State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action

In recent years, the Supreme Court has become increasingly reluctant to imply private rights of action under federal statutes not explicitly providing such a remedy.¹ The pressure on courts from injured persons seeking a cause of action remains,² however, and as the federal forum becomes less hospitable to private parties, plaintiffs may look increasingly to state courts for vindication of their rights. State court remedies are not necessarily foreclosed by the denial of an implied federal right of action. The demise of implied federal rights of action reflects an acknowledgment of the federal courts' limited power to create judicial remedies for statutory wrongs. The remedial powers of the states, however, are much broader than those of the federal courts; thus even when implied federal rights of action have been denied, states may often be able to provide a right of action to private plaintiffs by creating a parallel state law that incorporates federal law by reference.³ Given the current hostility of the Supreme Court to the implication of federal rights of action, state incorporation of federal standards in a state law right of action presents itself as an appropriate step forward in the vindication of individuals' statutory rights, a step in keeping with the best traditions of a federal system.

I. THE DEMISE OF THE IMPLIED FEDERAL RIGHTS OF ACTION

The recent reversal in the Supreme Court's approach to the judicial creation of private rights of action under federal statutes not expressly

1. See *Cannon v. University of Chicago*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring).

2. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 23 n.1 (1981) (Stevens, J., concurring in the judgment in part and dissenting in part) (noting unusually high frequency of litigation over question of whether an implied right of action may be recognized under federal regulatory statute); see also *Cannon*, 441 U.S. at 741-42 (Powell, J., dissenting) (listing 20 decisions in which the courts of appeals have implied private rights of action from federal statutes in recent years).

3. See generally P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 485-89 (2d ed. 1973 & Supp. 1981) [hereinafter cited as *HART & WECHSLER*] (discussing state incorporation of or reference to federal law); Greene, *Hybrid State Law in the Federal Courts*, 83 HARV. L. REV. 289 (1969) (discussing legitimacy of Supreme Court review and federal district court jurisdiction in hybrid state law cases); Mermin, "Cooperative Federalism" Again: *State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements* (pts. 1 & 2), 57 YALE L.J. 1, 201 (1947) (discussing validity of state incorporation of federal law); Note, *Supreme Court Review of State Interpretations of Federal Law Incorporated by Reference*, 66 HARV. L. REV. 1498 (1953) (discussing legitimacy of Supreme Court review of hybrid state law cases).

providing such a remedy⁴ manifests an increasing hostility to implied federal rights of action.⁵ The Court's newly emergent implication doctrine focuses tightly on legislative intent.⁶ Implication requires a finding of explicit or implicit congressional intent to create a private right of action.⁷

4. The evolution of the Supreme Court's current implication doctrine has been thoroughly discussed elsewhere. See Ashford, *Implied Causes of Action Under Federal Law: Calling the Court Back to Borak*, 79 NW. U.L. REV. 227 (1984); Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981); 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); Comment, *Implied Causes of Action: A Product of Statutory Construction or the Federal Common Law Power?*, 51 U. COLO. L. REV. 355 (1980); Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392 (1975) [hereinafter cited as Comment, *Private Rights of Action*].

5. In recent Terms, the Supreme Court decided ten cases in which the plaintiffs sought an implied right of action under a federal regulatory statute. The Court refused to find an implied right of action in seven of these cases. See *Daily Income Fund, Inc. v. Fox*, 104 S. Ct. 831 (1984) (no implied right of action for investment companies under § 36(b) of Investment Company Act of 1940); *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982) (no federal implied private right of action under Urban Mass Transportation Act for violations of labor agreement because Congress intended that agreement would be governed by state law); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (no implied private right of action for damages against state and federal officials for failure to enforce either federal Water Pollution Control Act or Marine Protection, Research, and Sanctuaries Act of 1972); *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (no implied right of action for contribution from co-conspirators under federal antitrust laws); *California v. Sierra Club*, 451 U.S. 287 (1981) (no implied private right of action under § 10 of Rivers and Harbors Appropriation Act of 1899); *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77 (1981) (no implied right of action for contribution in Title VII suit); *Universities Research Ass'n v. Coutu*, 450 U.S. 754 (1981) (no implied private right of action for back wages under Davis-Bacon Act under contract administratively determined not to be covered by the Act and which thus did not contain prevailing wage stipulation).

The Court did imply a private right of action in *Guardians Ass'n v. Civil Serv. Comm'n*, 103 S. Ct. 3221, 3227-28 (1983) (plurality opinion) (recognizing implied right of action under Title VI of Civil Rights Act of 1964); *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983) (affirming existence of implied right of action under § 10(b) of Securities Exchange Act of 1934); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982) (recognizing implied right of action for damages under Commodities Exchange Act).

6. The Supreme Court developed a formal four-factor test to determine whether a private right of action should be implied under a federal regulatory statute: (1) the identity of the class for whose especial benefit the statute was passed, (2) consideration of implicit or explicit legislative intent to create or deny a private remedy, (3) the consistency of a private remedy with the underlying purpose of the legislative scheme, and (4) the traditional role of the states in providing the relief sought. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

In subsequent decisions, however, the Supreme Court compressed the *Cort* test to a consideration solely of legislative intent. In *Cannon*, the Court characterized the existence of an implied right of action as a "question of statutory construction" and stated that "before concluding that Congress intended to make a remedy available to a special class of litigants, a court must carefully analyze the four factors that *Cort* identifies as indicative of such an intent." *Cannon*, 441 U.S. at 688 (emphasis added). See also *California v. Sierra Club*, 451 U.S. 287, 293 (1981) (noting that "the four factors specified in *Cort* remain the 'criteria through which [congressional] intent could be discerned.'") (quoting *Davis v. Passman*, 442 U.S. 228, 241 (1979)).

In two other cases, the Court further emphasized the primary importance of congressional intent. See *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) ("what must ultimately be determined is whether Congress intended to create the private remedy asserted"); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) ("our task is limited solely to determining whether Congress intended to create the private right of action asserted").

7. The Court's analysis of congressional intent focuses primarily on statutory construction. See *Transamerica Mortgage Advisors*, 444 U.S. at 15 ("The question whether a statute creates a cause of

Since the issue of whether Congress intended to create a right of action for private plaintiffs arises only when Congress has not expressly authorized such a remedy, the Court, in effect, attempts to divine legislative intent from congressional silence.⁸ Under the Court's present analysis, congressional silence, itself inherently ambiguous,⁹ has been construed as an intentional denial of private rights of action.¹⁰

The Supreme Court's intent analysis reflects a recognition of the limited jurisdiction of the federal courts, as well as broader separation-of-powers concerns:¹¹ "[F]ederal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers. . . . [T]he federal lawmaking power is vested in the legislative, not the judicial, branch of government" ¹² Implying a

action, either expressly or by implication, is basically a matter of statutory construction."); accord *Northwest Airlines*, 451 U.S. at 94 ("[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.").

8. This method of analysis has met with serious academic criticism. See HART & WECHSLER, *supra* note 3, at 194 (2d ed. Supp. 1981) (noting that Court's current analysis may create danger of "game playing").

9. The Supreme Court itself noted the difficulty of discerning legislative intent from Congressional silence: "[L]egislative silence is often encountered in implied-right-of-action cases; it is to be expected that 'the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question.'" *Northwest Airlines*, 451 U.S. at 94 (quoting *Cannon*, 441 U.S. at 694). See also *Guardians Ass'n v. Civil Serv. Comm'n*, 103 S. Ct. 3221, 3235 (1983) (Powell, J., concurring in the judgment) ("Congress, for reasons of its own, all too frequently elects to remain silent on the private right-of-action question. The result frequently is uncertainty and litigation as to available remedies, leaving the courts to provide an answer without clear legislative guidance."); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 290-91 (1963) (discussing ambiguity of legislative silence and dubiousness of negative implication).

