Implied Private Rights of Action: Definition, and Factors to Determine Whether a Private Action Will Be Implied from a Federal Statute

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When the heirs of singer Ray Charles wanted to terminate a copyright, they had something in common with a student who wanted to obtain damages from her school after a teacher assaulted her. Both the heirs and the student asked a court to judicially imply a private right of action from a federal statute. This Article will provide insight into the subject of implied private rights of action. It will define what a private right of action is, discuss where private actions came from, and then provide sixteen guidelines to predict whether a court will imply a private action from a federal statute.

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INTRODUCTION

When the heirs of singer Ray Charles wanted to terminate a copyright, they had something in common with a student who wanted to obtain damages from her school after a teacher assaulted her. Both the heirs and the student asked a court to judicially imply a private right of action from a federal statute. The aim of this Article is to provide insight into the subject of implied private rights of action and to suggest guidelines to determine whether a private action will be implied from a federal statute.

Implied private rights of action appear in areas as diverse as copyright law,[1] education law,[2] civil rights law,[3] and securities law.[4] The

1. Ray Charles Found. v. Robinson, 795 F.3d 1109, 1122 (9th Cir. 2015) ("[A]n implied private cause of action exists under the termination provisions [of the Copyright Act].").

2. *See* Franklin v. Gwinnett Cty. Pub. Schs., 503 U.S. 60, 66 (1992) (recognizing implied right of action to allow a student to recover damages against her school under Title IX); *see also* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005) (recognizing implied private right of action for retaliation under Title IX).

3. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969) (finding private right of action implied under the Voting Rights Act).

4. *See* Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 37 (2011) ("We have implied a

importance of these actions cannot be overestimated.[5] Indeed, afraid that a court might imply a private action from a statute that does not contain one, the drafters of the Communications Act expressly prohibited the implication of any private action at all.[6]

This Article will begin by defining what a private right of action is in Part I. Part II will briefly discuss the origin of implied private rights of action. Because statutes are the most important source of implied private action today, Part III will provide guidelines to determine whether a private right of action will be implied from a federal statute.

I. DEFINITION OF AN IMPLIED PRIVATE RIGHT OF ACTION

A private right of action allows a private plaintiff to bring an action based directly on a public statute, the Constitution, or federal common law. Although Congress has placed *express* private rights of action into legislation such as the Clayton Antitrust Act[7] and the Americans with Disabilities Act,[8] implied private rights of action are not created by Congress. They are *created by courts*. A judicially created implied private right of action allows a private plaintiff to enforce a public statute, despite the fact that the statute itself contains no express right of action.[9] For example, courts have recognized a private party's right to bring an action for violation of certain provisions of the Securities Exchange Act, even though "Congress made no specific reference to a private right of action. . . ."[10] Why is this important? It is important because in instances

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private cause of action from the text and purpose of §10(b) [of the Securities Exchange Act].").

5. *See, e.g.*, Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws*, 107 HARV. L. REV. 963, 965 (1994) (implied private rights of action have been used to obtain *billions* of dollars from claims based on securities fraud) (emphasis added).

6. Communications and Video Accessibility Act, 47 U.S.C. § 613(j) (2010) ("Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation hereunder. The [Federal Communications] Commission shall have exclusive jurisdiction with respect to any complaint under this section.").

7. Clayton Act, 15 U.S.C. § 15(a) (1982) ("*Any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws *may sue*. . . .") (emphasis added).

8. Americans with Disabilities Act, 42 U.S.C. § 12188 (a)(1) ("The remedies and procedures set forth in [the Act] are . . . provid[ed] *to any person* who is being subjected to discrimination on the basis of disability in violation of [this Act].") (emphasis added).

9. A district court explained the difference between an "express" and an "implied" private action:

> Many federal statutes provide a private cause of action through their express terms. Other federal statutes, however, merely define rights and duties, and are silent on the issue of whether an individual may bring suit to enforce them. For statutes in this latter category . . . courts have held that "implied" private rights of action may exist subject to statutory interpretation.

Landegger v. Cohen, 5 F. Supp. 3d 1278, 1284 (D. Colo. 2013).

10. J.I. Case Co. v. Borak, 377 U.S. 426, 430–31 (1964), *abrogated on other grounds by* Ziglar

where no express private right of action exists in a statute, a private plaintiff seeking to enforce such a statute has an alternative source of relief: a judicially implied private right of action. Justice Powell compared express versus implied rights of action in the following manner: "[W]e are not dealing here with any private right created by the *express language* of [a federal statute] . . . We are dealing with a private cause of action which has been *judicially found* to exist. . . ."[11]

The examples above demonstrate that, although Congress envisioned that it would be a public agency like the Securities Exchange Commission ("SEC") that would unilaterally enforce certain statutes, this is not what happened. Federal courts, through the judicial creation of implied private rights of action, have allowed individual plaintiffs to bring private claims under various public statutes that do not expressly provide for such actions.[12]

Moving from examples and turning to the technical definition of a private right of action, these actions are defined as the "right of a private party to seek judicial relief from injuries caused by another's violation of a legal requirement."[13] Normally this "legal requirement" is based on a statute passed by Congress. However, implied private actions can also be based on the United States Constitution, federal regulations, or federal common law.[14]

Having discussed what an implied private right of action is, it is important to note what it is not. Cases involving the existence of an implied right of action are distinct from cases involving standing.[15] Standing focuses on the nature of the plaintiff's injury.[16] In contrast, cases involving the existence of an implied cause of action focus on the right the plaintiff is claiming.[17] Put another way, standing involves "who"

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v. Abbasi, 137 S. Ct. 1843 (2017).

11. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 748–49 (1975) (emphasis added).

12. The question of whether to create a private right of action has been described by the Supreme Court in the following way: "Since the [federal statute] does not explicitly create a private enforcement mechanism, the initial question presented . . . is whether such a private right of action can be implied on behalf of those allegedly injured by a claimed violation of [the statute]." California v. Sierra Club, 451 U.S. 287, 289–90 (1981).

13. Cannon v. Univ. of Chi., 441 U.S. 677, 730 n.1 (1979) (Powell, J., dissenting).

14. *See infra* notes 24–28.

15. *See* La. Landmarks Soc., Inc. v. City of New Orleans, 85 F.3d 1119, 1122 n.3 (5th Cir. 1996).

16. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (noting that there are three elements necessary to establish "irreducible constitutional minimum of standing").

17. *See* Davis v. Passman, 442 U.S. 228, 239 n.18 (1979) (distinguishing between a plaintiff's right and a plaintiff's relief). Most federal courts are aware of the distinction, and caution that before addressing any standing issue, "a court must answer the threshold question of whether a statute affords a plaintiff a private right of action." Asbury Park Bd. of Educ. v. Hope Acad. Charter Sch.,

may assert a cause of action, while implied private right of action cases involve the entirely different question of whether the cause of action itself exists.[18]

In addition to standing, there is another area that presents a source of confusion for anyone entering the world of implied private right of action analysis. This is the area of private attorneys general.[19] Plaintiffs who become private attorneys general usually do so to advance the public interest.[20] Plaintiffs proceeding under an implied private right of action generally do so to advance their own interest.[21] If a private right of action plaintiff recovers damages against a defendant, the plaintiff keeps the money. If a private attorney general plaintiff obtains a penalty from a defendant, the fine usually goes to the government.[22]

II. SOURCES OF IMPLIED PRIVATE ACTIONS

Implied private rights of action can be separated into two categories: theoretical sources and subject matter sources. Subject matter sources are those broad areas of law such as education law, securities law, or civil rights law from which implied private rights of action can arise. Theoretical sources, on the other hand, provide the foundation for the implication of private rights of action in all areas of law.

A. Theoretical Sources

This Article takes the position that there are four theoretical sources of federal implied private rights of action. These sources are: (a) the United

278 F. Supp. 2d 417, 420 n.2 (D.N.J. 2003).

18. *In re* Bernard L. Madoff Inv. Secs. LLC, 721 F.3d 54, 68 (2d Cir. 2013) ("However, the question of *who* may assert a right of action is presented ordinarily only if a right of *action has been found to exist*.") (emphasis added).

19. The term seems to have made its first appearance in 1943, when a federal judge noted that "even if the sole purpose is to vindicate the public interest[,] [these] persons, so authorized, are, so to speak, private Attorney Generals." Associated Indus. of N.Y. State v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), *vacated,* 320 U.S. 707 (1943).

20. Justice Harlan described the interests of private attorneys general as "bereft of any personal or propriety coloration . . . hav[ing] standing as 'representatives of the public interest.'" Flast v. Cohen, 392 U.S. 83, 119–20 (1968) (Harlan, J., dissenting).

21. *See id.* at 119 n.5. Private actions contain "almost no mention of vindicating the public's rights . . . or other similar expressions of serving the common good. . . . " Pamela H. Bucy, *Private Justice,* 76 S. CAL. L. REV. 1, 15 (2002).

22. *See* Sierra Club v. SCM Corp., 580 F. Supp. 862, 863 n.1 (W.D.N.Y. 1984) ("Because there is no private right of action for damages under the F.W.P.C.A. [Federal Water Pollution Control Act], any fines levied would be *payable to the Government* and *not to the plaintiff*.") (emphasis added). Another difference is that, unlike implied private right of action plaintiffs, a plaintiff proceeding as a private attorney general can, in some cases, recover attorneys' fees on the ground that they are "vindicating a policy that Congress considered of the highest priority." Fox v. Vice, 563 U.S. 826, 833 (2011).

States Constitution;[23] (b) "limited" federal common law;[24] (c) federal regulations;[25] and (d) federal statutes.[26]

Statutes are the most common source of implied private rights of actions in federal courts.[27] Because of their importance as the primary source of implied private rights of action today, the remainder of this Article will provide guidelines to determine whether a private action will be implied from a federal statute. These guidelines can be better understood after a brief discussion of the development of implied private actions themselves.

B. Development of Implied Private Rights of Action

The doctrine of implied private rights of action, so heavily dependent

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23. *See* Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388, 392 (1971) (holding there is a federal remedy for an unlawful search and arrest not limited to conduct condemned by state law). "*Bivens* authorizes a private cause of action against federal officials . . . who violate an individual's constitutional rights while acting under color of federal law." Mullen v. Bureau of Prisons, 843 F. Supp. 2d 112, 116 (D.D.C. 2012).

