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JUSTICE SCALIA, IMPLIED RIGHTS OF ACTION, AND HISTORICAL PRACTICE

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INTRODUCTION

Justice Scalia influenced constitutional and statutory interpretation in U.S. courts in important ways. Regarding constitutional interpretation, Justice Scalia argued that the role of courts is to apply the original public meaning of the Constitution, as best as they can determine it. In defending this position, Justice Scalia moved scholars, judges, and lawyers to account more for constitutional text, structure, and historical practice when interpreting the Constitution.[1] Regarding statutory interpretation, Justice Scalia argued that the role of courts is to apply the meaning that statutory text conveys to a reasonable and informed reader. In defending this position, Justice Scalia moved scholars, judges, and lawyers to think harder about questions involving statutory text, legislative history, legislative purpose, legislative intent, canons of construction, and so on. During his tenure on the Supreme Court, Justice Scalia applied these methods of interpretation to a wide range of constitutional and statutory questions.

This Essay examines a specific area that Justice Scalia influenced through the methods of interpretation that he applied—namely, the question of "implied rights of action." When may a plaintiff bring a federal right of action for damages for the violation of a federal statute that does not expressly create one? This question is one of a series of related questions, such as when may a plaintiff pursue equitable relief for a statutory violation, or pursue legal or equitable relief for a constitutional violation—absent express congressional authorization. The Court has considered the question of when a plaintiff may pursue damages for a federal statutory violation on its own terms, however, and this Essay will address this question alone.[2] At one time, the Supreme Court treated this question as a question of federal judicial power to apply federal common law. Today, in part due to Justice Scalia's influence, the Court treats the question of implied rights of action as a question of statutory interpretation.

Justice Scalia advocated two positions that influenced how the Court determines whether a private damages action is available for the violation of a federal statute. First, Justice Scalia contended that legislative action, not unenacted policy considerations, should determine whether a private right of action is available for the violation of a federal statute. Second, Justice Scalia

1 *See* William K. Kelley, *Justice Antonin Scalia and the Long Game*, 80 GEO. WASH. L. REV. 1601 (2012); Chief Justice John G. Roberts, Jr. et al., *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 1 (2016).

2 Even though this Essay does not address implied rights of action for damages for constitutional violations, or the availability of equitable remedies for federal statutory or constitutional violations, the history this Essay describes in Part III may be relevant to those questions as well.

argued that courts should apply a textual method—rather than a purposive one—to determine whether Congress authorized a civil damages remedy for a federal statutory violation. In 2001, a majority of the Court adopted both of these positions in *Alexander v. Sandoval*.[3] In *Sandoval*, the Court (1) held that congressional intent determines whether a plaintiff has a right of action for the violation of a federal statute and (2) applied a textual method to ascertain whether Congress demonstrated such an intent.[4]

Judges and scholars have argued that the approach the Court adopted in *Sandoval* is not faithful to historical practice—a critique that aligns with Justice Scalia's commitment to resolve questions of federal judicial power (like other constitutional questions) in accord with historical understandings and practice. Critics have argued that historical practice refutes the position that legislative intent should determine the existence of a private right of action for a federal statutory violation.[5] In determining questions of federal judicial power, as in determining constitutional questions generally, Justice Scalia placed significant reliance on historical practice. As a matter of historical practice, it is argued, federal courts adjudicated common law actions for violations of federal statutes since the founding regardless of whether a violated federal statute itself created a right of action. This historical practice, the argument goes, demonstrates that federal courts today should be understood to have power to adjudicate private damages claims for the violation of a federal statute regardless of whether the statute itself authorizes a cause of action. If Justice Scalia had recognized this historical practice, the argument suggests, he would have understood under the demands of his own method of constitutional interpretation that the federal judicial power includes power to provide legal remedies for violations of federal statutes regardless of whether Congress authorized them. In other words, fidelity to historical practice requires a return to the practice of federal courts supplying implied rights of action as a form of federal common law.

This Essay seeks to demonstrate that historical practice in fact does not refute the approach that Justice Scalia articulated for the Court in *Sandoval*. The claim that federal courts historically adjudicated common law actions for federal statutory violations, independently of any congressional action, overlooks important early acts of Congress. The First Congress did not leave federal courts free to determine for themselves what causes of action would be available to litigants. Rather, in two little-noticed acts—little-noticed at least today—Congress defined the causes of action that federal courts could adjudicate. In the Process Acts of 1789[6] and 1792,[7] Congress directed federal courts to apply the same forms of action as those used by the courts of the state in which they sat. Understood in proper legal and historical context, these acts directed federal courts to borrow state causes of action to remedy

3 532 U.S. 275 (2001).

4 *Id.* at 286.

5 *See infra* Part II.

6 Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93 (repealed 1792).

7 Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (repealed 1872).

common law injuries, including injuries resulting from the violation of a federal statute. Congress continued this directive in the 1870s in the Conformity Act.[8]

Pursuant to these directives, when federal courts historically adjudicated common law causes of action for federal statutory violations, they were not doing so simply upon their own authority; rather, they were doing so pursuant to an express congressional authorization. With the eventual death of the forms of action in the early twentieth century and with the adoption of the Federal Rules of Civil Procedure in the 1930s, the congressional authorization to federal courts to borrow state causes of action dissipated, and the question of implied rights of action, as it is understood today, arose.

Any argument about implied rights of action and historical practice must account for these acts of Congress. Because federal courts had congressional authorization to adjudicate common law causes of action for much of U.S. history, the fact that historically federal courts adjudicated common law actions for federal statutory violations does not prove in itself that federal courts had independent authority to adjudicate such actions, absent congressional authorization. To the contrary, there is reason to think that federal courts would have been understood to lack authority to give common law remedies for federal statutory violations had Congress not authorized them to borrow state common law causes of action. In any event, regardless of whether historical practice proves that federal courts need congressional authorization to provide a damages remedy for a federal statutory violation, historical practice fails to prove that federal courts always had authority to supply such actions on their own.

This Essay proceeds as follows. Part I describes Justice Scalia's influence on the development of the Supreme Court's implied-rights-of-action jurisprudence. It explains both how he argued that the question of implied rights of action was a question of legislative intent and how he applied textual methods to determine such intent. Part II describes an important critique of his approach—namely, the claim that historical practice proves that federal courts may supply private rights of action for federal statutory violations regardless of congressional intent. Part III critically evaluates this critique of Justice Scalia's position. The idea that federal courts historically applied common law causes of action to remedy federal statutory violations without congressional authorization is a myth. From the first, federal courts heard only those causes of action that Congress had authorized them to hear. And there is reason to think that early federal courts would not have been understood to have power to define their own causes of action had Congress not provided this authorization from the start. At a minimum, however, historical practice does not establish that early federal courts understood themselves to have power to define and apply common law actions for federal statutory violations absent congressional authorization to do so.

8 Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197 (repealed 1934).

I. JUSTICE SCALIA AND IMPLIED RIGHTS OF ACTION

Justice Scalia made two significant contributions in the area of implied rights of action, beginning shortly after he joined the Court. First, Justice Scalia argued that, as a separation of powers matter, legislative intent—rather than judicial discretion—should determine whether a private right of action is available to remedy a federal statutory violation. His view was that the Court's role is to determine whether the text of a statute demonstrates that Congress made a private right of action available. Second, Justice Scalia argued that the Court should apply a textual method to determine whether Congress made such a right of action available, not a purposive one or one otherwise based on legislative history. In 2001, a majority of the Court adopted both of these positions in *Alexander v. Sandoval*.[9] This Part describes these aspects of Justice Scalia's approach to implied rights of action.

A. Legislative Intent

First, Justice Scalia argued that legislative intent—not unenacted policy considerations—should determine whether a private right of action is available for the violation of a federal statute. To understand his position, it is useful to recount—at least briefly—the various approaches to implied rights of action that the Court had taken in the decades before Justice Scalia joined the Court.

