se under state law); Florida Freight Terminals v. Cabanas, 354 So. 2d 1222, 1225 (Fla. App. 1978) (violation of federal air regulations is evidence of negligence under Florida law); Lociiero v. Interpace Corp., 83 Wis. 2d 876, 884, 266 N.W.2d 423, 427 (1978) (violation of federal legislative or administrative enactments can constitute negligence per se under Wisconsin law).

263. Professor Foy considers this a "strange and disquieting" prospect:

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. Foy, supra note 54, at 569. Another commentator who reviewed current state practice on implication of private rights of action concluded that state court rulings have been unpredictable and that the law is in disarray. See Note, Implication of Implied Causes of Action in the State Courts, 30 Stan. L. Rev. 1243, 1244, 1261 (1978).
that federal court enforcement of a state cause of action predicated on a federal standard would undermine Congress' intent not to create a private remedy, a state judge might well conclude that it would also undermine congressional intent to allow a plaintiff to proceed in state court under the same procedural alignment.

It would be unfortunate if state judges reached this conclusion because state court actions are the only remaining means of enforcing federal rights in cases that do not meet \textit{Touche Ross-Transmaerica} standards. Also, as noted above, \textit{Merrell Dow}'s inferences about congressional intent to deny a private federal cause of action and thus to deny federal jurisdiction are shaky at best.\textsuperscript{264} As a general matter, a state judge should conclude that Congress does not want federal rights enforced in state court only if Congress says so directly by preempting state enforcement.

\textit{Merrell Dow} and the Court's restrictive standards for implication of private rights of action present substantial obstacles to enforcement of federal statutory rights. The Court has offered two main justifications for the new standards. One is based on policy concerns; the other is constitutional. A majority of the Justices agree that it is far better for Congress rather than the courts to create rights of action.\textsuperscript{265} Congress has superior law-making powers. It is much more capable than a court to gather facts, establish priorities, and accommodate varying viewpoints in setting the enforcement provisions of regulatory statutes.\textsuperscript{266} In addition, the Court has stated that the complexity of modern legislation requires reliance on Congress.\textsuperscript{267} Intricate policy calculations may be necessary to adjust and coordinate the enforcement mechanisms of complex legislation, and judicial creation of rights of action may disrupt a delicate bal-

\begin{itemize}
\item \textsuperscript{264} See supra notes 249-52 and accompanying text.
\item \textsuperscript{266} See Carlson v. Green, 446 U.S. 14, 36 (1980) (Rehnquist, J., dissenting). Judge Henry J. Friendly once summarized a legislature's advantages in making law:
\begin{quote}
The legislature's superior resources for fact gathering; its ability to act without awaiting an adventitious concatenation of the determined party, the right set of facts, the persuasive lawyer, and the perceptive court; its power to frame pragmatic rules departing from strict logic, and to fashion a broad new regime or to bring new facts within an existing one; its practice of changing law solely for the future in contrast to the general judicial reluctance so to proceed; and, finally, the greater assurance that a legislative solution is not likely to run counter to the popular will: all these give the legislature a position of decided advantage, if only it will use it.
\end{quote}
\item \textsuperscript{267} Merrell Dow, 106 S. Ct. at 3234; Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 377 (1982).
\end{itemize}
The Court has also argued that the new standards will help reduce federal court caseloads. Moreover, judicial creation of remedies may deflect judicial resources from enforcement of causes of action that Congress has explicitly created, thus distorting congressional priorities. Finally, Justice Powell has suggested that the Court test invites Congress to avoid resolution of controversial enforcement issues by leaving them to the courts.

Several of the Justices believe that the traditional standards for implication of private rights of action violate separation of powers principles. According to this view, Congress alone has the power to create private rights of action. Judicial creation of a cause of action is undemocratic because it circumvents the majoritarian political process. It also impermissibly expands the subject matter jurisdiction of the federal courts by extending judicial power to a dispute that Congress has not given the courts authority to resolve. In addition, \textit{Erie Railroad v.}