10. In *Cannon v. University of Chicago*, the Court gave notice to Congress that "[w]hen Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights." *Cannon*, 441 U.S. at 717. In keeping with this policy, the Court has interpreted congressional silence as prohibitory, establishing a clear presumption that when Congress has not explicitly authorized a right of action, Congress did not intend to create one. See *Touche Ross & Co. v. Redington*, 442 U.S. at 572 ("Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly."); *Northwest Airlines*, 451 U.S. at 94 ("It is, of course, not within our competence as federal judges to amend these comprehensive enforcement schemes by adding to them another private remedy not authorized by Congress."); cf. *id.* at 97 (noting that "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme") (emphasis added).

11. See *Cannon*, 441 U.S. at 730-31, 743 (Powell, J., dissenting); see also Creswell, *The Separation of Powers Implications of Implied Rights of Action*, 34 MERCER L. REV. 973, 989-96 (1983) (discussing validity of separation-of-powers objections to implied federal rights of action). But see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. at 375-76 ("[T]here is no merit to the argument . . . that the judicial recognition of an implied private remedy violates the separation-of-powers doctrine.").

12. *Northwest Airlines*, 451 U.S. at 95 (Stevens, J.).

private right of action arguably constitutes a judicial appropriation of congressional authority.¹³ Further, the creation of private enforcement mechanisms may impinge upon the development of substantive regulatory policy—a function reserved to the legislative and executive branches.¹⁴ In essence, the Court is concerned that an unwarranted exercise of judicial remedial power may provide private plaintiffs with a cause of action Congress never intended to create.

These objections to the creation of implied rights of action by the federal courts do not, however, preclude the creation of state remedies. Insofar as current implication doctrine is based upon the limited remedial powers of the federal judiciary, the Court's rationale is inapplicable to the creation of private remedies by state common law courts of general jurisdiction. With respect to state lawmaking, congressional silence should be construed as permissive rather than prohibitory. The power of state courts to create rights of action and remedies is limited only by the possibility of federal preemption;¹⁵ preemption aside, there are no independent separation-of-powers or federalism concerns that would justify further restriction of the states' traditional remedial powers. Therefore, despite the foreclosure of federal implied rights of action under the Supreme Court's narrow congressional intent analysis, there are permissible and appropriate avenues of state action, including state incorporation of federal law. If plaintiffs cannot find a remedy under federal law, they may now resort to state law to obtain the relief they seek.¹⁶

13. Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1221 (1982).

14. *Id.*

15. See *infra* text accompanying notes notes 68–104.

16. This phenomenon has already occurred to a significant degree in the area of personal civil rights. There is now a substantial literature relating to the vindication of individuals' civil rights under the provisions of various state constitutions rather than under the federal Constitution. Justice Brennan, for example, advocates the protection of civil rights under state constitutions and urges that "state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms." Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977). See also Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981) (discussing role of state courts in litigation under the federal Constitution); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976) (discussing extent to which states have developed interpretations of civil rights under state constitutions which are broader than the Burger Court's interpretations of civil rights under the federal Constitution); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973) (examining protection of individuals' civil liberties under state bills of rights); Comment, *Protecting Fundamental Rights in State Courts: Fitting a State Peg to a Federal Hole*, 12 HARV. C.R.-C.L. L. REV. 63 (1977) (considering various means by which state courts can protect civil liberties in view of federal abdication).

Though the analogy to the protection of civil rights in state courts may be imperfect, as there are significant differences between constitutional and statutory rights, state incorporation of federal law as a response to the demise of implied federal rights of action may be viewed as yet another manifestation of the new federalism.

II. CREATING A STATE RIGHT OF ACTION

States may provide remedies that Congress has failed to provide explicitly by the incorporation of federal standards in a state law cause of action.¹⁷ This can be accomplished either legislatively¹⁸ or

17. States have incorporated federal law in a wide variety of substantive areas. For example, states have incorporated federal health and safety standards by incorporating provisions of the following statutes:

Grain Standards Act, 7 U.S.C. §§ 71-87i (1982). *See Note, State Legislation Adopting Federal Standards*, 23 COLUM. L. REV. 674, 674-75 (1923) [hereinafter cited as *Note, State Legislation*].

Pure Food and Drugs Act, 21 U.S.C. §§ 16, 17, 301-392 (1982). *See Comment, Validity of State Recovery Acts Adopting Federal Codes*, 33 MICH. L. REV. 597, 601 n.14 (1935) [hereinafter cited as *Comment, Validity of State Recovery Acts*].

Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-392 (1982). *See, e.g.*, North Dakota Food, Drug, and Cosmetic Act, N.D. CENT. CODE §§ 19-02.1-01(9), 19-02.1-02(10), 19-02.1-02(12) (1981); Controlled Substance, Drug, Device and Cosmetic Act, PA. STAT. ANN. tit. 35, §§ 780-104(3)(vi), -104(4)(iii) (Purdon Supp. 1984-1985).

Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1982). *See, e.g.*, Maryland Occupational Safety and Health Law of 1973, MD. ANN. CODE art. 89, §§ 28-49B (1979 & Supp. 1984); *see also* J.I. Hass Co. v. Department of Licensing & Regulation, 275 Md. 321, 327, 340 A.2d 255, 259 (1975) (Maryland law "substantially similar" to and "tracks" federal Act).

States have similarly incorporated federal standards governing commerce by adopting provisions of the following Acts:

Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1982). *See, e.g.*, Unfair Trade Practices and Consumer Protection Act, ALASKA STAT. §§ 45.50.471, .481, .545 (1980); Consumer Protection Act, WASH. REV. CODE ANN. § 19.86.920 (1978); *see also* State v. O'Neill Investigations, Inc., 609 P.2d 520, 523-24, 533 (Alaska 1980) (Alaska law adopts interpretations of FTC Act § 5(a)(1), 15 U.S.C. § 45(a)(1)); State v. Reader's Digest Ass'n, Inc., 81 Wash. 2d 259, 269, 501 P.2d 290, 298 (1972) (Washington law incorporates FTC Act § 5(a)(1), 15 U.S.C. § 45(a)(1)).

Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1982). *See, e.g.*, Alaska Antitrust Act, ALASKA STAT. §§ 45.50.562, .564 (1980); Donnelly Act, N.Y. GEN. BUS. LAW §§ 340-347 (McKinney 1968 & Supp. 1984-1985); *see also* West v. Whitney-Fildago Seafoods, Inc., 628 P.2d 10, 14 & n.6 (Alaska 1981) (Alaska Antitrust Act incorporates Sherman Act §§ 1 and 2); People v. Roth, 52 N.Y.2d 440, 447, 449, 420 N.E.2d 929, 930, 931, 438 N.Y.S.2d 737, 738, 739 (1981) (N.Y. Gen. Bus. Law § 340 analogous to Sherman Act).

Small Business Act, 15 U.S.C. §§ 631-649d (1982). *See* Iconco v. Jensen Constr. Co., 622 F.2d 1291 (8th Cir. 1980) (violations of Small Business Act constitute fraud and unjust enrichment under Iowa law).

Truth in Lending Act, 15 U.S.C. §§ 1601-1693r (1982). *See, e.g.*, IDAHO CODE §§ 28-41-302, 28-43-201 (Supp. 1984); IOWA CODE ANN. §§ 537.1302, .3201 (West Supp. 1984-1985); KAN. STAT. ANN. § 16a-3-206 (1981); ME. REV. STAT. ANN. tit. 9-A, § 3-201(5) (1980); *see also* UNIF. CONSUMER CREDIT CODE §§ 1.302, 3.201, 7 U.L.A. 647, 700 (1978).

National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982). *See, e.g.*, CAL. LAB. CODE §§ 1152-1153 (West Supp. 1978); *see also* Agricultural Labor Relations Bd. v. Superior Court, 16 Cal. 3d 392, 399 nn.1 & 2, 546 P.2d 687, 691, 128 Cal. Rptr. 183, 187 (1976) (Cal. Lab. Code §§ 1152, 1153 adopt NRLA §§ 7, 8).

