A LITTLE "RIGHT" *MUSICK*: THE UNCONSTITUTIONAL JUDICIAL CREATION OF PRIVATE RIGHTS OF ACTION UNDER SECTION 10(b) OF THE SECURITIES EXCHANGE ACT

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I. INTRODUCTION

Securities litigators[1] and scholars[2] are virtually obsessed with the private

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1. More civil actions have been filed under section 10(b) of the Securities Exchange Act of 1934 than under any other provision of the federal securities laws. ALFRED F. CONARD, ET AL., ENTERPRISE ORGANIZATION 991 (3d ed. 1982) ("Since the first civil action sired by Rule 10b-5 pecked its way out of the eggshell in 1947, its progeny have multiplied to become the most litigated segment of the SEC's jurisdiction.").

2. More scholarship has been devoted to the private right of action for violations of section 10(b) than to any other securities law issue. The quantity of the scholarship devoted to section 10(b) is manifest by the attention given just to the issue of the implied right of action. *See, e.g.*, Roy L. Brooks, *Rule 10b-5 in the Balance: An Analysis of the Supreme Court's Policy Perspective*, 32 HASTINGS L.J. 403 (1980); Alfred F. Conard, *Securities Regulation in the Burger Court*, 56 U. COLO. L. REV. 193 (1985); Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981); Thomas L. Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Moratorium—Civil Rights, Securities Regulation, and Beyond*, 33 VAND. L. REV. 1333 (1980); John A. Maher & Joan Dawley Maher, *Statutorily Implied Federal Causes of Action After* Merrill Lynch: *How Sad It Is; How Simple It Could Be*, 88 DICK. L. REV. 593 (1984); John A. Maher, *Implied Private Rights of Action and the Federal Securities Laws: A Historical Perspective*, 37 WASH. & LEE L. REV. 783 (1980); William F. Schneider, *Implying Private Rights and Remedies Under the Federal Securities Acts*, 62 N.C. L. REV. 853 (1984); Marc I. Steinberg, *The Propriety and Scope of Cumulative Remedies Under the Federal Securities Laws*, 67 CORNELL L. REV. 557 (1982); Marc I. Steinberg, *Implied Private Rights of Action, Under Federal Law*, 55 NOTRE DAME L. REV. 33 (1979). Section 10(b) itself is the subject of multi-volume treatises. *See* ALAN R. BROMBERG, SECURITIES LAW FRAUD, SEC RULE 10b-5 (1977); ARNOLD S. JACOBS, LITIGATION AND PRACTICE UNDER RULE 10b-5 (1981). Despite the quantity of this scholarship devoted to the section 10(b) implied private right of action, none of it addresses the constitutional legitimacy of the judicial creation of a private remedy based on federal court remedial power or legislative acquiescence.

right of action under section 10(b)[3] of the Securities Exchange Act of 1934 (the 1934 Act)[4] and Securities Exchange Commission (SEC) Rule 10b-5.[5] Since its inception in 1946,[6] the judicially-created private remedy[7] for violations of section 10(b) has become a significant supplement to the SEC's effort to enforce the federal securities laws[8] and has become an important source of compensation for defrauded securities investors.[9] The United States Supreme Court has "repeatedly reaffirmed"[10] the private remedy, declaring its existence to be "well-established"[11] and "simply beyond peradventure."[12]

Despite its undeniable appeal to litigators, academics, regulators and federal judges, however, the propriety of the judicially-created section 10(b) private right of action is still not beyond peradventure. Although the Supreme Court has recognized or assumed the existence of the private

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3. 15 U.S.C. § 78j(b) (1988). Section 10 of the Securities Exchange Act of 1934 makes it "unlawful for any person . . . (b) [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." *Id.*

4. 15 U.S.C. § 78a-78ll (1988).

5. 17 C.F.R § 240.10b-5 (1993). Rule 10b-5 provides:

> Employment of manipulative and deceptive devices. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

6. Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

7. Throughout this Article, the private right of action for monetary relief caused by violations of section 10(b) and Rule 10b-5 is variously termed a "private right of action," a "private cause of action" or a "private remedy." For purposes of the issues addressed in this Article, the differences in label have no significance.

8. Pursuant to its authority under section 10(b), the SEC in 1942 promulgated Rule 10b-5. 17 C.F.R. § 240.10b-5 (1993). Because the scope of Rule 10b-5 can be no broader than the scope of section 10(b), *see* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213 (1976), this Article generally refers to section 10(b) without also referring to Rule 10b-5.

9. *See, e.g.*, Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2088 (1993); Basic, Inc. v. Levinson, 485 U.S. 224, 230-31 (1988). *See also To Establish a Statute of Limitations for Private Rights of Action Arising from a Violation of the Securities Exchange Act of 1934: Hearings on S. 1533*, 102d Cong., 1st Sess. (1991).

10. Herman & MacLean v. Huddleston, 459 U.S. 375, 380 n.10 (1983) (citing Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971)).

11. *Huddleston*, 459 U.S. at 380 n.10 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976)).

12. *Huddleston*, 459 U.S. at 380. *See also Basic*, 485 U.S. at 230-31.

remedy,[13] that Court never has squarely held that such a remedy does, or should, exist. Moreover, in not one of its cases interpreting the elements of section 10(b) liability has the Supreme Court been required to reach the issue whether the private right of action for violations of section 10(b) arises under federal law for purposes of affording the federal district courts subject matter jurisdiction over that action.[14]

Because the Supreme Court has never directly addressed the existence of the section 10(b) private remedy, the Court has never constructed a reasoned argument supporting its constitutional propriety. In the course of defining the elements of section 10(b) liability, however, the Court has casually suggested two alternative justifications for the judicially-created private remedy: the federal courts' remedial power to create private remedies for the violation of a federal statute[15] or congressional acquiescence in federal court recognition of the private remedy.[16]

Yet, the Court has rejected each of these justifications. The Court has characterized arguments for the creation of a private right of action based on the federal judicial power to remedy violations of the federal securities laws as "entirely misplaced."[17] At the same time, the Court has stated that it would have "trouble inferring" congressional acquiescence in the federal court creation of private securities law remedies.[18] The Court's dissatisfaction with the justifications for the judicial creation of private remedies has led some of its members to insist that such remedies should never be created.[19] Other justices have begun to hint that even the well-established

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13. *See Hochfelder*, 425 U.S. at 196; Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975).

14. *See* discussion *infra* part II. *See also Kardon*, 69 F. Supp. at 512-13.

15. Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2088 (1993) (citing *Blue Chip Stamps*, 421 U.S. at 730, 737). In the portion of *Blue Chip Stamps* cited in *Musick*, the Court relies on the federal remedial power to create private remedies for the violation of the securities laws in order to "supplement" SEC actions. *Blue Chip Stamps*, 421 U.S. at 730 (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964)).

16. *Musick*, 113 S. Ct. at 2088; *Huddleston*, 459 U.S. at 384; *Basic*, 485 U.S. at 230-31.

17. Touche Ross Co. v. Redington, 442 U.S. 560, 568 (1979) (rejecting arguments for the creation of a private right of action for violation of the reporting requirements of section 17(a) of the 1934 Act, 15 U.S.C. § 78q(a) (1988)).

18. Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749, 2764 (1991) (rejecting a congressional acquiescence argument for extending section 14(a) of the 1934 Act, 15 U.S.C. § 780(a) (1988)).

19. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2783 (1991) (Scalia, J., concurring) (citing Thompson v. Thompson, 484 U.S. 174, 190 (1980); Cannon v. University of Chicago, 441 U.S. 677, 730-49 (1979)).

section 10(b) private remedy may be ripe for reconsideration.[20]

This Article engages in that reconsideration and offers a constitutional argument for the elimination of the judicially-created private right of action under section 10(b). Part II confronts and overcomes stare decisis barriers to the judicial reconsideration of section 10(b). Ultimately, the Supreme Court should address the legitimacy of the section 10(b) private right of action because federal court recognition of that right of action is unconstitutional.

Part III of this Article illustrates that the arguments supporting the judicial creation of the section 10(b) private right of action cannot survive serious constitutional scrutiny. If the section 10(b) private remedy is rooted in federal court remedial power, then it represents the unconstitutional exercise by the federal courts of the power to make law and to expand their own subject matter jurisdiction. If that remedy instead is based on notions of congressional acquiescence, then it represents an unconstitutional judicial usurpation of legislative power.

Part IV contends that the Supreme Court's opinions interpreting section 10(b) display the unfortunate consequences of the unconstitutional exercise of judicial power. Devoid of any legislative guidance for its decisions interpreting the section 10(b) implied private remedy, the Supreme Court has issued opinions which are driven by the Court's express distaste for the private remedy itself and by the Court's desire to protect defendants from its reach. Part V addresses the Supreme Court's recent decision in *Musick, Peeler & Garrett v. Employers Trust Insurance of Wausau*,[21] and argues that the Court's recognition of an implied section 10(b) right to contribution only compounds the constitutional maladies of the remedy's underpinnings.

Finally, Part VI concludes by predicting the effect of eliminating the section 10(b) implied right of action. Congress likely will respond to the absence of the implied right of action by legislating an express remedy for violations of section 10(b). Even if Congress does not act, however, the cost to those victims of securities fraud who would no longer be able to obtain monetary relief under section 10(b) is relatively small compared to the benefits of constitutional compliance.

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20. *Musick*, 113 S. Ct. at 2092 (Thomas, J., dissenting) ("We again have no cause to reconsider whether the 10b-5 action should have been recognized at all."). Justice Thomas was joined in his dissenting opinion by Justices Blackmun and O'Connor. *See also Virginia Bankshares*, 111 S. Ct. at 2764 n.11 ("The object of our inquiry does not extend further to question the holding of . . . J.I. Case Co. v. Borak . . . *at this date*.") (emphasis added).

21. 113 S. Ct. 2085 (1993).

II. THE ROLE OF STARE DECISIS IN THE JUDICIAL RECOGNITION OF THE SECTION 10(b) PRIVATE RIGHT OF ACTION

The principle of stare decisis directs the Supreme Court to afford some deference to its previous decisions.[22] That principle, however, does not preclude the Court from reaching the merits of the issue whether the federal courts have the power to create a private right of action under section 10(b) because: (1) the Supreme Court never has formally held that such a private right of action exists; (2) even if the Supreme Court decisions are considered statutory precedents interpreting section 10(b) to create a private remedy, they are not protected by a rule of statutory stare decisis; and (3) the unconstitutionality of the judicial creation and maintenance of that private remedy justifies the reconsideration of any precedent supporting the remedy.

The Supreme Court is not bound by stare decisis to maintain the private section 10(b) remedy because there is no prior Supreme Court decision establishing the remedy. The principle of stare decisis, even in its strongest form, only binds the Supreme Court to follow its own precedents.[23] But the Supreme Court has never held that the federal courts have the power to create a private remedy for violations of section 10(b).[24] Instead, the Supreme Court merely has expressly acquiesced in the lower federal court recognition of that remedy.[25] Certainly, the Court has assumed the existence of the private remedy for purposes of interpreting elements of state of mind,[26] standing,[27] deception,[28] exclusivity,[29] materiality,[30]

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22. *Compare* Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (refusing to overrule Runyon v. McCrary, 427 U.S. 160 (1989)) *with* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (overruling Wilko v. Swan, 346 U.S. 427 (1953)) *and* Gulfstream Aerospace Corp. v. Mayacamas Corp., 108 S. Ct. 1133 (1988) (overruling Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935)). *See also* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1427-29 (1988); Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401 (1988); Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988).

23. *See generally* PETER WESLEY-SMITH, THEORIES OF ADJUDICATION AND THE STATUS OF STARE DECISIS, PRECEDENT IN LAW 81-82 (Goldstein ed. 1987); Eskridge, *supra* note 22, at 1364-1391; James W. Moore & Robert S. Oglesbay, *The Supreme Court, Stare Decisis and the Law of the Case*, 21 TEX. L. REV. 514, 523-25 (1943).

24. *See, e.g.*, Superintendent of Ins. v. Bankers Life & Casualty, Co., 404 U.S. 6, 13 n.9 (1971).

25. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975).

26. Santa Fe Indus. v. Green, 430 U.S. 462 (1977).

27. *Blue Chip Stamps*, 421 U.S. at 730.

28. *Hochfelder*, 425 U.S. at 196.

reliance,[31] the statute of limitations,[32] and contribution.[33] In not one of those cases, however, did the Supreme Court actually hold, much less expressly reason to the conclusion, that the federal court creation of the private section 10(b) remedy was proper.[34]

Perhaps more significant, however, is that the Supreme Court has never been required to reach the issue whether the section 10(b) remedy arises under federal law for purposes of providing an independent basis for subject matter jurisdiction in the federal district courts.[35] In some of its decisions addressing the section 10(b) remedy, the Supreme Court has held that no section 10(b) private right of action exists for the plaintiffs' claims.[36] In all of the remaining cases, the plaintiffs asserted a basis for federal jurisdiction independent of those claims.[37] The federal courts had

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29. Herman & MacLean v. Huddleston, 459 U.S. 375, 387 (1983).

30. Basic Inc. v. Levinson, 485 U.S. 224 (1988).

31. *Id.*

32. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991).

33. Musick, Peeler & Garrett v. Employers Trust Ins. of Wausau, 113 S. Ct. 2085 (1993).

34. By contrast, *see* Cannon v. University of Chicago, 441 U.S. 677 (1979) (carefully reasoning to the holding that a private cause of action exists under Title IX of the Education Amendments of 1972).

35. Because the federal courts are courts of limited jurisdiction, *see* U.S. CONST. art. III, § 2, there must be an independent jurisdictional basis for each claim filed in federal court. *See, e.g.*, American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18 (1951). Exercising its exclusive power to create the federal district courts, Congress has assigned to those courts original jurisdiction over claims "arising under" federal law. 28 U.S.C. § 1331 (1988).

36. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (finding no private right of action for offerees of stock who neither purchased nor sold securities); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (asserting that no private right of action will "lie" for negligence); Santa Fe Indus. v. Green, 430 U.S. 462 (1977) (no private right of action for corporate mismanagement); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991) (finding no private right of action if filed more than three years after the challenged transaction or one year from discovery).

37. *See* Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085 (1993) (recognizing that initial claims brought under sections 11 and 12 of the 1933 Act, afforded supplemental jurisdiction, 28 U.S.C. § 1367, for the "related" section 10(b) contribution claim); Bateman, Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985) (finding section 10(b) claims supplemental to other expressed federal claims, including under the 1933 Act); Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) (assuming the existence of cumulative remedies under section 11 of the 1933 Act, affording supplemental jurisdiction for the "related" section 10(b) claims, 28 U.S.C. § 1367 (1988)); Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) (recognizing jurisdiction under 28 U.S.C. § 1346(b) as the United States was a party-defendant); Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6 (1971) (recognizing that because plaintiffs claims under the express liability provisions of the Securities Act of 1933, provided the federal court with "supplemental" jurisdiction over the "related" section 10(b) claims, 28 U.S.C. § 1367 (1988)). *But see* Basic Inc. v. Levinson, 485 U.S. 224 (1988) (defining materiality and finding appropriate the lower court's certification of a class based on rebuttable presumption of reliance, provided that class is adjusted on remand as circumstances demand).

subject matter jurisdiction over the section 10(b) claims, therefore, based upon the doctrine of supplemental jurisdiction.[38] Consequently, the Supreme Court has never reached the issue whether a private right of action under section 10(b) is a claim "arising under" federal law which would afford independent federal question jurisdiction for that action.[39]

Even if the Supreme Court's section 10(b) decisions were considered precedents interpreting that section to create private remedies, the doctrine of statutory stare decisis would not preclude the Court from reconsidering those precedents. The principle of statutory stare decisis directs the Supreme Court to afford heightened or even absolute deference to its previous decisions interpreting statutes.[40] If there is any consistency in the Supreme Court's use of stare decisis,[41] it is in its rhetorical distinction between precedents interpreting federal statutes and those interpreting the Constitution.[42] In statutory construction cases, the Court has concluded that "[c]onsiderations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."[43]

The degree of deference required even by the principle of statutory stare decisis, however, is uncertain.[44] The Court has been willing to overturn

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38. The term "supplemental jurisdiction" derives from the congressional codification of the judicial doctrines of "pendent" and "ancillary" jurisdiction. 28 U.S.C. § 1367 (1988). *See* Thomas M. Mengler et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213 (1991). Supplemental jurisdiction affords the federal district courts original jurisdiction over nonfederal, nondiverse claims which are "so related" to joined federal claims as to be part of the same constitutional "case." *Id.*

39. Indeed, in *Kardon*, in which the court first created the private right of action for violations of section 10(b), the court expressly did not reach the question whether that action arises under federal law because there was federal court diversity jurisdiction in that case. Kardon v. National Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946).

40. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 171 (1989) (refusing to overrule Runyon v. McCrary, 427 U.S. 160 (1976), despite its express acknowledgment that "[m]embers of this Court believe that *Runyon* was decided incorrectly.")

41. *But see* Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 179 (1989) ("The uncertainty about the current status of stare decisis can be attributed, at least in part, to the fuzziness of the stare decisis principle itself.").

42. *Id.* at 181. ("The flip side of the Court's refusal to overrule constitutional precedents has been its general reticence to overrule precedents construing statutes.").

43. *Patterson*, 491 U.S. at 172-73 (citing Square D. Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424 (1986); Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977)).

44. *Compare Patterson*, 491 U.S. at 171-73 (refusing to overrule *Runyon's* interpretation of a federal statute) *with* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 480-81 (1989) (overruling Wilko v. Swan, 346 U.S. 427 (1953)) *and* Gulfstream Aerospace Corp. v.

its statutory precedents where "the intervening development of the law . . . [has] weakened the conceptual underpinnings from the prior decision,"[45] or where "later law has rendered the decision irreconcilable with competing legal doctrines or policies . . . ."[46]

The Supreme Court's current approach to the issue whether the federal courts have the power to create implied rights of action for the violation of a federal statute is irreconcilable with the continued maintenance of the section 10(b) private right of action. Some members of the Supreme Court believe that private remedies should never be implied by the federal judiciary under any circumstances.[47] Even in those rare cases in which the Supreme Court has tolerated the judicial implication of private rights of action,[48] the Court has made it clear that the implication must be based on evidence of congressional intent.[49] Furthermore, the Court has rejected as "entirely misplaced"[50] the judicial implication of private remedies based

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Mayacamas Corp., 108 S. Ct. 1133 (1988) (overruling Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935)). *See also* Eskridge, *supra* note 22, at 1427-29. *See generally* Cooper, *supra* note 22; Easterbrook, *supra* note 22.

45. *See Patterson*, 491 U.S. at 173 (citing *Rodriguez de Quijas*, 490 U.S. at 480-81; Andrews v. Louisville & Nashville R.R., 406 U.S. 320, 322-23 (1972)).