\begin{itemize}
\item[268.] Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 408 (1982) (Powell, J., dissenting). \textit{See Frankel, supra note 233}, at 570-84 (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); Stewart & Sunstein, \textit{supra} note 93, at 1206-07 (arguing 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).
\item[269.] \textit{See Merrell Dow, 106 S. Ct. at 3234; Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 377 (1982).}
\item[270.] \textit{See Carlson v. Green, 446 U.S. 14, 36 (1980) (Rehnquist, J., dissenting).}
\item[271.] Cannon v. University of Chicago, 441 U.S. 677, 743 (1979) (Powell, J., dissenting). Some commentators have suggested that crass political maneuvering may underlie a legislative decision to omit private rights of action from a statute:
\begin{quote}
[As to] social legislation that places the burden of progress on those whom it regulates, a very low prospect of effectiveness may be the \textit{sine qua non} of winning enactment of the law at all. . . . Contrary to the instrumentalist canon, the ineffectiveness of a law to achieve its goal may be itself a policy, a policy shared by the act's opponents and some of its supporters, and may be the price for permitting the law to reach enactment.
\end{quote}
\begin{quote}
. . . People have reasons for wanting a law, and the lawmaker will see a value in meeting their wishes, quite apart from any practical good it may do.
\end{quote}
\item[273.] Cannon \textit{v. University of Chicago, 441 U.S. 677, 743 (1979) (Powell, J., dissenting).}
\item[274.] \textit{Id. at 745-46 (Powell, J., dissenting); see also Jackson Transit Auth. v. Transit Union, 457 U.S. 15, 30 (1982) (Powell, J., dissenting).}
\end{itemize}
Tompkins explicitly restricted the power of the federal courts to declare rules of general common law. Consequently, while it may have been permissible in 1916 in Texas & Pacific Railroad Co. v. Rigsby to enforce a federal statutory standard by means of a federal common-law negligence cause of action, this practice is improper today. The Cort v. Ash test thus is seen to invite unconstitutional judicial law-making.

Neither the policy arguments nor the constitutional arguments for the restrictive implication standards can withstand close scrutiny. Consequently, they cannot overcome the presumption favoring enforcement of rights in cases that satisfy the traditional implication standards. The policy arguments are weak at best. Few would disagree that Congress is better situated than the federal courts to make law. Congress can legislate comprehensively and prospectively, and can create administrative agencies to implement and monitor policy. But this argument misses the point. A court does not legislate at large when it creates a private right of action. Instead, it makes the relatively narrow decision to grant a judicial remedy to enforce a right that Congress has already created. At this stage in the law-making process, a court's perspective often will be superior. Congress cannot anticipate all of the situations in which a law may apply, and thus it cannot always specify in advance the precise remedy that justice requires. A court, on the other hand, can assess the actual effectiveness of an enforcement mechanism chosen by Congress, and decide whether creation of a private right of action in a specific case would further or interfere with congressional purposes. Therefore, when faced with congressional silence, a court should not ask simply whether Congress intended to create a private right of action on behalf of a particular plaintiff. Instead, it should also ask whether Congress, if it had considered this situation, would have wanted the plaintiff to have a private right of action. The new standards for implication improperly pre-

275. 304 U.S. 64 (1938).
276. 241 U.S. 33 (1916); see also supra notes 62-63 and accompanying text.
278. Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 529 (1947) ("The intrinsic difficulties of language and the emergence after enactment of situations not anticipated by the most gifted legislative imagination, reveal doubts and ambiguities in statutes that compel judicial construction."); Stewart & Sunstein, supra note 93, at 1229; see also THE FEDERALIST No. 37, at 229 (A. Hamilton) (C. Rossiter ed. 1961); Greenawalt, Policy, Rights, and Judicial Decision, 11 GA. L. REV. 991, 1004 (1977).
clude a court from supplementing a remedial scheme that proves inadequate to accomplish clear congressional purposes.281

The argument that courts may accidentally upset the delicate balance of statutory enforcement provisions is also unpersuasive.282 Deciding whether to create a private right of action is not intrinsically more sensitive or complex than other tasks that the courts undertake.283 The legislative history of federal statutes is preserved in hearing minutes and legislative reports, and a court can delve as deeply as necessary to determine whether implication of a private remedy would interfere with congressional purposes. Moreover, statutory enforcement provisions are not always finely tuned. Congress often leaves a great deal of discretion to administrative agencies in selecting sanctions because Congress cannot anticipate the exact activity that should be proscribed.284 The argument that the tightened standards for implication will lighten federal caseloads also is unpersuasive. If the federal court workload is too heavy, there obviously are better ways to address the problem than by refusing to enforce people's rights.285

Justice Powell's argument that the traditional standards for implication encourage congressional buck-passing presents a closer question. Ultimately, however, political concerns are insufficient to overcome the presumption in favor of enforcement of rights. Justice Powell made the argument as follows:

[Cort v. Ash] invites 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 then 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