For additional examples of state incorporation of federal law prior to 1953, *see Note, supra* note 3, at 1498 & nn.3-11; Mermin, *supra* note 3, at 2 & n.5; *Note, State Legislation, supra*, at 674-76; *Comment, Validity of State Recovery Acts, supra*, at 601-03.

18. For instance, federal safety standards have been incorporated into state law both legislatively and judicially. For an interesting example of legislative incorporation of federal standards to create a private state right of action in the absence of an implied federal right of action, *see* Gatlin v. Country-side Indus., 564 F. Supp. 1490 (N.D. Tex. 1983). In *Gatlin*, the federal Manufactured Home Construction and Safety Standards Act, 42 U.S.C. §§ 5401-5426 (1982), had provided that no state had authority to establish any standard not identical to the federal safety standards, and had further provided a savings clause preserving state jurisdiction over any manufactured home construction safety issue for which there was no federal standard. In response to this statute, Texas legislatively incorporated the federal standards into the Texas Manufactured Housing Standards Act, TEX. REV. CIV.

judicially.¹⁹ State legislatures can adopt federal standards as the definition of the state duty of care and provide an appropriate remedy for violations.²⁰ A state court incorporates a federal standard by adopting it as the duty of care in an existing state common law tort action.²¹ Whether the incorporation is legislative or judicial, the result is "hybrid"²² state law, wherein state law provides the right of action and the remedy, while the incorporated federal law defines the standard of care.²³

Courts are just beginning to consider, in the context of the curtailment of implied federal rights of action, the issues raised by the creation of private remedies through state incorporation of federal law. Where an implied right of action has been denied by the federal courts, the creation of a hybrid state right of action has generally been allowed by the few courts which have reached this issue,²⁴ with one notable exception.²⁵ An analysis

STAT. ANN. art. 5221(f) § 20 (Vernon Supp. 1984), and further provided express remedies for individuals. In remanding a suit upon the Texas Act to Texas court for failure to state a federal claim, a federal district court upheld the Texas Act:

The Texas law has been carefully designed to comply with federal law and to ensure commitment to the federal standards. While the state's model of enforcement was designed with reference to the federal law, Texas has extended the implications of the federal law by providing redress for the individual. The remedy which Gatlin relies upon is state created. The Texas legislature, rather than the United States Congress, has been sympathetic to enforcement of these federal duties for the benefit of the individual purchaser. The area of individual relief is not occupied by the federal law in a preemptive sense; nor is it served through the implication of a private cause of action under the federal law.

Id. at 1495 (citation omitted). For further examples of legislative incorporation, see *supra* note 17.

19. The *Hofbauer* and *R. B. J.* cases, discussed *infra* text accompanying notes 26-37, involved judicial incorporation. The following are further examples of judicial incorporation:

National Traffic and Motor Vehicle Safety Act of 1966 (MVSA), 15 U.S.C. §§ 1381-1431 (1982); see *Lowe v. General Motors Corp.*, 624 F.2d 1373 (5th Cir. 1980) (violation of MVSA establishes negligence per se under Alabama law); *Nevels v. Ford Motor Co.*, 439 F.2d 251 (5th Cir. 1971) (violation of MVSA establishes negligence under Georgia law).

General Operating and Flight Rules, 14 C.F.R. §§ 91.1-.311 (1984). See *Gatenby v. Altoona Aviation Corp.*, 407 F.2d 443 (3d Cir. 1968) (violation of safety regulation establishes negligence per se under Pennsylvania law); accord *Rudelson v. United States*, 431 F. Supp. 1101 (C.D. Cal. 1977) (California law), *aff'd*, 602 F.2d 1326 (9th Cir. 1979); *Todd v. United States*, 384 F. Supp. 1284 (M.D. Fla. 1975) (Alabama law), *aff'd*, 553 F.2d 384 (5th Cir. 1977); *Florida Freight Terminals, Inc. v. Cabanas*, 354 So. 2d 1222 (Fla. Dist. Ct. App. 1978) (Florida law).

20. See Greene, *supra* note 3, at 296-97.

21. *Id.*

22. The term "hybrid" state law was apparently coined by Greene. See *id.* at 291.

23. *Id.*

24. See *Hofbauer v. Northwestern Nat'l Bank*, 700 F.2d 1197 (8th Cir. 1983) (federal standards of National Flood Insurance Act could be voluntarily incorporated by State of Minnesota to establish negligence under Minnesota law); *Till v. Unifirst Fed. Sav. & Loan Ass'n*, 653 F.2d 152 (5th Cir. 1981) (remanded without discussion to Mississippi state court for determination of whether violation of National Flood Insurance Act establishes fraud and negligence in state common law actions); *Iconco v. Jensen Constr. Co.*, 622 F.2d 1291 (8th Cir. 1980) (violation of Small Business Act may establish fraud and unjust enrichment under Iowa law); *Gatlin v. Countryside Indus.*, 564 F. Supp. 1490 (N.D. Tex. 1983) (remanding to Texas state court for failure to state a federal claim, an action on the Texas Manufactured Housing Standards Act, wherein the Texas Act legislatively incorporated the provisions of the National Manufactured Home Construction Safety Standards Act and provided a private right of action for any violation of the federal Act). See also *Patry v. Rosenthal & Co.*, 534 F. Supp. 545, 548, 551 (D. Kan. 1982) (discussing survival of state common law claims in relation to

of the contrasting approaches taken by two courts in cases arising under the same federal statute reveals that widely divergent views of federalism underlie the conflicting results. In considering whether provisions of the National Flood Insurance Act could be incorporated into a state cause of action for negligence, the Eighth Circuit sitting in diversity in *Hofbauer v. Northwestern National Bank*²⁶ and the Supreme Court of North Dakota in *R.B.J. Apartments, Inc. v. Gate City Savings & Loan Association*²⁷ reached opposite conclusions. In *R.B.J.*, after a vague invocation of "the separation-of-powers doctrine and principles of federalism,"²⁸ the North Dakota Supreme Court disallowed the adoption of federal standards as the standard of care in a state common law action, asserting in essence that the denial of an implied right of action under the federal statute²⁹ mandated the denial of any state right of action.³⁰ Conversely, the Eighth Circuit in *Hofbauer* determined that even though the plaintiffs could not assert a private cause of action under federal law,³¹ they could still assert a valid claim for negligence if the federal standard were incorporated as the duty of care under Minnesota law.³²

federal enforcement mechanisms of Commodities Exchange Act).

25. *R.B.J. Apartments, Inc. v. Gate City Sav. & Loan Ass'n*, 315 N.W.2d 284 (N.D. 1982) (where National Flood Insurance Act provided no implied federal right of action, federal statute could not be adopted as standard of care in North Dakota negligence action).

26. 700 F.2d 1197 (8th Cir. 1983).

27. 315 N.W.2d 284 (N.D. 1982).

28. *Id.* at 290.

29. *Id.* at 289.

30. *Id.* at 290. The court's analysis is brief and conclusory:

The question of whether or not a common-law right of action exists for the violation of a federal statute is a matter of state law. We are not able to find a state cause of action in this instance. The separation-of-powers doctrine and principles of federalism militate against the adoption of the federal statute as the standard of care in a state negligence action when no private cause of action, either explicit or implicit, exists in the federal statute.

Id. (citation and footnote omitted).

The court cites in support of its reasoning Justice Powell's dissent in *Cannon v. University of Chicago*. *Id.* at 290 n.23 (citing *Cannon*, 441 U.S. at 730-31). The court cites the dissent for the vague and seemingly inapposite proposition that "Justice Powell stated that the majority's opinion illustrates how the implication of a private right of action 'denigrates the democratic process.'" *Id.* In fact, Justice Powell's separation-of-powers concerns are ultimately related to what he believes to be an unwarranted expansion of the federal courts' limited jurisdiction: "When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction." *Cannon*, 441 U.S. at 730-31 (emphasis added). Thus, Justice Powell concludes that in implying private rights of action, "the Court has tended to stray from the Art. III and separation-of-powers principle of limited jurisdiction." *Id.* at 731 (emphasis added).