1. From Federal Common Law to Legislative Intent

In the two decades before Justice Scalia joined the Court, the Court moved from applying rights of action as a matter of federal common law to determining the existence of rights of action from congressional intent.

a. Federal Common Law

In the 1960s, the Court exercised a broad power to fashion private rights of action as the Court thought necessary to effectuate congressional purposes. The Court's 1964 decision in *J.I. Case Co. v. Borak*[10] typifies this approach. In *Borak*, the Court held that private parties may bring a right of action to remedy violations of section 14(a) of the Securities Exchange Act of 1934, a provision that did not itself create a right of action.[11] In so holding, the Court determined that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."[12] The Court observed that it "is not uncommon for federal courts to fashion federal law where federal rights are concerned."[13] Under this

9 532 U.S. 275.

10 377 U.S. 426 (1964).

11 *Id.* at 430.

12 *Id.* at 433.

13 *Id.* at 434 (internal quotation marks omitted) (quoting Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448, 457 (1957)).

approach, the Court supplied a cause of action without determining whether or not Congress intended that one exist. This approach thus involved the application of "federal common law"—that is, "federal rules of decision whose content cannot be traced directly by traditional methods of interpretation to federal statutory or constitutional commands."[14]

b. *Cort* Multifactor Test

A decade later, in *Cort v. Ash*,[15] the Court applied a multifactor balancing test to determine whether a plaintiff had an implied right of action for the violation of a federal statute. Under this approach, the Court examined (a) whether the plaintiff belonged to a class for the special benefit of which the statute was enacted, (b) whether there was a legislative intent to create a remedy, (c) whether a remedy would be consistent with legislative purpose, and (d) whether the existence of a cause of action was a matter traditionally relegated to state law.[16] This test included "legislative intent" as one of a number of factors the Court would consider.

The Court applied this test in 1979 in *Cannon v. University of Chicago* to find that a plaintiff could bring an implied right of action for damages to remedy an alleged violation of Title IX. [17] The *Cannon* decision sparked a vigorous dissent by Justice Powell, who argued that the Court should focus exclusively on legislative intent in determining whether a right of action is available for a federal statutory violation.[18] Justice Powell contended that "the mode of analysis" that the Court had "applied in the recent past cannot be squared with the doctrine of the separation of powers."[19] "As the Legislative Branch, Congress . . . should determine when private parties are to be given causes of action under legislation it adopts."[20] Thus, "[w]hen Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy."[21] Instead, federal courts should entertain rights of action for federal statutory violations only when they have "the most compelling evidence that Congress in fact intended such an action to exist."[22]

14 RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 635 (7th ed. 2015).

15 422 U.S. 66 (1975).

16 *Id.* at 78.

17 441 U.S. 677, 687–710 (1979).

18 *Id.* at 730–49 (Powell, J., dissenting).

19 *Id.* at 730.

20 *Id.*

21 *Id.* at 730–31.

22 *Id.* at 749. In an opinion concurring in the judgment, Justice Rehnquist agreed with Justice Powell that "[t]he question of the existence of a private right of action is basically one of statutory construction." *Id.* at 717 (Rehnquist, J., concurring). Justice Rehnquist explained that,

> [n]ot only is it "far better" for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future

c. Legislative Intent

Shortly after the Court decided *Cannon*, it shifted its analysis toward the analysis that Justice Powell had advocated. In 1979, in *Touche Ross & Co. v. Redington*,[23] the Court held that a plaintiff could not bring a private right of action for the violation of section 17(a) of the Securities Exchange Act of 1934.[24] In so holding, the Court defined its task as "limited solely to determining whether Congress intended to create [a] private right of action."[25] Under this mode of analysis, the Court determined that "there is no basis in the language of § 17(a) for inferring that a civil cause of action for damages lay in favor of anyone."[26] Because it was "not at liberty to legislate," the Court concluded that "[i]f there is to be a federal damages remedy under these circumstances, Congress must provide it."[27]

* * *

When Justice Scalia joined the Court in 1986, then, the Court had moved in the direction of determining the existence of implied rights of action on the basis of legislative intent. The Court continued, however, to rely in certain cases on the test of *Cort v. Ash* to determine such intent.[28] In such cases, the Court considered itself free to ascertain congressional intent from the range of contextual factors that *Cort* identified.

2. Justice Scalia and Legislative Intent

Early in his tenure on the Supreme Court, Justice Scalia argued in a concurring opinion—as Justice Powell had argued in dissent in *Cannon*—that the creation of a private right of action is a legislative decision, not a judicial one. In *Thompson v. Thompson*,[29] the Court held in 1988 that no private right of action was available for violations of the Parental Kidnapping Prevention Act of 1980 (PKPA).[30] Justice Scalia agreed with this conclusion, but he disagreed with the Court's method of reaching it.[31] The *Thompson* Court applied the *Cort* test to determine that no cause of action was available. Although "[t]he intent of Congress remains the ultimate issue," the Court explained, a "focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in

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should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.

Id. at 718.

23 442 U.S. 560 (1979).

24 *See id.* at 563 n.2 (containing the statutory language).

25 *Id.* at 568.

26 *Id.* at 571.

27 *Id.* at 579.

28 *See, e.g.*, Thompson v. Thompson, 484 U.S. 174, 179 (1988).

29 484 U.S. 174, 187 (1988).

30 28 U.S.C. § 1738A (2012).

31 *See Thompson*, 484 U.S. at 188–92 (Scalia, J., concurring in the judgment).

mind the creation of a private cause of action."[32] Rather, "Congress' 'intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment.'"[33]

In his concurring opinion, Justice Scalia disagreed with the Court's understanding of congressional intent. Justice Scalia argued that in order for there to be an implied right of action, a statute must demonstrate "an actual congressional intent to create a private right of action."[34] He wrote that he was "at a loss to imagine what congressional intent to create a private right of action might mean, if it does not mean that Congress had in mind the creation of a private right of action."[35] "[T]o be sure," he continued, "the existence of intent may be inferred from various indicia; but that is worlds apart from today's Delphic pronouncement that intent is required but need not really exist."[36] Justice Scalia thus characterized the judicial search for congressional intent as a search for what Congress actually intended. Otherwise, he contended, courts would be imputing to Congress an intent that Congress did not demonstrate in the statute itself. Quoting Justice Powell's dissent in *Cannon*, Justice Scalia concluded, "[w]hen 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."[37] In this respect, Justice Scalia more or less signed on to the critique of implied rights of action that Justice Powell had articulated in his *Cannon* dissent and pushed it forward.[38]

B. Textual Method

Perhaps Justice Scalia's signal contribution in the area of implied rights of action was his insistence that the Court apply a textual method to determine congressional intent. If the judicial task is to determine whether Congress actually intended a right of action to exist, then the next question is how a court should make that determination. In this regard, Justice Scalia both rejected the *Cort* test as a means of determining congressional intent and refused to draw inferences about legislative intent from "contemporary legal context."[39]

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32 *Id.* at 179 (majority opinion).

33 *Id.* (quoting Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979)).

34 *Id.* at 188 (Scalia, J., concurring in the judgment).

35 *Id.*

36 *Id.* at 189.

37 *Id.* at 191 (internal quotation marks omitted) (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 730–31 (1979) (Powell, J., dissenting)).

38 *See also* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.").

39 *See* Alexander v. Sandoval, 532 U.S. 275, 288 (2001) (referring to the "contemporary legal context").