281. Frankel, supra note 233, at 566.
282. Stewart & Sunstein, supra note 93, at 1290-92.
284. Stewart & Sunstein, supra note 93, at 1290.
285. As Judge Parker once stated, if "a citizen is entitled to have his disputes adjudicated in a tribunal of the sovereignty to which he owes allegiance, it is unthinkable that that sovereignty should shirk its responsibility and abdicate its proper functions because of a comparatively insignificant matter of expense. Congestion should be relieved, if this is necessary, by creating additional courts . . . ." Parker, The Federal Jurisdiction and Recent Attacks Upon It, 18 A.B.A. J. 433, 438 (1932); see also Doernberg, There's No Reason For It; It's Just Our Policy: Why the Well-Pledged Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction, 38 HASTINGS L.J. 597, 653-55 (1987) (arguing that the well-pleaded complaint rule for federal subject matter jurisdiction cannot be justified as a means of controlling federal court caseloads).
There is some merit to this point. Proponents of a statute may be tempted to omit language explicitly creating a private right of action while creating legislative history that would encourage courts to imply a private remedy. In some instances, the restrictive standards for implication may have the salutary effect of inducing Congress to decide whether to create a private right of action, at least for those situations that Congress is able to foresee. As Justice Frankfurter once remarked, "[t]he pressure on legislatures to discharge their responsibility with care, understanding and imagination should be stiffened, not relaxed."287

Justice Powell's argument, however, proceeds from a somewhat unrealistic, or at least incomplete, view of the legislative process. While Congress may in some instances consciously leave the hard choices to the courts, in many other instances it simply has not anticipated the plaintiff's situation. In these circumstances, the restrictive implication standards will not have the intended salutary effect. In addition, while legislators may in some cases succeed in the subterfuge of creating a private right of action implicitly rather than explicitly, this strategy is not likely to be successful generally. Once alerted to the game, legislators who oppose private rights of action under a proposed law can create their own legislative history suggesting that courts should not create private rights of action. If a majority does not favor a private cause of action, legislators can require an explicit declaration to that effect as a condition for passing the bill. Even under traditional implication standards, if a court discovers clear legislative intent to deny a private right of action or sees substantial equivocation on the subject, it will generally decline to create the cause of action.288

The restrictive standards may also have another unwanted effect. Knowing that the courts will not be receptive to implying rights of action, Congress may feel freer to enact expansive legislation creating new "rights" without remedies. Constituents and pressure groups seeking legislation can be mollified, at least temporarily, with no fear that the courts will actually attempt to enforce the statute. Thus, instead of inducing Congress to make hard remedial choices, the Court's current approach may encourage Congress to avoid them.

On balance, the traditional standards for implication establish a healthier relationship between Congress and the federal courts. Under

287. Frankfurter, supra note 278, at 545.
288. See supra notes 229-33 and accompanying text.
the current standards, the Supreme Court says to Congress, in effect: "The whole responsibility in formulating remedies is yours and you can expect no help from us." The traditional criteria, by contrast, allow a sympathetic, cooperative effort by the courts to work with Congress in effectuating underlying congressional purposes and goals. The traditional standards also caution Congress not to create rights that it does not want enforced because courts will assume rights are to be enforced unless there is a good reason for not doing so. If the presumption of enforcement of rights leads Congress to create fewer rights, so be it. Society does not need more unenforceable and illusory "rights." Finally, it must be remembered that the traditional standards for implication do not require creation of a right of action for every "right" or interest contained in legislation. The statute must have been enacted for the plaintiff's benefit and the harm suffered must be of a kind the statute generally was intended to forestall. A court will not create a private right of action if Congress intended otherwise or if private enforcement of a particular provision would interfere with the overall purposes of the legislation. Furthermore, if Congress believes a court made a serious error by creating a private right of action, Congress can extinguish it.

The policy arguments in support of the current standards for implication are insufficient to overcome the presumption favoring enforcement of rights. The constitutional arguments based on separation of powers and the Erie doctrine would be sufficient to overcome the presumption if they were meritorious. But they too are very weak. They have been rejected by a majority of the Court and by virtually all of the commentators who have considered them.