46. *See Patterson*, 491 U.S. at 173 (citing Braden v. 30th Judicial Circuit Ct. of Ky., 410 U.S. 484, 497-99 (1973); Construction Laborers v. Curry, 371 U.S. 542, 552 (1963)). In such cases, the Court "has not hesitated to overrule an earlier decision." *Id.*

47. *See* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2783 (1991) (Scalia, J., concurring) (citing Thompson v. Thompson, 484 U.S. 174, 190 (1988); Cannon v. University of Chicago, 441 U.S. 677, 730-49 (1979)).

48. With rare exception, the Supreme Court, in cases since and including the Cort v. Ash, 422 U.S. 66 (1975), decision, has denied the existence of a private remedy. *See* Thompson v. Thompson, 484 U.S. 174 (1988) (Parental Kidnapping Prevention Act of 1980); Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (Employee Retirement Income Security Act of 1974); Daily Income Fund, Inc. v. Fox, 464 U.S. 523 (1984) (denying investment company an implied right of action under § 36(b) of the Investment Company Act of 1940); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (finding no implied right of action for contribution under Title VII or Equal Pay Act); Northwest Airlines, Inc. v. Transport Workers Union of Am., 451 U.S. 77 (1981) (Rivers and Harbors Appropriation Act); Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1981) (Davis-Bacon Act); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (finding no private remedy against accountants auditing financial reports as required by section 17(a) of the 1934 Act); Piper v. Chris-Craft Indus., 430 U.S. 1 (1977) (holding that defeated tender offeror does not have an implied cause of action against successful competitor under Williams Act). *But see* Merrell Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) (finding implied remedy for damages under the Commodity Exchange Act); Cannon v. University of Chicago, 441 U.S. 677 (1979) (finding implied remedy under section 901 of Title IX).

49. *Cannon*, 441 U.S. at 688. *See also* Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979).

50. *Touche Ross*, 442 U.S. at 568 ("Instead, our task is limited solely to determining whether Congress intended to create the private right of action.").

on the principles of federal court remedial power followed in earlier cases such as *Texas & Pacific Railroad Co. v. Rigsby*,[51] *J.I. Case Co. v. Borak*,[52] and *Kardon v. National Gypsum Co.*[53] At the same time, the Supreme Court has acknowledged that the judicial implication of the section 10(b) private remedy is based on the reasoning of those outmoded cases[54] and cannot be supported by any evidence of congressional intent.[55] The Court has indicated that the continuing judicial recognition of the section 10(b) private remedy is inconsistent with the current view of implied rights of action.[56]

Only an absolute rule of statutory stare decisis could protect the Supreme Court's decisions recognizing a private right of action under section 10(b). The argument for an absolute rule of statutory stare decisis, however, is unavailing. Professor Marshall artfully has argued that if the Court were to follow an absolute rule of stare decisis in its interpretations of statutes, Congress properly would accept the burden of correcting judicial error.[57] He asserts that the Constitution in its delegation to Congress of legislative powers, embodies a "normative vision of the judicial and legislative functions that considers the federal judiciary's hesitance to overrule statutory precedents an important element in the proper division of responsibility between Congress and the courts."[58]

This theory of absolute statutory stare decisis has been challenged on a number of grounds, including the lack of any empirical support for its assumption that the judiciary's refusal to correct its erroneous statutory interpretations would stimulate Congress to do so.[59] Professor Marshall has responded to the critics of his proposed rule of statutory stare decisis

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51. 241 U.S. 33, 39 (1916).

52. 377 U.S. 426, 432 (1964).

53. 69 F. Supp. 512, 512-13 (E.D. Pa. 1946).

54. *See* Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2088 (1993) (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730, 737 (1975)).

55. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2780 ("[W]e have made no pretense that it was Congress' design to provide the remedy afforded. . . .") (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976)). *See also Hochfelder*, 425 U.S. at 196 ("[T]here is no indication that Congress, or the Commission when adopting Rule 10b-5, contemplated such a remedy. . . .").

56. *Lampf*, 111 S. Ct. at 2780.

57. Marshall, *supra* note 41, at 200-215.

58. *Id.* at 200.

59. *See* William N. Eskridge, Jr., *The Case of the Amorous Defendant: Criticizing Absolute Stare Decisions for Statutory Cases*, 88 MICH. L. REV. 2450 (1990).

by accusing them of having contempt for Congress.[60]

But it is Professor Marshall's absolute rule of statutory stare decisis that appears to flaunt congressional power. In defending his proposal, Professor Marshall himself acknowledges that the theory of legislative acquiescence is flawed because, *inter alia*, it permits courts to assign unjustifiable and unconstitutional significance to the inaction of post-enactment Congresses.[61] Nonetheless, Professor Marshall contends that courts should adhere to their prior judicial interpretations of the intent of the enacting Congress even when they believe that those interpretations are erroneous.[62] He attempts to justify the perpetuation of erroneous interpretations of congressional intent by claiming—admittedly without support—that such perpetuation might induce Congress to legislate more often in the future.[63]

When courts maintain a knowingly erroneous interpretation of the intent of the enacting Congress, however, there can be no doubt that they diminish the significance of that congressional intent. By blatantly refusing to correct such erroneous interpretations, courts undermine the primacy of legislative intent in judicial administration. This overt judicial refusal to give priority to legislative will in interpreting pieces of legislation runs contrary to any normative vision of the constitutional roles assigned to the legislature and the judiciary.[64] A rule of absolute statutory stare decisis either tolerates this affront to legislative power or, at best, trades it for the possibility that Congress might become more active in responding to the judicial interpretations of its statutes. But the trade is inequitable: a blatant assault on legislative power is tolerated in return for an unsubstantiated hope that Congress might exert more legislative power in the future.

Yet, even an absolute rule of statutory stare decisis cannot preserve the section 10(b) private right of action because the unconstitutionality of the continuing federal court recognition of that action mandates that the Supreme Court confront the propriety of its existence.[65] In cases construing the Constitution, "where correction through legislative action is practically impossible," the Supreme Court "bows to the lessons of

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60. Lawrence C. Marshall, *Contempt of Congress: A Reply to the Critics of an Absolute Rule of Statutory Stare Decisions*, 88 MICH. L. REV. 2467 (1990).

61. Marshall, *supra* note 41, at 184-196.

62. *Id.*

63. *Id.*

64. That refusal even runs contrary to Professor Marshall's normative vision of the balance of legislative and judicial power. *See id.* at 200.

65. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77-78 (1938) (noting that "the unconstitutionality of the course pursued" requires overruling venerable authority).

experience and the force of better reasoning."[66] Accordingly, "adherence to precedent is not rigidly required in constitutional cases."[67]

The ongoing federal court acceptance of the section 10(b) private right of action raises serious constitutional issues regarding the power of the federal courts to make law, to expand their subject matter jurisdiction, to enact legislation and to interpret congressional statutes in a manner knowingly inconsistent with congressional intent.[68] Whatever the proper resolution of those constitutional issues,[69] their undeniable if subtle presence in the Supreme Court's section 10(b) decisions permits the Court to reject the precedent of those decisions in favor of the force of "better reasoning."

III. THE UNCONSTITUTIONALITY OF THE JUDICIAL CREATION AND PERPETUATION OF THE SECTION 10(b) PRIVATE RIGHT OF ACTION

A. The Evolving Justifications for the Judicial Recognition of Private Rights of Action

When Congress has not created an express private right of action for damages caused by the violation of a statutory duty, the federal courts, in limited circumstances, have implied such a right of action.[70] The Supreme Court's standard for determining whether to imply a private right of action has undergone significant change.[71] The changes in that standard typically are characterized as an evolution in three stages.[72] Initially, the Court followed what has been called the relatively simple *Rigsby*[73] approach. This standard recognized broad federal court remedial power to create private remedies for the violation of a federal statute so long as Congress had not intended to remove that power. In a 1975 decision, *Cort v. Ash*,[74]

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66. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting).

67. Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (citing Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); Smith v. Allwright, 321 U.S. 649, 665 (1944)). *See also* Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467.

68. *See* discussion *infra* part III.

69. In part III, this Article demonstrates that the federal court recognition of the section 10(b) implied remedy is unconstitutional.

70. *See, e.g.*, Merrell Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 374 (1982).

71. Cannon v. University of Chicago, 441 U.S. 677, 717 (1979).

72. *Curran*, 456 U.S. at 374.

73. Texas & Pac. R.R. v. Rigsby, 241 U.S. 33 (1916). In *Curran*, the Supreme Court traced the history of the judicial implication of a private remedy to *Rigsby*. *Curran*, 456 U.S. at 374.

74. 422 U.S. 66 (1975).

the Court modified this implication standard, requiring a consideration of four implication criteria: (1) whether the plaintiff is a member of the class for whose "especial benefit" the federal statute was enacted; (2) the legislative intent to create a private remedy; (3) the place of a private remedy in the legislative scheme; and (4) whether the cause of action has been "traditionally relegated to state law."[75] These four factors, however, were quickly sharpened to one: the intent of Congress.[76] Accordingly, the Supreme Court's current approach to the judicial implication of a private remedy is grudging. The federal courts have no power to create a private remedy absent evidence that Congress intended such a remedy.[77]

In deciding whether to create private remedies under the federal securities laws, the federal courts have variously employed each of these evolving standards. The decisions in *Kardon v. National Gypsum Co.*,[78] a federal court decision implying the section 10(b) private remedy, and *J.I. Case Co. v. Borak*,[79] in which the Supreme Court created a private remedy for violations of section 14(a) of the 1934 Act, were guided by the *Rigsby*[80] approach. Later in *Piper v. Chris-Craft Industries*, however, when the Supreme Court refused to recognize a private remedy for a defeated tender-offeror under section 14(e) of the 1934 Act, it applied the four-part *Cort v. Ash* implication test[81]. Finally, in *Touche Ross & Co. v. Redington*,[82] the Supreme Court, in rejecting a private right of action for violations of section 17(a) of the 1934 Act,[83] declared that its "task is limited solely to determining whether Congress intended to create the private right of action."[84] Whether a private right of action exists for the violation of any given federal securities law provision thus appears to be a function of the time-period in which the Supreme Court decided the issue.

In the particular case of the section 10(b) private right of action, however, the Supreme Court has never explicitly constructed a reasoned

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75. *Id.* at 78. *See also* Piper v. Chris-Craft Indus. 430 U.S. 1 (1977).

76. Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981). *See also* Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

77. *See, e.g.*, Thompson v. Thompson, 484 U.S. 174, 190 (1988) (Scalia, J., concurring).

78. 69 F. Supp. 512, 513 (citing *Rigsby*, 241 U.S. at 39).

79. *Borak*, 377 U.S. at 433 (citing Bell v. Hood, 327 U.S. 678, 684 (1946)).

80. Merrell Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 375-77 (1982) (characterizing the "*Rigsby* approach" which prevailed for "most of our history").

81. *Piper*, 430 U.S. at 39-41.

82. 442 U.S. 560 (1979).

83. 15 U.S.C. § 78q(a) (1988). This section requires securities brokers and dealers to file and maintain financial records.

84. *Touche Ross*, 442 U.S. at 568.

argument in favor of a section 10(b) private right of action. Rather, the Court has offered casual—and varying—insight into its possible basis. The Supreme Court first characterized its acceptance of the private remedy by declaring that it had "explicitly acquiesced" in the lower federal court recognition of the private remedy.[85] In *Musick, Peeler & Garrett v. Employers Insurance of Wausau*, the Court recently suggested that the lower federal courts created the section 10(b) private remedy on the theory that they are empowered to create remedies for violations of federal statutes, even absent congressional intent.[86]

As an alternative to this theory of federal court remedial power, the Supreme Court has indicated that the section 10(b) private remedy also can be justified by congressional acquiescence in the judicial creation of that remedy. The *Musick* court found evidence of congressional acquiescence in the federal courts' creation and interpretation of implied rights of action under section 10(b).[87] In *Basic Inc. v. Levinson*,[88] the Supreme Court included "legislative acquiescence" as a foundation for the judicial implication of the private section 10(b) remedy. Similarly, in *Herman & MacLean v. Huddleston*,[89] the Court based its cumulative construction of the remedies provided by the federal securities laws on congressional acquiescence.

Hence, although the Supreme Court has never squarely held that a private right of action exists under section 10(b), it has suggested two theoretical bases for the private remedy: (1) federal judicial power to create remedies, absent congressional intent, and (2) congressional acquiescence in the federal judicial power to create remedies for statutory

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85. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975). *See also* Cannon v. University of Chicago, 441 U.S. 677, 690-93 (1979); *Touche Ross*, 442 U.S. at 577 n.19; Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971).

86. Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2088 (1993) ("The private right of action under Rule 10b-5 was implied by the judiciary on the theory courts should recognize private remedies to supplement federal statutory duties, not on the theory Congress had given an unequivocal direction to the courts to do so.") (citing *Blue Chip Stamps*, 421 U.S. at 730, 737). In the portion of *Blue Chip Stamps* cited in *Musick*, the court, in turn, cited *Kardon* and *Borak* for the proposition that the "private enforcement of Commission rules may '[provide] a necessary supplement to Commission action.'" *Blue Chip Stamps*, 421 U.S. at 730 (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964)).

87. *Musick*, 113 S. Ct. at 2088.

88. Basic Inc. v. Levinson, 485 U.S. 224, 230-31 (1988) ("Judicial interpretation and application, legislative acquiescence, and the passage of time have removed any doubt that a private cause of action exists for a violation of § 10(b) and Rule 10b-5 . . . .").

89. 459 U.S. 375, 380 (1983).

violations. Neither of these theories, however, can survive constitutional analysis.

B. The Unconstitutional Judicial Creation of the Section 10(b) Private Remedy Based Upon the Theory of Federal Court Remedial Power

1. The Theory of Federal Judicial Power to Create Remedies Absent Congressional Intent

The *Kardon*[90] court's primary rationale for creating the section 10(b) private right of action was that the federal courts have the power to create a private remedy in favor of persons for whom Congress has created a statutory duty.[91] The court reasoned that the violation of section 10(b) is tantamount to a statutory tort; if the violation causes injury to an individual for whose benefit the statute was enacted, then that individual may recover damages as in tort.[92] The court concluded that its implication of a private remedy is "but an application of the maxim, *Ubi jus ibi remedium*,"[93] or "where there is a right, there is a remedy."[94]

The "right" which the *Kardon* court recognized does not derive from the federal securities laws.[95] Rather the "right" is the "right to recover damages arising by reason of violation of a statute."[96] The Court described this right as "fundamental," "deeply ingrained," and the product of the "general law."[97] Accordingly, the question presented becomes not whether Congress expressly or impliedly intended to create a private remedy.[98] To the contrary, the issue is "whether an intention can be implied to *deny* a remedy and to wipe out a liability which, normally, by virtue of basic principles of tort law accompanies the doing of the prohibited act."[99] Absent any evidence that Congress intended to remove from the federal courts the power to apply the fundamental or general principles of tort law, the *Kardon* court concluded that it possessed the

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90. Kardon v. National Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946).

91. *Kardon*, 69 F. Supp. at 513 (citing Texas & Pac. R.R. v. Rigsby, 241 U.S. 33, 39 (1916)).

92. *Kardon*, 69 F. Supp. at 513 (citing RESTATEMENT OF TORTS 206 (1939)).

93. *Id.* (citing *Rigsby*, 241 U.S. at 39).

94. BLACK'S LAW DICTIONARY 1520 (6th ed. 1990).

95. Hence, the *Kardon* court viewed the issue whether to create a section 10(b) private remedy as only "part" an issue of statutory construction. *Kardon*, 69 F. Supp. at 514.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* (emphasis added).

residual power to create a private section 10(b) remedy.[100]

Kardon's reasoning formed the basis of the wide-spread lower court acceptance of the section 10(b) private remedy.[101] In *Borak*,[102] that reasoning also was echoed by the Supreme Court in its decision to create a private action for proxy fraud under section 14(a) of the 1934 Act.[103] The Court declared that it is "'well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'"[104] In *Musick*,[105] the Supreme Court recently characterized the judicial recognition of the section 10(b) implied right of action as the product of the line of reasoning set forth in the *Borak* case.

By that reasoning, the federal courts are empowered to create private remedies *unless* Congress has indicated its intent to remove that power.[106] In *Rigsby*, the Supreme Court offered perhaps its fullest justification for this exercise of federal judicial power:

> 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

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100. *Id.* Significantly, the *Kardon* court had no cause to reach the issue whether its newly created section 10(b) cause of action in favor of private investors arises under the federal securities laws. The federal courts had subject matter jurisdiction over the matter based on diversity of citizenship.

101. *See* Fratt v. Robinson, 203 F.2d 627, 632 n.15 (9th Cir. 1953); Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 787 n.4 (2d Cir. 1951); Speed v. Transamerica Corp., 71 F. Supp. 457, 458 (D. Del. 1947), *aff'd.* 235 F.2d 369 (3d Cir. 1956); Osborne v. Mallory, 86 F. Supp. 869, 879 (S.D.N.Y. 1949). By 1969, the private right of action had been recognized by ten of the eleven courts of appeals. *See* Herman & MacLean v. Huddleston, 459 U.S. 375 n.10 (1983) (citing 6 LOUIS LOSS, SECURITIES REGULATION 3871-73 (2d ed. Supp. 1969)).

102. J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

103. 15 U.S.C. § 78n(a) (1988).

104. *Borak*, 377 U.S. at 433 (quoting Bell v. Hood, 327 U.S. 678 (1946)). The court also relied upon section 27 of the 1934 Act, 15 U.S.C. § 78aa, for its creation of the private action. That section provides federal jurisdiction to the federal courts to "enforce any liability or duty" created by the 1934 Act.

105. Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2088 (1993).

106. Texas & Pac. R.R. v. Rigsby, 241 U.S. 33, 39-40 (1916). *See also* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 374-75 (1982) ("Under this approach, federal courts following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule.").

him contrary to the said law." This is but an application of the maxim, *Ubi jus ibi remedium.*[107]

This justification of judicial power actually rests upon two independent tenets: (a) the "right-remedy" principle of *ubi jus ibi remedium,*[108] and (b) the "application" of that principle to the "right" to recover damages for harm caused by the violation of a statute.[109] Neither tenet, however, justifies the exercise of federal judicial power to create a private remedy absent congressional intent.

a. Ubi Jus Ibi Remedium

The source of the right-remedy principle frequently is traced to *Blackstone's Commentaries.*[110] Indeed, that maxim "dominated Blackstone's law of wrongs."[111] Blackstone began his chapter in his *Book of Private Wrongs* on the Courts in General by declaring: "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."[112] Similarly, Blackstone opened his treatment of the common-law courts by reaffirming that "it is a settled and invariable principle in the laws of England that every right when withheld must have a remedy, and every injury its proper redress."[113]

A careful reading of Blackstone reveals, however, that he did not understand the maxim, *ubi jus ibi remedium,* to empower judges to create remedies for all perceived wrongs.[114] In its proper historical context, Blackstone's use of the right-remedy principle can be seen as an effort to distinguish the civilized English legal system from so-called primitive legal systems.[115] Primitive systems operated on an *ad hoc* basis, finding remedies for wrongs without a prior structure of rights. The civilized English system, by contrast, proceeded in the reverse order, fashioning

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107. *Rigsby,* 241 U.S. at 39-40 (citations omitted). *See also* Kardon v. National Gypsum Co., 69 F. Supp. 512, 512-13 (E.D. Pa. 1946).