31. *Hofbauer*, 700 F.2d at 1201.

32. After finding that there was no implied federal right of action under the National Flood Insurance Act (NFIA) and that the plaintiffs therefore could not state a valid federal claim, the Eighth Circuit held not that violations of the NFIA would constitute negligence under Minnesota law, but rather that Minnesota could voluntarily incorporate the federal standards as the duty of care in a state cause of action. The court of appeals then remanded the case to state court for a determination of whether Minnesota would in fact incorporate the federal standards in a state law negligence action. *Id.*

[A] state court “is certainly free to look to the provisions of a federal statute for guidance in applying its longstanding common-law remedies” unless Congress has prohibited the state from looking to the statute’s provisions as a standard in determining whether there has been a common-law breach of duty.³³

After careful consideration of relevant preemption factors and federalism concerns,³⁴ the court concluded finally that “[w]e do not see how [the goals of the federal regulatory program] would be frustrated by allowing common-law negligence suits”³⁵

Hofbauer and other cases resting upon similar analyses³⁶ represent the better view. Rather than immediately invoking a presumption of preemption on the basis of an erroneous conception of federalism,³⁷ these cases consider carefully whether the denial of a federal right of action on the basis of the limited remedial powers of the federal judiciary should also foreclose the creation of traditional state remedies through state incorporation of federal law.

A. *The Legitimacy of State Incorporation of Federal Law*

The Supreme Court implicitly recognized the legitimacy of state rights of action which incorporate federal law in *Moore v. Chesapeake & Ohio Railway*.³⁸ In *Moore*, the Court held that nothing in the Federal Safety Appliance Acts precluded Kentucky from incorporating in its state legislation the federal provisions regulating safety equipment on trains³⁹ and

33. *Id.* (quoting *Iconco v. Jensen Constr. Co.*, 622 F.2d 1291, 1298 (8th Cir. 1980)).

34. The court’s analysis considered such factors as the statute’s purpose of providing protection against flood damage, the identity of the Hofbauers as members of the broad class of “flood victims” the statute was intended to protect, and the possibility of conflict with the federal scheme. *Hofbauer*, 700 F.2d at 1201. See *infra* text accompanying notes 85–92.

35. *Hofbauer*, 700 F.2d at 1201.

36. See cases cited *supra* note 24; see also *Gatlin v. Countryside Indus.*, 564 F. Supp. 1490, 1495 (N.D. Tex. 1983) (discussed *supra* note 18).

37. *R.B.J.* reflects a fundamental misconception of the federalism concerns at issue in this area. The North Dakota Supreme Court implicitly and erroneously assumes that its own remedial powers are no broader than those of the federal courts. The court’s analysis ignores the fact that state rights of action are created not by federal courts of limited jurisdiction, but by common law courts of general jurisdiction. See *R.B.J.*, 315 N.W.2d at 289: “It is not within the competence of the judiciary to amend these comprehensive enforcement schemes” (emphasis added). The North Dakota Supreme Court here paraphrased *Northwest Airlines v. Transport Workers Union*, 451 U.S. at 94, wherein the Supreme Court’s language correctly indicated that “It is . . . not within our competence as federal judges to amend these comprehensive enforcement schemes” (emphasis added).

38. 291 U.S. 205 (1934).

39. *Id.* at 216 (“[N]othing in the Safety Appliance Acts precluded the State from incorporating in its legislation applicable to local transportation the paramount duty which the Safety Appliance Acts imposed.”). The Kentucky Act provided that no employee engaged in intrastate commerce should be held “to have been guilty of contributory negligence” or “to have assumed the risk of his employment” in any case “where the violation by [a] common carrier of any statute, state or federal, enacted for the safety of employees contributed to the injury or death of such employee.” *Id.* at 212–13 (quoting 1918

providing a state right of action to intrastate employees injured as a result of violations of the Acts by interstate carriers.⁴⁰ While federal law defined the duty of care, the Court made clear that the right of action was created and governed by state law: "[T]he right to recover damages sustained by the injured [intrastate] employee through the breach of duty sprang from the principle of the common law . . . and was left to be enforced accordingly. . . ."⁴¹ Holding that the case properly arose under state law,⁴² the Court thus left the field open for states to provide whatever remedies they deem fit for violations of similar statutes.

The Supreme Court most recently reaffirmed *Moore* and its progeny⁴³ in *Crane v. Cedar Rapids & Iowa City Railway*.⁴⁴ In *Crane*, the Court held that a state could make the defense of contributory negligence available to a railroad sued by a nonemployee for damages caused by the railroad's violation of the Federal Safety Appliance Act.⁴⁵ The nonemployee

Ky. Acts 153). The Court found the Federal Safety Appliance Acts to have been "manifestly embraced" by this description. *Id.* at 213. The circuit court below had reasoned that if the plaintiff were allowed to establish the negligence required by the state statute by proving a violation of the federal statute, the court would be placed "in the anomalous position of extending the benefits of the Safety Appliance Act to intrastate commerce." *Id.* The Supreme Court rejected this reasoning, stating that "the statute of Kentucky . . . in effect, reads into the provisions of the statute the requirements of the Federal Act for the safety of employees. There appears [sic] to be no anomaly in enforcing the state law with this defined content." *Id.* at 214.

40. The Federal Safety Appliance Acts had provided a right of action under the Federal Employers Liability Act only for employees engaged in interstate commerce. *Id.* at 210-11.

41. *Id.* at 215 (citation omitted).

42. *Id.* at 217. The Court's holding in *Moore* that the case arose under state law is highly significant in that it denies original federal jurisdiction over state law causes of action that incorporate federal law. *Id.* Accord *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 214 (1921) (Holmes, J., dissenting):

The whole foundation of the duty is Missouri law, which at its sole will incorporated the other law as it might incorporate a document. The other law or document depends for its relevance and effect not on its own force but upon the law that took it up, so I repeat once more the cause of action arises wholly from the law of the State.

But see id. at 199-202 (majority opinion) (holding that presence of a pivotal question of federal law in state law cause of action was sufficient to sustain federal question jurisdiction). While the cases on federal jurisdiction in the context of incorporation by reference are "terribly confused," Currie, *The Federal Courts and the American Law Institute* (pt. 2), 36 U. CHI. L. REV. 268, 277 (1969), the consensus opinion is stated by Wright, Miller & Cooper:

Although it occasionally has been held that [the incorporation of federal law as the applicable state standard] is enough to bring a suit under the state statute within the federal question jurisdiction of the federal courts, the sounder view seems to be to the contrary and would find jurisdiction only when federal law is applicable by its own force.

13B C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3563 (1984) (footnotes omitted). See also Greene, *supra* note 3, at 322-25 (concluding that only rare hybrid state law case will be cognizable in district courts). The question of federal jurisdiction also arises in the context of Supreme Court review of state court decisions. See *infra* note 63.

43. *Tipton v. Atchison, T. & S. F. R.R.*, 298 U.S. 141 (1936); *Fairport, P. & E. R.R. v. Meredith*, 292 U.S. 589 (1934).

44. 395 U.S. 164, 167 (1969) ("Our examination of the relevant legislative materials convinces us that this line of decisions should be reaffirmed.") (footnote omitted).

45. *Id.* at 165-67. Under federal law, by contrast, a violation of the Federal Safety Appliance Act would provide grounds for precluding the defenses of contributory negligence and assumption of risk. *Moore*, 291 U.S. at 213.

State Incorporation of Federal Law

had no implied federal right of action⁴⁶ and therefore was relegated to a state law tort action.⁴⁷ The Court held that although a federal standard establishes the state duty of care, “the definition of causation and the availability of the defenses of assumption of risk and contributory negligence are left to state law.”⁴⁸ *Moore* and *Crane* thus establish that when states incorporate federal law the right to recover and the remedy are created and governed by state law,⁴⁹ and that, to the extent that they are not preempted by federal law,⁵⁰ the content and the very existence of such state rights of action are matters of federal indifference.⁵¹ Since *Moore*, therefore, the states have been free to adopt federal standards, while creating rights of action and remedies that are wholly governed by state law.