Initially, proponents of the separation of powers argument face a heavy burden in proving the unconstitutionality of the implication standards followed since the beginning of the republic. The history of sep-

289. Cf. Stewart & Sunstein, supra note 93, at 1258 ("Democratic processes could arguably be strengthened if courts were to insist on procedures that forced Congress to deliver on its substantive promises.").
290. See supra notes 53 & 56 and accompanying text.
293. See, e.g., Brown, supra note 233, at 622-27; Creswell, The Separation of Powers Implications of Implicated Rights of Action, 34 Mercer L. Rev. 973, 979, 989-96 (1983); Foy, supra note 54, at 572-84; Frankel, supra note 233, at 563-66; Greenawalt, supra note 278, at 1044-45; Greene, supra note 233, at 487-89; Stewart & Sunstein, supra note 93, at 1220-32; The Supreme Court, 1979 Term, supra note 283, at 287.
294. There are, of course, precedents for overruling practices long thought to be constitutional. See, e.g., Brown v. Board of Educ., 347 U.S. 483 (1954) (overruling Plessy v. Ferguson,
aration of powers does not assist them in meeting that burden. 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 and adopted the system of checks and balances to keep each branch of government from overstepping its bounds. The view that separation of powers forbids a court to create a private right of action establishes the sort of rigid separation that the founders cautioned against.

The framers also recognized that a government must have the powers necessary to accomplish its objective. Justice Powell's view of separation of powers contradicts this principle because it denies the federal courts a necessary power. Because Congress cannot foresee all of the situations in which a law may apply, the federal courts must be free to fill statutory interstices to ensure completeness and consistency in federal law and to provide appropriate remedies. This exercise of judicial power is not a usurpation of legislative authority, but rather is a neces-


295. 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."); J. FREEDMAN, CRISIS AND LEGITIMACY 18 (1978) (Separation of powers has "not preclude[d] one branch of government from participating in functions assigned primarily to another.").


298. THE FEDERALIST No. 31, at 194 (A. Hamilton) (C. Rossiter ed. 1961) ("A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible . . ."); Id. No. 44, at 285 (J. Madison) ("[W]henever a general power to do a thing is given, every particular power necessary for doing it is included."); see also Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 818-19 (1824) ("[T]he legislative, executive, and judicial powers, of every well constructed government, are . . . potentially coextensive. . . . All governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws. If we examine the constitution of the United States, we find that its framers kept this great political principle in view.").

299. See Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. PA. L. REV. 797, 800 (1957) ("Separation of powers cannot be watertight; exclusive reliance upon statutory provision for the solution of all problems is futile."); The Supreme Court, 1979 Term, supra note 283, at 287 ("Allowing courts to resolve the private liability question requires neither unusual nor undemocratic exercises of judicial power and, within limits, reflects a sensible allocation of functions between the judiciary and the legislature."); see also Brown, supra note 233, at 623-25; Greene, supra note 233, at 487-89.
sary supplement to it.300

Justice Powell also argues that implication of a private right of action improperly expands the subject matter jurisdiction of a federal court by extending its authority to a dispute that Congress has not assigned to it for resolution.301 This argument involves a fundamental 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 the 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. § 1331.302 Moreover, jurisdiction entails the power to grant appropriate remedies. As Justice Harlan once stated, “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.”303 Justice Powell’s theory of jurisdiction requires Congress not only to create a right in a person’s favor but also to say explicitly that he 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.”304

The argument that *Erie Railroad v. Tompkins*305 requires a rejection of traditional standards for implication borders on the frivolous.306 *Erie*
involved the relationship between federal law and state law, not the relationship between the federal courts and Congress. Although the decision extinguished the power of the federal courts to create general federal common law in areas constitutionally left to state control, the case did not restrict the power of federal courts to create common law in areas properly within federal cognizance. Consequently, *Erie* does not preclude a federal court from creating a private right of action under a properly enacted federal statute.

The arguments in favor of the restrictive standards for implication of private rights of action are thus insufficient to overcome the presumption favoring enforcement of rights. The Court should therefore abandon those standards. If the Court fails to take this step, Congress should take appropriate action. There are many approaches Congress might adopt. Congress could enact a general directive requiring the courts to imply a private right of action on behalf of any person whose rights under any federal statute are violated. Such a directive, however, would be most unwise. In some instances, creation of a private right of action might undermine congressional purposes or distort a carefully balanced remedial scheme. Courts must determine whether a private right of action should exist for statutory violations on a case-by-case basis.

Although Congress cannot responsibly enact a blanket standard, it could enact a general provision to guide the courts in deciding whether to imply a private right of action in a particular case. The most logical standards to adopt are those set forth in *Cort v. Ash*. *Cort* essentially collected and restated the traditional criteria for implication of private remedies. Those criteria worked tolerably well for hundreds of years. If Congress is not prepared to enact general legislation directing the courts to apply the *Cort v. Ash* test, it could instead issue instructions with each new law it enacts. A series of standard instructions could be included in a legislative drafting manual. Depending on the statute involved, Congress might direct the federal courts to create a private right of action for any violation of the statute, direct the courts to use the *Cort* criteria, or

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307. At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or "judicial legislation," rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. In other words, it must mean recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation.