108. *Rigsby,* 241 U.S. at 39-40.

109. *Id.*

110. *See, e.g., id.*; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

111. *See* Duncan Kennedy, *The Structure of Blackstone's Commentaries,* 28 BUFF. L. REV. 209, 239 (1979).

112. 3 WILLIAM BLACKSTONE, COMMENTARIES *23.

113. 3 *Id.* at *109. *See also* 3 *id.* at *86, *183-84, *266, *422.

114. *See* Kennedy, *supra* note 111.

115. In defining *ubi jus ibi remedium, Black's Law Dictionary* states: "It is said that the rule of primitive law was the reverse: Where there is a remedy, there is a right." BLACK'S LAW DICTIONARY 1520 (6th ed. 1990).

remedies after recognizing a system of rights.[116]

Although at some points in the *Commentaries*, Blackstone described judicial remedies as the natural result of any private wrong,[117] he did not contend that the judicial system is or should be empowered to remedy all wrongs. Instead, when Blackstone introduced the subject of the Courts of Law In General, he was careful to cabin judicial power within the rubric of rights recognized by law: "where there is a *legal* right, there is also a *legal* remedy."[118] This significant qualification indicates that the courts should not have the inherent power to remedy all wrongs; they should apply only the legal remedies which the law has already created to redress violations of legally recognized rights.[119] Blackstone thus extolled the "excellence of our English laws" for their capacity "to adapt their redress exactly to the circumstances of the injury."[120] Even the judicial power to adapt legal remedies to legal wrongs derives from legislation broadly authorizing the evolution of remedies.[121]

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116. Sir William Holdsworth locates the shift from the older view that *ubi remedium ibi jus* (where there is a remedy, there is a right) to *ubi jus ibi remedium* (where there is a right, there is a remedy) in the fourteenth and fifteenth centuries, primarily under the influence of Littleton. In Sir Edward Coke's *Commentary Upon Littleton*, the author, in discussing tenancy in common, explained that, while a single tenant in common may have an assisi for the moiety of a rent of (for example) twenty shillings, the tenants in common shall join in an assisi for a rent of (for example) a horse. 2 SIR EDWARD COKE, COMMENTARY UPON LITTLETON 129 (1853). The novelty here is that the tenants in common were allowed to join in an action as plaintiffs. Joinder was permitted in such a case because one man could not recover the moiety of a horse "or any other entire thing," while a man could recover the moiety of a severable or divisible rent such as twenty shillings. *Id.* If the tenants in common could not join, Littleton observed, "'they should have *damnum et injuriam*, and yet should have no remedy by law, which should be inconvenient, but the law will, that in every case where a man is wronged and damaged, that he shall have remedy.'" *Id.*

One of the earliest causes involving violation of a statute was *Ashby v. White*. 87 Eng. Rep. 808 (Q.B. 1702). This was a suit against the sheriff of Bucks for refusing to receive the plaintiff's vote in a parliamentary election, in contravention of the plaintiff's right to vote. *Id.* at 808-810. To the question whether the plaintiff should be able to maintain his suit, Chief Justice Holt answered: "[I]t is vain thing to imagine that there should be right without a remedy; want of right and want of remedy are *termini convertibles*." *Id.* at 815. The fact that the right is created by statute does not matter: "If an Act of Parliament be made for the benefit of any person, and he is hindered by another of that benefit, by necessary consequence of law he shall have an action; and the current of all the books is so." *Id.*

117. *See* 3 BLACKSTONE, *supra* note 112, at *266, *422.

118. 3 *Id.* at *23 (emphasis added). *See also* Blackstone's discussion of trespass on the case in which he concluded: "For whenever the common-law gives a right or prohibits an injury, it also gives a remedy. . . ." 3 *Id.* at *123.

119. 3 *Id.* at *266.

120. 3 *Id.*

121. Blackstone suggested that the Statute of Westminster II provides the prudent legislative process for developing new remedies for new wrongs:

Blackstone thus viewed the principle of *ubi jus ibi remedium* as a necessary check on judicial power in a liberal society. The beauty of English law is not so much that it provides legal remedies for the violation of legal rights, but that it dictates a singular legal remedy for each wrong.[122] A legal system which assigns to each wrong a corresponding remedy allows individuals to predict the legal consequences of their conduct and to order their affairs accordingly.[123] In order to preserve this symmetrical and predictive function of the legal process, judicial power must be curtailed.[124] In perhaps his most telling statement, Blackstone concludes that the "excellence" of English law is that "as little as possible is left in the breast of the judges, whom the law appoints to administer, and not to prescribe the remedy."[125] In a liberal regime, judges cannot create rights and they cannot create remedies for any wrong they perceive. Judges must administer the remedial system constructed by the legislature.[126]

> [W]hensoever from thenceforth in one case a writ shall be found in the chancery, and in a like case falling under the same right and requiring like remedy no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one: and, if they cannot agree, it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law, lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors.

3 BLACKSTONE, *supra* note 112, at *50-51 (quoting Statute of Westminster II, Y.B. 13 Edw. 1, c.24 (1285)). According to Blackstone, this statute was enacted "to quicken the diligence of the clerks in the chancery," who were too attached to the old precedents, in devising new writs to give remedies in cases in which remedies had never before been given. 3 *Id.* at *50. This accounts, he said, for the great proliferation of writs of trespass on the case. "For wherever the common-law gives a right or prohibits an injury, it also gives a remedy by action; and therefore, wherever a new injury is done, a new method of remedy must be pursued." 3 *Id.* at *123. *But see* Theodore F.T. Plucknett, *Case and the Statute of Westminster II*, 31 COLUM. L. REV. 778 (1931) (arguing that the writs of trespass on the case expanded independently of the statute).

122. Blackstone wrote that the English laws "do not furnish one and the same action for different wrongs, which are impossible to be brought within one and the same description. . . ." 3 BLACKSTONE, *supra* note 112, at *266.

123. Blackstone wrote: "[E]very man knows what satisfaction he is entitled to expect from the courts of justice. . . ." 3 *Id.*

124. 3 *Id.*

125. 3 *Id.*

126. In his comprehensive and insightful analysis of Blackstone, Professor Duncan Kennedy observed:

> [I]t seems reasonable to conclude that 'for every right a remedy' was more than merely a claim that the administration of justice faithfully executed whatever a superior will commanded. But it was *less* than a claim that the judges were empowered to devise a remedial institution whenever they perceived behavior they themselves thought wrongful.

Kennedy, *supra* note 111, at 243. According to Kennedy, Blackstone believed that common-law judges were partially responsible for the wonderful symmetry between the laws of England and the laws of nature. Yet, whatever Blackstone believed about the *source* of the rights of English citizens, he undoubtedly believed that their *preservation* depended upon limiting the power of judges to fashion

The Supreme Court's adoption of Blackstone's remedial principle in *Marbury v. Madison*[127] provides no additional justification for the federal judicial power to create private remedies. Justice Marshall relied on Blackstone when he declared:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury .... The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if, the laws furnish no remedy for the violation of a vested legal right.[128]

Yet, as employed by Justice Marshall, the right-remedy principle is even more limited than that advanced by Blackstone.[129] Marshall chose to cite those passages in *Blackstone's Commentaries* which make clear that the judiciary has the limited power to administer the "legal remedy" which the legislature has created for the invasion of a "legal right."[130] Furthermore, the Supreme Court in *Marbury* even recognized a significant "class of cases which come under the description of *damnum absque injuria*; a loss without an injury."[131]

The remedial issue in *Marbury*, therefore, was presented in descriptive rather than normative terms. The Court had to decide whether the "laws of [Marbury's] country afford[ed] him a remedy" for the violation of his rights to a commission for his appointment as justice of the peace.[132] The question was not whether the laws of the United States *should* afford a remedy; rather the issue was whether the laws of Marbury's country afforded a remedy. Nor did Justice Marshall use the word "laws" in any majestic, common-law sense. Instead, Marshall merely examined the propriety of applying the existing statutory remedy of the writ of manda-

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remedies contrary to the remedial system designed by the legislature.

127. 5 U.S. (1 Cranch) 137 (1803).

128. *Id.* at 163.

129. The difference has been described as rhetorical. Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1778 n.243 (1991) ("For reasons more of rhetorical structure than substance, however, Marshall's own formulation did not take the classic *ubi jus, ibi remedium* format").

130. *Marbury*, 5 U.S. (1 Cranch) at 163 (citing 3 BLACKSTONE, *supra* note 112, at *23, *109).

131. *Id.* at 164.

132. *Id.* at 163. The first issue reached by the Supreme Court was whether Marbury had a right to the commission pursuant to the Act of February 27, 1801, Ch. 15, § 11, 2 Stat. 107 (1807), empowering the executive to appoint justices of the peace for five-year terms. The Court concluded that once President Adams signed and sealed the commission, Marbury's right to the commission had fully vested. *Id.* at 162.

mus to persons acting under the authority of executive power.[133] The writ is an extraordinary remedy, but it is one provided by statute. The writ is available only when other legal remedies are inadequate for the compulsion of a specific non-discretionary act required by law and readily enforceable by the courts.[134] The Court concluded simply that the writ of mandamus was available in the factual situation presented.

The only troubling aspect of those facts is that they involved the executive branch. A cabinet officer working under the authority of the President must be judicially compelled to consummate the appointment.[135] Accordingly, the remedial issue was whether the executive branch is *immune* from the operation of the statutorily created and otherwise applicable remedy of mandamus for the violation of a legally recognized right. It was in this context that Marshall cited Blackstone and proclaimed that civil liberty and a government of laws depend upon the ability of individuals to claim legal protection for the violation of their rights.[136] Marshall asserted that civil liberty and a government of laws cannot survive if the executive branch is fully immune from the judicial enforcement of statutorily created remedies. He did not argue that the essence of civil liberty and of a government of laws consists of the judicial power to create remedies for any perceived wrong, even if the wrong is the clear violation of a legal right.

Indeed, Marshall concluded that while the executive branch is not fully immune from the judicial enforcement of statutorily created remedies, that branch does enjoy some immunity from judicial scrutiny in matters of constitutional or legal discretion.[137] If Blackstone's message is that civil liberty requires judges to administer legislative remedies, then Marshall's message is that civil liberty requires judges to administer faithfully legislative remedies against the executive branch except in discretionary matters. Neither message contains any basis for the judicial creation of

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133. *Id.* at 172-73. The Judiciary Act of 1789 provided for a writ of mandamus "in cases warranted by the principles and usages of law, to . . . person holding office under the authority of the United States."

134. *Id.* at 172-74. *See also* William Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 13 (1969).

135. Professor Van Alstyne claims that "this was regarded at the time as the most critical issue, with Jefferson taking the position that the Court had no authority thus to examine the exercise of executive prerogatives." Van Alstyne, *supra* note 134, at 11.

136. *Marbury*, 5 U.S. (1 Cranch) at 163.

137. *Id.* at 170. ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.").

private remedies.

Nor can the Supreme Court's *Rigsby*[138] decision form the basis of the federal court power to create private remedies. In that case, Rigsby sought damages under the Federal Safety Appliance Acts[139] for injuries he suffered while performing his duties as a railroad switchman.[140] The Federal Safety Appliance Acts required railroads operating in interstate commerce to meet minimum federal safety standards, but they contained no express right of action for injuries resulting from violations of those standards.[141] In recognizing a private remedy, the Supreme Court recited the right-remedy principle.[142] However, the Court's argument favoring the private remedy is based primarily upon congressional intent. The Court asserted that Congress expressly declared its intent to "[p]romote the safety of employees." The "inference of a private right of action," the court claimed, "is rendered irresistible" by the statutory language removing from any cause of action the defense of assumption of the risk.[143] Further evidence of congressional intent to create a private remedy was also found in the clause reserving "liability in any remedial action for the death or injury of any railroad employee."[144]

Similarly, in *Bell v. Hood*,[145] the Supreme Court trumpeted the remedial principle, but ultimately refused to reach the issue whether a private damage remedy exists for injuries resulting from the violation of constitutional rights.[146] Because in that case it was the "pleaders' purpose" to make violations of the Constitution the basis of their claims and because the complaints were "drawn" in such a manner as "to seek recovery" for constitutional violations, the Supreme Court found a sufficient jurisdictional basis for the claims.[147] The Court concluded that the issue "whether federal courts can grant money recovery for damages said to have been suffered" as a result of constitutional violations is itself

138. Texas & Pac. R.R. v. Rigsby, 241 U.S. 33 (1916).

139. 36 Stat. 398 (1910); 27 Stat. 531 (1893) (amended 32 Stat. 943 (1903)).

140. *Rigsby*, 241 U.S. at 36.

141. *See id.* at 39.

142. *Id.* at 38.

143. *Id.* at 40.

144. *Id.* at 39. Because the action was removed to federal court by the federal railroad companies, the Supreme Court did not have to reach the issue whether the cause of action asserted by Rigsby arose under federal law or state common-law.

145. 327 U.S. 678 (1946).

146. *Id.* at 683-85.

147. *Id.* at 681-82.

significant enough to "warrant exercise of federal jurisdiction."[148]

In suggesting that the action to recover damages was not "patently without merit," the Court declared:

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.[149]

In its proper context, however, this declaration of federal judicial power is not so profound. The declaration is presented only as a potential argument which might be made on remand to support the merits of the allegations in the complaint. The argument gives to those allegations a dubious status—they are at least not "patently" without merit.[150]

Even as a mere non-frivolous argument, the Supreme Court's assertion about federal judicial power is heavily qualified. Courts do not create remedies; they merely "adjust" them to grant "necessary" relief.[151] The Supreme Court invokes the familiar language that "federal courts may use any available remedy to make good the wrong done,"[152] but only where "legal" rights have been invaded and a federal statute provides for a "right to sue for such invasion."[153] Accordingly, the maxim, "where there is a right, there is a remedy" has not and cannot provide any independent justification for the judicial creation of private remedies for statutory violations absent legislative intent.

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148. *Id.* at 684.

149. *Id.*

150. *Id.* at 683.

151. *Id.* at 684. The Court cites to *Marbury* for this proposition, but even with its contextual limitations, the *Marbury* Court's formulation of this principle of federal judicial power was stronger: where there is a legal right, there is a legal remedy.

152. *Id.*

153. *Id.* As Justice Harlan later indicated in his concurrence in Bivens v. Six Unknown Agents of the Fed. Bureau of Investigation, 403 U.S. 388 (1971) (Harlan, J., concurring), *Bell* is more about the scope of federal remedial power than about the existence of federal remedial power. Assuming that the federal courts have the power to enjoin constitutional violations, the only true issue presented in *Bell* and in *Bivens* was whether that power extends to the remedy of damages. Since *Bivens*, the Supreme Court has expressed its unwillingness to create private rights of action even for violations of constitutional prohibitions. *See* Schweiker v. Chilicky, 487 U.S. 412 (1988) (rejecting private remedy for due process violations).

b. The Right to Recover Damages for Statutory Violations

The judicial power to create private remedies for the violation of statutory standards cannot be justified as an application of *ubi jus ibi remedium*. Nor is the "right" to recover damages by reason of the violation of a statute itself "fundamental" or "deeply ingrained" in the "basic principles of tort law."[154]

In *Rigsby*, the Supreme Court's reliance on *Couch v. Steel*[155] to support the proposition that judges may create a private right of action for the violation of a statutory standard is misplaced.[156] Couch, a common seaman, brought an action for damages against the owner of the vessel on which he had served.[157] In the second count,[158] Couch alleged that he was injured as a result of the shipowner's failure to keep on board a sufficient supply of medicines, as required by statute.[159] The statute prescribed a penalty for failure to keep the required medicines on board, but the plaintiff in *Couch* did not sue for this penalty. Rather, he brought an action on the case[160] to recover the damages he sustained as a result of the defendant's breach of his statutory duty.[161]

In ruling on the second count, Lord Campbell noted in dicta that if the act sued upon had not provided a specific, express penalty for its breach, "it seems clear that the action would be maintainable."[162] The statute, he observed, established a benefit for the seaman. The declaration alleged that the defendant had violated this enactment, depriving the plaintiff of his benefit and injuring his health.[163] Lord Campbell cited the general rule that a man may have an action on the case for his damages when he has

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154. *See* Kardon v. National Gypsum Co., 69 F. Supp. 513, 513-14 (E.D. Pa. 1946).

155. 118 Eng. Rep. 1193 (1854).

156. Texas & Pac. R.R. v. Rigsby, 241 U.S. 33, 39-40 (1916). The Court also referred to the statement by Chief Justice Holt in Anonymous, 87 Eng. Rep. 791 (Q.B., 1703) "[W]her-ever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him . . . ."

157. *Couch*, 118 Eng. Rep. at 1193.

158. *Id.* at 1193-94. In the first count, Couch alleged that the defendant so "negligently managed, fitted out and equipped" the vessel that it was unseaworthy and in a leaky and dangerous condition, as a consequence of which the plaintiff became sick and suffered damages.

159. *Id.* at 1194.

160. *Id.* at 1196.

161. The defendant demurred to both counts. *Id.* at 1194. The demurrer was sustained with respect to the first count. *Id.* at 1195-96.

162. *Id.* at 1196.

163. *Id.*

been injured by the wrong of another.[164] Yet, like Blackstone, Lord Campbell found support for this general rule from the Statute of Westminster II.[165] According to Lord Campbell, Chapter 50 of that Statute[166] gave a remedy by action on the case to all who were aggrieved by the neglect of any duty created by any statute.[167]

Because the shipowner's statute sued upon in *Couch* did provide a penalty for non-performance, however, the court addressed the question whether that penalty should be the exclusive private remedy for a violation of the statute.[168] The court attempted to draw a distinction between the public wrong of failing to keep a sufficient supply of medicines on board the ship and the private wrong of causing a special and particular damage to an individual by failure to keep such medicines on board.[169] For the public wrong, the court held that there was no remedy except that expressly provided by statute.[170] The court found, however, that the penal statute did not extend to circumstances involving personal injury resulting from the breach of the public duty to carry medicines. Because the statute did not contemplate compensation for private special damages,[171] it did not eliminate the broader right created by the Statute of Westminster II to maintain an action for special damages arising from the breach of any statutory duty. The court concluded, therefore, that an action on the case for special damages caused by the breach of a public duty could be maintained.[172]

Had the terms of the statute been broad enough to provide a specific remedy for injuries caused by violations of the statute's standards of conduct, the court's decision would have been different. The court, by its reasoning, would have concluded that the broad right to recover damages created by the Statute of Westminster II was preempted by the precise statutory remedies for injuries caused by the failure to maintain sufficient medicine on the ship. The court's holding thus must be limited to

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164. *Id.* (citing Comyn's Digest, Action upon the Case (A)).