B. *The Desirability of State Incorporation of Federal Law*

State incorporation of federal law is an appropriate and effective device by which states can step into the breach created by the foreclosure of federal remedies⁵² for violations of federal rights.⁵³ In the absence of a federal

46. See *supra* note 40.

47. *Crane*, 395 U.S. at 166.

48. *Id.* at 167.

49. *Moore*, 291 U.S. at 215–17; *Crane*, 395 U.S. at 166–67.

50. For a general discussion of the preemption issue, see *infra* text accompanying notes 68–104.

51. See *Mobil Oil Corp. v. Coastal Petroleum Co.*, 671 F.2d 419 (11th Cir.), *cert. denied*, 459 U.S. 970 (1982). Under Florida law, the determination of whether a certain submerged riverbed was sovereign land depended upon the navigability of the river at the time the land was acquired from the United States, a question of federal law. The court of appeals held that “there is no federal interest whatever in the resolution of this controversy. Federal law is *appropriately indifferent* to Florida’s invocation or application of a federal test of navigability as a precondition to determining a question of state law.” *Id.* at 426 (emphasis added).

52. See Brennan, *supra* note 16, at 503.

53. It could be argued that the denial of an implied federal right of action not only forecloses a private remedy but also denies the existence of any private right under the federal statute. In several of the cases in which the Supreme Court has refused to find an implied right of action, however, the plaintiffs were members of the class that the statute was intended to protect. See, e.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979) (finding no implied right of action under § 206 of the Investment Advisers Act of 1940). Section 206, 15 U.S.C. § 80b-6 (1982), provides that it shall be unlawful for any investment adviser to engage in any act, practice, or course of business that operates as a fraud or deceit upon any client or prospective client. Despite this federal right to be free of fraud, deception, and manipulation in investment advisement transactions, the Court held that defrauded private plaintiffs had no federal right of action for damages resulting from violations of § 206: “Section 206 of the Act here involved concededly was intended to protect the victims of the fraudulent practices it prohibited. But the mere fact that the statute was designed to protect advisers’ clients does not require the implication of a private cause of action for damages on their behalf.” *Transamerica Mortgage Advisors, Inc.*, 444 U.S. at 24.

Even if the denial of an implied federal right of action were tantamount to the denial of the existence of a federal right of the plaintiff rather than merely the denial of a federal remedy, in the context of incorporation this distinction is immaterial, since the state, by incorporating the federal standard, creates a *state* cause of action wherein the plaintiff is vested with a private *state* right and the defendant is subjected to a *state* duty.

statutory remedy, plaintiffs are traditionally relegated to whatever remedies they may have at state common law.⁵⁴ Existing state common law actions, however, may be inadequate to remedy the injury the plaintiff has suffered as a result of the violation of a federal statutory right. For example, the federally protected right may be one for which there is no analogous state common law action, or violation of the federal standard may be insufficient to constitute a violation of the state standard of care, or vindication of a federal right may be barred by state common law defenses, such as contributory negligence. By incorporating the federal standard into a state cause of action, a state may grant its citizens the same right as provided by the federal statute, while creating a private remedy for its breach.⁵⁵

Voluntary incorporation of federal standards can benefit states in several ways. One advantage of state incorporation of federal law is that it allows the creation of supplemental private remedies that serve the dual purposes of compensation and deterrence,⁵⁶ thereby reinforcing a comprehensive federal remedial scheme. When a plaintiff has suffered injury through another's violation of a statutory duty, state incorporation recognizes that the plaintiff is entitled to compensation for the "wrong done to him."⁵⁷ At the same time, a private remedy serves to enforce the statutory duty and vindicate the federal norm by deterring unlawful conduct.⁵⁸

Furthermore, the option of incorporating federal law enhances flexibility in the development of state regulatory and remedial schemes. A state is

54. See *Pollard v. Bailey*, 87 U.S. (20 Wall.) 520, 527 (1874) ("A general liability created by statute without a remedy may be enforced by an appropriate common-law action.").

55. Texas, for example, incorporated federal safety standards for mobile home construction into state law and provided a private right of action for consumers:

While the state's model of enforcement was designed with reference to the federal law, Texas has extended the implications of the federal law by providing redress for the individual. . . .

The Texas legislature, rather than the United States Congress, has been sympathetic to enforcement of these federal duties for the benefit of the individual purchaser.

Gatlin v. Countryside Indus., 564 F. Supp. at 1495. See also *Greene*, *supra* note 3, at 300-01 (states may attach additional consequences to violations of federally defined obligations); *Mermin*, *supra* note 3, pt. 1, at 1-2 (states may supplement federal regulatory schemes by adopting and enforcing federal standards).

56. See *Frankel*, *supra* note 4, at 555-57 (discussing, in context of implication doctrine, deterrence and compensation justifications for private causes of action under federal securities statutes).

57. *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916) (citing *Anonymous*, 6 Mod. 26-27, 87 Eng. Rep. 791, 791 (Q.B. 1703) (per Holt, C.J.)). See also *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 23 (1981) (Stevens, J., concurring in part and dissenting in part) ("Although criminal laws and legislation enacted for the benefit of the public at large were expected to be enforced by public officials, a statute enacted for the benefit of a special class presumptively afforded a remedy for members of that class injured by violations of the statute.").

58. There may, of course, be a risk of overdeterrence through the creation of private actions. See *infra* text accompanying notes 94-97. For a critique of private remedies under the federal securities laws, see *Frankel*, *supra* note 4, at 570-78. *Frankel* argues that the provision of private actions under the broad and vague standards of the federal securities acts creates indeterminate, expansive liability which may deter useful market activity, and that the costs arising from this overdeterrence may outweigh the benefits of private enforcement. *Id.* at 578.

under no compulsion to adopt a federal standard as the definition of the state duty of care or to extend a private right of action for its violation beyond the class of plaintiffs recognized by the federal law.⁵⁹ Yet if a state voluntarily incorporates the federal standard in a state cause of action, the state may create additional sanctions for breach of the federal law.⁶⁰ Moreover, state legislatures and courts are free to tailor the nature and scope of the remedy provided, as *Crane* illustrates.⁶¹

State incorporation of federal law may also promote uniformity⁶² between state and federal law,⁶³ mitigating the risk of conflict between state

59. States will not always incorporate a federal standard as the state norm. A state that is indifferent or hostile to a federal standard may not wish to commit its resources to providing additional enforcement of such a standard. A state may be indifferent to the compensation of plaintiffs injured through violation of such a federal statute, and may indeed wish to insulate potential defendants from any additional liability under the federal standard. A state, for example, may have a strong interest in creating a regulation-free legal climate in order to attract new industry.

Aside from indifference or hostility toward federal standards, states may prefer to create their own unique standards in response to particularized state and local concerns. This comports well with the view that the states should function as social laboratories, each independently seeking the optimum solution to any given concern. As a practical matter, however, in areas in which there is an existing federal regulatory scheme, the possibility of federal preemption may constrain the states' ability to create diverse regulatory standards. *See infra* text accompanying notes 68–104.

60. A distinction should be made, however, between the creation of additional state sanctions for violations of a federal duty that already applies of its own force within the state, where the state's action merely enlarges the class of plaintiffs who may bring suit for violations of the standard, *see Moore*, 291 U.S. at 205, and the adoption of a federal standard to govern conduct not previously subject to federal governance, where the state's action extends the federal duty to a separate class of state defendants. In *Moore*, the defendant railway company was an interstate carrier and was therefore subject to a preexisting federal duty to abide by the provisions of the Federal Safety Appliance Acts. The Kentucky statute merely enlarged the class of plaintiffs eligible to bring suit for violation of the federal standards to include intrastate as well as interstate employees. In such a case, the existence of a concurrent federal regulatory scheme constrains the state's use of the federal standard. This is the issue addressed in this Note, for the denial of an implied private right of action almost presupposes the existence of a rather comprehensive federal remedial scheme. Any attempt by a state to incorporate or employ a federal standard in a manner inconsistent with the federal regulatory scheme is likely to run afoul of the preemption doctrine, *see infra* text accompanying notes 68–104.