1. Rejecting the *Cort* Factors

First, Justice Scalia rejected the idea that the test of *Cort v. Ash* is an appropriate means of determining legislative intent. In *Thompson*, in holding that no implied right of action is available for violations of the PKPA, the Court explained:

> In determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute. As guides to discerning that intent, we have relied on the four factors set out in *Cort v. Ash*, along with other tools of statutory construction.[40]

Justice Scalia wrote in his concurring opinion that the Court's ongoing use of the *Cort* test was inconsistent with its more recent decisions that legislative intent was determinative.[41] "It could not be plainer," Justice Scalia wrote, "that we effectively overruled the *Cort v. Ash* analysis in *Touche Ross & Co. v. Redington*, . . . converting one of its four factors (congressional intent) into *the determinative factor*, with the other three merely indicative of its presence or absence."[42]

2. Rejecting Legal Context Absent Statutory Text

Second, Justice Scalia refused to draw inferences about legislative intent from contemporary legal context alone. Before he joined the Court, the Court analyzed in certain cases whether the Court's own practice of inferring private rights of action demonstrated a congressional intent that one exists (on the ground that the Court should impute to Congress an awareness that the Court would provide one). In *Cannon*, for example, in determining whether a private right of action was available under Title IX, the Court explained that Title IX was virtually identical to Title VI of the Civil Rights Act of 1964 in its language and administrative enforcement mechanisms.[43] "In 1972 when Title IX was enacted," the Court explained, "the critical language in Title VI had already been construed as creating a private remedy."[44] Because "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law," the Court concluded that it was "especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX."[45]

In his concurring opinion in *Thompson*, Justice Scalia rejected any broader use of contemporary legal context to discern the existence of a private right of action. When there is no indication in the text that Congress intended to create a right of action, he explained, an examination of "the 'context' of the legislation for indication of intent to create a private right of

40 *Thompson*, 484 U.S. at 179 (citation omitted).
41 *Id.* at 189 (Scalia, J., concurring in the judgment).
42 *Id.* (citations omitted).
43 Cannon v. Univ. of Chi., 441 U.S. 677, 694–95 (1979).
44 *Id.* at 696.
45 *Id.* at 696–98.

action . . . is entirely superfluous, since context alone cannot suffice."[46] As for *Cannon*'s use of legal context, he simply observed, without endorsing or rejecting that use, that the Court had used legal context in only two cases, including *Cannon*, "both of which involved statutory language that, in the judicial interpretation of related legislation prior to the subject statute's enactment, or of the same legislation prior to its reenactment, had been held to create private rights of action."[47] Regardless of whether he thought that this use of contemporary legal context was justified, Justice Scalia rejected the use of contemporary legal context for any purpose other than determining the meaning of statutory text.

C. Alexander v. Sandoval

In 2001 in *Alexander v. Sandoval*, a majority of the Court adopted most of the analysis that Justice Scalia had argued should govern implied rights of action.[48] In *Sandoval*, the plaintiffs brought an action for the alleged violation of section 602 of Title VI. They claimed that the Alabama Department of Public Safety had violated regulations issued by the U.S. Department of Justice prohibiting disparate-impact discrimination when the Department decided to administer state driver's license exams in English only.[49] The Court previously had recognized a private right of action for section 601 of Title VI; the question presented was whether a private right of action existed for violations of section 602 as well.[50] In holding that no right of action was available, the Court (1) adopted Justice Scalia's view that the salient question is whether the statute displays an actual congressional intent to create a private right of action, and (2) applied a more textual method to answer that question, sidestepping (without overruling) the test of *Cort v. Ash*, and refusing to consider evidence of contemporary legal context.

1. Legislative Intent

First, the *Sandoval* Court adopted Justice Scalia's view that the appropriate question for determining whether a plaintiff may pursue a private right of action for the violation of a federal statute is whether the statute demonstrates an actual congressional intent that one exist. "Like substantive federal law itself," Justice Scalia wrote for the Court, "private rights of action to enforce federal law must be created by Congress."[51] The relevant judicial inquiry, in the Court's view, was thus whether the statute displays an actual congressional intent to create a cause of action:

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46 *Thompson*, 484 U.S. at 189 (Scalia, J., concurring in the judgment).

47 *Id.* at 189–90 (citing *Cannon*, 441 U.S. 677; and then citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982)).

48 Alexander v. Sandoval, 532 U.S. 275 (2001).

49 *Id.* at 278–79.

50 *Id.* at 279.

51 *Id.* at 286.

> The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.[52]

In this passage, a five-Justice majority of the Court adopted Justice Scalia's view that implied rights of action are a function of what a statute conveys about actual congressional intent.

2. Textual Method

The Court further explained in *Sandoval* that it should determine congressional intent by examining the "text and structure" of the statute.[53] In adopting this position, the Court rejected the argument that it should consider "the expectations that the enacting Congress had formed in light of the contemporary legal context."[54] Although the Court acknowledged that it had examined contemporary legal context in prior cases when Congress had enacted "verbatim statutory text that courts had previously interpreted to create a private right of action,"[55] the Court observed that it had "never accorded dispositive weight to context shorn of text."[56] The reason it had never done so, the Court explained, is that "[i]n determining whether statutes create private rights of action, as in interpreting statutes generally, legal context matters only to the extent it clarifies text."[57] The Court thus categorically rejected the use of contemporary legal context to determine the existence of a right of action absent text demonstrating that one exists. "We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI."[58]

This method of discerning congressional intent from the text and structure of the statute appears to leave little room for application of the *Cort* multifactor test. In *Thompson*, Justice Scalia, writing only for himself, had argued that the Court already had overturned *Cort v. Ash* by focusing its analysis on legislative intent. In his view, the Court should ascertain legislative intent by examining what the text and structure of the statute convey about it.[59] The *Cort* factors extend beyond the bounds of that task. The Court did not apply the *Cort* factors in *Sandoval*, but neither did the Court outright reject the test or overrule the case. Notwithstanding the importance of *Cort v. Ash* in prior implied-rights-of-action cases, the *Sandoval* Court cited it only

52 *Id.* at 286–87 (citations omitted).
53 *Id.* at 288.
54 *Id.* at 276 (citations omitted).
55 *Id.* at 288.
56 *Id.*
57 *Id.* (citation omitted).
58 *Id.*
59 Thompson v. Thompson, 484 U.S. 174, 188–89 (1988) (Scalia, J., concurring in the judgment).

for the proposition that it had abandoned *Borak*'s understanding of implied rights of action.[60] It is possible that a majority of the *Sandoval* Court did not agree on whether to overturn the *Cort* test, and the Court thus simply avoided discussing its ongoing relevance.[61]

II. CRITIQUES OF JUSTICE SCALIA'S APPROACH

Justice Scalia's approach to implied rights of action has been subject to various critiques. One critique is that courts seeking to determine congressional intent to create a cause of action should not be limited to examining the text and structure of the statute. This critique argues that in this context, as in others, courts should apply a less textual method of statutory interpretation, such as a more purposive one.[62] Another critique—the one on which this Part focuses—is that the existence of an implied right of action should not be a question of legislative intent at all. This critique relies heavily on historical judicial practice. For much of U.S. history, this critique argues, federal courts supplied common law causes of action for federal statutory violations regardless of whether Congress authorized a cause of action—and thus regardless of congressional intent. This historical practice, the argument goes, demonstrates that federal courts have power to provide private

60 *Sandoval*, 532 U.S. at 287.

61 The Supreme Court has not relied on the *Cort* factors to determine whether a private right of action is available for a federal statutory violation since its decision in *Sandoval*. Certain U.S. Court of Appeals cases have treated *Sandoval* as displacing the *Cort* factors in this context, at least to the extent that the application of those factors is inconsistent with congressional intent. *See, e.g.*, San Juan Cable LLC v. P.R. Tel. Co., 612 F.3d 25, 32 (1st Cir. 2010) (explaining that "[t]he proponent of an implied private right of action cannot prevail under the four-factor *Cort* test in the face of a showing that Congress probably did not intend to create" a right of action); Wisniewski v. Rodale, Inc., 510 F.3d 294, 299–300 (3d Cir. 2007) ("The Supreme Court's decision in *Alexander v. Sandoval* strongly suggests that the Court has abandoned the *Cort v. Ash* test." (citation omitted)). Other Court of Appeals cases continue to apply the *Cort* factors as a means of discerning congressional intent. *See, e.g.*, Republic of Iraq v. ABB AG, 768 F.3d 145, 170 (2d Cir. 2014) (explaining that "[t]o discern Congress's intent, we look first to the text and structure of the statute," and "we also consider the factors enumerated in *Cort*" (citations omitted) (quoting Lindsay v. Ass'n of Prof'l Flight Attendants, 581 F.3d 47, 52 (2d Cir. 2009) (internal quotation marks omitted))); Logan v. U.S. Bank Nat'l Ass'n, 722 F.3d 1163, 1170–71 (9th Cir. 2013) (explaining that although "the Supreme Court essentially collapsed the *Cort* test into a single focus" on legislative intent, "our court has found the four factor test helpful, and has continued to employ it to guide [the] central project of discerning Congress's intent" (alteration in original) (quoting Okrin v. Taylor, 487 F.3d 734, 739 (9th Cir. 2007) (internal quotation marks omitted))).