165. 118 Eng. Rep. at 1196.

166. Statute of Westminster II, 13 Edw. 1, ch. 50 (Eng.).

167. 118 Eng. Rep. at 1196.

168. *See id.* at 1197 ("The penalty being annexed to the offence in the very clause of the Act creating it, no indictment or other proceeding could be taken against the person making default for the mere breach of the duty cast upon him by the Act.").

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

situations in which the language of a narrow statute creating express remedies for violations does not eclipse the broad statutory right to recover damages for injuries caused by statutory violations.

Even this narrow holding, however, was cast into doubt in subsequent actions on the case for violations of statutes prescribing penalties for their breach. In *Atkinson v. Newcastle & Gateshead Waterworks Co.*,[173] the owner of a timber yard and sawmill which had been destroyed by fire brought suit under the Waterworks Clauses Act (Act).[174] The owner alleged that because the defendants failed to provide water to the fireplugs at the pressure required by the Act, such water was unavailable for use in extinguishing the fire.[175] Section 43 of the Act set forth specific penalties for a breach of the Waterwork's duties.[176] The court found that the Act did not create any duty enforceable by the suit of individuals.[177] Rather, the Act was intended to enumerate the duties of a public waterworks company and to provide, by means of statutory penalties, guarantees for the fulfillment of those duties.[178]

The *Atkinson* court rejected the argument that *Couch v. Steel* supported the plaintiff's right to sue for special damages. Though not expressly overruling the case, none of the justices thought that the broad rule of *Couch* could be sustained.[179] Furthermore, in subsequent cases, the English courts blatantly rejected *Couch* and concluded that the presence of a statutory penalty for public injuries would preclude the judicial creation of additional private remedies for damages caused by the violation of a statutory standard of care.[180] Although the holding of *Couch* has been

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173. Atkinson v. Newcastle & Gateshead Waterworks Co., 2 Ex. D. 441 (C.A. 1877).

174. Waterworks Clauses Act, 10 Vict., ch. 17, §§ 42, 43 (1847).

175. 2 Ex. D. at 442-43.

176. According to the court, the Act specified penalties for four classes of neglect: (1) failure to fix, maintain, or repair fireplugs; (2) failure to furnish the town commission with a sufficient supply of water for public purposes; (3) failure to keep the pipes charged under the required pressure (the specific class of neglect sued upon); and (4) failure to furnish any owner or occupier with the supply of water to which he was entitled. The Act provided a penalty of 10£ for each such violation. Moreover, in the second and fourth classes, the Act provided a further penalty for every day the neglect continued, payable to the aggrieved party. *Id.* at 446.

177. *Id.*

178. *Id.* at 447.

179. *Id.* at 447-49.

180. In two later cases, the rule in *Couch* was rejected in favor of that announced in *Atkinson*: Cowley v. Newmarket Local Bd., 1892 App. Cas. 345, 392 (H.L. 1892) (appeal taken from Q.B.), and Saunders v. Holborn Dist. Bd. of Works [1895] 1 Q.B. 64, 68. Both cases were suits against a public corporation which, through the neglect of its statutory duty, allegedly caused special damages to the plaintiff. *Cowley*, 1892 App. Cas. at 346; *Saunders*, [1895] 1 Q.B. at 64. In both cases, the statute

widely criticized, its dicta that a violation of a statute which does not contain an exclusive penalty is actionable, has not suffered a similar fate.[181]

American tort law, however, has since refined and narrowed that dicta and effectively eliminated the unqualified right to recover damages for the violation of a statute. The *Restatement of Torts* does make clear that tort law permits judges to "adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment."[182] Yet, it is no less clear that tort law does not *require* any court to adopt a statutory prohibition as the standard of conduct of a reasonable man.[183] To the contrary, the *Reporters' Notes* explaining section 286 of the *Restatement (Second) of Torts* summarize the law as follows: "[T]he court is under no compulsion to adopt the requirements of the enactment as the standard of conduct . . . ."[184] Accordingly, tort law does not create a "right" in any meaningful

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sued upon provided a penalty for non-feasance, but the plaintiff unsuccessfully attempted to invoke *Couch v. Steel* to justify an action on the case for special damages. *Cowley*, 1892 App. Cas. at 348, 353; *Saunders*, 1 Q.B. at 68, 65. Furthermore, both cases cited *Atkinson* in refusing to follow the rule in *Couch*. *Cowley*, 1892 App. Cas. at 352; *Saunders*, 1 Q.B. at 68.

181. For example, the case of Groves v. Wimborne (Lord), [1898] 2 Q.B. 402 (Eng. C.A.), involved a violation of the Factory and Workshop Act which required dangerous parts of machinery in factories to be fenced for the safety of the workers. While the Act did establish penalties for failure to keep the machinery securely fenced, the court nonetheless held that a worker injured by improperly fenced machinery could maintain an action on the statute for his special damages. In reaching this decision, the court asked:

> Could it be doubted that, if § 5 stood alone, and if no fine were provided by the Act for contravention of its provisions, a person injured by a breach of the absolute and unqualified duty imposed by that section would have a cause of action in respect of that breach? Clearly it could not be doubted.

182. *See* RESTATEMENT (SECOND) OF TORTS § 286 (1965). Section 286, relied upon by the *Kardon* Court, provides:

> 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:
> (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and
> (b) the interest invaded is one which the enactment is intended to protect; and,
> (c) where the enactment is intended to protect an interest from a particular hazard, the invasion of the interest results from that hazard; and,
> (d) the violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining the action.

Id.

183. *See* RESTATEMENT (SECOND) OF TORTS §§ 285-288 (1965). *See also* 28 EARL OF HALSBURY, THE LAWS OF ENGLAND 10-19 (Gavin T. Simonds ed., 3rd ed. 1952); JOHN F. CLERK & WILLIAM H.B. LINDSELL ON TORTS 643-54 (15th ed. 1982); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 190-204 (4th ed. 1971).

184. *See* RESTATEMENT (SECOND) OF TORTS § 286 reporters' notes (1965).

sense to recover damages for the violation of a statute.

Tort law, however, does empower the court to adopt or borrow a statutory standard in a civil action for damages. As the *Kardon* court noted, when a court borrows a statutory standard for use in defining negligence, it does more than follow a "canon of statutory interpretation."[185] Yet, the court does much less than create a right to recover damages for the violation of that standard. The statutory standard is relevant to only one element in a tort action: the standard of care.[186] The statute is not employed to create the right sued upon, to establish the necessary causal connection between the breach of the standard of care and the harm, or to provide the remedy. Thus, in the absence of any arguably relevant statutory prohibition, the court is empowered to define the standard of reasonable conduct by its own wits.[187]

Even when a relevant statutory prohibition exists, the court may ignore that prohibition completely in defining the standard of reasonable conduct.[188] Indeed, the unexcused violation of a legislative enactment alone is not negligence per se. To the contrary, such a violation only becomes negligence if the court has exercised its discretion and adopted that standard as part of its definition of reasonable conduct.[189] A statutory prohibition by itself simply cannot create a right to recover damages in tort.[190]

2. *The Unconstitutionality of Federal Judicial Power to Create Remedies Absent Congressional Intent*

Apart from its historic roots, the judicial recognition of implied private remedies has been justified by the judiciary's "well-defined" power to order "familiar" remedies to enforce statutory obligations[191] in "light of the

185. Kardon v. National Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946).

186. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 286 (1965).

187. *Id.* § 285.

188. *Id.* § 288 C ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.").

189. *See id.* § 288 B.

190. If a statutory prohibition does not create a "right" to recover tort damages, then, even under the *ubi jus ibi remedium* maxim, there need not be any civil remedy for its violation. Statutes, however, do create general rights to be free from violations of their prohibitions. When a statute is violated the right to be free from such violation is violated as well. Under the right-remedy principle, the court should be empowered to create a remedy for the violation of that right. As has been discussed, however, the right-remedy principle does not empower courts to fashion remedies for all wrongs; rather it directs the courts to administer the system of remedies created by the legislature.

191. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 376 (1982).

statutory language and purpose."[192] The Supreme Court thus has declared that "there is no merit to the argument . . . that the judicial recognition of an implied private remedy violates the separation-of-powers doctrine."[193] Furthermore, there is little doubt that "the federal judiciary has substantial powers to construe legislation, including, when appropriate, the power to prescribe substantive standards of conduct that supplement federal legislation."[194]

Although the common-law courts may retain the power to create private remedies, the federal courts have no such power. When a federal court creates a private right of action for the violation of a federal statute, that court does more than prescribe standards of conduct or order familiar remedies: it engages in an unconstitutional expansion of its limited power to make law and an unconstitutional expansion of its limited subject matter jurisdiction.[195]

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192. *Id.* (citing Jackson County v. United States, 308 U.S. 343, 351 (1939)).

193. *Curran*, 456 U.S. at 375-76.

194. Cannon v. University of Chicago, 441 U.S. 677, 745 (1979) (Powell, J., dissenting).

195. Justice Powell suggested in his dissent in *Cannon* that the issues of federal common-law and federal jurisdiction are intertwined. *Id.* at 745 n.17 (Powell, J., dissenting). The federal courts have no independent power to create federal common-law because the Constitution nowhere delegates that power to the United States judiciary. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) ("[N]o clause in the Constitution purports to confer such a power upon the federal courts."). Absent a constitutional delegation to the federal courts of the power to create common law, that power is reserved to the states. U.S. CONST. amend. X.

The Constitution, however, does delegate to the United States Supreme Court judicial power over cases "arising under" federal law. U.S. CONST. art. III, § 2. The Constitution also delegates to Congress the power to create the lower federal courts. U.S. CONST. art III, § 1. Accordingly, Congress has the constitutional power to create the federal district courts and to assign to them jurisdiction over cases arising under federal law. *Id. See* 28 U.S.C. § 1331. However, Congress cannot assign to the federal courts any greater power than the Constitution assigns to the United States judiciary. Because the Constitution does not delegate to the United States judiciary the power to create federal common law, Congress cannot grant jurisdiction to the lower federal courts to resolve cases arising under federal common-law. Instead, the jurisdiction of the federal courts is limited to cases arising under the Constitution, treaties, or congressional enactments.

If, as Justice Powell recognized, the arising under jurisdiction of the federal courts is broad enough to accept a state law cause of action which includes as an element the violation of a federal statute, then the implication of a private remedy expands the scope of federal jurisdiction. *Cannon*, 441 U.S. at 745 n.17. Justice Powell concluded that to the extent that such an expansive interpretation of arising under jurisdiction permits the federal courts to "assume control over disputes which Congress did not consign" to them that interpretation is constitutionally defective. *Id.* Ironically, after Justice Powell's dissent in *Cannon*, the Supreme Court rejected such an expansive interpretation of arising under jurisdiction. *See infra* note 252 and accompanying text. Accordingly, this Article contends that even if a cause of action can be implied for a section 10(b) violation, that action does not, and cannot consistent with the Constitution, arise under federal law.

a. The Federal Judiciary Has No Federal Common-law Power to Create Private Remedies

Despite *Erie*'s oft-cited proclamation that "[t]here is no federal general common-law,"[196] federal courts have retained the power to create common-law in two "restricted" circumstances:[197] (1) when "necessary to protect uniquely federal interests"[198] or (2) when Congress has "vested jurisdiction in the federal courts and empowered them to create governing rules of law."[199] The federal securities statutes, like most comprehensive congressional regulatory schemes, embody a federal interest in eliminating harmful conduct. However, they do not present the kind of "uniquely federal interests" which empower the federal courts to fashion federal common-law.[200] If that power exists in the realm of securities law, it must derive from a specific congressional delegation to the federal courts of both subject matter jurisdiction and the authority to create governing rules of law.[201]

Congress, however, has provided no such grant of power to the federal courts. In the 1934 Act,[202] Congress gave the federal district courts "exclusive" subject matter jurisdiction over all "suits in equity and actions

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196. *Erie*, 304 U.S. at 78.

197. *See* Wheeldin v. Wheeler, 373 U.S. 647 (1963). *See also* Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77 (1981); Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); United States v. Standard Oil Co., 332 U.S. 301, 308 (1947).

198. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964). *See, e.g.*, United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973) (regarding the rights and obligations of the United States); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (same); Illinois v. Milwaukee, 406 U.S. 91 (1972) (resolving interstate controversies); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) ("[C]ontroversies concerning . . . boundaries . . . have been recognized as presenting federal questions."); Edwards v. Campagnie Generale Transatlantique, 443 U.S. 256 (1979) (resolving admiralty disputes); Cooper Stevedoring Co. v. Frita Kopke Inc., 417 U.S. 106 (1974) (same).

199. Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 642 (1981). *See also* Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

200. *See* Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2088 (1993). The Court in *Texas Industries* stated:

> Admittedly, there is a federal interest in the sense that vindication of rights arising out of these congressional enactments supplements federal enforcement and fulfills the objects of the statutory scheme. Notwithstanding that nexus, contribution among antitrust wrongdoers does not involve the duties of the Federal Government, the distribution of powers in our federal system, or matters necessarily subject to federal control even in the absence of statutory authority.

451 U.S. at 642.

201. *Texas Industries*, 451 U.S. at 642-43; *Wheeldin*, 373 U.S. at 652.

202. 15 U.S.C. § 78a-78*ll* (1988).

at law brought to enforce any liability or duty created by [the 1934 Act] or the rules and regulations thereunder."[203] This grant of jurisdiction, however, is limited to actions based on liabilities or duties "created by" the federal statute.[204] As the Supreme Court has declared, this language "creates no cause of action of its own force and effect; it imposes no liabilities."[205] Congress has expressly granted federal jurisdiction only over actions created by the "substantive provisions" of the 1934 Act.[206] The mere grant of exclusive federal jurisdiction over actions expressly created by a federal statute does not empower the federal courts to create additional federal common-law actions which are not expressly created by that statute.[207]

Nor do the sweeping antifraud provisions of the federal securities laws justify the creation of federal common-law rights. There is no doubt that the federal securities laws represent a comprehensive congressional effort to regulate interstate securities transactions.[208] The existence of that scheme alone, however, does not evidence a congressional intent to delegate to the federal courts the power to fashion common-law rights.[209] To the contrary, the "detailed and specific" remedial provisions throughout the federal securities laws create a presumption that Congress did not intend the federal courts to have the "power to alter or supplement the remedies enacted."[210] As the Supreme Court has recently concluded,

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203. 15 U.S.C. § 78aa (1988).

204. *Id.*

205. Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979) (holding that the grant of subject matter jurisdiction in section 27(a) of the 1934 Act does not alone empower the federal courts to create private remedies for violations of the reporting requirements of section 17(a) of the 1934 Act).

206. *Id.* at 577.

207. *See, e.g.*, Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804 (1986); Texas Indus. v. Radcliffe Materials, Inc., 451 U.S. 630, 643-46 (1981) (reasoning that the congressional delegation to the federal courts of exclusive jurisdiction over unique remedies for antitrust law violations does not include a delegation to create an additional common-law right to contribution).

208. The federal regulatory scheme is based upon the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1988), the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78*ll* (1988), and their amendments. *See, e.g.*, The Williams Act, 15 U.S.C. §§ 78m(d), (e), 78n(d), (f) (1988). The 1933 Act regulates the offer or sale of securities by means of a materially false registration statement, 15 U.S.C. § 77k, or prospectus, 15 U.S.C. § 77*l*(2). The scope of the Securities Exchange Act of 1934 is far more broad. It governs registration, distribution, sale, and resale of securities in interstate commerce. *See, e.g.*, 15 U.S.C. § 78j(b) (making unlawful use of interstate commerce to "use or employ any manipulative or deceptive device."). The 1934 Act renders unlawful fraud in the sale and purchase of securities, 15 U.S.C. § 78j(b), as well as manipulation, insider trading, and misstatements in filed documents, 15 U.S.C. §§ 78i, 78b, 78r(a).

209. *See Texas Industries*, 451 U.S. at 644-45.

210. *Id.* at 645.

"'[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.'"[211] Even in the context of the antitrust laws under which the "federal courts enjoy more flexibility and act more as common-law courts than in other areas governed by federal statute,"[212] the Supreme Court has held that congressional delegation of federal jurisdiction over a comprehensive remedial scheme does not include a delegation of the power to create federal common-law remedies.[213]

Moreover, the necessity for federal courts to interpret and apply congressional statutes does not empower those courts to supplement the remedies provided in such statutes. The federal courts certainly have the authority to give "concrete meaning" to federal statutes through a "process of case-by-case judicial decision in the common-law tradition."[214] Jurisdiction to resolve cases or controversies created by federal statutes naturally includes the power to interpret "ambiguous or incomplete provisions."[215] The power to develop a federal common-law through court decisions interpreting and applying federal statutes, however, does not extend to the creation of remedies not within the statutes.[216] The federal courts' inherent authority to interpret federal securities laws in the course of deciding the myriad actions expressly created by those laws, therefore, does not include the authority to create additional private common-law remedies.

b. The Federal Judiciary Has No Power to Expand Its Subject Matter Jurisdiction to Include the Section 10(b) Private Remedy

Even if the federal courts had the power to create a private, common-law cause of action for the violation of section 10(b), the federal district courts

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211. *Id.* (quoting Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 97 (1981)).

212. *Northwest Airlines*, 451 U.S. at 98 n.42 (citing National Society of Professional Engineers v. United States, 435 U.S. 679, 688 (1978)).

213. *Texas Industries*, 451 U.S. at 646. Even in the exercise of its admiralty jurisdiction, the Supreme Court has refused to "fashion new remedies if there is a possibility that they may interfere with a legislative program." *Northwest Airlines*, 451 U.S. at 97 n.40 (citing Halcyon Lines v. Haenn Ship Corp., 342 U.S. 282, 285-87 (1952)).

214. *Northwest Airlines*, 451 U.S. at 95.

215. *Id.* at 97.

216. *Texas Industries*, 451 U.S. at 646 ("In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.") (citing *Northwest Airlines*, 451 U.S. at 97).

nonetheless would lack subject matter jurisdiction over that action. The 1934 Act's specific grant of exclusive jurisdiction over actions to enforce liabilities "created by" that Act does not alone provide for subject matter jurisdiction over judicially-created actions such as the private section 10(b) remedy.[217] Furthermore, although Congress has granted the federal district courts original jurisdiction over "all civil actions arising under the . . . laws . . . of the United States,"[218] that grant of jurisdiction does not extend to judicially-created private actions for the violation of a federal statute.