If, on the other hand, the defendant in *Moore* had been a municipal or intrastate trolley car railway rather than an interstate carrier, and therefore not subject to a preexisting federal duty, the state's action would have extended the federally defined duty to a new class of defendants, intrastate trolley lines. *See generally* Note, *supra* note 3, at 1503–04 (discussing this distinction in context of availability of Supreme Court review of hybrid state law). When the federal standard does not apply of its own force to the conduct that gives rise to the suit, the state is free to employ the standard in the development of the state regulatory or remedial scheme in any manner it deems fit.

61. In *Crane*, although the State of Iowa had adopted a federal standard of care, the Supreme Court held that the state was free to provide a defense of contributory negligence in suits under Iowa law even though the defense had been abrogated in suits under federal law. *See Crane v. Cedar Rapids & Iowa City Ry.*, 395 U.S. at 164.

62. Uniformity as used here is a relative term. State incorporation of federal law would not create greater uniformity of law than would exist if private plaintiffs had *no* remedy for violations of their federal statutory rights, but it does promote greater uniformity of law than would exist if each of the 50 states were to create a distinct cause of action.

63. The uniformity of law sought to be achieved by state incorporation of federal law is attainable, however, only to the extent that the federal standard is clear and unambiguous, either as written or as authoritatively interpreted by the Supreme Court. To attain uniformity between state and federal law and between the laws of the several states, all states adopting a given federal regulation must adhere to the federal interpretation of that regulation. *See* Note, *supra* note 3, at 1502.

and federal regulatory enforcement schemes and thereby allowing states to create substantive regulatory programs in areas in which state action might otherwise be wholly preempted.⁶⁴ Further, the creation of parallel state standards provides an element of predictability and precedent to those who must obey the law, for the state may not impose a duty more burdensome than the identical and pre-existing federal duty.⁶⁵ Moreover, if a number of states were to adopt a given federal substantive standard as their own, this incorporation of federal law might also promote uniformity of law among the states themselves, thereby avoiding commerce-clause conflicts between coequal state laws.⁶⁶

Finally, state incorporation of federal law arguably combines the best features of state and federal regulatory systems. Although federal courts have only limited powers to fashion judicial remedies for statutory wrongs, state legislatures and common law courts of general jurisdiction are free to create new remedies for violations of any given standard of conduct, and to tailor these remedies to suit the state's purposes. Thus, when fashioning remedies state courts and legislatures can exercise a measure of creativity that is unavailable in enforcement through the federal courts. At the same time, however, by adopting federal law a state may take advantage of the sophistication and expertise embodied in the federal

One means of ensuring uniformity is Supreme Court review of state court interpretations of federal law incorporated by reference. The availability of Supreme Court review, however, is the subject of considerable judicial and scholarly dispute. An argument can be made denying entirely the availability of Supreme Court review in hybrid state law cases. This view posits that the right of action is created by the state, the remedy is created by the state, and the incorporated federal standards are purely definitional. There is, therefore, no federal question and thus no basis for Supreme Court review. State law, purportedly regulating only state concerns, wholly subsumes the federal standards. *See Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 214 (1921) (Holmes, J., dissenting).

Professor Tribe expresses a more moderate view: "[T]he Supreme Court, in deciding whether it has jurisdiction to review state court interpretations of hybrid state law, must perform what is essentially a supremacy clause analysis: the Court must decide whether state autonomy threatens federal interests to such an extent that uniformity must prevail." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-33, at 122 (1978) (footnote omitted). Other commentators argue persuasively that Supreme Court review is justified to the extent that the incorporated federal law is operative of its own force. *See Greene, supra* note 3, at 304-05, 325-26; Note, *supra* note 3, at 1503-04. Finally, in some instances, such as where the possibility of preemption arises, the very existence of the hybrid state law may present a federal question sufficient to sustain Supreme Court review. *See Greene, supra* note 3, at 300.

64. "[B]y preventing the state from interpreting [a federal act] so as to impose duties at variance with those which the federal courts find to have been required by the federal act, a possible invalidation of the state law on the grounds that federal law 'filled the field' is avoided." Note, *supra* note 3, at 1502 (footnote omitted).

65. *See id.* at 1501.

66. The Supreme Court has considered the effect of other states' law in assessing commerce-clause claims. *See, e.g., Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978) (invalidating as imposing undue burden on interstate commerce a state's regulation barring all trucks longer than 55 feet from its highways, when 33 other states permitted the use of standard-sized 65 foot double trailers); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (invalidating as imposing undue burden on interstate commerce a state statute requiring use of contour mudguards on trucks and trailers operating within state when use of conventional mudflaps was permissible in at least 45 other states).

standard,⁶⁷ and thereby achieve and maintain conformity with the federal standard in furtherance of a single nationwide duty. In short, state incorporation of federal law represents the best of both worlds.

III. LIMITS TO THE CREATION OF STATE RIGHTS OF ACTION

The primary challenge to state incorporation of federal law is the possibility of federal preemption.⁶⁸ Under the supremacy clause, a state may not act in contravention of the express will of Congress. If the creation of private remedies through state incorporation of federal law would thwart the express intent of Congress or severely impair the operation of a comprehensive federal regulatory scheme, such state action would be barred under the doctrine of federal preemption. Federal law, and particularly a comprehensive remedial scheme, might be deemed to have "filled the field," leaving no room for state action of any kind.⁶⁹ In other instances, a comprehensive federal regulatory scheme may partially preclude state action, or may circumscribe the nature and scope of permissible state regulatory activity. Alternatively, a court may find that a newly created state right of action directly conflicts with the federal enforcement scheme.

If Congress intends to preempt the creation of state remedies, it must do so "expressly or by fair implication."⁷⁰ In the federal system, there is an assumption of concurrent jurisdiction between the states and the federal government.⁷¹ Thus, unless Congress makes an unambiguous statement of

67. The federal standard may have been established after a full congressional weighing of the interests at stake on the basis of nationwide evidence. Moreover, the standard may have been further refined and perfected through precedents established by the federal regulatory agency in the course of its practical enforcement efforts. Finally, a federal standard is specially designed to be applied effectively throughout the country.

68. The preemption issue arises under the supremacy clause of the United States Constitution. U.S. CONST. art. VI, § 2. A state law that is incompatible with a federal statute must yield to, and is thus "preempted" by, the federal legislation. See generally Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975) (recent Supreme Court decisions indicate that state legislation will be allowed to stand where Congress has not expressed a clear intent to preempt, or where conflict is neither directly related to the purpose of the federal statute nor immediately apparent).

Another challenge to incorporation is the prohibition contained in several state constitutions against delegation of state legislative power to other lawmaking bodies, especially through the adoption of federal law *in futuro* as well as that currently existing. While this presents a formidable obstacle to the incorporation of federal law, states have generally succeeded in circumventing such prohibitions. A state, for example, may adopt only existing federal law, with the proviso that the state shall be guided, but not bound, by future federal interpretations of the incorporated federal legislation. See generally Mermin, *supra* note 3, pt. 1, at 4-26 (concluding that because of recognized doctrinal exceptions, such state constitutional prohibitions ordinarily will not bar adoption of federal law).

69. See HART & WECHSLER, *supra* note 3, at 800-03.

70. C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 35-36 (4th ed. 1983) ("[F]ederal jurisdiction is not exclusive unless Congress chooses to make it so, either expressly or by fair implication.") (footnote omitted).