62 *See, e.g.*, *Sandoval*, 532 U.S. at 313 (Stevens, J., dissenting) (arguing that the majority "adopts a methodology that blinds itself to important evidence of congressional intent," including the purposes of the underlying statute); Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148, 179–80 (2008) (Stevens, J., dissenting) (arguing that the Court should determine the existence of a cause of action in light of Congress's presumed understanding of contemporary legal context).

rights of action to remedy federal statutory violations even in the absence of congressional authorization.

This argument—which judges and scholars have asserted both before and after Justice Scalia joined the Court—includes at least two different threads. One thread is that as a matter of observable historical fact, U.S. courts traditionally created or recognized common law actions to remedy statutory violations as they saw fit.[63] Another thread of this argument is that, as a matter of principle, an important role of courts traditionally was to provide a remedy for any legal wrong.[64] This argument treats the maxim *ubi jus, ibi remedium* as reflecting a longstanding federal judicial practice that should endure today: because federal courts traditionally were understood to have power to give private remedies for statutory violations, they should be understood to have no less power today, regardless of whether any given statute expressly creates or authorizes a private damages action for its enforcement.[65]

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63 *See* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1542 (1972) (presuming "a common law background in which courts created damage remedies as a matter of course"); *cf.* Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 28 (2014) ("For most of this nation's history, the traditional view was that federal courts could elaborate the remedial implications of statutes and the Constitution in a common law mode."); Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 565 (1981) ("It is doubtful . . . that the Constitution mandates . . . a restrictive doctrine of implied private actions. Federal courts possess recognized power to create substantive common law in areas of important federal interest. . . . The federal judiciary, then, has both the power and the responsibility to make substantive common law ancillary to federal statutes.").

64 *See* H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 534 (1986) (arguing that in English and early American courts "an adequate private remedy existed for every statutory wrong," and observing that "[t]he notion that an adequate private remedy existed for every statutory wrong played an important role in . . . *Marbury v. Madison*"); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 864 (1996) ("The early view of the courts on the question of when it is appropriate to imply a private cause of action from a federal statute that itself does not provide for such an action was that an individual is entitled to an adequate remedy for any legal wrong, whether common law wrong or statutory wrong." (footnotes omitted)); Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 676 (1987) ("Historically, . . . tort actions on statutes provided a clear example of the common law striving to provide remedies for the violation of rights."); Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 68 (2001) (explaining that traditionally "courts strove to provide an appropriate remedy" for the violation of a right, and "[c]ourts frequently applied this standard in actions to enforce a statute").

65 *See Stoneridge*, 552 U.S. at 176–78 (Stevens, J., dissenting) (arguing that for 200 years "[f]ashioning appropriate remedies for the violation of rules of law designed to protect a class of citizens was the routine business of judges," and "the same practice prevailed in federal courts with regard to federal statutes that left questions of remedy open for judges to answer"); *see also* Gordan Gamm & Howard Eisberg, *The Implied Rights Doctrine*, 41 UMKC L. REV. 292, 297 (1972) (citing *ubi jus, ibi remedium* as a basis for supporting a broad implied rights doctrine); Linda Sheryl Greene, *Judicial Implication of Remedies for Federal*

To the extent that this critique relies on historical practice, it seeks to employ a methodology that Justice Scalia himself defended in resolving constitutional questions, including questions of federal judicial power. If this critique is correct, then Justice Scalia would have taken two wrong turns in his thinking about implied rights of action. The first wrong turn would be his assumption that the question of implied rights of action is a question of discerning actual legislative intent. If U.S. courts have power, as revealed by historical practice, to provide private rights of action for federal statutory violations regardless of whether Congress authorized a right of action, then the focus on actual legislative intent would be misguided. The second wrong turn would be deploying a textual method of statutory interpretation to determine legislative intent. If actual legislative intent is not determinative, then there is no good reason why a court may not evaluate congressional purposes in determining whether a cause of action should be available as a matter of federal common law, or why a court may not purposively interpret a statute to allow a private damages action when the text says nothing on the matter.

The problem with this critique, however, is that it does not accurately represent historical practice. This critique overlooks the fact that historically Congress did in fact authorize the causes of action that federal courts could hear. In other words, this critique overlooks the fact that historically federal courts did not supply private rights of action for federal statutory violations independently of congressional authority. Instead, federal courts recognized such actions pursuant to an express congressional directive. The next Part describes this lost history and how it bears on Justice Scalia's approach to implied rights of action.

III. Implied Rights of Action and Historical Practice

It is true enough that federal courts historically adjudicated private causes of action for federal statutory violations in certain cases. The largely forgotten fact, however, is that they did so *with congressional authorization.* The First Congress (and subsequent Congresses) provided federal courts with specific direction regarding what causes of action they could hear. Thus, federal courts did not historically supply causes of action for federal statutory violations independently of congressional intent. Rather, they adjudicated those common law causes of action that Congress authorized them to

Statutory Violations: The Separation of Powers Concerns, 53 Temp. L.Q. 469, 471–72 (1980) ("The historical, indeed philosophical, origins of the doctrine of remedial implication appear to hark back to the ancient, common law doctrine *of ubi jus, ibi remedium*—where there is a right, there is a remedy—and to eighteenth-century English decisions holding that nonperformance of statutory duties embodied in criminal statutes could support a private action in tort to secure compensation for resultant damages." (footnotes omitted)); Paul Joseph McMahon & Gerald Jay Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 Dick. L. Rev. 167, 167 (1975) ("Judicial implication of a private cause of action for violation of a statute has its roots in the ancient English common law doctrine of *ubi jus, ibi remedium* . . . .").

hear. This Part will discuss this history and its implications for Justice Scalia's approach to implied rights of action and the historical claims of his critics.

A. Reevaluating Historical Practice

To understand the practices of federal courts in providing legal remedies for federal statutory violations, it is important to appreciate both (1) the nature of a cause of action as causes of action were understood by early federal courts, and (2) early acts of Congress that specified the causes of action that federal courts could hear. Professor Bradford Clark and I have discussed these matters at length in earlier works. This Section provides a summary of our prior findings.[66] These findings demonstrate that historical federal judicial practice does not in and of itself establish a federal judicial power to supply causes of action as federal common law.

1. The Nature of a Cause of Action

It is necessary to appreciate two important aspects of judicial practice in England and America at the time of the founding in order to understand how historical federal judicial practice relates to the modern question of implied rights of action. First, at the founding, the existence of a cause of action was a question of local law, not general law, and each nation was understood to have its own system of rights of action. Second, the existence of a right of action followed from the availability of a "form of action" or a "form of proceeding." On the basis of these well-accepted features of the common law system, early federal legislation specified the causes of action that federal courts could adjudicate.[67]

a. Local Law, Not General Law

First, each nation determined for itself what kinds of injuries its courts would remedy. In other words, "local law," not "general law," defined the causes of action available in English and American courts. There was no transnational, general law system that defined rights of action or their availability.[68] As Blackstone explained in his *Commentaries*, local English law defined the causes of action that English courts could hear. "Every nation must and will abide by its own municipal laws" regarding what causes of action its courts may hear, "which various accidents conspire to render different in almost every country in Europe."[69] In other words, English courts did

66 The matters discussed in this Part are discussed in more detail in Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609 (2015), and Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004). The discussion in this Part draws upon the evidence and analysis set forth in those articles.