The Constitution provides that the federal judicial power shall extend to "all Cases in Law and Equity, arising under . . . the laws of the United States."[219] This constitutional grant of jurisdiction has been interpreted with "great breadth" to confer original jurisdiction upon the Supreme Court "whenever a federal question is an 'ingredient' of the action" or whenever a case involves "'potential federal questions.'"[220]

This broad grant of jurisdiction, however, has no independent application to the lower federal courts. Instead, the Constitution empowers Congress, and only Congress, to create "tribunals inferior to" the Supreme Court and to define the jurisdiction of those inferior federal courts.[221] The lower federal courts have no constitutional power to expand their own subject matter jurisdiction.[222] While Congress cannot assign the lower federal courts any more power than the Constitution confers upon the Supreme Court, Congress can assign to those courts less power than allowed by the Constitution.[223] Indeed, although Congress' statutory grant of jurisdiction to the lower federal courts virtually copies the Constitution's grant of federal judicial power,[224] the Supreme Court has interpreted the congressional delegation much more restrictively than its constitutional counterpart.[225]

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217. 15 U.S.C. § 78aa (1988). *See also Touche Ross*, 422 U.S. at 577.

218. 28 U.S.C. § 1331 (1988).

219. U.S. CONST. art. III, § 2.

220. *See* Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804, 818 (Brennan, J., dissenting).

221. U.S. CONST. art. III, § 1. *See also* U.S. CONST. art. I, § 7; *Merrell Dow*, 478 U.S. at 807 (recognizing that constitutional grant of judicial power is not "self-executing").

222. American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17 (1951); Lockerty v. Phillips, 319 U.S. 182 (1943); Kline v. Burke Const. Co., 260 U.S. 226 (1922). *See also* United States v. New York Tel. Co., 434 U.S. 159, 179 (1977) (Stevens, J., dissenting).

223. See U.S. CONST. amend X.

224. 28 U.S.C. § 1331 (1988) ("The district courts shall have original jurisdictions of all civil actions arising under the . . . laws . . . of the United States.").

225. *Merrell Dow*, 478 U.S. at 807.

Under the Supreme Court's current view of the congressional grant of "arising under" jurisdiction to the lower federal courts, there is no doubt that those courts have the power to hear cases in which a federal statute actually "creates" the cause of action.[226] In *Moore v. Chesapeake & Ohio Railroad*,[227] the Supreme Court concluded, however, that an implied right of action for the violation of a federal statute is created by state law. Moore filed two claims against the railroad alleging that he was injured as a result of a defective lever which he used in attempting to uncouple freight cars. The Court concluded that the first claim, brought pursuant to the Federal Employers' Liability Act which provides for an express private right of action, clearly arose under federal law.[228] However, the Supreme Court held that the second claim did not arise under federal law because the allegations in Moore's complaint relied upon the Federal Safety Appliance Acts for the duty of care and not for the right to sue.[229] Although the federal statute supplied the duty, the "right to recover damages . . . sprang from the principle of the common-law" and therefore supplied no basis for federal court "arising under" jurisdiction.[230] The *Moore* Court reconciled its holding with *Rigsby* by explaining that *Rigsby* was "brought in the state court and was removed to the federal court upon the ground that the defendant was a federal corporation."[231]

In its *Moore* decision, the Supreme Court made clear that any private right of action for the violation of a federal statute which is created by the court absent congressional intent must have its origin in state tort law.[232] Therefore, an implied section 10(b) right of action must be a creation of state law[233] to the extent that its basis is a theory of judicial power that permits the creation of private remedies absent an expressed contrary

226. *Id.* at 808 (citing American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916)).

227. 291 U.S. 205 (1934).

228. *Id.* at 211.

229. *Id.*

230. *Id.*

231. *Id.* at 215 n.6.

232. *Id.* at 215 ("The Safety Appliance Acts having prescribed the duty in this fashion, the right to recover damages sustained by the injured employee through the breach of duty sprang from the principle of the common-law . . . .").

233. Indeed, there is no genuine dispute that Congress, in enacting the 1934 Act, did not create private remedies for the violation of section 10(b). *See, e.g.*, Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2780 (1991) ("[W]e have made no pretense that it was Congress' design to provide the remedy afforded.").

congressional intent.[234] Because section 10(b) does not expressly create a private cause of action, subject matter jurisdiction for such an action must be based on the "presence of a claimed violation of the statute as an element of a state cause of action."[235] There is considerable doubt, however, whether the federal courts are empowered to hear claims that are not created by federal law, but which merely hinge on a question of federal law.[236]

In *Franchise Tax Board v. Construction Laborers Vacation Trust*,[237] the Supreme Court declared that a case may arise under federal law "where the vindication of a right under state law necessarily turned on some construction of federal law."[238] As the Supreme Court itself cautioned in *Merrell Dow Pharmaceuticals v. Thompson*, however, its "actual holding" in *Franchise Tax* rejects this basis for federal jurisdiction.[239] The Supreme Court acknowledged that the plaintiffs' state law claims in *Franchise Tax* hinged on a substantial question of federal law; yet, the Supreme Court nonetheless denied the existence of "arising under" jurisdiction.[240] In *Merrell Dow*, the Supreme Court explicitly indicated that the federal district courts have no jurisdiction over causes of action created by state law, even those which necessarily depend upon the judicial construction of a federal statute.[241] The plaintiffs in *Merrell Dow* sought damages for injuries allegedly caused by the company's failure to satisfy the branding requirements[242] of the Federal Food, Drug, and Cosmetics Act (FDCA).[243] The Supreme Court assumed that the FDCA did not itself create a private right of action for monetary relief.[244] The Court

234. *See, e.g.*, Kardon v. National Gypsum Co., 69 F. Supp. 512, 512 (E.D. Pa. 1946); Musick, Peeler & Garrett v. Employer's Ins. of Wausau, 113 S. Ct. 2085, 2088 (1993).

235. *See* Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 814 (1986).

236. *See id.* at 813-14. *See also id.* at 821 n.1 (Brennan, J., dissenting). *Compare* Moore v. Chesapeake & Ohio R.R., 291 U.S. 205 (1934) *with* Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921).

237. 463 U.S. 1 (1983).

238. *Id.* at 9.

239. *Merrell Dow*, 478 U.S. at 809.

240. *See id.* at 801.

241. *Id.* at 817.

242. *Id.* at 805.

243. 21 U.S.C. §§ 301-333 (1988).

244. 478 U.S. at 810. Both parties agreed that the FDCA contains no private right of action. However, that concurrence is hardly based on the merits of the arguments rejecting the private remedy. Rather, despite their desire to litigate in federal court, the defendants did not wish to acknowledge the existence of any private FDCA remedy which could be used against them. The plaintiffs, despite their desire for a remedy, denied the existence of a federal cause of action so that they could remain in state

further assumed that "some combination" of the then-controlling *Cort v. Ash*[245] implication factors were not present.[246] Accordingly, the Court reasoned that "careful scrutiny of legislative intent" would reveal the absence of any congressional desire to provide for a private right of action.[247] The Court concluded:

> 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.[248]

The Court found that the federal statutory issue was not sufficiently substantial despite Congress' comprehensive scheme for enforcing federal food, drug and cosmetic standards and despite Congress' grant of exclusive federal jurisdiction[249] for all claims brought under the statute.[250] Whatever doubt remains after *Merrell Dow* regarding the extent of federal jurisdiction over state law claims which depend on a "substantial question" of federal law,[251] it is clear that district courts have no jurisdiction over a state law claim that depends on the construction of a federal statute.[252]

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court.

245. 422 U.S. 66 (1975).

246. *Merrell Dow*, 478 U.S. at 810-11.

247. *Id.* at 811 (citing Merrell Lynch, Pierce, Fenner & Smith Inc. v. Curran, 456 U.S. 353, 377 (1982)).

248. *Merrell Dow*, 478 U.S. at 814.

249. *Id.* at 830 (Brennan, J., dissenting) (citing 21 U.S.C. §§ 332(a), 333, 334(a)(1) (1988)).

250. "Congress structured the FDCA so that all express remedies are provided by the federal courts . . . ." *Merrell Dow*, 478 U.S. at 831 (Brennan, J., dissenting). The FDCA in this respect is indistinguishable from the 1934 Act. Both create exclusive jurisdiction in federal courts for express remedies, and both create a specialized administrative agency responsible for overseeing implementation and enforcement of the statutory standards. *See, e.g.*, 15 U.S.C. § 27a (1988).

251. The *Merrell Dow* majority did not eliminate federal jurisdiction for state law claims which turn on a substantial question of federal law. 478 U.S. at 814. The Court concluded that the presence of a federal statutory standard as an element of a state-law cause of action did not rise to the level of a substantial federal question. *Id.*

252. The *Merrell Dow* majority reconciled its holding with Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921), by suggesting that *Smith* involved a question of the "constitutionality of an important federal statute" rather than merely the construction of an important federal statute. 478 U.S. at 814 n.12. The "nature" of the constitutional issue at stake in *Smith* was different from the "nature" of the federal statutory issue at stake in *Merrell Dow*. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 568 (1985); William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 916 (1967); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 67 (1980). The dissent took issue with the majority's effort to reconcile *Smith*, asserting that *Smith* is a vital and influential case which cannot be reconciled on a clearly-defined and principled basis with

Under the reasoning of *Merrell Dow*, *Franchise Tax* and *Moore*, therefore, the presence of a claimed section 10(b) violation as an element of a state law action for damages is "insufficiently 'substantial' to confer federal-question jurisdiction."[253] The original congressional determination rejecting a private remedy for the violation of section 10(b) is "tantamount" to a congressional conclusion that the necessity of construing that standard in resolving a state law claim does not present a "substantial" federal question.

Even if the federal courts had the power to imply a private cause of action for a section 10(b) violation they would have no independent "arising under" jurisdiction over that private cause of action.[254] The continued recognition of federal subject matter jurisdiction over the section 10(b) private action is an unconstitutional exercise of the federal judicial power.

Merrell Dow. 478 U.S. at 821 n.1 (Brennan, J., dissenting).

Yet, there can be no dispute that the Supreme Court has made a clear distinction between constitutional questions at stake in cases such as *Smith* and the federal statutory questions at stake in cases such as *Merrell Dow*. In *Smith*, the Supreme Court affirmed federal jurisdiction over a shareholder's suit to enjoin a corporation from issuing bonds on the grounds that the federal statute which authorized the issuance was unconstitutional. *Smith*, 255 U.S. at 199. The Court announced the "general rule" that federal jurisdiction exists when the plaintiff's "right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation. . . ." *Id.* Yet, in *Smith*, the Court argued that it was the "constitutional validity of an act of Congress which is directly drawn in question" which supported the exercise of federal jurisdiction. *Id.* at 201.

In *Moore*, by contrast, the federal question derived from a federal statute (the Federal Safety and Appliance Acts) which created a duty, the breach of which gave rise to a state-law tort action. 291 U.S. at 216-17 ("The federal statute, in the present case, touched the duty of the master at a single point and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the State.") (quoting Minneapolis, St. P. & S. Ste. M. Ry. v. Popplar, 237 U.S. 369, 372 (1915)). Similarly, in *Merrell Dow*, the FDCA touched the duty of drug manufactures such as Merrell Dow at a single point, and the right of the plaintiff to recover was left to be determined by state law.

The jurisdictional distinction between claims that depend upon a construction of a federal statute and those that depend upon a construction of the Constitution has also been struck in the Supreme Court's implied right of action decisions. *See* Schweiker v. Chilicky, 487 U.S. 412 (1988).

253. *Merrell Dow*, 478 U.S. at 814.

254. Federal courts of course would have subject matter jurisdiction over the section 10(b) private cause of action in diversity cases, 28 U.S.C. § 1332 (1988), or in cases in which that action is supplemental to other claims for which there is an independent jurisdictional basis. 28 U.S.C. § 1367 (1988). *See, e.g.*, Kardon v. National Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946); Moore v. Chesapeake & Ohio R.R., 291 U.S. 205, 214-15 (1934).

C. The Unconstitutional Judicial Perpetuation of the Section 10(b) Private Remedy Based on the Theory of Congressional Acquiescence

The Supreme Court alternatively has suggested that the theory of "legislative acquiescence justifies" the continuing judicial recognition of the section 10(b) private right of action.[255] In its purest form, the theory of legislative acquiescence is that congressional silence in the wake of the judicial construction of a statute indicates congressional approval of that construction.[256] The theory gains additional strength when Congress has either reenacted[257] a statute without altering the judicially construed portion or has altered other provisions of the statute, but has left intact the judicially construed portion.[258] The Supreme Court has expressed sharply divergent views on the inferences that can be drawn from both absolute congressional silence[259] and congressional silence in the midst of a revisitation.[260] Scholars also disagree about the legitimate inferences that can be drawn from congressional inaction.[261]

The premise that congressional inaction is tantamount to, or evidence of, congressional approval of the judicial interpretation of a statute,

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255. Herman & Maclean v. Huddleston, 459 U.S. 375, 384 (1983). *See also* Basic, Inc. v. Levinson, 485 U.S. 224, 230-31 (1988); Musick, Peeler & Garrett v. Employer's Trust Ins. of Wausau, 113 S. Ct. 2085, 2088 (1993) (characterizing the implication of the section 10(b) private remedy as the product of federal court power to supplement statutory duties, but insisting on evidence of legislative intent or acquiescence in its creation of an implied right to contribution under that section).

256. The Supreme Court has explained this principle in these terms: "When a court says to a legislature: 'You (or your predecessor) meant X,' it almost invites the legislature to answer: 'We did not.'" Johnson v. Transportation Agency, 480 U.S. 616, 630 n.7 (1987) (quoting GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31-32 (1982)).

257. *See Huddleston*, 459 U.S. at 384; Lorillard v. Pons, 434 U.S. 575, 580-81 (1978).

258. *See, e.g., Lorillard*, 434 U.S. at 580-81; Don E. Williams Co. v. Commissioner, 429 U.S. 569, 576-77 (1977); United States v. Hermanos y Co., 209 U.S. 337, 339 (1908). *But see* Leary v. United States, 395 U.S. 6, 24-25 (1969); United States v. Calamaro, 354 U.S. 351, 359 (1957); Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

259. *Compare* Girouard v. United States, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in [c]ongressional silence alone the adoption of a controlling rule of law.") *with* Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 (1940) ("The long time failure of Congress to alter the Act after it had been judicially construed . . . is persuasive of legislative recognition that the judicial construction is the correct one.").

260. *Compare Lorillard*, 434 U.S. at 580-81 *with* Leary v. United States, 395 U.S. 6, 24-25 (1969).

261. *See, e.g.*, Marshall, *supra* note 41; William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988); John C. Grabow, *Congressional Silence and the Search into Legislative Intent: A Venture Into "Speculative Unrealities,"* 1984 B.U. L. REV. 737; Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982).

however, is deeply flawed. The theory of legislative acquiescence is contrary to the realities of congressional conduct and to the constitutional roles assigned to the legislature and judiciary.[262] Legislative acquiescence, therefore, is not a legitimate basis for the perpetuation of the judicially-created section 10(b) private remedy.

1. The Theory of Congressional Acquiescence Has No Evidentiary Foundation

First, there is no evidence that a majority of the members of Congress typically is aware of court decisions interpreting statutes.[263] What evidence there is suggests that "most Supreme Court decisions never come to the attention of Congress."[264] Even if some members of Congress by virtue of their leadership or subcommittee roles follow judicial interpretations of legislation, their knowledge rarely spreads to a majority of the Senate and the House of Representatives.[265]

Second, even if Congress is fully aware of the judicial construction of its legislation and even if a majority of Congress disagrees with that construction, there is no guarantee that Congress will take corrective action. Congressional inaction is often the product not of approval, but of "inertia"[266] or even "paralysis."[267]

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262. Professor Marshall has thoroughly attacked this premise in the context of statutory stare decisis. He shows that ignorance, inertia, interpretational ambiguity and irrelevance make it difficult to infer congressional approval from congressional inaction. Marshall, *supra* note 41, at 186-200.

263. *See, e.g.*, SAMUEL KRISLOV, THE SUPREME COURT AND THE POLITICAL PROCESS 144 (1965) ("No study has been undertaken to estimate the number of Court decisions heavily criticized in Congress . . . .").

264. *See* Marshall, *supra* note 41, at 186 (quoting Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587-609 (1983)). *See also* WILLIAM J. KEEFE & MORRIS S. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES 420 (1981) ("[L]egislative bodies rarely concern themselves with activities of courts . . . ."); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 384 ("Most of the time Congress does not read judicial decisions. . . .").

265. *See* Marshall, *supra* note 41, at 189 (citing DAVID J. VOGLER & SIDNEY R. WALDMAN, CONGRESS AND DEMOCRACY 112 (1985)) ("In the absence of an actual vote by an entire body, it seems unrealistic to assume that members of Congress are made more knowledgeable about a decision simply because some committee holds a hearing or some members make speeches about it.").

266. *See id.* at 190-91. Professor Marshall quotes Hart and Sacks' classic work on legislation for a sampling of the factors which would cause Congress to "decline to overrule a decision with which most members disagree": "[b]elief that the bill is sound in principle but politically inexpedient to be connected with"; "[u]nwillingness to have the bill's sponsors get credits for its enactment"; "[b]elief that the bill is sound in principle but defective in material particulars"; "[t]entative approval, but belief that action should be withheld until the problem can be attacked on a broader front"; and "Etc., etc., etc., etc., etc." HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE

Third, even if congressional inaction does indicate approval of the judicial construction of a statute, it is often difficult to determine which precise aspect of that construction is being applauded by Congress. Congressional silence may indicate approval of the court's actual result in a case, or it could indicate an endorsement of the court's exercise of power in interpreting the statute.[268] In addition, Congress could approve of the court's disposition of the case on a substantive or procedural point wholly unrelated to the legislation. Indeed, the ambiguity present in virtually every court decision naturally renders congressional inaction in the wake of a court decision also ambiguous.

2. *The Theory of Congressional Acquiescence Has No Constitutional Foundation*

The inference of congressional approval from congressional silence is not only contrary to fact, but also contrary to the constitutional roles assigned to the legislative and judicial branches. The Constitution, with rare clarity, requires that before a law can be enacted, it must be "passed" by both houses of Congress and "presented" to the President.[269] This requirement insures a multi-faceted balance of power: (1) a law cannot be enacted without approval of both the House and the Senate, giving to each veto power; (2) a law cannot be enacted without presentation to the President, giving to the President modified veto power;[270] and (3) the judiciary cannot enact a law.