71. See *Clafflin v. Houseman*, 93 U.S. 130, 136 (1876) (state courts can exercise concurrent jurisdiction "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case"). The principle of concurrent jurisdiction was recognized by

its intent to oust the states' jurisdiction, state common law courts of general jurisdiction are presumed to be competent to hear any claim.⁷² Furthermore, the courts should not seek out conflicts between a state and the United States where none clearly exists.⁷³

The Supreme Court's recent opinions denying implied rights of action under federal statutes present no bar to the creation of state rights of action.⁷⁴ The Supreme Court has not held that private rights of action would be inappropriate or in conflict with existing enforcement mechanisms, but rather that such remedies were not expressly authorized by Congress.⁷⁵ In other words, the Court has not put forward positive arguments against private rights of action, but has in most cases merely accepted the negative implication that because Congress failed to authorize such a right of action, Congress must not have intended to create one.⁷⁶ While the Court has held that other remedies authorized by a particular

Alexander Hamilton in *THE FEDERALIST* even before the ratification of the Constitution:

When . . . we consider the state governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the state courts would have concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited.

THE FEDERALIST NO. 82, at 536 (A. Hamilton) (Modern Library ed. 1937) (emphasis in original). See generally Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 313-25 (1976) (discussing *Clafin* and concurrent jurisdiction); Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509 (1957) (discussing exclusive and concurrent jurisdiction).

72. *Clafin v. Houseman*, 93 U.S. at 136; accord *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962) (federal laws may be fully enforced in state courts). The historic jurisdiction of the states is not to be superseded by federal legislation "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); accord *Iconco v. Jensen Constr. Co.*, 622 F.2d 1291, 1296 (8th Cir. 1980); *Patry v. Rosenthal & Co.*, 534 F. Supp. 545, 547 (D. Kan. 1982).

73. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960); accord *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130 (1978); *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 45 (1966); *Iconco v. Jensen Constr. Co.*, 622 F.2d at 1298.

74. The Court has generally chosen to decide implication cases on threshold jurisdictional issues rather than on the substantive merits of providing a private right of action within the context of an existing regulatory scheme. "[A]s the Court's recent opinions have made clear, the question whether a statute creates a private right of action is ultimately 'one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.'" *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 770 (1981) (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)). See also *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981) ("In declining to provide a right to contribution [from co-conspirators under federal antitrust laws], . . . we recognize that, regardless of the merits of the conflicting arguments, this is a matter for Congress, not the courts, to resolve.") (emphasis added).

There are two notable exceptions. See *Universities Research Ass'n v. Coutu*, 450 U.S. 754 (1981) (finding no implied private right of action for back wages under the Davis-Bacon Act under a contract that was administratively determined not to call for Davis-Bacon work and which therefore contained no prevailing wage stipulation); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974) (finding no implied right of action for private plaintiffs under the Amtrak Act because such right of action would interfere with comprehensive federal enforcement scheme).

75. The argument that implied private rights of action would conflict with particular federal regulatory schemes has generally been advanced by academic commentators rather than by the courts. See, e.g., Frankel, *supra* note 4, at 570-85.

76. But see exceptions noted *supra* note 74.

federal statute provided adequate relief, it has done so without suggesting that a private right of action would result in overenforcement or be otherwise inimical to federal goals.⁷⁷ Therefore, to the extent that the Supreme Court puts forward no positive arguments against a private right of action, state rights of action should not be voided as in conflict with and thus preempted by federal law.

Nonetheless, a state may not act in a manner that creates an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁷⁸ Therefore, even in the absence of a clear statement prohibiting states from creating private remedies where an implied federal right of action has been denied, courts and legislatures must still consider whether the nature of the particular federal regulatory scheme precludes further state action.⁷⁹

The sole question is whether Congress has impliedly prohibited states from incorporating the federal law as the state duty of care and from creating additional remedies for its breach.⁸⁰ The analysis must begin with a consideration of the language and history of the regulatory statute. If Congress has made an explicit statement that permits, limits, or prohibits state action, the role of the states in the creation of supplementary remedies is generally quite clear.⁸¹ There may be, for example, a statutory bar to state action, as when Congress explicitly declares a given federal remedial scheme to be a plaintiff's sole and exclusive remedy,⁸² or when a statute clearly provides for exclusive federal jurisdiction.⁸³ Likewise, the exis-

77. But see exceptions noted *supra* note 74.

78. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted).

79. For an apposite, albeit dated, discussion of preemption in relation to state incorporation of federal law, see Mermin, *supra* note 3, pt. 2, at 203-08. For an excellent discussion of the closely related issue of the survival of prior remedies under federal regulatory statutes, see O'Neil, *Public Regulation and Private Rights of Action*, 52 CALIF. L. REV. 231, 257-70 (1964). O'Neil's analysis was published just prior to the Supreme Court's broadening of the implication doctrine in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), and in fact foreshadows the expansion of federal implied rights of action. The Supreme Court's implication doctrine has come full circle since 1964, and thus O'Neil's article, which appeared before the heyday of the implied right of action, now presents a timely and cogent analysis.

For a discussion of the creation of private remedies in relation to comprehensive regulatory schemes in the context of the implication doctrine, see Comment, *Private Rights of Action*, *supra* note 4, at 1411-37.

80. See cases cited *supra* notes 24 & 25.

81. See, e.g., *Gatlin v. Countryside Indus.*, 564 F. Supp. 1490, 1492 (N.D. Tex. 1983) (Mobile Home Construction and Safety Standards Act provided that "[N]o state . . . shall have any authority either to establish, or to continue in effect . . . any standard . . . which is not identical to the Federal . . . standard.").

82. See *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974) (discussed *supra* note 74).

83. The federal courts generally have exclusive federal jurisdiction over actions arising under the bankruptcy, patent and copyright, and antitrust laws, as well as in a number of other areas of primarily federal interest. See generally D. CURRIE, *FEDERAL COURTS* 201-06 (3d ed. 1982) (discussing exclusive federal jurisdiction); Note, *supra* note 71, at 509-11 (same).

tence of a "savings clause" preserving the jurisdiction of state courts is strong evidence of intent to permit state action.⁸⁴

As in the implied federal rights of action context, however, difficulties arise when the statute is silent as to the provision of private remedies.⁸⁵ Courts must then consider several other factors. First, the provision of a private state remedy must be consistent with the purpose of the federal statute, broadly construed.⁸⁶ The creation or continuance of a state right of action should be allowed as long as the resultant remedy is consistent with and promotes the attainment of the federal goals.⁸⁷ A second factor is the identity of the class the statute was intended to protect. While in the implied rights of action context federal courts are constrained by the exact language of the statute and an increasingly restrictive test of congressional intent,⁸⁸ state courts are free to construe the identity of the class intended to be protected more broadly,⁸⁹ while still maintaining consistency with the purpose of the statute.⁹⁰ Indeed, the primary motive for state incorporation of federal law, as recognized in *Moore*, is to extend the protections of the federal standard to a class of plaintiffs not expressly provided for in the federal statute.⁹¹ A third general factor is a consideration of whether a

84. See *Patry v. Rosenthal & Co.*, 534 F. Supp. at 548-49.

85. See, e.g., *Iconco v. Jensen Constr. Co.*, 622 F.2d at 1297 (Small Business Act and its legislative history neither expressly authorize nor expressly prohibit suits by unsuccessful bidders against successful ones).

86. State courts of general jurisdiction are traditionally vested with the common law power to fashion rights and remedies. Therefore, in determining the appropriateness of the provision of a remedy by a state court, rather than by a federal court of limited jurisdiction, a statute should be construed broadly rather than narrowly.

87. See *Hofbauer v. Northwestern Nat'l Bank*, 700 F.2d 1197, 1201 (8th Cir. 1983) ("We do not see how these [federal] goals would be frustrated by allowing common-law negligence suits . . ."); *Iconco v. Jensen Constr. Co.*, 622 F.2d at 1298.

88. See *supra* note 53; *infra* note 90.

89. Federal courts sitting in diversity may also be free to construe the definition of the class to be protected more broadly in interpreting state law. See *infra* note 90.