67 Bellia & Clark, *supra* note 66, at 628.

68 *Id.*

69 3 WILLIAM BLACKSTONE, COMMENTARIES *86–87.

not look to general law to define the causes of action they could hear; rather, they looked to the local law of England.

b. Forms of Proceeding

Second, the local laws in England and American states defined what causes of action were available in their respective courts by providing certain "forms of action" or "forms of proceeding." In the late eighteenth century, the English common law understood a cause of action to be available if local law provided a form of proceeding capable of redressing the harm in question.[70] Today, the U.S. legal system generally treats the availability of a cause of action as a question of substantive law.[71] The question is whether a person or entity suffering an injury is legally entitled to request a judicial remedy for the injury.[72] If so, that person or entity has a cause of action. When the Constitution was adopted, however, the legal system understood a cause of action differently. An injured plaintiff could pursue a judicial remedy only if the plaintiff could fit the injury suffered into an established form of action by pleading sufficient facts to show that the court should issue the writ that corresponded to that form of action.[73] In other words, a cause of action for a remedy at law existed when a form of action provided a remedy for the kind of injury that the plaintiff had suffered.[74]

This understanding of the cause of action was part of the legal fabric that late eighteenth-century lawyers and judges in England and America took for granted. As F.W. Maitland explained, in the late eighteenth century "the forms of action are given," and "the causes of action must be deduced therefrom."[75] At this time, Maitland wrote, an aggrieved person might "find that, plausible as his case may seem, it just will not fit any one of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong."[76] Thus, as Blackstone explained, the specific remedy that an available writ provided was the "foundation of the suit."[77]

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70 Bellia & Clark, *supra* note 66, at 628.

71 *Id.* at 631.

72 *See* Bellia, *supra* note 66, at 792–99 (explaining the historical development of understandings of causes of action).

73 *Id.* at 789.

74 *See id.* at 787–89 (describing how lawyers and judges understood causes of action at the time the Constitution was adopted); *see also* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 9–10 (2d ed. 2003) (describing how common law writs determined, for example, the substance of tort law). The growth and decline of the writ system is described in JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 87–100, 377–402 (2009).

75 F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES 5 (1936).

76 *Id.* at 4–5.

77 BLACKSTONE, *supra* note 69, at *272.

> When a person hath received an injury, and thinks it worth his while to demand a satisfaction for it, he is to consider . . . what redress the law has given for that injury; and thereupon is to make application or suit . . . for that particular specific remedy.[78]

On this understanding, one had a cause of action only if one satisfied the legal determinants necessary to obtain a remedy afforded by a particular form of proceeding.[79] Courts of equity and admiralty operated under a similar conception of the cause of action.[80]

As a practical matter, a plaintiff would commence an action at law by seeking an appropriate "writ." Each writ corresponded to a particular "form of action."[81]

> Examples of original common law writs—designating particular forms of action—included ejectment (to recover possession of real property), detinue (to recover possession of personal property based upon a superior right), replevin (to recover possession of personal property wrongfully taken), debt (to recover money due), covenant (to recover for breach of a promise under seal), special assumpsit (to recover damages for breach of contract), general (indebitatus) assumpsit (to recover damages in quasi contract), trespass (to recover damages for physical interference with person or property), trespass on the case (to recover damages for wrongful acts resulting in indirect interference with person or property), and trover (to recover damages for the conversion of chattel).[82]

The phrases "form of action" and "form of proceeding" both referred to the kind of action that a specific writ authorized a person with a particular kind of injury to pursue.[83] Each distinct "cause of action" as defined by a distinct writ "had its own mini-civil procedure system" for matters such as summons, proof, and remedies.[84] The phrase "mode of proceeding" sometimes referred to the particular method for obtaining redress under a specific form of proceeding, and sometimes was a synonym for "form of proceeding."[85]

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78 *Id.*

79 Bellia, *supra* note 66, at 783. As Henry John Stephen explained in his 1824 treatise on pleading, "the enumeration of writs, and that of actions" is "identical":

> An original writ . . . is essential to the due institution of the suit. These instruments have consequently had the effect of limiting and defining the right of action itself; and no cases are considered as within the scope of judicial remedy, in the English law, but those to which the language of some known writ is found to apply, or for which some new writ, framed on the analogy of those already existing, may, under the provision of the Statute of Westminster 2, be lawfully devised. The enumeration of writs, and that of actions, have become, in this manner, identical.

HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 8 (Phila., Abraham Small 1824) (footnotes omitted).

80 *See* Bellia & Clark, *supra* note 66, at 633; Bellia, *supra* note 66, at 790.

81 MAITLAND, *supra* note 75, at 4.

82 Bellia & Clark, *supra* note 66, at 633–34.

83 *Id.* at 634.

84 LANGBEIN ET AL., *supra* note 74, at 96.

85 Bellia & Clark, *supra* note 66, at 635.

The forms and modes of proceeding that defined legal causes of action varied among the courts of different sovereigns. The forms and modes of proceeding of U.S. states varied from each other and from the forms and modes of proceeding that English common law courts used.[86] An important question for the First Congress was what forms and modes of proceeding—and thus what causes of action—would be available in courts of the United States.

2. Congressional Authorization and State Causes of Action

The First Congress defined the causes of action that were available in federal courts in the Process Act of 1789—and reenacted this legislation with some revisions in 1792.[87] As Professor Clark and I have explained elsewhere, a late eighteenth-century reader of the Process Acts, knowledgeable of background legal principles, would have understood these acts to specify the causes of action that Congress had authorized federal courts to hear.[88] The Process Act of 1792 remained in effect until 1872, when Congress replaced it with the Conformity Act.[89]

During this period, the Process Acts of 1789 and 1792 directed federal courts to use state forms of proceeding in actions at law when Congress had not otherwise enacted a cause of action. Congress always could and sometimes did create a specific cause of action for the enforcement of a federal right.[90] For most actions at law within the jurisdiction of federal courts, however, Congress did not create a cause of action even where it created a federal right. For such cases, the Process Acts directed federal courts to apply the same forms of proceeding as the local state courts would apply.[91]

Professor Julius Goebel described the Process Acts as "doomed to be little regarded by historians, for the subject matter was hardly such to captivate those to whom the larger aspects of institutional development were to be more beguiling."[92] The Process Acts, however, were crucial to the development of federal courts—and they account for the source of causes of action in federal courts through much of U.S. history.[93]

Initially, in section 14 of the First Judiciary Act, the First Congress gave federal courts a general authority to issue writs—in other words, to adjudicate causes of action—"which may be necessary for the exercise of their

86 *Id.* at 637.

87 *Id.* at 641.

88 *See id.* at 641–55.

89 *Id.* at 655.

90 For example, the Patent Act of 1790 gave patent holders a federal right against infringement and specified that the right was enforceable through an "action on the case," Act of Apr. 10, 1790, ch. 7, § 4, 1 Stat. 109, 111 (repealed 1793), a common law form of proceeding.

91 Bellia & Clark, *supra* note 66, at 653.

92 1 JULIUS GOEBEL, JR., THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 509 (1971).