Equating congressional inaction with congressional approval of the judicial interpretation of a statute threatens each of these balances. The equation effectively gives to each house of Congress not the power to veto legislation, but the power to pass legislation. For, so long as one house fails to pass legislation disapproving the judicial interpretation of a statute, Congress as a whole is deemed to approve that legislation. Although a minority of the most powerful members within each house does not have

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267. Marshall, *supra* note 41, at 191-92.

268. *Id. See also* Grabow, *supra* note 261, at 749.

269. U.S. CONST. art. I, § 7 ("Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States."). *See also* Bowsher v. Synar, 478 U.S. 714 (1986); Chadha v. Immigration & Naturalization Serv., 462 U.S. 919 (1983) (observing that presentment clause and bicameral enactment are "integral parts of the Constitutional design for the separation of powers").

270. Congress retains the power to override a presidential veto by a two-thirds vote. U.S. CONST. art. 1, § 7.

the power to pass legislation,[271] that minority may well have the power to block legislation.[272] Under the theory of legislative acquiescence, if a strong minority of one house blocks legislation that would negate the judicial interpretation of a statute, that minority is treated as having the affirmative power to fashion legislation approving the interpretation.[273]

Similarly, the doctrine of legislative acquiescence usurps the presidential veto power. The constitutional requirement that legislation be presented to the president for a potential veto creates an additional countermajoritarian check on that legislation.[274] The President's veto not only gives the executive branch the power to block legislation, it also helps to focus public attention on that legislation.[275] When the presidential veto is exercised, the constitutional requirement of a two-thirds vote to override the veto empowers a minority of Congress to prevent the enactment of the legislation. Additionally, the override requirement extends the length and intensity of public analysis of the legislation.

The theory of legislative acquiescence upsets this process at every turn. By failing to pass legislation disapproving the judicial construction of a statute, Congress is construed to enact legislation approving that construction. By its inaction, Congress thereby avoids the need to present its laws to the President; presidential veto power; constitutional check on its lawmaking power; and public scrutiny which comes from the process itself.[276] The judicial treatment of congressional inaction as the equivalent of congressional legislation, therefore, disrupts the constitutional roles assigned to the President and the Congress in the lawmaking process.

The doctrine of legislative acquiescence also upsets the roles which the

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271. RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 279, 99th Cong., 2d Sess. § 508 (1987).

272. *See* Marshall, *supra* note 41, at 188 ("[T]he power of congressional leaders is largely a *negative* power; they often can control the agenda in a manner that effectively kills certain proposed legislation.").

273. As Professor Marshall writes, "A court that relies on acquiescence does far more than give a veto power to a minority of the legislature. The court, in essence, treats Congress' silence as the functional equivalent of an affirmative congressional enactment endorsing the court's earlier (now recognized as erroneous) decision." *Id.*

274. *See id.* ("A great many provisions of the Constitution (including bicameralism, the executive veto, and judicial review) present impediments to the passage of legislation, reflecting the essentially conservative bias of our system of government.") (citing JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 26 (1980)).

275. *Id.* at 194.

276. *See id.* ("Inaction enables Congress to effectuate its will without ever risking presidential veto (not to mention public scrutiny or pressure).").

Constitution assigns to the legislative and judicial branches of government. The Constitution requires that "[a]ll legislative powers" shall be vested in Congress.[277] This apparently clear assignment of legislative power has been interpreted in two different ways. The delegation of power might mean that Congress has the exclusive power to make law and therefore the judiciary is constitutionally prohibited from doing so.[278] On the other hand, the Constitution's delegation of "legislative powers" to the Congress has been interpreted as an exclusive delegation only of the power to enact statutes, leaving to the federal courts the power to create common-law.[279] But even the most strident advocates of federal judicial power accept the qualification that a court applying a statute should attempt to interpret the legislature's will and not create its own law.[280]

When the courts presume congressional approval from congressional silence, they not only fail to administer the legislature's will, but also expressly and knowingly interpret the statute in a manner contrary to the will of that legislature. The theory of legislative acquiescence presumes congressional intent from the silence of the legislature in the wake of a court decision interpreting a statute. In its first interpretation of a statute, a court endeavors to divine the legislative intent of the Congress responsible for passing the legislation.[281] This initial act of judicial power is consistent with the role assigned to the judiciary in the Constitution.[282] After that first interpretation, however, the court revisits its prior construction and discovers that its initial interpretation of the intent of the enacting legislature was incorrect.[283] The court nevertheless is unwilling to correct that interpretation because Congress has not acted in the wake of the

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277. U.S. CONST. art. 1, § 1.

278. For a particularly stark example of this view, see Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985) (finding that the Constitution prohibits the courts from making law and that courts must therefore adhere strictly to Congressional intent in construing a statute).

279. *See* William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1499 (1987). Eskridge argues that the power to make common law is consistent with the Framer's view of the separation of powers, a view which tolerated shared lawmaking power, but not concentrated lawmaking power.

280. *See id.* at 1501 n.88 (citing THE FEDERALIST No. 78 (Alexander Hamilton)) ("The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.").

281. *See, e.g.*, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979); Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977).

282. *See, e.g.*, Frank H. Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533 (1983). *See also Oscar Mayer*, 441 U.S. at 758.

283. *See* Marshall, *supra* note 41, at 186; Grabow, *supra* note 261, at 741.

court's erroneous decision.[284]

When the court "interprets" the inaction of post-enactment Congresses, the court exceeds the legitimate exercise of its constitutional power. The conduct of post-enactment Congresses is not germane to the issue of the intent of the enacting Congress. The Congress or Congresses that do not act to correct a court decision are not the same Congress that enacted the statute.[285] The Supreme Court is not even willing to accept the comments of legislators after the enactment of a statute as evidence of the enacting Congress' intent.[286] The Court has found that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[287] Indeed, although it is easy to identify the Congress which enacted the initial legislation and even easy to identify expressed post-enactment statements, it is virtually impossible to identify the Congress, Congresses or legislators which have *not* passed corrective legislation. Thus, the court purports to administer the intent of a series of diffuse Congresses which apparently have expressed their intent through their silence after the enactment. Therefore, when the court presumes congressional intent from congressional inaction, it fails to interpret the intent of the Congress which enacted the statute.

Moreover, under the theory of legislative acquiescence, the court purposefully gives more power to the inaction of post-enactment Congresses than it does to the intent of the enacting Congress. The doctrine presumes that the court has discovered that its prior interpretation of a statute is incorrect. Yet, the court is willing to maintain that clearly erroneous interpretation of the intent of the enacting Congress merely because post-enactment Congresses have failed to act.[288]

Judges and scholars long have disagreed about the proper balance of power between the legislature and the judiciary.[289] No matter where one

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284. *See* Marshall, *supra* note 41.

285. *See, e.g.*, Runyan v. McCrary, 427 U.S. 160, 174 n.11 (1976).

286. *See, e.g.*, Grove City College v. Bell, 465 U.S. 555 (1984); Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974).

287. Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980) (quoting United States v. Price, 361 U.S. 304, 313 (1960)). *See also* United States v. Clark, 445 U.S. 23, 33 n.9 (1980).

288. Professor Marshall states: "It is downright silly for a court that takes this stand with respect to rather contemporaneous and explicit post-enactment history to afford extraordinary significance to far removed and ambiguous inaction." Marshall, *supra* note 41, at 193-94.

289. *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); Martin H. Redish, *Federal Common-law, Political Legitimacy, and the Interpretive Process: An "Institutional" Perspective*, 83 NW. U. L. REV. 761 (1989); Steven D. Smith, *Why Should Courts Obey the Law?*, 77 GEO. L.J. 113 (1988).

strikes that balance, it is indisputable that the Constitution does not empower the federal courts to apply a congressional statute in a manner that is knowingly contrary to the intent of the legislature which enacted the statute. That is precisely the effect of the theory of legislative acquiescence.

3. *The Theory of Congressional Acquiescence Provides No Evidentiary or Constitutional Foundation for the Judicial Perpetuation of the Section 10(b) Private Remedy*

The Supreme Court has acknowledged[290] and recent scholarship has confirmed[291] that Congress, when it enacted section 10(b) in 1934, did not intend to create or to have the courts create a private right of action for damages. Nonetheless, the Supreme Court has suggested that since at least 1975, Congress, by its inaction, has manifested its acquiescence in a long line of court decisions approving the private remedy.[292]

The evidence of congressional approval of the private remedy seems particularly strong because Congress has revisited the federal securities laws on many occasions without "correcting" the judicial creation of the private remedy. Since the recognition of private recovery under section 10(b), Congress has considered and passed ten major legislative amendments to the 1934 Act.[293] When Congress passed the Insider Trading and Securities

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290. *See, e.g.*, Musick, Peeler & Garrett v. Employer's Trust Ins. of Wausau, 113 S. Ct. 2085, 2088 (1993); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2780 (1991) (stating that the Supreme Court has "made no pretense that it was Congress' design to provide the remedy afforded"); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730, 737 (1975).

291. Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385 (1990).

292. *See* Herman & Maclean v. Huddleston, 459 U.S. 375, 384-85 (1983). In *Huddleston*, the Court supported the cumulative use of the implied section 10(b) remedy with express securities law remedies by arguing that "when Congress comprehensively revised the securities laws in 1975, a consistent line of judicial decisions had permitted plaintiffs to sue under § 10(b) regardless of the availability of express remedies. . . . Congress' decision to leave § 10(b) intact suggests that Congress ratified the cumulative nature of the § 10(b) action." *Id.* at 384. The Securities Act Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97, were the "most substantial and significant revisions of this country's Federal Securities laws since the passage of the Securities Exchange Act in 1934." *Hearings on S. 249 Before the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 1 (1975). The conference report to the 1975 Amendments claimed that they were the product of "the most searching reexaminations of the competitive, statutory, and economic issues facing The Securities Markets, the securities industry, and, of course, public investors, since the 1930's." H.R. REP. NO. 229, 94th Cong., 1st Sess. 91 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 322.

293. The major revisions of the 1934 Act during the period 1968 to the present, are:

1. Williams Act of 1968, Pub. L. No. 90-439, 82 Stat. 454 (codified as amended in scattered

Fraud Enforcement Act of 1988,[294] (the 1988 Act) it even preserved all "implied" remedies under the 1934 Act. Most recently, in 1991, when Congress enacted section 27A of the 1934 Act reinstating statute of limitations periods for section 10(b), it specifically referred to the section 10(b) private remedy.[295]

By the time Congress amended the securities laws in 1988 and certainly by the time it added section 27A to the 1934 Act in 1991, the "consensus" in the lower federal courts concerning section 10(b)'s private remedy was "old" and "overwhelming."[296] According to the Supreme Court, "the fact that a comprehensive reexamination and significant amendment of [a statute] left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively

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sections of 15 U.S.C.) (regulating tender offers);

2. Williams Act Amendment of 1970, Pub. L. No. 91-567, 84 Stat. 1497 (codified as amended at 15 U.S.C. § 78n(e) (1988)) (giving SEC regulatory authority under § 14(e) to define and proscribe fraudulent practices);

3. Securities Act Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (codified as amended in scattered sections of 15 U.S.C.) (providing for national market system for securities; provisions related to self-regulation of exchanges, municipal securities, regulation of clearing agencies and transfer agents);

4. Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.) (regulating the activities of issuers who engage in foreign corrupt practices);

5. Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264 (codified as amended in scattered sections of 15 U.S.C.) (increasing sanctions against insider trading);

6. Government Securities Act of 1986, Pub. L. No. 99-571, 100 Stat. 3208 (codified in scattered sections of 15 U.S.C. and 31 U.S.C.) (providing for regulation of broker-dealers in government securities);

7. Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (codified in scattered sections of 15 U.S.C.) (providing private right of action based on contemporaneous insider trading);

8. Penny Stock Reform Act, Pub. L. No. 101-429, 181 Stat. 931 (codified in scattered sections of 15 U.S.C.) (regulating penny stock issuers and dealers);

9. Market Reform Act of 1990, Pub. L. No. 101-432, 104 Stat. 963 (codified in scattered sections of 12 U.S.C. and 15 U.S.C.) (permitting SEC to suspend trading for protection of investors and to limit practices which result in market volatility); and

10. Pub. L. No. 102-242, 105 Stat. 2236 (codified as 15 U.S.C. § 78aa-1) (special statute of limitations provision for cases filed pre-*Lampf*).

294. 15 U.S.C. § 78t-1 (1988).

295. 15 U.S.C. § 78aa-1 (Supp. IV 1992).

296. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 380 (1982). The Supreme Court in *Curran* suggests that the consensus regarding the private remedy under the Commodities Exchange Act was not so "old" or so "overwhelming" as that under section 10(b). That the Court was willing to infer the Congressional intent to create the private Commodities Exchange Act remedy suggests that *a fortiori* it would do so in the context of section 10(b).

intended to preserve that remedy."[297]

Moreover, contrary to the notion that Congress is unaware of, or uninterested in, Supreme Court decisions interpreting its statutes, the legislative history of both the 1988 Act and section 27A indicates a congressional preoccupation with such decisions. The legislative history of the 1988 Act is replete with references to Supreme Court decisions limiting the reach of congressional legislation designed to prevent insider trading.[298] The history indicates that Congress intended to codify a theory of liability for misappropriating material non-public information, a theory which the Supreme Court had discussed, but never approved.[299] Similarly, when Congress enacted section 27A of the 1934 Act, it was plainly aware of the Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*[300] which created a uniform, retroactive statute of limitations period for section 10(b) actions. Congress not only enacted section 27A in direct response to the Supreme Court's *Lampf* decision, it actually incorporated that decision and the date on which *Lampf* was rendered as terms in the legislation itself.[301] This legislative activity

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297. *Curran*, 456 U.S. at 381-82 (holding that the congressional revisitation of the Commodity Exchange Act without altering the provision from which the courts had implied a private remedy indicates the congressional intent to maintain that remedy).

298. H.R. REP. NO. 910, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 6043 [hereinafter H.R. REP. NO. 910].

299. The legislative history mentions the case of Carpenter v. United States, 484 U.S. 19 (1987), in which the Supreme Court divided 4-4 on the merits of the misappropriation theory. H.R. REP. NO. 910, *supra* note 298, at 10.

300. 111 S. Ct. 2773, 2780 (1991).

301. *See* 15 U.S.C. § 78aa-1 (Supp. IV 1992). That section provides:

> Special provision relating to statute of limitations on private causes of action.
>
> (a) Effect on pending causes of action. The limitation period for any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991, shall be the limitations period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991 -
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991.

In fact, section 27A was so responsive to the Supreme Court's *Lampf* decision that it has been challenged—albeit with limited success—as an unconstitutional effort by Congress to overturn a Supreme Court decision. *Compare* Brichard Securities Litigation, 788 F. Supp. 1098, 1106-07 (N.D. Cal. 1992) *with* Henderson v. Scientific-Atlanta Inc., 971 F.2d 1567 (11th Cir. 1992) *and* Johnston v. Cigna Corp., 789 F. Supp. 1098, 1100 (D. Colo. 1992) *and* Pacific Mutual Life Ins. Co. v. First Repulicbank Corp., 806 F. Supp. 108 (N.D. Tex. 1992).

indicates congressional awareness of key Supreme Court decisions affecting securities fraud.

If the 1988 Act and section 27A are considered revisitations of the 1934 Act, then the case for congressional approval of the private remedy appears particularly strong. The Supreme Court has endorsed the view that when Congress adopts a new law incorporating portions of a prior law, it "normally can be presumed to have had knowledge of the interpretation given to the incorporated law."[302] This presumption seems to apply to the section 10(b) private remedy.

Even this relatively strong evidence of congressional acquiescence in the section 10(b) private remedy, however, cannot support a legitimate inference of congressional approval of that remedy. The language of the 1988 Act and section 27A cannot independently support the legislative creation of the private remedy. The 1988 Act expressly preserves "the availability of any cause of action implied" from a provision of the 1934 Act.[303] Section 27A goes further and reinstates statute of limitations periods for "any private civil action implied under" section 10(b).[304] This language certainly evidences congressional awareness that private civil actions have been implied under section 10(b).

The 1988 Act also arguably evidences the congressional intent that the courts should not construe the 1988 Act in a manner which would limit any cause of action implied under the 1934 Act. Section 27A further indicates the congressional desire that any section 10(b) private action filed before the Supreme Court's *Lampf* decision be governed by the statute of limitations period applicable to that action prior to *Lampf*.[305] Yet, nowhere in these provisions is there an express creation of a private remedy for damages for section 10(b) violations.

The strongest argument that Congress has affirmatively enacted such a remedy is based on reading section 27A together with section 10(b). The argument is that in the 1934 Act, as amended, Congress created a prohibition against fraud in connection with the purchase or sale of securities[306] and a statute of limitations period for any implied right of

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302. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382 n.66 (citing Lorillard v. Pons, 434 U.S. 575, 580-81 (1978)). *See also* Don E. Williams Co. v. Commissioner, 429 U.S. 569, 576 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975); NLRB v. Gullett Gin Co., 340 U.S. 361, 366 (1951); National Lead Co. v. United States, 252 U.S. 140, 147 (1920).

303. 15 U.S.C. § 78t-1(d) (1988).

304. 15 U.S.C. § 78aa-1 (Supp. IV 1992).

305. *Id.*

306. 15 U.S.C. § 78j(b) (1988).

action for violations of that prohibition.[307] The combination of these two affirmative legislative enactments leads to the conclusion that Congress has created a private right of action for damages.

Although this argument has some superficial appeal, it is not persuasive. Section 27A by itself does not create a statute of limitations period for section 10(b) actions.[308] Both the House and the Senate considered various proposals for a uniform federal statute of limitations period, but those proposals were rejected.[309] Congress instead settled on a piece of legislation that applies only to section 10(b) actions filed before June 19, 1991.[310] As to those actions filed before June 19, 1991, the legislation merely reinstates the circuit-by-circuit, judicially-created statute of limitations principles in place at that time.[311] As drafted, section 27A is

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307. 15 U.S.C. § 78aa-1 (Supp. IV 1992).

308. Ironically, the Supreme Court in *Musick* found in section 27A the congressional intent to have the courts and not Congress flesh out the contours of section 10(b) liability. Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2089 (1993). By this logic, the Court acknowledged that Section 27A enacts no limitations period at all. *Id.*

309. On July 23, 1991, Senator Richard Bryan introduced Senate bill 1533, entitled the Investor Protection Act of 1991. The bill overturned the retroactive effect of *Lampf* and, as ultimately drafted, created a prospective, uniform statute of limitations period for section 10(b) actions which required such actions to be filed within two years of discovery of the violation, but no longer than five years from the challenged transaction. This bill was approved by the Senate Banking Committee on August 2, 1991. The House of Representatives drafted a similar bill (H.R. 3185, 102d Cong., 1st Sess. (1991)) which created a uniform limitations period requiring section 10(b) actions to be filed within three years of discovery and five years of the challenged transaction.