90. See *Hofbauer v. Northwestern Nat'l Bank*, 700 F.2d at 1200. In *Hofbauer*, the court held that the plaintiffs had no implied right of action under the National Flood Insurance Act:

The Hofbauers are members of a class for whose benefit the statute was enacted. But in order to satisfy the first of the *Cort v. Ash* criteria they must show more. They must be members of a "special class" for whose benefit the statute was enacted . . . and show that Congress drafted the statute with an "unmistakable focus on the benefitted class." . . . This they cannot do.

Id. (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 691 (1979)) (citations omitted).

In remanding the case to state court, however, the Eighth Circuit indicated that if Minnesota common law adopted the requirements of the federal Act as the applicable standard of conduct, the plaintiffs might be able to state a valid claim for common law negligence: "The purpose of the statute is to aid flood victims and lessen federal expenses for flood relief. We do not see how these goals would be frustrated by allowing common-law negligence suits . . ." *Id.* at 1201 (emphasis added). See also *Iconco v. Jensen Constr. Co.*, 622 F.2d at 1298-99 (although Small Business Act provided no authorization for civil suits of any kind, the court indicated that plaintiff could base common law action for fraud and unjust enrichment by unsuccessful bidder against successful one on violation of federal standard).

91. See *Moore v. Chesapeake & O. Ry.*, 291 U.S. 205, 213-14 (1934).

state right of action would conflict with the federal regulatory scheme.⁹² In contrast to the creation of new and possibly conflicting state duties, the creation of identical parallel standards and the provision of merely supplemental state remedies minimizes the risk of federal preemption.⁹³ Nonetheless, a state right of action could create conflict by distorting the impact and incentives of an intricate and finely balanced comprehensive federal enforcement scheme.⁹⁴ The problem is essentially one of overdeterrence.⁹⁵ The cumulation of civil, administrative, and possibly criminal sanctions may overburden a regulated industry.⁹⁶ Creation of a private right of action for damages may disturb the level of enforcement sought to be maintained by the federal regulatory agency,⁹⁷ and the prospect of potential civil liability may deter even lawful conduct on the part of regulated defendants.

Furthermore, tensions may arise between private and agency enforcement.⁹⁸ First, private enforcement could pose a threat to the uniformity of interpretation and application of the federal standard promulgated by the agency. Second, a private remedy may produce results at odds with the aims and policy objectives of the the regulatory statute, as interpreted by the agency. Third, a private remedy may vitiate plaintiffs' incentives to exhaust their administrative remedies, thereby encroaching upon the agency's regulatory authority. Finally, a private remedy may have long-

92. Cf. *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 45-46 (1966) (New York Alcoholic Beverage Control (ABC) laws not in conflict with Sherman and Robinson-Patman Acts, as obedience to New York ABC laws did not compel violation of federal antitrust laws).

93. But see HART & WECHSLER, *supra* note 3, at 802-03 (federal law may preempt even identical parallel state law). Federal preemption of identical parallel state law is rarely invoked in the context of cases arising under the commerce clause, but is occasionally invoked in cases arising in areas in which Congress has been granted exclusive jurisdiction or special authority under the Constitution, or in areas which Congress has carved out as particularly federal enclaves. See *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (federal air commerce regulation); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964) (patent); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) (same); *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959) (communications regulation); *San Diego Bldg. Trade Council v. Garmon*, 359 U.S. 236 (1959) (labor relations); *Garner v. Teamster's Local Union No. 776*, 346 U.S. 485 (1953) (same); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (foreign affairs). See generally Note, *supra* note 68, at 632-39 (discussing congressional intent and other factors considered in preemption analysis).

94. See generally Frankel, *supra* note 4, at 570-84 (discussing possibility of conflict between private rights of action and federal securities regulation); O'Neil, *supra* note 79, at 261-67 (discussing effect of private remedies on federal regulatory schemes); Comment, *Private Rights of Action*, *supra* note 4, at 1425-26, 1433-35 (suggesting that private rights of action could, in some circumstances, result in overdeterrence and interference with agency enforcement).

95. There is now a substantial literature providing economic analyses of optimal deterrence in private and public enforcement of law. See, e.g., Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 GEO. L.J. 1075 (1980); Schwartz & Tullock, *The Costs of a Legal System*, 4 J. LEGAL STUD. 75 (1975).

96. See O'Neil, *supra* note 79, at 263.

97. *Id.*

98. *Id.* at 264.

run economic effects both within and between regulated industries, resulting in an allocation of resources away from excessively regulated or overburdened activities or industries toward less regulated sectors.⁹⁹ As a result of these tensions, the provision of a private remedy might create a situation where the agency "can no longer speak with authority in its own house."¹⁰⁰ Some of these tensions could be resolved by referring appropriate cases to the agency for an initial adjudication.¹⁰¹ Inevitably, however, some tensions would remain. An evaluation of the practical effect of a private remedy on a federal regulatory scheme as a whole may require a balancing of the equity of providing compensation to injured individuals against the value to the industry and the public of a purely public enforcement scheme.¹⁰² If the private remedy would create no conflict, or if the equities of providing compensation to injured individuals outweigh potential minor distortions of the federal regulatory scheme,¹⁰³ a private remedy should be allowed.¹⁰⁴

CONCLUSION

Unlike their federal counterparts, state common law courts are vested with broad and expansive powers to create rights and remedies. For a state court to assume that its own remedial powers are no broader than those of the federal courts¹⁰⁵ reflects a fundamental misconception of the federalism concerns at issue in this area. State rights of action are created not by federal courts of limited jurisdiction, but by common law courts of

99. These tensions are more fully discussed in O'Neil, *supra* note 79, at 264-67.

100. *Id.* at 263 (footnote omitted).

101. The doctrine of primary jurisdiction allows courts to defer to administrative agencies for the initial adjudication of some disputes. *Patry v. Rosenthal & Co.*, 534 F. Supp. 545, 551-52 (D. Kan. 1982). See generally S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 992-1011 (1979 & Supp. 1982) (discussing primary jurisdiction doctrine); K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* §19.04 (1976) (discussing, in context of National Labor Relations Board, the primary jurisdiction of federal agencies as against state courts and state agencies). For a discussion of primary jurisdiction and the mechanics of referral in the closely related context of the survival of prior remedies under comprehensive regulatory schemes, see O'Neil, *supra* note 79, at 270-79.

102. Cf. O'Neil, *supra* note 79, at 270 (discussing survival of prior remedies under comprehensive regulatory schemes).

103. See *New York Dep't of Social Serv. v. Dublino*, 413 U.S. 405, 423 n.29 (1973) (noting that "[c]onflicts, to merit judicial rather than cooperative federal-state resolution, should be of substance and not merely trivial or insubstantial"); *supra* note 73 and accompanying text.

104. While the three factors of the statute's purpose, the class intended to be protected, and the potential for conflict between state and federal enforcement schemes should be considered carefully in determining whether Congress has preempted the creation of private remedies through state incorporation of federal law, these are by no means the only relevant factors. Preemption analysis requires a particularized examination of the specific federal enforcement scheme, L. TRIBE, *supra* note 63, § 6-25, at 386, and the Supreme Court has made clear that "[i]n the final [preemption] analysis, there can be no one crystal clear distinctly marked formula." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

105. See, e.g., *R.B.J. Apartments, Inc. v. Gate City Sav. & Loan Ass'n*, 315 N.W.2d at 289 (discussed *supra* note 37).

State Incorporation of Federal Law

general jurisdiction. The state courts' power to create rights of action and remedies is limited only by the possibility of federal preemption. Preemption aside, where the federal courts have denied a litigant a remedy for a federal right, it is not only permissible, but proper for state courts of general jurisdiction to step into the breach created by the foreclosure of federal remedies. In view of the apparent demise of the implied right of action under the Burger Court, state incorporation of federal law is an appropriate step forward in the vindication of private individuals' state and federal statutory rights.

—*Pauline E. Calande*