93 Bellia & Clark, *supra* note 66, at 646–47.

respective jurisdictions, and agreeable to the principles and usages of law."[94] This general authorization was temporary, however, and the First Congress quickly enacted more specific directives for federal courts.[95] In developing more specific directives, the First Congress had to decide whether to establish uniform forms of proceedings for federal courts, or whether to have the forms of proceeding available in federal courts track those available in state courts. The Senate committee that drafted the Judiciary Act of 1789 initially drafted a bill that attempted to establish some uniform rules of proceeding for federal courts.[96] Due in part to anti-Federalist opposition to "consolidated government,"[97] however, Congress was unable to agree on a uniform set of proceedings for federal courts.[98] Instead, Congress enacted the Process Acts, which borrowed state forms of proceeding as the actions at law to be used in federal court. As Maeva Marcus has explained, "the entire Process Act of 1789 reflected Congress's inability or unwillingness to agree on uniform rules for the operation of the federal courts."[99]

The Process Act of 1789 provided that

> the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same.[100]

In other words, in actions at law a federal circuit or district court was to apply the forms of writs and executions that the supreme court of the state in which it sat would apply.[101]

Read in context, this provision defined the causes of action that federal courts could enforce in actions at law. Specifically, it directed a federal court to use the same causes of action that the courts of the state in which it sat would use. As explained, the form of a writ defined a cause of action. For example, under the Process Act, if a plaintiff wished to recover damages in federal court for an intentionally inflicted bodily injury, the plaintiff would seek a writ of trespass, so long as state law allowed such a writ, in the form that state law provided. If a plaintiff sought a writ not recognized under state law, then the plaintiff's suit would fail because the district and circuit courts could use only the same writs and forms of action as the courts of the state in which they sat would use. Rather than adopt a uniform system of writs and modes of process for actions at law in circuit and district courts, Congress

94 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82.

95 *See* Bellia & Clark, *supra* note 66, at 643–46 (discussing the meaning and import of section 14).

96 *See* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 115–18 (Maeva Marcus et al. eds., 1992).

97 GOEBEL, *supra* note 92, at 510.

98 *See* THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra* note 96, at 112.

99 *Id.*

100 Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93 (repealed 1792).

101 Bellia & Clark, *supra* note 66, at 641.

tethered federal courts to the forms of writs and modes of process that prevailed in state courts. For cases in equity and admiralty jurisdiction, the First Congress provided that "the forms and modes of proceedings . . . shall be according to the course of the civil law."[102]

For various reasons, possibly including confusing language in the provision governing equity and admiralty cases, Congress reenacted the Process Act, with some revisions, in 1792.[103] The Process Act of 1792 provided that "the forms of writs, executions and other process, except their style and the forms and modes of proceeding in suits in those of common law shall be the same as are now used in the said courts respectively in pursuance of [the Process Act of 1789]."[104] In this provision, Congress continued the requirement of the original Process Act that federal courts apply state forms of writs. In the second Process Act, however, Congress replaced the phrase "mode of process" with the phrase "forms and modes of proceeding."[105] It is unclear why Congress made this change, but, whatever the reason, the new language strengthened the directive that federal courts apply state forms of proceeding—and therefore state causes of action—in suits at law. In the eighteenth century, courts in England and America routinely used the phrases "form of proceeding" and "mode of proceeding" to define not only what today we categorize as "procedure," but also the causes of action that gave plaintiffs a right to a legal remedy.[106] In time, the Supreme Court interpreted this provision to require "static" conformity to state forms and modes of proceeding as they existed in 1792 when the Act was adopted, rather than conformity to how they might develop in the future.[107] The Process Act of 1792 also dispelled any confusion that might have surrounded the language of the 1789 Act governing equity and admiralty cases. The 1792 Act provided that the "forms and modes of proceeding" in cases "of equity" and "of admiralty and maritime jurisdiction" were to be "according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law."[108] This provision thus adopted English equity and admiralty forms of proceeding as the causes of action available in the federal courts' equity and admiralty jurisdiction.

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102 § 2, 1 Stat. at 93–94. The reference in this provision to the "civil law" may have been ambiguous and confusing to lawyers at the time, insofar as it could refer either to civil law legal systems or to the "civilian" equity practice in England. *See* Bellia & Clark, *supra* note 66, at 649. Whatever Congress meant by the "civil law," the provision authorized federal courts to provide remedies in equity and admiralty only according to such law.

103 *See* Bellia & Clark, *supra* note 66, at 651–52.

104 Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (repealed 1872).

105 *Id.*

106 *See* Bellia & Clark, *supra* note 66, at 652.

107 *Id.* at 653; *see* Bank of the U.S. v. Halstead, 23 U.S. (10 Wheat.) 51, 59 (1825); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 49–50 (1825).

108 § 2, 1 Stat. at 276.

The Process Act of 1792 established a framework that federal courts internalized and rarely had reason to discuss in their opinions.[109] This framework continued in force until 1872, when Congress replaced it with the first Conformity Act.[110] Whereas the Process Act of 1792, as interpreted by the Court, required "static" conformity to state forms of proceeding as they existed in 1792, the Conformity Act adopted a principle of "dynamic" conformity, directing federal courts to apply state legal forms of proceeding "existing at the time" a case was heard.[111]

In the late nineteenth century and early twentieth century, with the rise of code pleading, the source of the causes of action available in state and federal courts gradually shifted from the realm of "procedure" to the realm of "substance."[112] Even as this shift occurred, however, federal courts continued to apply state law causes of action under applicable federal statutes. If states still applied traditional common law forms of action, then federal courts borrowed them under the Conformity Act. If, however, states enacted statutes abolishing forms of proceeding and defining causes of action outside the realm of "procedure," then federal courts applied the resulting state causes of action as "rules of decision" under section 34 of the First Judiciary Act.[113]

It was during this period of transition under the Conformity Act that the Court decided *Texas & Pacific Railway Co. v. Rigsby*[114]—a case widely viewed as the Court's seminal implied-rights-of-action case. The question in *Rigsby* was whether the plaintiff had a cause of action against the railroad for violating the Federal Safety Appliance Act.[115] In *Rigsby*, the Court observed that the Act did not contain "express language conferring a right of action for the death or injury of an employee."[116] Nonetheless, the Court explained, "the safety of employees and travelers is [the Act's] principle object, and the right of private action by an injured employee . . . has never been doubted."[117] The Court cited a number of its own cases (plus a few Court of Appeals cases) for the proposition that

> [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.[118]

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109 *See* Bellia & Clark, *supra* note 66, at 667–77 (describing federal judicial practice pursuant to the Process Acts).

110 Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197 (repealed 1934).

111 *Id.*

112 *See* Bellia, *supra* note 66, 792–99 (describing this shift).

113 Bellia & Clark, *supra* note 66, at 655–56.

114 241 U.S. 33 (1916).

115 *Id.* at 37–39.

116 *Id.* at 39.

117 *Id.*

118 *Id.*

The Supreme Court cases that the Court cited were ones adjudicating either a state law negligence action or an action on the case under the old forms of action. Some of these cases were originally litigated in the federal courts' diversity jurisdiction,[119] and others were originally litigated in state court and appealed to the Supreme Court because they involved a disputed issue of federal law.[120] In one case, the defendant removed a state law action of trespass on the case to federal court on the ground that liability was based on a violation of the federal safety appliance act.[121] None of the cases that *Rigsby* cited established that federal courts could create a cause of action as a matter of federal common law—independent of state law and the Conformity Act—for a federal statutory violation.

Rigsby nonetheless has come to be regarded as the seminal implied-rights-of-action case in the Supreme Court. This status may derive in part from the Court's suggestion in *Rigsby* that the cause of action arose by inference from the federal statute itself. The *Rigsby* Court determined that, by implication, the statute itself created a remedy: "[T]he Act must therefore be deemed to create a liability in [the plaintiff's] favor."[122] The Court found "[t]he inference of a private right of action . . . irresistible" by a provision of the Act that governed assumption of risk, and therefore presumed the existence of a private right of action in favor of injured plaintiffs.[123] Although *Rigsby* contains some confusing language, the Court ultimately concluded that the Act itself created a right of action, albeit by implication. In this respect, *Rigsby* did not rely on a federal judicial power to create federal common law causes of action. It found that the statute itself created the right of action.