24. The need to provide a uniform rule to resolve interstate controversies is an example of a limited federal common law area which can provide the basis for an implied private right of action. *See, e.g.*, Drucker v. O'Brien Moving & Storage, Inc., 745 F. Supp. 616 (D. Nev. 1990), *aff'd on other grounds,* 963 F.2d 1171 (9th Cir. 1992). Plaintiff was allowed to bring an implied private right of action, based on federal common law, in a case arising from an interstate move involving a common carrier. The district court specifically found that "it is important that the rules [involving the interstate movement of goods by a common carrier] be uniform throughout the United States. . . ." *Id.* at 623.

25. Implied private rights of action can be based on federal regulations designed to implement a federal statute. For example, Rule 10b-5 (17 C.F.R. § 240.10b-5 (1951)) is a regulation designed to implement section 10b of the Securities Exchange Act. Private actions brought under Rule 10b-5 have become "the most litigated segment of securities law." ALFRED F. CONARD, ET AL., ENTERPRISE ORGANIZATION: CASES, STATUTES, AND ANALYSIS ON EMPLOYMENT, AGENCY, PARTNERSHIPS, ASSOCIATIONS, AND CORPORATIONS 935 (4th ed. 1987).

26. Of course, state statutes can provide the basis for state implied private rights of action. *E.g.*, Bob Godfrey Pontiac, Inc. v. Roloff, 630 P.2d 840, 848 (Or. 1981) (holding the state statute did not give rise to a claim for relief in private actions). However, as its title suggests, this Article is about federal statutes. It is beyond the scope of this Article to discuss state implied private rights of action.

27. Grundfest, *supra* note 5, at 963. ("Most private securities fraud litigation arises pursuant to *statutory provisions* . . . provisions for which the *courts have implied private damage remedies* that are not express in the statute.") (emphasis added). One of the reasons statutes are the primary source of implied private rights of action is because courts have refused to extend private actions based on the Constitution (so-called *Bivens* actions) into new contexts. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017). In addition, actions based on "limited common law" are rare. They are limited to unique situations such as the need for uniformity in a case involving an interstate move, an interstate bill of lading, and an interstate common carrier. *See, e.g.*, *Drucker*, 745 F. Supp. at 623. Finally, implied private actions based on federal regulations are themselves a type of statutory-based private right of action. This is because the Supreme Court has declared that a private action cannot be based on a federal regulation which creates an entirely new prohibition different from the statute it was purporting to enforce. Alexander v. Sandoval, 532 U.S. 275, 291 (2001) ("Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.").

on statutes today, originated as a principle of the common law having nothing to do with statutes.

It rested on the English common law principle that for every legal right there is a remedy.[28] This meant that if a legal right already existed, then a court had the power to fashion a remedy. This common law principle was used by John Marshall to decide *Marbury v. Madison*.[29] It was only after the explosion of legislation in the early twentieth century[30] that statutes began to emerge as a foundation for implied private rights of action.

Implied actions based on statutes have gone through several identifiable eras of development. Each era either restricted or expanded the availability of implied private rights of action. The first era was transitional. It began with a 1916 case based on a common law claim of negligence and a federal statute. In *Texas & Pacific Railroad v. Rigsby*,[31] the common law provided an injured railroad employee with a cause of action against his employer for negligence,[32] while a federal statute provided a duty of care.[33]

The transitional era was followed by an expansive era. This was a time when private rights of action were "freely inferred" from federal statutes.[34] The height of the expansive era occurred in the 1960s when the Supreme Court decided *J.I. Case Co. v. Borak*.[35] In that case, the

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28. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1783).

29. 5 U.S. 137 (1803). In that case, the Secretary of State refused to deliver a judicial commission to William Marbury. Justice Marshall found that Marbury had a *legal right* to his commission. *Id.* at 162. Relying on William Blackstone's famous treatise on the common law, Marshall declared, "it is a general and indisputable rule that where there is a legal right, there is also a legal remedy. . . ." *Id.* at 163 (citing BLACKSTONE, COMMENTARIES at 23).

30. In a case decided in 1994, the Supreme Court wrote, "In this century, legislation has come to supply the dominant means of legal ordering. . . ." Landgraf v. USI Film Products, 511 U.S 244, 272 (1994).

31. 241 U.S. 33 (1916).

32. In a petition filed by the railroad employee plaintiff in the Fifth Circuit on Oct. 9, 1913, Count II states that "the said *defendant was negligent* in not having the said hold or grab securely fastened to the said car, and that *by reason of such negligence*, the same gave way and threw the plaintiff to the ground." (on file with author).

33. The worker was injured after he fell off a box car because of a defective hand hold. The Federal Safety Appliance Act provided that railroad cars shall "be equipped with secure hand holds. . . ." *Rigsby*, 241 U.S. at 37. The fact that the statute was enacted for the benefit of a particular class was legally significant because it triggered "a common-law tradition" which "regarded the denial of a remedy as the exception rather than the rule." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 374–75 (1982).