308. 422 U.S. 66, 78 (1975); see *supra* note 233.
even direct the court not to entertain any causes of action not explicitly created by Congress.\textsuperscript{309}

Arguably, Congress cannot legitimately direct the courts to follow particular standards in deciding whether to imply a private right of action. In a sense, Congress would be delegating a law-making function to the federal courts by empowering them to create causes of action, possibly violating separation of powers principles. There appear to be several answers to this argument. If Congress were to direct the courts to use the \textit{Cort} criteria, it would merely be telling the courts to do what they have traditionally done. Since courts have exercised the power to create causes of action under the \textit{Cort} standards in the past, it is hard to see why it would violate separation of powers principles for Congress to instruct them to use those standards in the future. This response may beg the question, however. While courts may properly decide the scope of their common-law powers themselves, Congress might be overstepping its authority in directing the courts to use those powers and in telling them what the scope of those powers should be. Congress plainly can affect the interpretive process by defining its terms,\textsuperscript{310} but directing the federal courts to make law goes much further.

\textsuperscript{309} Congress has given the courts instructions on implying private rights of action on at least one occasion, in the legislative history of the Small Business Investment Incentive Act of 1980. Pub. L. No. 96-477, 94 Stat. 2275 (codified at 15 U.S.C. § 77a \textit{passim} (1981)). The main purpose of the Act was to reduce the regulatory burdens on small businesses that offered and traded in securities to aid them in raising capital. Ashford, \textit{supra} note 233, at 284. Congress recognized, however, that it must not leave investors unprotected. \textit{Id.} at 290-91. Committee reports of both the Senate and the House stated that the reduced regulation should be accompanied by increased remedial enforcement by the Securities Exchange Commission and through private rights of action. H.R. REP. No. 1341, 96th Cong., 2d Sess. 28 (1980); S. REP. No. 958, 96th Cong., 2d Sess. 14, 35 (1980). The House Committee expressly indicated that the federal courts should use criteria very similar to \textit{Cort v. Ash} standards in interpreting the Act:

\begin{quote}
The Committee wishes to make plain that it expects the courts to imply private rights of action under this legislation, where the plaintiff falls within the class of persons protected by the statutory provision in question[, where such a right would be consistent with and would further Congress' intent in enacting that provision, and where such actions would not improperly occupy an area traditionally the concern of state law.
\end{quote}


\textsuperscript{310} See, \textit{e.g.}, Act of Feb. 25, 1871, § 2, 16 Stat. 431 (giving general definitions of terms to be followed in construing federal statutes).
There are precedents for such congressional action, however. Congress has delegated broad law-making power to the federal courts in other contexts. For example, in *Textile Workers Union v. Lincoln Mills*, the Court held that section 301(a) of the Labor Management Relations Act of 1947 authorized the federal courts to fashion a body of federal common law governing labor contracts in industries affecting interstate commerce. If Congress can grant the federal courts broad power to create substantive law, it follows that Congress also can grant the courts the narrower power to create remedies to effectuate congressionally created substantive rights and duties.

In addition, Congress has delegated broad law-making authority to administrative agencies. The authority delegated often includes the power to set standards of conduct and the discretion to choose among various remedial measures to enforce administratively promulgated rules. If such delegation is legitimate, it follows that delegation of similar power to the courts is legitimate.

Delegation of law-making power in the administrative context is constitutional if it provides an intelligible principle to guide the agency receiving the delegation. A direction that the federal courts use the *Cort v. Ash* criteria in deciding whether to create a private right of action satisfies this requirement. *Cort v. Ash* establishes four criteria for courts to use in deciding an implication question. The test clearly circumscribes and guides a court's discretion, establishing intelligible standards for its exercise. A court's discretion is narrow, channeled, and hedged about on all sides by legislative choices because Congress created the rights and corresponding duties. Indeed, when compared with the broad delegation of power to administrative agencies, delegation of power to the courts to create a private cause of action under a federal statute seems relatively modest. This is not to say that the courts' function is unimportant. A court's decision whether to create a cause of action may determine if the

statute is to have a practical effect or be simply hortatory. Nonetheless, a congressional direction to use Cort standards would be a relatively limited delegation of power.