On October 2, 1991 then-chairman of the SEC, Richard Breeden, testified before the Securities Subcommittee of the Senate Committee on Banking, Housing and Urban Affairs. He acknowledged the claims of various lobby groups that private actions under the federal securities laws should be broadly reformed, but he argued that such reform should not take the form of a harsh statute of limitations period. *To Establish a Statute of Limitations for Private Rights of Action Arising From a Violation of the Securities Exchange Act of 1934: Hearings on S. 1533 Before the Subcomm. on Securities of the Comm. on Banking, Housing, and Urban Affairs*, 102d Cong., 1st Sess. 13 (1991) (statement of Richard Breeden, Chairman, SEC) [hereinafter *Hearings*]. He insisted that private actions were necessary to preserve the integrity of the securities markets and to compensate defrauded investors. *Id.*

On November 14, 1991, however, the Bush Administration informed the Senate Banking Committee that it would not accept any legislation extending the statute of limitations period for private actions unless that legislation included sweeping reforms of those actions. *White House Specifies Reforms It Wants in Return for Supporting* Lampf *Proposal*, BNA SEC. L. DAILY Nov. 21, 1991.

Ultimately, Congress rejected Senator Bryan's bill, Chairman Breeden's testimony and the President's proposed reforms. Instead, Congress merely passed as an amendment to the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2236 (1991) (codified at 15 U.S.C. § 78aa-1 (Supp. IV 1992)), a stop-gap provision which eliminates the retroactive effect of the Supreme Court's *Lampf* decision.

310. 15 U.S.C. § 78aa-1 (Supp. IV 1992).

311. *Id.*

narrowly designed to remove some of the harsh retroactive effects of the Supreme Court's *Lampf* decision.[312] Section 27A does not affirmatively establish any statute of limitations period. Nor did Congress, when it enacted section 10(b), intend to create a private remedy for damages.[313] If neither section 10(b) nor section 27A independently create a private remedy, then the two provisions in tandem cannot create that remedy.

In addition, when Congress passed the 1988 Act and section 27A, it did not affirmatively "reenact" the 1934 Act in any significant sense.[314] Instead, these provisions are both portions of different public statutes which have been added to section 78 of the United States Code.[315] In passing those provisions, Congress did not enact new legislation which repeats either the entire 1934 Act or section 10(b). Because Congress has never affirmatively reenacted section 10(b) in the wake of the "old" or "overwhelming" consensus favoring the private remedy, Congress has never exercised its legislative power to create that remedy.

Finally, that some members of Congress have shown their awareness of court decisions narrowing insider trading liability and imposing a retroactive statute of limitations period for implied section 10(b) actions cannot provide any evidentiary basis for congressional acquiescence in the judicially-created section 10(b) private remedy. The relatively prompt congressional reaction to these court decisions is narrowly tailored to the decisions themselves. In the Insider Trading and Securities Fraud Enforcement Act of 1988, Congress intended to codify a theory presented in the Supreme Court decisions while in section 27A, Congress intended narrowly to remove only the retroactive application of the Supreme Court's *Lampf* decision. The promptness and precision with which Congress amended its securities statutes in the wake of these Supreme Court decisions lends credence to the suggestion that the absence of such prompt

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312. *Id.*

313. *See, e.g.*, Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2780 (1991).

314. The term "reenactment" refers precisely to the affirmative congressional act of enacting a new statute which incorporates most, but typically not all, of a prior statute. Congress has not reenacted the 1934 Act. As with the 1974 amendments at issue in The Commodities Exchange Act in *Curran*, Congress merely added language without "actively readopting the terms that were left unchanged." Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 403 n.11 (1982) (distinguishing reenactment cases such as Lorillard v. Pons, 434 U.S. 575, 580-81 (1978)). *See also* Robert C. Brown, *Regulations, Reenactment, and the Revenue Acts*, 54 HARV. L. REV. 377 (1941).

315. The Insider Trading and Securities Enforcement Act of 1988, 15 U.S.C. § 78l-1 (1988), is Pub. L. No. 100-704, 102 Stat. 4677. Section 27A is Pub. L. No. 102-242, 105 Stat. 2236 and is a small portion of the Federal Deposit Insurance Corporation Improvement Act of 1991.

and precise action indicates congressional approval of other Supreme Court decisions.

Even in this context, however, Congress has not exercised its legislative power to create a private remedy. The existence of that remedy still depends on the theory of legislative acquiescence. Having revisited its securities laws to add a private remedy for victims of insider trading[316] and to vitiate the retroactive effect of the Supreme Court's statute of limitations period for section 10(b) actions,[317] Congress had a golden opportunity to create an express right of action for damages under section 10(b). Nonetheless, Congress failed to create such an express remedy. Its inaction could evidence resistance to such a remedy as much as it could indicate its approval of the judicial creation of that remedy.[318] Thus, the inferences that can be drawn from Congress' failure to enact legislation expressly rejecting the section 10(b) private remedy are at best inconclusive.

However, as has been demonstrated, even if the Supreme Court could safely infer congressional approval of that remedy from congressional inaction, the Constitution does not permit it to do so. Congress cannot enact legislation by its inaction. The Court admits its awareness that the Congress which enacted section 10(b) intended no such private remedy. To continue to recognize the section 10(b) private right of action, therefore, is to elevate the inaction of post-enactment Congresses above the acknowledged contrary intent of the enacting Congress. Thus, when the Court perpetuates the section 10(b) private remedy, it unconstitutionally fosters a knowingly erroneous interpretation and application of congressional intent.

IV. THE UNFORTUNATE CONSEQUENCES OF THE UNCONSTITUTIONAL EXERCISE OF JUDICIAL POWER

The Supreme Court's decisions interpreting the elements of section 10(b) demonstrate the deleterious consequences of the unconstitutional

316. 15 U.S.C. § 78t-1 (1988).

317. 15 U.S.C. § 78aa-1 (Supp. IV 1992).

318. The Supreme Court has endorsed this inference. "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 97 (1981). *See also* Middlesex County Sewerage Auth. v. National Sea Clammers, 453 U.S. 1, 14-15 (1981); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974).

exercise of judicial power. When a federal court creates and defines the elements of a private right of action, it naturally gains little guidance from the intent of the Congress which enacted the legislation.[319] Absent any such guidance, the court necessarily interprets the remedy on its own, embarking on a "lawless" act of "imagining."[320]

Freed of its legislative moorings, the Supreme Court has been guided in its decisions construing section 10(b) by its distaste for the existence of the private remedy and by its desire to protect defendants from liability. In *Blue Chip Stamps v. Manor Drug Stores*,[321] for example, the Supreme Court based its decision denying section 10(b) standing to mere offerees of securities upon the uncertain origins of the private remedy:

> When we deal with private action under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn . . . . It is therefore proper that we consider . . . what may be described as policy considerations when we come to flesh out the portions of the law.[322]

The Court further decided that, "[g]iven the peculiar blend of legislative, administrative, and judicial history which now surrounds Rule 10b-5, we believe that practical factors . . . are entitled to a good deal of weight."[323]

The so-called practical policy reason for the Court's restriction of section 10(b) liability was the defendants' concern for the "danger of vexatious litigation which could result from a widely expanded class of plaintiffs under Rule 10b-5."[324] The Court acknowledged that in fashioning its limitation on section 10(b) liability, it did not dismiss as a "factor" that its result "makes it easier, rather than more difficult, for a defendant to obtain a summary judgment."[325] The justification for the Court's desire to protect defendants from liability was the uncertain judicial origin of the private remedy.[326]

Similarly, in *Ernst & Ernst v. Hochfelder*,[327] the Court's transparent dissatisfaction with the existence of the section 10(b) private action drove

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319. *See* Cannon v. University of Chicago, 441 U.S. 677, 742-43 (1979) (Powell, J., dissenting).

320. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2783 (1991) (Scalia, J., concurring). *See also Cannon*, 441 U.S. at 744 (Powell, J., dissenting); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194-95 (1978).

321. 421 U.S. 723 (1975).

322. *Id.* at 737.

323. *Id.* at 749.

324. *Id.* at 740.

325. *Id.* at 742.

326. *Id.* at 762 (Blackmun, J., dissenting).

327. 425 U.S. 185 (1976).

its rejection of any such action based on allegations of mere negligence.[328] The Court argued that because it was dealing with a "judicially implied liability," the statutory language, which seemed to require intentional misconduct, foreclosed "further inquiry."[329] Whereas the Court in *Blue Chip Stamps* argued that the judicial origins of the section 10(b) private remedy justified its reliance on policy considerations, the Court in *Hochfelder* argued that those origins require strict adherence to the statutory language.

Nonetheless, the *Hochfelder* Court contended that the unique role of the section 10(b) remedy within the federal securities laws also supported its denial of that remedy for negligent conduct.[330] After observing that the express remedies created by the federal securities laws carry express procedural restrictions not present in the context of the implied section 10(b) remedy, the Court concluded: "We think these procedural limitations indicate that the judicially created private damages remedy under section 10(b) which has no comparable restrictions cannot be extended, consistently with the intent of Congress, to actions premised on negligent wrongdoing."[331] According to the Court's reasoning, because recovery under the express remedies of the securities laws is subject to express procedural requirements, recovery under the implied section 10(b) remedy should at least be subject to implied substantive limitations.

Based on dubious logic, this argument can be seen as the product of the Court's fundamental dislike for the section 10(b) implied remedy and the desire to limit its use. Indeed, *Hochfelder* cited *Blue Chip Stamps* with approval for its "concern that the inexorable broadening of the class of plaintiff who may sue in this area of the law will ultimately result in more harm than good."[332]

The Supreme Court also based its decision in *Lampf*[333] to create a uniform, retroactive statute of limitations period for private section 10(b) actions on the uncertain judicial origins of those actions. There, the Court

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328. *Id.* at 193.

329. *Id.* at 200-01.

330. *Id.* at 208-12.

331. *Id.* at 210. Ironically, one of the procedural barriers not present in section 10(b) actions cited by the Court, is the relatively short statute of limitations period governing the express rights of action. 425 U.S. at 210 n.29. The irony, of course, is that the Supreme Court in *Lampf* created a uniform statute of limitations period for section 10(b) actions based on the limitations periods for those express rights of action. 111 S. Ct. at 2780.

332. *Hochfelder*, 425 U.S. at 214 n.33 (quoting *Blue Chip Stamps*, 421 U.S. at 747-48).

333. 111 S. Ct. 2773 (1991).

complained that its task in defining the section 10(b) limitations period was "awkward" and "complicated by the nontraditional origins of the section 10(b) cause of action."[334] Justice Scalia agreed that the case presented a "distinctive difficulty because it involves one of those so-called 'implied' causes of action that, for several decades, this Court was prone to discover in—or, more accurately, create in reliance upon—federal legislation."[335] Because, as Justice Scalia frankly acknowledged, the Court was "imagining," it established a retroactive limitations period limiting the effectiveness of the section 10(b) remedy.[336]

The uncertainty surrounding the origins of the section 10(b) private right of action not only drives the Court's interpretations of the elements of that action, it also produces result-oriented decision-making. With limited exception,[337] the Supreme Court has restricted the scope of the section 10(b) private remedy in each of its decisions interpreting the elements of that remedy.[338] The Court has not been reticent in those decisions about its desire to protect defendants from securities fraud litigation.[339] In doing so, the Court has created the unfortunate perception that it is engaging in "preternatural solicitousness for corporate well-being" and "callousness toward the investing public."[340]

V. *MUSICK*: TWO CONSTITUTIONAL WRONGS MAKE A RIGHT TO CONTRIBUTION

The Supreme Court's decision in *Musick* to recognize an implied right to contribution under section 10(b) not only exemplifies, but also compounds the unconstitutional exercise of judicial power. The Court

334. *Id.* at 2779.

335. *Id.* at 2783 (Scalia, J., concurring).

336. *Id.*

337. *See* Basic, Inc. v. Levinson, 485 U.S. 224 (1988); Herman & Maclean v. Huddleston, 459 U.S. 375 (1983). In those rare cases in which the Supreme Court has not limited the reach of the section 10(b) private remedy, it has suggested that the origins of that remedy are rooted in legislative acquiescence rather than judicial power. In *Huddleston*, the Court justified its cumulative construction of the federal securities law remedies by arguing that "Congress ratified the cumulative nature of the § 10(b) action." *Huddleston*, 459 U.S. at 386. Similarly, when the Court in *Basic* defined materiality for section 10(b) actions and upheld the district courts' discretion to certify a section 10(b) class action based on a rebuttable presumption of reliance, it suggested that "legislative acquiescence" was the basis of the private action. *Basic*, 485 U.S. at 230-31.

338. *See supra* notes 321-36 and accompanying text.

339. *See, e.g.*, *Blue Chip Stamps*, 421 U.S. at 739, 742; *Hochfelder*, 425 U.S. at 214 n.33; *Lampf*, 111 S. Ct. at 2779-80.

340. *Blue Chip Stamps*, 421 U.S. at 762 (Blackmun, J., dissenting).

acknowledged that the underlying section 10(b) private remedy derives from a "theory" of judicial power to "supplement statutory duties" rather than a theory of congressional intent.[341] The Court further acknowledged that under its own precedent, the creation of rights of action "ought to be left to the legislature, not the courts."[342] This is yet another recognition by the Supreme Court that the "theory" of judicial power which gave birth to the section 10(b) private remedy is no longer sound.[343]

As has been made clear, however, the section 10(b) implied right of action is based on more than a discarded "theory"; it is based on the unconstitutional exercise of the federal judicial power.[344] Rather than confront the constitutional propriety of the section 10(b) private remedy, the Court, true to form, assumed the remedy's existence for purposes of interpreting its scope.[345] The Court based its decision to recognize an implied right to contribution under section 10(b) on the very fact that the private remedy is a judicial creation. The Court suggested that but for the judicial origins of the section 10(b) private remedy, the Court would follow its recent precedents rejecting implied rights to contribution under comparable[346] federal regulatory schemes.[347] Despite the section 10(b) private action's inconsistency with the Court's decisions rejecting such actions absent congressional intent,[348] the Court believed that it "must

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341. *Musick*, 113 S. Ct. at 2088 (noting that a search for Congressional intent to create the right would be "futile").

342. *Id.* (citing Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754, 770 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 575-77 (1979)).

343. *See Touche Ross*, 442 U.S. at 575-77; *Lampf*, 111 S. Ct. at 2783 (Scalia, J., concurring).

344. *See infra* part III.

345. Once again, the issue of federal "arising under" jurisdiction over the section 10(b) private remedy was not present in the case because the initial claims were brought under the express statutory remedies of the 1933 Act, thereby creating supplemental jurisdiction over the plaintiffs' implied section 10(b) claim, and the insurance companies' contribution claims. 28 U.S.C. § 1367 (1988).

346. Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77 (1981) (holding that employer has no right to contribution against unions alleged to be joint participants with the employer in violations of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964); Texas Indus. v. Radcliff Materials, Inc. 451 U.S. 630 (1981) (holding no right to contribution for recovery, based on section 1 of the Sherman Act).

347. Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2088 (1993). The argument against the creation of a federal common-law right to contribution from the Court's recent cases "would have much force were the duty to be created one governing conduct subject to liability under an express remedial provision fashioned by Congress, or one governing conduct not already subject to liability through private suit." *Id.*

348. *Id.*

confront the law in its current form,"[349] in the "present context,"[350] and in the "present state of the jurisprudence we consider here."[351] It is the unique judicial origin of the private section 10(b) remedy which, the Court reasoned, gave it the judicial power to define "the contours"[352] of the remedy by creating a right to contribution.[353]

The Court's reasoning, however, confounds logic and constitutional principles. The Court asserts that because the section 10(b) private right of action has questionable judicial origins, the federal courts may exercise more power than otherwise proper to create an additional right of action for contribution. The Court acknowledges that in situations in which the federal courts properly interpret and apply private remedies expressly created by Congress, the courts have no constitutional power to expand their jurisdiction by creating a federal common-law right to contribution.[354] The Court argues, however, that because the federal courts first exceeded their constitutional power by creating an underlying cause of action for the violation of a federal statute, they may further exceed their constitutional power by creating an additional private right to contribution. This reasoning is simply a sophisticated version of the argument that "two wrongs make a right." The initial constitutional error in creating a section 10(b) private remedy is used to justify a second constitutional error in creating a section 10(b) right to contribution.

Apparently cognizant of the logical and constitutional flaws in this argument, the Supreme Court attempted to support its newly-created section 10(b) right to contribution by appealing alternatively to legislative acquiescence.[355] The Court contended that recent congressional "references" to the section 10(b) private right of action[356] indicated not only congressional approval of that action, but also a broad delegation of power to the judiciary over its formulation.[357] The Court's reliance on legislative acquiescence, however, is unavailing.

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349. *Id.* at 2089.

350. *Id.*

351. *Id.* at 2088.

352. *Id.* at 2089 (citing Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749 (1991)).

353. *Id.* at 2091.

354. *Id.* at 2088 (citing with approval *Northwest Airlines*, 451 U.S. at 77; *Texas Industries*, 451 U.S. at 630).

355. *Musick*, 113 S. Ct. at 2089 (citing Herman & Maclean v. Huddleston, 459 U.S. 375, 384-86 (1983); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378-82 (1982)).

356. *Musick*, 113 S. Ct. at 2089 (citing the Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. § 78l-2 (1988), and § 27A of the 1934 Act, 15 U.S.C. § 78aa-1 (Supp. IV 1992)).

357. *Musick*, 113 S. Ct. at 2089 ("That task, it would appear, Congress has left to us.").

As has been shown, legislative acquiescence is never a valid basis for the judicial creation of a private statutory remedy.[358] The theory of legislative acquiescence is based on unfounded assumptions about congressional inaction.[359] More significantly, the theory upsets the constitutionally mandated separation of legislative and judicial power; it permits the judiciary to treat congressional inaction as a legislative enactment and to maintain a knowingly erroneous interpretation of the intent of the enacting Congress.[360] Even in the context of the legislative responses to the judicial interpretations of section 10(b), legislative acquiescence provides no legitimate constitutional basis for maintaining the private right of action in the face of the contrary intent of the enacting Congress.[361]

When the Court in *Musick* employed the theory of legislative acquiescence to justify its power to create a right to contribution, it once again compounded these constitutional difficulties. The Court inferred from congressional "references" to section 10(b) not just congressional approval of a court decision, but a broad congressional delegation of judicial power to continue to fashion the section 10(b) remedy, including the power to fashion additional rights of action such as those for contribution.