34. Long Term Care Pharmacy All. v. Ferguson, 362 F.3d 50, 57 (1st Cir. 2004).

35. 377 U.S. 426 (1964), *abrogated by* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017). The 1960s was popularly known as the Civil Rights era. About this expansive era, Justice Rehnquist wrote, "Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act tended to rely to a large extent on the courts to *decide* whether there should be a private right of

Court announced that courts had the ability, indeed even the *duty*, to create new implied private rights of action, and that these actions could be based on the broad ground of *legislative purpose.*[36] This was an extraordinary decision because of the breadth of judicial lawmaking power that the Supreme Court appeared to sanction.[37]

After its opinion in *Borak,* the Supreme Court's acceptance of implied private rights of action became more grudging. The judicial stage was now set for the more restrictive approach of *Cort v. Ash*.[38] In *Cort*, the Supreme Court developed a four-factor test to determine whether a private action could be implied from a federal statute.[39]

This four-factor test underwent significant reconstruction at the hands of the Supreme Court in 1979, and the factor of legislative intent emerged as the "central inquiry."[40] Although they were weakened—and seemed to be only a shadow of their formerly lively selves—*Cort*'s other factors survived, along with additional factors, which the remainder of this Article will discuss.[41]

III. Factors Used to Determine Whether a Private Action Will Be Implied from a Federal Statute

Other than *Cort*'s weakened four factors, no precise test has been articulated to determine whether a federal court will imply a private action from a federal statute. Nevertheless, the following factors have consistently emerged as guidelines for the creation of implied private rights of action. In reviewing these factors, it is important to note that not all factors are weighed equally. The "legislative intent" factor, along with the "rights creating" factor, are the most significant. The following factors are presented chronologically, not in order of their significance.

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action, rather than determining this question for itself." Cannon v. Univ. of Chi., 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) (italics in original) (underlining added).

36. *Borak*, 377 U.S. at 433 ("[I]t is the *duty* of the courts to be alert to provide such remedies as are necessary to *make effective the congressional purpose*.") (emphasis added).

37. About *Borak*, one district court remarked that, "the *Borak* approach is viewed as the *least* restrictive approach in determining whether a private cause of action may be discerned from a statute." Landegger v. Cohen, 5 F. Supp. 3d 1278, 1284–85 (D. Colo. 2013) (emphasis in original).

38. 422 U.S. 66 (1975).

39. These factors are: (1) whether the plaintiff is part of a class "for whose special benefit the statute was enacted[;]" (2) whether there is an indication of any legislative intent to deny or create such a remedy; (3) whether the remedy would be consistent with the "underlying purposes" of the legislation; and (4) whether the subject of the cause of action was one "traditionally relegated to state law" so that it would be inappropriate to imply a new action based on federal law. *Id.* at 78.

40. Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979).

41. Wright v. Allstate Ins. Co., 500 F.3d 390, 395 (5th Cir. 2007) ("Cases subsequent to *Cort* have recognized that all four factors may be important, but the determinative question is whether Congress intended to create a private right of action in favor of the plaintiff.").

We begin with the type of statute that the plaintiff has chosen to rely on.

A. FACTOR ONE: Type of Statute

1. Prohibitory Statutes Favored; Disclosure and Recordkeeping Statutes Not Favored

A court is more likely to base an implied private right of action on a prohibitory statute, rather than a disclosure statute. Title IX is a prohibitory statute which the Supreme Court has held "implies a private right of action to enforce its prohibition on intentional sex discrimination."[42] The Freedom of Information Act ("FOIA")[43] is a disclosure statute. When a plaintiff tried to use FOIA as the basis for an implied private right of action, the Supreme Court refused, emphasizing that FOIA is "exclusively a disclosure statute."[44] Recordkeeping statutes are also disfavored. This is because recordkeeping statutes, like disclosure statutes, do not contain standards of conduct which a private action could enforce.[45] For example, a statute which simply imposed a recordkeeping requirement on a business could not provide the basis for an implied private action because it proscribed "no conduct as unlawful."[46]

2. Spending Clause Statutes Disfavored

A court is also less likely to imply a private right of action from a spending clause statute. The Family Educational Rights and Privacy Act ("FERPA") is a spending clause statute.[47] In 2002, after first noting that recent decisions "have rejected attempts to infer enforceable rights from Spending Clause statutes,"[48] the Supreme Court refused to allow a plaintiff to use FERPA to bring a claim under an implied right of action theory.[49]

The reluctance of a court to make an implied action available under a Spending Clause statute is based, in part, on the contractual nature of this

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42. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005) (citing Cannon v. Univ. of Chi., 441 U.S. 677, 690–93 (1979)).

43. The Freedom of Information Act, 5 U.S.C. § 552 (2012).

44. Chrysler Corp. v. Brown, 441 U.S. 281, 292 (1979).

45. Sec. Inv. Prot. Corp. v. Barbour, 421 U.S. 412, 424 (1975).

46. Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979).

47. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 278 (2002) ("Congress enacted FERPA under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records.").

48. *Id.* at 281.

49. *Id.* at 286.

type of legislation.[50] Acceptance of the terms of a contract cannot be knowing[51] if one party to the contract is unaware of new conditions that might be imposed on it through the judicial creation of an implied private action.