C. A Brief Comparison of the Abstention Doctrines and the Standards for Implication of Private Remedies

It is useful to compare the two types of impediments to enforcement of rights addressed in this Article. On one level, the abstention doctrines and the restrictive standards for implication are consistent. Both result in the denial of legal rights. On another level, however, they are inconsistent. The restrictive implication standards direct courts to focus almost exclusively on whether Congress intended to create a private right of action. The abstention doctrines, by contrast, often require a court to ignore legislative intent by refusing to entertain a cause of action that Congress has explicitly authorized. The Court cannot have it both ways. It should not honor legislative intent in one context while ignoring it in another. The Justices who argue that separation of powers principles require the restrictive implication standards generally have supported the Court's abstention decisions.\(^{316}\) These Justices face a problem in harmonizing their positions. If separation of powers principles require that Congress alone create remedies, it is as much a violation of those principles to negate a remedy that Congress has explicitly created as to create a remedy that Congress has not authorized.\(^{317}\)

This Article has suggested that the Court reverse direction in both areas either sua sponte or at Congress' command. This proposal raises the question of whether the author is guilty of a converse inconsistency. Can the suggestion that the courts limit abstention but imply private rights of action more freely be harmonized from the standpoint of congressional intent and separation of powers?

Abstention involves a blatant refusal to follow congressional intent that federal causes of action be heard in federal court. If Congress affirmatively directed the judicial branch to stop abstaining, the courts would be honoring congressional intent by following this directive. But even if the courts took this step on their own, they would effectuate congressional intent more fully and faithfully than they do at present. Traditional implication standards, by contrast, require a court to consider


\(^{317}\) Redish, supra note 96, at 82 n.58.
whether the legislative history of a statute reveals an intent to grant the private right of action in question. These standards also require a court to consider underlying congressional purposes in deciding if a private right of action is necessary or appropriate to effectuate those purposes. Thus, if the courts ceased abstaining and resumed use of the traditional implication criteria, they would more faithfully follow congressional intent than they do presently.

As to separation of powers, Professor Redish has persuasively demonstrated that abstention violates separation of powers principles.\textsuperscript{318} If the courts stopped abstaining, the violation would cease. Traditional implication standards, by contrast, do not violate separation of powers principles, as demonstrated above.\textsuperscript{319} Nevertheless, the separation of powers concerns of some of the Justices might be eased if Congress and the Court adopt the more cooperative, conciliatory approach that I have suggested. If Congress directs the Court to follow the Cort criteria in interpreting some or all statutes, the Justices might be less concerned that they are exceeding their competence. They would simply be following congressional direction. Furthermore, Congress would not be improperly delegating law-making authority by directing the courts to follow the Cort criteria.\textsuperscript{320} Thus, if the courts were to cease abstaining and to imply private rights of action more freely, their actions would be consistent with respect to both congressional intent and separation of powers. This would be even clearer if Congress directed these steps.

**Conclusion**

This Article has demonstrated the importance of the principle that rights require remedies. It has shown that the principle substantially influenced the growth of Anglo-American legal institutions, and it has explained why enforcement of rights is fundamental to democratic government. The Article also has set forth a new approach to the enforcement of rights, and has given examples of how that approach should be applied.

The abstention doctrines and the restrictive implication standards are only two of the many barriers to the enforcement of rights developed by the Burger Court.\textsuperscript{321} The new approach also should be applied in evaluating other obstructions. In each instance, the courts should begin with the presumption in favor of enforcement of rights. Unless the de-

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\textsuperscript{318} Redish, \textit{supra} note 96.

\textsuperscript{319} \textit{See supra} notes 292-307 and accompanying text.

\textsuperscript{320} \textit{See supra} notes 310-11 and accompanying text.

\textsuperscript{321} \textit{See supra} notes 3-4 and accompanying text.
fendant can affirmatively demonstrate that the harm to others or to important governmental interests from enforcement would exceed the harm to the plaintiff from nonenforcement, the plaintiff's rights should be vindicated.

Simple justice demands that the new approach be adopted. The courts should strive to enforce legal rights, not invent ways to deny them. As Ronald Dworkin has stated, "[i]f we cannot insist that the Government reach the right answers about the rights of its citizens, we can insist at least that it try. We can insist that it take rights seriously, follow a coherent theory of what these rights are, and act consistently with its own professions."322 The federal courts would do well to follow this admonition by working to enforce legal rights fully and effectively.

322. R. DWORKIN, TAKING RIGHTS SERIOUSLY 186 (paper ed. 1978).