The Court's interpretation of congressional "references" to section 10(b), however, lacks support. The Insider Trading and Securities Fraud Enforcement Act of 1988 preserves "implied remedies"; it does not expressly or implicitly delegate any judicial power to the federal courts.[362] To the contrary, this statute expressly limits the traditional judicial power to construe statutory remedies in an exclusive manner.[363] Similarly, section 27A expressly vitiates the retroactive effect of the Supreme Court's decision in *Lampf* to create a uniform statute of limitations period for section 10(b) claims.[364] Contrary to the Court's inference, this stop-gap provision does not avoid "entangling Congress" in the formulation of the statute of limitations issue.[365] Far from expressly or implicitly delegating to the judiciary the power to formulate the elements

358. *See infra* part III.C.
359. *See infra* part III.C.1.
360. *See infra* part III.C.2.
361. *See supra* notes 293-95 and accompanying text.
362. 15 U.S.C. § 78aa-A (1988).
363. *Id.*
364. 15 U.S.C. § 78aa-1 (Supp. IV 1992).
365. See *Musick*, 113 S. Ct. at 2089. See also *supra* notes 309-10 and accompanying text, detailing the congressional debate regarding the statute of limitations.

of section 10(b), this provision is a flat rejection of the Court's prior work.[366] Any inference that Congress has acquiesced in the Court's power to formulate section 10(b), therefore, is contrary to fact.

Moreover, any exercise of judicial power based on legislative acquiescence is contrary to the Constitution. When a court uses legislative acquiescence as a basis for statutory construction, it unconstitutionally maintains an erroneous interpretation of the intent of the enacting Congress merely because of the inaction of subsequent, non-enacting Congresses. In *Musick*, this constitutional error is magnified. There, the Court did not, and could not, argue that legislative acquiescence supports the right to contribution because there is no clear judicial authority or line of authority recognizing that implied right.[367] Instead, the Court asserted that Congress has acquiesced in its *power* to decide such matters as whether to create an implied right to contribution under section 10(b).[368] The Court assumed that neither section 10(b) nor the general congressional grant of "arising under" subject matter jurisdiction,[369] expressly or impliedly confers this power on the federal courts.[370] Nonetheless, because the federal courts have exercised that power and because Congress has not acted to remove that power, the Court inferred that Congress approves of the judicial use of that power.[371] Once again, this argument improperly elevates the inaction of non-enacting Congresses over the intent of the enacting Congress.

Even if Congress by its silence had acquiesced in an expansion of federal judicial power beyond that contemplated in section 10(b) or in the general grants of federal subject matter jurisdiction, the federal courts could not consistent with the Constitution accept that power. The Constitution grants to Congress the sole authority to create the lower federal courts and to assign to them subject matter jurisdiction.[372] Congress can only create the lower federal courts and assign to them subject matter jurisdiction through the legislative process.[373] Congress cannot, by its inaction,

366. Indeed, Congress' legislative rejection of the Supreme Court's *Lampf* decision is so obvious that it has been challenged as an unconstitutional attempt to overrule a Supreme Court decision. *See, e.g., In re* Birchard Securities Litigation, 788 F. Supp. 1089, 1106-07 (N.D. Cal. 1992).

367. *Musick*, 113 S. Ct. at 2086.

368. *Id.* at 2089.

369. 28 U.S.C. § 1331 (1988).

370. *Musick*, 113 S. Ct. at 2089.

371. *Id.*

372. *See* U.S. CONST. art. III, § 1; art. I, § 8.

373. *See* U.S. CONST. art I, § 7.

delegate judicial power to the lower federal courts.[374] The Constitution prohibits the federal courts from accepting judicial power not delegated by an act of Congress.[375] Accordingly, the Supreme Court cannot permit the federal courts to accept judicial power absent such a delegation.[376] Congress, therefore, cannot by its acquiescence delegate federal judicial power. Thus, the *Musick* Court's reliance on legislative acquiescence to support its view that Congress delegated to the federal courts the judicial power to create an implied right to contribution flies in the face of settled principles of constitutional law.

Neither legislative acquiescence nor the unique judicial origins of the section 10(b) private remedy can authorize the Court to "define the contours" of that remedy by creating new rights of action.[377] When the federal courts interpret and apply express statutory remedies, they undoubtedly have the power to define the "contours" or "flesh out" those remedies.[378] But, even the *Musick* Court acknowledged[379] that power does not extend to the creation of new rights of action.

Furthermore, when determining whether a right to contribution fits within the "contours" of the implied section 10(b) remedy, the Court expands the notion of statutory "contours" beyond recognition. It concludes that the "contours" of section 10(b) are broad enough to encompass a contribution action.[380] Yet, the Court does not search for the right to contribution within the "contours" of section 10(b).[381] The Court instead infers from analogous express rights to contribution in the 1934 Act[382] that Congress, had it created a section 10(b) private right of action, would have also created a corresponding right to contribution.[383] At this point, however, the Court is no longer exercising its power to "round out" the scope of

374. *See id.*

375. *See* U.S. CONST. art. III, §§ 1, 2. *See also* American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951).

376. *Finn*, 341 U.S. at 17-18.

377. *Musick*, 113 S. Ct. at 2089.

378. *Id.* (citing Virginia Bankshares, Inc., v. Sandberg, 111 S. Ct. 2749, 2764 (1991); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975)). *See also* Cannon v. University of Chicago, 441 U.S. 677, 745 (1979) (Powell, J., dissenting) ("[T]he federal judiciary necessarily exercises substantial powers to construe legislation, including, when appropriate, the power to prescribe substantive standards of conduct that supplement federal legislation.").

379. *Musick*, 113 S. Ct. at 2088.

380. *Id.* at 2089.

381. *Id.*

382. *See* 15 U.S.C. §§ 78i, 78r (1988).

383. *Musick*, 113 S. Ct. at 2089.

statutory language; instead, it is writing into the federal securities laws a private right of action for contribution which admittedly is not within the contours of section 10(b) itself and is not part of the congressional scheme.

The Court's reliance upon the presumed intent of Congress in enacting the 1934 Act to support its creation of an implied right to contribution is ironic. The Court initially justifies its power to create the remedy by arguing that even though Congress in 1934 did not intend to create a section 10(b) private remedy, post-enactment Congresses have acquiesced in its power to create and to fill out the contours of the section 10(b) private action.[384] When the Court fills out those contours, however, it suddenly returns to the intent of the enacting Congress.[385] The irony is that the Court freely acknowledges that the enacting Congress did not intend to create the section 10(b) private right of action, did not intend to create any section 10(b) right to contribution, and did not intend to empower the federal courts to do so.

In light of the dubious logic and constitutional basis for the *Musick* decision, the specter of result-oriented reasoning reappears. Unlike most of its prior decisions limiting the reach of the section 10(b) private action, the Supreme Court in *Musick* appears to have extended the scope of that private action.[386] Ultimately, however, all of the Court's arguments in *Musick* hinge on its concern for defendants threatened with securities fraud liability: "Having implied the underlying liability in the first place, to now disavow any authority to allocate it on the theory that Congress has not addressed the issue would be most unfair to those against whom damages are assessed."[387]

Hence, in the Supreme Court's previous decisions narrowing the scope of section 10(b), the Court argues that the unique judicial origins of the private remedy mandate a limiting construction.[388] In *Musick*, and to some extent in *Lampf*, however, the Court argues that the unique judicial origins of the private remedy mandate the expanded use of judicial power

384. *Id.* at 2088.

385. *Id.* at 2089.

386. Most, if not all, of the Supreme Court's recent decisions interpreting section 10(b) limit rather than expand the scope of the private right of action. *See supra* notes 321-36 and accompanying text.

387. *Musick*, 113 S. Ct. at 2088. This is the same sort of fairness argument made by Justice Scalia in *Lampf*, 111 S. Ct. at 2783. There, Justice Scalia asserted that absent a congressionally mandated statute of limitations period for section 10(b), "no limitations period exists." But he declined to follow this principled result, because it would be "highly unjust to those who must litigate past inventions." *Id.*

388. *See supra* notes 321-26 and accompanying text.

to create a new private action for contribution and a new retroactive uniform federal limitations period. On the one hand, the judicial origins of section 10(b) are used to justify a contraction of federal judicial power. On the other hand, those origins are used to justify an expansion of federal judicial power.

This inconsistency is not irreconcilable. But the regrettable point of reconciliation in these section 10(b) decisions is the Court's almost unwavering protection of defendants threatened with securities fraud liability. The Court has limited the reach of the section 10(b) private remedy by arguing that the judicial origins of the remedy give it no power to expand the congressional scheme. Additionally, it has created a contribution right and a relatively short retroactive limitations period by arguing that the judicial origins of that remedy give it special power to do so. By limiting the reach of section 10(b), by fashioning a short retroactive limitations period, and by creating a right to contribution, the Court in all of its significant section 10(b) cases has consistently protected defendants from securities fraud damages actions.

VI. CONCLUSION: COPING WITH THE ABSENCE OF THE JUDICIALLY-CREATED SECTION 10(b) PRIVATE REMEDY

The prospect of life without the section 10(b) private remedy no doubt sends shivers through the spines of securities investors and securities lawyers. But their fears are unfounded.

Congress would likely respond to the judicial elimination of the private remedy by creating an express remedy for violations of section 10(b). Predicting congressional action is hazardous. Yet, when the Supreme Court in *Lampf*[389] created a retroactive statute of limitations period which effectively destroyed many pending private section 10(b) claims, Congress quickly responded with legislation vitiating the decision's harsh retroactive effects.[390] Congress, however, left for another day legislation addressing broader policy questions regarding securities fraud litigation.[391]

If Congress' response to *Lampf* is any guide, Congress would likely react promptly to the judicial elimination of the private section 10(b) remedy by creating an amendment to section 10(b) which would simply declare that any person injured as a result of a violation of section 10(b) may bring an

389. 111 S. Ct. 2773 (1991).
390. *See* 15 U.S.C. § 27aa-1 (1988).
391. *Hearings*, *supra* note 309.

action for monetary or equitable relief in federal district court. But Congress might be slower to resolve the broader questions of the elements of its newly-created private remedy.

Any congressional reaction establishing an express private right of action for violations of section 10(b), however, would serve the goals of investor protection more than the current "guerilla warfare"[392] being waged against the implied right of action. As Justice Kennedy warned in *Virginia Bankshares*, "Congress and those charged with enforcement of the securities laws stand forewarned that unresolved questions concerning the scope of those causes of action are likely to be answered by the Court in favor of defendants."[393]

Even if Congress did not act to restore private remedies for the violation of section 10(b), however, the costs to investor protection would be outweighed by the benefits of eliminating the unconstitutional use of judicial power. Under section 10(b), as currently construed by the federal courts, purchasers or sellers of securities may recover their out-of-pocket losses or the defendant's profits only if they bring suit within one year of discovering the wrong and within three years of a challenged transaction. Additionally, depending on the circuit, they must prove: (1) scienter[394] or recklessness;[395] (2) a material misstatement[396] or a material omission, provided there was an independent, pre-existing duty to disclose;[397] (3) in connection with (4) the purchase or sale[398] of (5) an instrument which represents an investment in a common enterprise with profits coming solely[399] or primarily from the efforts of others,[400] and (6) the plaintiff

392. Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749, 2769 (1991).

393. *Id.* at 2770 (Kennedy, J., dissenting in part and concurring in part). Justice Kennedy was joined in his views by Justices Stevens, Blackmun, and Marshall.

394. *See, e.g.*, Stokes v. Lokken, 644 F.2d 779, 783 (8th Cir. 1981) (stating that intent is required to sustain civil liability).

395. *See, e.g.*, Hackbart v. Holmes, 675 F.2d 1114, 1117 (10th Cir. 1982) (finding recklessness standard adequate to satisfy Rule 10b-5 scienter requirement).

396. *See, e.g.*, Flamm v. Eberstadt, 814 F.2d 1169, 1174-75 (7th Cir.) (noting that a firm may be silent but may not lie), *cert. denied*, 484 U.S. 853 (1987).

397. *See, e.g.*, Kennedy v. Josephthal & Co., 814 F.2d 798, 804 (1st Cir. 1987) (conditioning plaintiff's claim on proof that defendant intended to misrepresent or failed to disclose material fact upon which plaintiff relied).

398. Crane Co. v. American Standard, Inc., 603 F.2d 244, 249 (2d Cir. 1979) (stating that Rule 10b-5 applies generally to activities in connection with purchase or sale of securities).

399. United Hous. Found., Inc. v. Forman, 423 U.S. 837, 852 (stating that basic test for distinguishing a security is whether investment scheme contemplates profits to come solely from efforts of others), *reh'g denied*, 423 U.S. 884 (1975).

presumptively,[401] reasonably,[402] or justifiably,[403] relied upon the defendant's misstatements or omissions, which (7) caused the plaintiff to enter the transaction[404] and (8) caused the plaintiff to suffer losses.[405]

For defrauded buyers of securities, who may seek express remedies under section 11[406] or section 12(2)[407] of the Securities Act of 1933 Act without showing scienter, loss causation, or an independent duty to disclose, the implied private remedy under section 10(b) has become a redundant or even relatively unattractive option.

For defrauded sellers of securities who often allege that a nondisclosure rather than an affirmative misrepresentation induced them to part with their stock at an unfairly low price, the section 10(b) remedy is not particularly helpful. Defrauded sellers cannot recover under section 10(b) unless they can establish that the defendants owed them a pre-existing duty to disclose material, nonpublic facts.[408] The presence of such a pre-existing disclosure obligation is rare in impersonal market transactions. The rare investor who is defrauded by a person who owes them a disclosure obligation likely will have state law claims for fraud and breach of fiduciary duty.[409]

For those remaining defrauded sellers who are induced to sell their

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400. *See, e.g.*, SEC v. Koscot Interplanetary Inc., 497 F.2d 473, 483 (5th Cir. 1974) (finding that appropriate test is whether efforts made by those other than investor are undeniably significant).

401. *See* Flamm v. Eberstadt, 814 F.2d 1169, 1174-75 (7th Cir.) (stating that an omission is material where omitted fact would have assumed actual significance in decisions of reasonable shareholder), *cert. denied*, 484 U.S. 853 (1987).

402. *See, e.g.*, Sharp v. Coopers & Lybrand, 649 F.2d 175, 187 (3d Cir. 1981) (finding facts withheld were material to reasonable investor), *cert. denied*, 455 U.S. 938 (1982).

403. *See, e.g.*, Zobrist v. Coal-X, Inc., 708 F.2d 1511, 1516 (10th Cir. 1983) (stating that plaintiff must establish justifiable reliance on false representation).

404. *See, e.g.*, Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 380 (2d Cir. 1974) (requiring that Rule 10b-5 claimant show that violations at issue caused plaintiff to engage in transaction), *cert. denied*, 421 U.S. 976 (1975).

405. *Id.* at 381 (conditioning 10b-5 claim on plaintiff's allegation that transaction resulted in loss).

406. 15 U.S.C. § 77K (1988). Section 11 provides an express right of action to any person who acquires a registered security pursuant to a material misstatement or omission on a registration statement.

407. 15 U.S.C. § 77*l*(2) (1988). Section 12(2) provides an express right of action to any acquiror of securities against sellers who make material misrepresentations or omission.

408. *See* Dirks v. SEC, 463 U.S. 646, 657-58 (1983) (finding that duty to disclose arises from relationship of parties, not from mere possession of material nonpublic information); Chiarella v. United States, 445 U.S. 222, 228 (1980) (holding that failure to disclose information violates section 10(b) only where duty to disclose exists).

409. *See* Santa Fe Indus. v. Green, 430 U.S. 462, 477-80 (1977); Cort v. Ash, 422 U.S. 66, 80 (1975); MARC J. STEINBERG & RALPH C. FERRARA, SECURITIES PRACTICE: FEDERAL AND STATE ENFORCEMENT § 12:18 (1985).

securities by affirmative misrepresentations, the section 10(b) private remedy supplements the remedies available under section 9,[410] section 18(a),[411] and section 27A[412] of the 1934 Act, and under the Racketeer Influenced and Corrupt Organizations (RICO) treble damages provisions.[413] Moreover, in light of the federal courts' restrictions on section 10(b) recovery, state common-law and statutory remedies are also attracting the attention of defrauded securities sellers.[414]

Finally, even if the Supreme Court abandons the section 10(b) private right of action, a violation of the provision could still provide the basis for a state law tort action. The state law action would not have independent federal subject matter jurisdiction, but could still be heard in federal court where diversity or supplemental jurisdiction is present.

Accordingly, as currently interpreted by the Supreme Court, the implied right of action under section 10(b) provides the exclusive remedy only for those sellers of securities who: (1) prove that a defendant's intentional or reckless misrepresentation of material fact, or failure to disclose a material fact in breach of a duty to disclose caused their securities losses; (2) file their claims within three years of the sale and one year of discovery of the wrong; and (3) would not otherwise be able to recover under the express remedies provided by the federal securities laws, RICO, state securities statutes, or the common-law. The Supreme Court and the federal courts have narrowed the reach of the implied section 10(b) remedy to such a degree that its complete elimination works a correspondingly narrow hardship.

The benefits of eliminating the judicially-created private remedy outweigh this hardship. If the Supreme Court would use the issue of the propriety of the section 10(b) implied right to announce its intention to "get

410. 15 U.S.C. § 78i (1988). Section 9 prohibits manipulation of securities prices.

411. 15 U.S.C. § 78r(a) (1988). Section 18(a) prohibits material misstatements on filed reports.

412. 15 U.S.C. § 27A (1988). Section 27A allows recovery of profits made by any person trading on material, nonpublic information.

413. 18 U.S.C. § 1964(c) (1988). A violation of section 10(b) would constitute a predicate act for RICO liability purposes, whether or not an independent private right of action for that violation exists. *See* Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311 (1992).

414. MARC J. STEINBERG, UNDERSTANDING SECURITIES LAW 133 (1989).

> Due to the Supreme Court's decisions in the federal securities law, area which have had the effect of making a plaintiff's task in establishing a successful cause of action more difficult, counsel may deem it wise to consider bringing state common-law or state securities law claims.

Id.

out of the business"[415] of implying rights of action, Congress would assume its proper burden of deciding whether to create an express right of action not only for section 10(b) violations, but for violations of all of its prohibitions. In this regard, the Court's decision to let Congress create its own remedies would serve the Constitution's required separation of judicial and legislative power. The policy questions surrounding the proper remedies for statutory violations would be decided in the legislature and not in the courts. The courts then would be guided by the language and the intent of the enacting legislature rather than by the judges' relatively untethered policy views.

Ironically, the Supreme Court's refusal to recognize implied rights of action under section 10(b) or under any congressional prohibition would go a long way toward realizing Blackstone's real vision of judicial power in a liberal regime. The beauty of the Constitution is that the federal courts have limited power to remedy the violation of a federal right if, but only if, the legislature has created the right and the remedy. One lesson from the unconstitutional judicial creation of the implied section 10(b) remedy is that if the federal courts can create remedies for judicially-perceived wrongs without the consent of the governed, they can also eliminate—case by case—the efficacy of those remedies without the consent of the governed.

415. *See* Thompson v. Thompson, 484 U.S. 174, 190 (1988) (Scalia, J., concurring).