The contractual nature of spending clause legislation also has practical implications for implied private right of action plaintiffs. This is because it can limit the type of relief a plaintiff can obtain.[52] For example, when a plaintiff asked the Supreme Court to imply a remedy for punitive damages from a spending clause statute, the Court refused.[53] It did so because punitive damages are "not normally available" in a contract action.[54] Finally, it is important to note that simply because a statute is characterized as a spending statute is not by itself determinative of whether a court will imply a private action.[55]

3. Jurisdictional Statutes Cannot Provide the Basis for an Implied Private Right of Action

At one time, the Supreme Court appeared to suggest that a private right of action could be implied from a jurisdictional provision.[56] This is not the law today. The Court has flatly rejected the idea that a jurisdictional provision, standing alone, can provide the basis for an implied private right of action.[57] Instead, the source of a plaintiff's action must be found "in the substantive provisions" of the statute the plaintiff is trying to

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50. Spending Clause legislation is "in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); *see also* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1387 (2015) (echoing *Pennhurst* in analyzing Medicaid funds).

51. *See Pennhurst*, 451 U.S. at 17 ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'").

52. *See* Barnes v. Gorman, 536 U.S. 181, 186 (2002) ("Although we have been careful not to imply that *all* contract-law rules apply to Spending Clause legislation, . . . *we have regularly applied the contract-law analogy* in cases defining the scope of conduct for which funding recipients may be held liable for money *damages*.") (emphasis in original) (citation omitted); *but see* David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496, 497 (2007) ("[A]cceptance or rejection of this [contract] thesis . . . has split the Justices into two essentially equal camps. . . .").

53. *Barnes*, 536 U.S. at 189.

54. *Id.* at 188.

55. *See* Cannon v. Univ. of Chi., 441 U.S. 677 (1994) (Title IX is a spending clause statute).

56. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (Section 27 of the Securities Exchange Act grants district courts jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by this title.").

57. *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979) (plaintiff's source of remedy must be found in the substantive provisions of the Securities Exchange Act, not the jurisdictional provisions).

enforce.[58] The reason that jurisdictional provisions cannot provide the basis for an implied private action is because they create no cause of action and impose no liability.[59]

4. Civil Statutes Preferable to Criminal Statutes

Not only will courts refuse to imply a private right of action from a jurisdictional statute, courts are also *reluctant*, but not always opposed, to imply a private right of action from a criminal statute.[60] There are two reasons for this. First, criminal statutes are designed to benefit the public at large and not a particular class.[61] Second, they do not ordinarily "confer a right to a person."[62]

B. FACTOR TWO: Statute Must Identify a Particular Group it is Designed to Benefit; Criminal Statutes and General Regulatory Statutes Often Fail to Satisfy This Requirement

Criminal statutes are not favored as sources of implied private actions because they fail to satisfy a requirement of implied private rights of action analysis. This is the requirement that a statute must expressly identify a specific group that the statute is designed to benefit.[63]

General regulatory statutes also fail to satisfy this requirement. In fact, the Court has "come to view the implication of private remedies in regulatory statutes with increasing disfavor."[64] This is because regulatory statutes, like criminal statutes, are usually enacted for the general public; they are not enacted for the benefit of a specific class. For example, in refusing to engraft a private right of action onto the Rivers and Harbors Act, the Supreme Court found that the language in the statute was not

58. *See id.*

59. *See* AT&T v. M/V Cape Fear, 967 F.2d 864, 869 (3d Cir. 1992) (provision controlling jurisdiction, venue, or service of process creates no private cause of action).

60. *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 190 (1994) ("We have been quite reluctant to infer a private right of action from a criminal prohibition alone. . . ."); *see also* Concert v. Luzerne Cty. Children & Youth Servs., No. 3:CV-08-1340, 2008 WL 4753709, at *3 (M.D. Pa. Oct. 29, 2008) ("Criminal statutes do not generally provide a private cause of action nor basis for civil liability.").

61. Cannon v. Univ. of Chi., 441 U.S. 677, 690 n.13 (1979).

62. *See* Jones v. Lockett, No. 08-16, 2009 WL 2232812, at *8 (W.D. Pa. July 23, 2009) ("It is clear that the criminal statutes invoked by Plaintiff . . . do not provide for a private cause of action. In other words, those statutes do not confer a right to a person.").

63. For example, after two ships broke one of AT&T's underwater cables, AT&T tried to bring an implied private right of action against the vessels based on the Submarine Cable Act. The Third Circuit refused. *AT&T*, 967 F.2d at 867. It characterized the Cable Act as "primarily criminal in nature," making it a misdemeanor to break an underwater cable. It contains no more than a general proscription and does not "focus on any particular class of beneficiaries. . . ." *Id.* (citation omitted).

64. Hallwood Realty Partners, L.P. v. Gotham Partners, L.P., 286 F.3d 613, 618 (2d Cir. 2002).

intended to benefit a particular class.[65] Instead, "it was intended to *benefit the public at large* through a *general regulatory scheme*. . . ."[66] Similarly, in denying a private right of action to an airline passenger under the Air Deregulation Act ("ADA"), a federal court based its decision on the fact that "ADA provisions do not expressly identify domestic air passengers as a class that Congress intended to benefit."[67]

C. FACTOR THREE: The Statute Relied on Must Confer a "Right" on the Plaintiff

In addition to benefiting a particular class, for a statute to provide the basis of an implied private right of action the statute must create "a federal right in favor of the plaintiff."[68] So important is this "rights-creating" factor that if a court determines at the outset that the statute at issue confers no substantive right, then it will not go on to the question of whether there is an implied private cause of action.[69]

Courts have looked at the following characteristics to determine whether a statute creates the necessary federal right to support an implied private right of action: (a) whether the statute contains individual rights; (b) whether the focus of the statute is on the individual protected, not the entity regulated; and (c) whether the right is definite and specific. Each characteristic will be discussed below.