Two decades later, the Court backed away from *Rigsby*'s inference that the Safety Appliance Act itself created a private right of action for a remedy. In 1934, in *Moore v. Chesapeake & Ohio Railway Co.*,[124] the Court explained *Rigsby* as follows: "The Safety Appliance Acts having prescribed the duty [of the employer] in this fashion, the right to recover damages sustained by the injured employee through the breach of duty sprang from the principle of

119 *See* Delk v. St. Louis & S.F. R.R. Co., 220 U.S. 580 (1911) (state negligence action removed to federal court diversity jurisdiction); Johnson v. S. Pac. Co., 196 U.S. 1 (1904) (same); Chi., M. & St. P. Ry. Co. v. Voelker, 129 F. 522 (8th Cir. 1904) (negligence action in diversity); Denver & R.G. R. Co. v. Arrighi, 129 F. 347 (8th Cir. 1904) (negligence action in diversity); Cleveland, C., C. & St. Louis Ry. Co. v. Baker, 91 F. 224 (7th Cir. 1899) (action of trespass on the case in diversity).

120 *See* Schlemmer v. Buffalo, Rochester, & Pittsburgh Ry. Co., 205 U.S. 1 (1907) (reviewing the judgment of the Supreme Court of Pennsylvania on a writ of error); St. Louis, Iron Mountain, & S. Ry. Corp. v. Taylor, 210 U.S. 281 (1908) (reviewing the judgment of the Supreme Court of Arkansas on a writ of error).

121 Chi. Junction Ry. v. King, 169 F. 372 (7th Cir. 1909); *see* Transcript of Record, Chi. Junction Ry. v. King, 222 U.S. 222 (1911) (No. 34).

122 *Rigsby*, 241 U.S. at 40.

123 *Id.*

124 291 U.S. 205 (1934).

the common law and was left to be enforced accordingly."[125] By "common law," the Court in *Moore* meant state common law. The Court explained that "nothing 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 as to the equipment of cars used on interstate railroads."[126] An action for a violation of the Act, the Court thus explained in *Moore*,

> fell within the familiar category of cases involving the duty of a master to his servant. This duty is defined by the common law, except as it may be modified by legislation. 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.[127]

In other words, the *Moore* Court described *Rigsby* as a state negligence per se action premised on the violation of a federal statute.

Under this analysis, when state courts came to treat substantive rather than procedural law as the source of causes of action in common law cases, federal courts relied on state law to determine the causes of action available for the violation of federal statutes that themselves did not create a cause of action. Although *Rigsby* suggested that a federal statute itself created a cause of action by implication—an analysis the *Moore* Court later disclaimed—*Rigsby* did not suggest that federal courts could create causes of action as a matter of federal common law. Rather, if a federal statute did not create a cause of action, federal courts either continued to borrow state forms of action (where they continued to exist under state law) or applied state causes of action (where substantive state law defined them).

In 1938, federal courts finally promulgated their own uniform rules of procedure. Congress repealed the Conformity Act in 1934 when it adopted the Rules Enabling Act—and thereby repealed the authority of federal courts to apply state forms of action where they still existed.[128] The Rules Enabling Act authorized the Supreme Court to prescribe uniform rules of procedure for federal courts,[129] and the Supreme Court eliminated the forms of action in federal court in 1938 in the Federal Rules of Civil Procedure.[130] Prior to 1938, federal courts used state forms of proceeding under the Conformity Act. After 1938, federal courts used their own uniform procedures under the

125 *Id.* at 215 (citation omitted) (citing *Rigsby*, 241 U.S. at 39, 40).

126 *Id.* at 216.

127 *Id.* at 216–17 (quoting Minneapolis, St. Paul, & Sault Ste. Marie R. Co. v. Popplar, 237 U.S. 369, 372 (1915)).

128 *See* Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2012)).

129 *Id.*

130 FED. R. CIV. P. (1938). Under the Federal Rules of Civil Procedure, there are no specific forms of proceeding for different kinds of cases; instead, there is just "one form of action—the civil action." *Id.* 2.

Rules Enabling Act, but continued to apply substantive state law, absent preemption by federal law, under *Erie*.

Post *Erie*, federal courts may still use causes of action defined by state substantive law to provide remedies for the violation of federal statutory rights—so long as the case falls within federal court jurisdiction. In some cases, however, no state law cause of action will be available to remedy a federal statutory violation. Even if a state law cause of action is available to remedy the violation of a federal statute, it might not fall within the original jurisdiction of federal courts.[131] A state law cause of action might also be subject to limitations to which a federal cause of action would not. An important question, then, has been when federal courts may adjudicate a federal right of action—sufficient to establish "arising under" jurisdiction—for the violation of a federal statute that does not itself create a right of action.

B. Lessons from Historical Practice

As described above, scholars have argued that courts should not treat the question of whether a private right of action is available for the violation of a federal statute as a question of statutory interpretation. Rather, they have argued, historical practice demonstrates that federal courts traditionally supplied rights of action for federal statutory violations from "the common law."[132] This understanding overlooks the fact that for most of U.S. history federal courts had congressional authorization under the Process Acts (and later the Conformity Acts) to provide common law remedies for federal statutory violations if state law would afford them. The idea that federal courts provided common law remedies on their own initiative is a myth.

That said, the fact that federal courts provided private common law remedies for federal statutory violations with congressional authorization does

131 In *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1985), the Supreme Court held that federal courts lacked "arising under" jurisdiction under 28 U.S.C. § 1331 over a state negligence per se action based on the violation of a federal law that did not itself create a cause of action. Later, in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), the Court held that a federal court has "arising under" jurisdiction over a cause of action not created by federal law when "a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 314.

132 Even if this were true, it would not establish that federal courts today may provide a right of action that is itself sufficient to create "arising under" jurisdiction. As explained, historically a right of action was a function of local procedural law. A plaintiff had a right of action if a form of action fit the alleged injury to the plaintiff's legal right or title. During the time that that understanding prevailed, a case arose not under the source of law that created the form of action, but rather under the law that conferred the right or title that the plaintiff sought to enforce through a form of action. *See* Bellia & Clark, *supra* note 66, at 642 n.151 (explaining these matters in more detail). For this reason, the fact that Congress authorized federal courts to use state forms of action did not mean that any cause brought in federal court under such a form of action was one arising under federal law.

not in itself prove that federal courts would have lacked power to provide common law remedies had Congress not provided any such authorization. There is good reason to think, however, that federal courts would not have been understood to have power to hear private common law causes of action without congressional authorization to do so. First, many members of the founding generation expressed fears over unrestrained federal judicial power. The choice for the First Congress was whether to define uniform forms of proceeding for federal courts or to tie them to state law. It does not appear that allowing an unrestrained federal judicial power to define causes of action for federal courts was a discussed option. Second, in the case of criminal actions, where Congress largely remained silent, a vigorous debate ensued regarding whether federal courts had power to entertain criminal actions that Congress had not created. Ultimately, the Supreme Court held that federal courts lacked such power under the separation of powers that the Constitution established.

1. The Early Debate over Federal Judicial Power

When the First Congress met in 1789, a contest ensued between those who favored more centralized federal judicial power and those who favored preserving the powers of localized state courts.[133] Opponents of creating inferior federal courts argued that such courts would be inconvenient for litigants, especially defendants sued in distant courts.[134] They also expressed concern that federal courts might use unfamiliar and novel procedures,[135] and might exercise unrestrained equity powers.[136]

In the First Judiciary Act, members of Congress made an initial compromise for establishing federal courts for the United States. The Act created district and circuit courts, but defined and limited their respective jurisdictions in significant ways.[137] The Act also contained important directions regarding the sources of law that federal courts were to apply. In section 34, the Act directed federal judges to apply local state law rules of decision in actions at law absent preemption by the Constitution, laws, and treaties of the United States: "[T]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[138] Although only a

133 *See* Bellia & Clark, *supra* note 66, at 638–40.

134 *See* GOEBEL, *supra* note 92, at 472–73 (describing such claims).

135 *See* THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra* note 96, at 8, 14–15 (discussing such issues).