1. Statute Must Create an Individual Right

The first characteristic a court will look at is whether the statute contains any rights at all. If a statute provides "no indication that Congress intends to create new individual rights, there is no basis for . . . an implied right of action."[70]

For example, when a plaintiff tried to bring an implied private right of action under the federal Indian Gaming Regulatory Act, the Eleventh Circuit began its opinion by announcing, "We begin by looking to the text of [the statute] *for rights-creating language*."[71] The court noted that, while a statute that includes words like "no person shall be denied the right to vote" *does* contain the necessary rights-creating language,[72] the

65. California v. Sierra Club, 451 U.S. 287, 297–98 (1980).

66. *Id.* at 297–98 (emphasis added).

67. Casas v. Am. Airlines, Inc., 304 F.3d 517, 522 n.8 (5th Cir. 2002).

68. Cort v. Ash, 422 U.S. 66, 78 (1975); *see also* Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1387 (2015) ("Section 30(A) [of the Medicaid Act] lacks the sort of *rights-creating language* needed to *imply a private right of action*.") (emphasis added).

69. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 n.21 (1981).

70. Gonzaga Univ. v. Doe, 536 U.S. 273, 286 (2002).

71. Alabama v. PCI Gaming Auth., 801 F.3d 1278, 1296 (11th Cir. 2015) (emphasis added).

72. *Id.* at 1296–97 (citing Allen v. State Bd. of Elections, 393 U.S. 544, 555–57 (1969)).

Gaming Act contains no rights-creating language. Therefore, the statute cannot be used to provide the basis for an implied private right of action.[73] The same rights-creating factor was emphasized by the Supreme Court in *Alexander v. Sandoval*.[74] The *Sandoval* case involved an attempt to bring a private cause of action based on a regulation to enforce a section of Title VI.[75] The Court refused to imply a private action because it was "clear that the 'rights creating' language so critical" to the creation of an implied private action was absent from the section.[76]

A federal court reached the opposite conclusion in *Indiana Protection and Advocacy Services v. Indiana Family and Social Services Administration*.[77] In that case, the Seventh Circuit decided that the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI Act") *could* be enforced by an implied private action. Unlike the statute in *Sandoval*, the statutory language in the PAIMI Act directly granted rights to the "plaintiff here."[78]

2. The Focus of the Statute Must Be on the Individuals Protected, Not on the Entity Regulated

A second characteristic a court will look at to determine whether the statutory language is sufficient to provide the necessary individual "right" is whether the focus of the statute is on the entity regulated, rather than the person protected. For example, in denying a private right of action to a worker under the Davis-Bacon Act,[79] the Supreme Court found that, although the Act required that provisions be put into federal construction contracts to benefit "laborers," the requirement did "not confer rights directly on those individuals."[80] Similarly, a federal court refused to imply a private action under the Indian Open Dump Cleanup Act because the statute simply created "agency obligations."[81] The statute did not "focus on the rights of protected parties."[82]

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73. *See id.* at 1297.

74. 532 U.S. 275 (2001).

75. *See id.* at 278 ("[This] case presents the question whether private individuals may sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964.").

76. *Id.* at 288.

77. 603 F.3d 365, 383 (7th Cir. 2010).

78. *Id.* at 378 ("Unlike the statute[] in *Sandoval* . . . the PAIMI Act's key language is not directed at an administrator . . . Instead, the Act directly grants rights and powers to the . . . plaintiff here.").

79. Davis-Bacon Act, 40 U.S.C. § 3141 (2006) *et seq.*

80. Univs. Research Ass'n, Inc. v. Corfu, 450 U.S. 754, 772 (1981).

81. El Paso Nat. Gas Co. v. United States, 750 F.3d 863, 871 (D.C. Cir. 2014) (discussing 25 U.S.C. § 3901 *et seq.*).

82. *Id.* (finding "no right of action can be implied in the [Indian Open Dump Cleanup Act]").

In short, if a federal statute merely imposes a duty on an entity or an agency, but fails to create any rights in favor of the plaintiff, then a court will ordinarily refuse to imply a private right of action. Indeed, one federal court concluded that "the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action."[83]

3. The Right Must Be Definite and Specific

A third characteristic a court will look at to determine whether the statute at issue contains the necessary "right" is whether the so-called right is definite and specific.

Only unambiguously conferred rights can provide the basis for an implied cause of action.[84] Statutory language which consists of vague words like "decent, safe, and sanitary" is not sufficiently definite.[85] Such language suggests that "Congress did not intend to create a judicially enforceable right."[86]

As the discussion above indicates, there is no easy solution to the problem of deciding whether a statute creates the necessary "right" to support an implied private action. Before leaving this section, it is important to note that, in looking for cases to support the existence of a federal right, the same cases used to determine the existence of a federal right for purposes of establishing a statutory "right" under 42 U.S.C. § 1983[87] can also be used to support the existence of a statutory "right" for purposes of creating an implied private right of action.[88]

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83. La. Landmarks Soc., Inc. v. City of New Orleans, 85 F.3d 1119, 1124 (5th Cir. 1996). Earlier, the same court found that the statute at issue "'creates no rights in favor of individuals' but rather, it 'imposes duties on a federal agency. . . .'" *Id.* (citing Abate v. S. Pac. Trans. Co., 928 F.2d 167, 169 (5th Cir. 1991)).

84. Gonzaga v. Doe, 536 U.S. 273, 283 (2002) ("We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under §1983 . . . we further reject the notion that our implied right of action cases are separate and distinct from our §1983 cases.").

85. *See* Banks v. Dall. Hous. Auth., 271 F.3d 605, 610 (5th Cir. 2001) (noting that the Supreme Court finds "statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons") (internal citation omitted).

86. *Id.*

87. More than a hundred years after 42 U.S.C. § 1983 was enacted, the Supreme Court expanded the scope of protections afforded under § 1983 to include violations of federal statutory law, as well as constitutional law. Maine v. Thiboutot, 448 U.S. 1, 4 (1980). However, the Court also ruled that for a statutory claim to go forward, the plaintiff in a § 1983 action must assert the defendant's violation of "a federal *right*, not merely a violation of federal *law*." Blessing v. Freestone, 520 U.S. 329, 340 (1997) (emphasis in original).

88. *Gonzaga*, 536 U.S. at 283 ("[O]ur implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983."). The Court went on

D. FACTOR FOUR: The Conduct of the Defendant Must Be Intentional

Turning from statutory language to potential defendants, liability for a private right of action will be imposed only if the action of a defendant is intentional. Mere negligence is not enough to support an implied private right of action. For example, intent is a necessary element of any implied private action brought under § 10(b) of the Securities Exchange Act.[89] Intent is also an element of the private action created by the Court under Title IX to prohibit discrimination in education.[90] Liability can only attach if a school intentionally acts in violation of Title IX.[91] Liability cannot be imposed against any school vicariously, or through imputation.[92]

E. FACTOR FIVE: "Remediless"

A court will be more likely to create an implied private action in a case where a plaintiff lacks any remedy at all. To deny a plaintiff an implied private action in such a situation would leave such a plaintiff "remediless." The remediless factor can appear in two contexts.

1. Remediless Factor Arising from Agency Failure to Enforce an Existing Statutory Remedy

The first context arises in a situation where a remedy exists, but the government agency tasked with enforcing a statute refuses to do so. *Franklin v. Gwinnett County Public Schools*[93] provides an example of the Supreme Court deciding to imply a private remedy from a federal statute after the public agency tasked with enforcing it failed to do so. The *Franklin* case arose when a 14-year-old female student was repeatedly and brazenly[94] sexually assaulted by a teacher/coach. The Court allowed the student to seek damages, based on an implied private right of action

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to declare that: "[T]he initial inquiry—determining whether a statute confers any right at all [under §1983]—*is no different from the initial inquiry in an implied private right of action case*. . . ." *Id.* at 285 (emphasis added).

89. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976) ("§10(b) [of the Securities Exchange Act] . . . cannot be read to impose liability for negligent conduct alone.").

90. *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 642 (1999) (finding an intentional violation of Title IX does not bar a private cause of action); *see also* Hunter *ex. rel*. Hunter v. Barnstable Sch. Comm., 456 F. Supp. 2d 255, 265 (Mass. Dist. Ct. 2006) ("deliberate indifference" standard is met when school system intentionally violates Title IX).

91. *Hunter*, 456 F. Supp. 2d at 265.

92. *Davis*, 526 U.S. at 642.

93. 503 U.S. 60, 76 (1992).

94. *Id.* at 63 (three times the coach "interrupted a class, requested that the teacher excuse [the student] and took her to a private office where he subjected her to coercive intercourse.").

theory, since any other approach would have left her "*remediless*."[95]

The student was indeed remediless. Although she complained to her school's administrators, not only did the school fail to take substantive action, one school official attempted to dissuade her from pursuing any complaint at all![96] Of even more significance was the fact that the Office of Civil Rights of the Department of Education, the federal agency charged with enforcing Title IX's gender discrimination ban, closed its investigation once the teacher resigned.[97] Remarkably, the agency decided to close its investigation even though the agency itself had reached the conclusion that the student's rights had been violated.[98]

2. Remediless Factor Arising from the Fact That a Statute Contains No Remedy at All

The second context in which the remediless factor can arise is in a situation where a statute contains no remedy at all.[99] A court is more likely to imply a private action under a rights-creating statute that contains no enforcement mechanism. For example, when shareholders of a bank asked a court to imply a private right of action under the Federal Deposit Insurance Act, the federal court agreed.[100] The court examined the statutory scheme and found that there was no means to enforce its provisions "apart from an implied private right of action."[101] The court went on to hold that where Congress failed to provide an enforcement mechanism, "it is appropriate to infer that Congress did not intend to enact unenforceable requirements. Thus, it is fair to imply a private right of action from the statute at issue."[102]

Similarly, in an earlier case involving a statute which prohibited unions

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95. *Id.* at 76 (emphasis added).