136 *See id.* at 12.

137 The First Judiciary Act defined most of the jurisdiction of federal courts in sections 9–13. Judiciary Act of 1789, ch. 20, §§ 9–13, 1 Stat. 73, 76–81. In sections 14–17, the Act proceeded to confer certain powers on federal courts. *Id.* §§ 14–17, 1 Stat. at 81–83.

138 *Id.* § 34, 1 Stat. at 92.

limited record survives regarding the drafting of this text,[139] it is believed that "[t]he addition of section 34 was induced . . . by the need for some positive direction regarding the basic law by which the new courts were to be governed."[140] In addition, section 16 of the Act prohibited federal courts from entertaining suits in equity when an adequate remedy existed at law.[141] Section 16 thus restrained federal courts from exercising their equity jurisdiction beyond its conventional limits, thereby protecting the rights of litigants to a jury trial when a legal form of action was available to remedy a claimed injury.

Given these compromises and limitations, the First Congress does not appear to have considered the possibility of leaving federal judges free to decide for themselves what causes of action would be available in federal courts. The question that members of Congress debated was whether Congress should try to create uniform forms of proceeding for federal courts, or whether Congress instead should have the forms of proceeding available in federal courts track those available in state courts. No one appears to have suggested that Congress should (or could) leave federal judges free to decide for themselves what forms of proceeding would be available in federal courts. In the end, the First Congress instructed federal courts to borrow the forms of proceeding governing actions at law in the courts of the state where the federal court was located. This instruction served "to quiet the alarums raised regarding the threatened inconvenience of the federal system."[142] Given fears at the time of unrestrained federal judicial power, it seems unlikely that those involved in these debates generally understood that federal courts had power to decide for themselves what rights of action they could adjudicate.

2. The Early Debate over Federal Common Law Crimes

The early debate over federal common law crimes also suggests that any power in federal courts to decide for themselves what private rights of action they would entertain would have been, at a minimum, contested. Whereas Congress specified the causes of action that federal courts could adjudicate in civil cases, Congress defined few crimes in the early years of the United States.[143] Believing that the peace and security of the United States required more federal crimes, some federal executive officials and judges argued that federal courts could adjudicate common law crimes.[144] Certain early

139 *See* GOEBEL, *supra* note 92, at 502 ("Nothing more is known of its genesis than that the text is written out on a chit in Ellsworth's hand and marked for page 15.").

140 *Id.*

141 Congress provided in section 16 "[t]hat suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." Judiciary Act of 1789 § 16, 1 Stat. at 82.

142 GOEBEL, *supra* note 92, at 473.

143 The Crimes Act of 1790, ch. 9, 1 Stat. 112, defined only a few federal offenses.

144 *See* Bellia & Clark, *supra* note 66, at 661–67 (describing the use of federal common law crimes in the early republic).

Supreme Court Justices embraced the idea of federal common law crimes while riding circuit,[145] but the Supreme Court did not address the power of federal courts to adjudicate federal common law crimes until 1812. In *United States v. Hudson & Goodwin*,[146] the Court held that federal courts lack power to adjudicate common law criminal prosecutions. Before a federal court may entertain a criminal case, the Court explained, "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."[147] Accordingly, the Court established that federal courts had no power to entertain criminal actions absent authorization from Congress to do so.

Because the First Congress immediately specified in the Process Acts the civil causes of action that federal courts could hear, no similar debate occurred over whether federal courts could hear common law civil actions. Had Congress not specified the causes of action that federal courts could hear in civil cases, it is possible that a parallel debate would have ensued. And had that debate ensued, it would have involved the question whether the Constitution adopted the common law, or certain aspects of it, for the United States as a whole. There were strong arguments at the time—some made in debates over federal common law crimes—that federal courts could not adopt the common law in whole or in part on their own. James Madison, for example, argued that incorporation of the common law would have been inconsistent with the Constitution's enumeration of limited federal powers. Madison rejected the notion "'that the common or unwritten law' . . . makes a part of the law of these States, in their united and national capacity."[148] Specifically, Madison argued that any such understanding of the incorporation of the common law would be inconsistent with the Constitution's enumeration of limited federal powers. In his view, such incorporation would mean that "the authority of Congress [would be] co-extensive with the objects of common law"—that is, Congress "would be authorized to legislate in all cases whatsoever."[149] Moreover, a judicial power to adopt common law for the nation would "erect [federal judges] into legislators" by requiring them to decide which parts of the common law were properly applicable to the circumstances of the United States.[150] The Supreme Court agreed with this position in *Hudson & Goodwin* in 1812, and the Court reaffirmed it two decades later in *Wheaton v. Peters*:

> It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law,

145 *Id.* at 663.

146 11 U.S. (7 Cranch) 32 (1812).

147 *Id.* at 34.

148 Letter from James Madison to Thomas Jefferson (Jan. 18, 1800), *in* VI THE WRITINGS OF JAMES MADISON 347, 372 (Gaillard Hunt ed., 1906).

149 *Id.* at 380.

150 *Id.* at 381.

> that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption.[151]

Had Congress not provided federal courts with direction regarding the private rights of action they could enforce, perhaps a debate parallel to that over federal common law crimes would have ensued. And perhaps that debate would have reached the same resolution, forcing Congress to specify the civil causes of action federal courts could hear, had Congress not done so when it first created federal courts.

* * *

The point for now is that critics of Justice Scalia's approach have overlooked the fact that early Congresses did in fact specify the legal causes of action that federal courts could hear in civil cases—including in cases seeking a remedy for the violation of a federal statute. Accordingly, the argument that Justice Scalia's approach to implied rights of action is inconsistent with historical judicial practice rests on a false premise. Federal courts did not historically exercise a power to supply a cause of action under any freewheeling idea of the common law, or by appeal to any conception of ambient general common law. Instead, federal courts had congressional authorization to provide a cause of action for the violation of a federal statute, so long as such a cause of action was available under state law. Justice Scalia's approach to implied rights of action requires a legislative determination that a cause of action is available for the violation of a federal statute before a court may provide one. Regardless of whether historical practice requires this approach, it certainly does not disprove it.

CONCLUSION

In the last several decades, the Supreme Court has moved from treating the existence of a private right of action for the violation of a federal statute as a question of federal common law to treating the existence of such an action as a question of congressional intent. Justice Scalia influenced this shift in significant ways. First, he advanced the argument that federal courts should allow private rights of action for federal statutory violations only if Congress intended courts to do so. Second, he argued that federal courts should determine congressional intent through a textual method of interpretation. A majority of the Court joined him in this approach in *Alexander v. Sandoval*.

One critique of this approach is that it is not faithful to historical judicial practice. Justice Scalia himself was well known for arguing that historical practice should inform questions of constitutional meaning, including questions of federal judicial power. Many scholars have argued that federal courts should be understood to have power to enforce federal common law causes of action for federal statutory violations because historically federal courts

151 33 U.S. (8 Pet.) 591, 658 (1834).

supplied common law causes of action for such violations. This argument is based on a false premise. It is true enough that federal courts supplied common law causes of action to remedy federal statutory violations in certain cases, but they did so only pursuant to congressional authorization. In the Process Acts and the Conformity Acts, Congress directed federal courts to borrow state forms of proceeding—in other words, state causes of action—in common law cases. Later, as states abolished forms of proceeding and began defining causes of action in substantive state law, federal courts applied state law causes of action to remedy federal statutory violations. The contention that federal courts historically applied "the common law" in affording causes of action for statutory violations—and thus should be understood to have power to do so today regardless of congressional authorization—rests on an incomplete account of federal judicial history.

For much of U.S. history, federal courts heard causes of action for the violation of federal statutes because Congress authorized them to do so. Justice Scalia argued that federal courts may hear causes of action to remedy federal statutory violations only if Congress determines that a cause of action is available. Regardless of whether the historical practice of congressional authorization of rights of action in federal courts requires this approach, it certainly does not disprove it.