96. *Id.* at 64. The lower court opinion tells the story. Franklin v. Gwinnett City. Pub. Sch., 911 F.2d 617, 618 (11th Cir. 1990) (After the student reported the teacher to school authorities, another teacher "tried to discourage her from pursuing the matter by talking to her about the negative publicity. . . . [The second teacher also contacted the student's boyfriend] in an effort to enlist his assistance to discourage Franklin from pursuing the matter."), *rev'd,* 503 U.S. 60 (1992).

97. *Franklin*, 503 U.S. at 64 n.3.

98. *Id.* (Although the Office of Civil Rights of the Department of Education, (OCR) "concluded that the school district had violated the student's rights by subjecting her to physical and verbal sexual harassment and by interfering with her right to complain . . . [OCR] terminated its investigation.").

99. Wisniewski v. Rodale, Inc., 510 F.3d 294, 297 (3rd Cir. 2007) (Some federal statutes "merely define rights and duties, and are silent about whether an individual may bring suit to enforce them. For some statutes in this latter category, courts have held that 'implied' private rights of action exist.").

100. *See* First Pac. Bancorp, Inc. v. Helfer, 224 F.3d 1117, 1126 (9th Cir. 2000).

101. *Id.* at 1126.

102. *Id.*

from discriminating against minority workers, the Supreme Court "judicially implied" a remedy.[103] The Court declared that where statutory duties are in the form of commands, and there is an "absence of any available administrative remedy," the only mode of enforcement is the courts.[104]

F. FACTOR SIX: Type of Remedy Sought

A federal court is more likely to imply a private action if the plaintiff is seeking equitable relief, rather than money damages. For example, in deciding to imply a private right of action for accounting in favor of a bank's shareholders, the Ninth Circuit pointed to the fact that the remedy plaintiff shareholders were seeking was "an equitable one, an accounting."[105] The court went on to declare that "because the remedy at hand is an equitable one, we are more inclined to perceive in Congress' silence a presumption that an individual may pursue a claim."[106]

G. FACTOR SEVEN: Federalism: Whether the Claim Involves an Area That is Normally Relegated to State Law

A court is less likely to create a private right of action from a federal statute if the subject matter is one traditionally regulated by state law.[107]

Family law is a traditional area of state law. In *Thompson v. Thompson*,[108] the Supreme Court refused to recognize an implied private right of action involving a custody dispute under the federal Parental Kidnapping Prevention Act.[109] The Court declared that allowing a parent to bring an implied private right of action under the Kidnapping Act would entangle federal courts in an area of "traditional state-law

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103. Steele v. Louisville Nashville R.R., 323 U.S. 192, 207 (1944). The Supreme Court later determined, "The right to bring unfair representation actions is *judicially* '*implied* from the statute and the policy which it has adopted' . . . and Congress has not specified what remedies are available in these suits." Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 47 (1979) (citing *Steele*, 323 U.S. at 204).

104. *Steele*, 323 U.S. at 207.

105. *First Pac. Bancorp, Inc.*, 224 F.3d at 1125.

106. *Id.*; *see also* Note, *Private Rights of Action—Equitable Remedies to Enforce the Medicaid Act—Armstrong v. Exceptional Child Center, Inc.*, 129 HARV. L. REV. 211, 215–16 (2015) ("As its private-rights-of-action doctrine has evolved, the Court has drawn distinctions among different remedies. . . . In suits for damages under federal statutes . . . the Court has applied a skeptical approach. . . . Yet in suits for equitable relief, the approach has remained broad and permissive. . . .").

107. Cort v. Ash, 422 U.S. 66, 78 (1975) (If a cause of action is "traditionally relegated to state law, . . . then it would be inappropriate to infer a cause of action based solely on federal law.").

108. 484 U.S. 174, 187 (1988) (analyzing a possible private right of action under 28 U.S.C. § 1738A).

109. *Id.* (There is a "conclusive case *against* inferring a cause of action in federal court to determine which of two conflicting state custody decrees is valid.") (emphasis added).

questions" which they "have little expertise to resolve."[110]

Landlord-tenant law is another traditional area of state law. When a plaintiff tried to bring an implied private right of action based on a housing statute, a federal court refused on the ground that states have a great interest in the area of landlord-tenant law.[111]

H. FACTOR EIGHT: Interference with Statutory Purpose

A court is less likely to recognize a new private action if it would interfere with the purpose of a statute. For example, in *National Railroad Passenger Corp. v. National Association of Railroad Passengers*,[112] the Court refused to imply a private right of action in favor of a railroad passenger who wanted to challenge a route reduction plan under the Rail Passenger Service Act.[113] The Court found that the purpose of the statute was to eliminate uneconomic train routes. Permitting passengers to bring private rights of action would *hurt* the overall statutory *purpose*.[114] Similarly, when a cable operator sought to imply a private right of action that would have allowed him to prevent another cable operator from providing service, a federal court refused.[115] The court explained that the purpose of the Act was "to promote competition," and allowing an incumbent cable operator to bring a private action against a new entrant might thwart competition.[116]

I. FACTOR NINE: Accomplishment of Statutory Purpose

The factor of statutory purpose is a double-edged sword. In addition to being used to deny an implied private right of action, "purpose" can also be used as a factor in support of the creation of an implied private right of action. For example, when bank shareholders asked a federal court to imply a private right of action under the Federal Reserve Act, the court noted that an important inquiry in deciding the case was whether implying a new remedy "is consistent with the underlying purposes of the legislative scheme."[117]

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110. *Id.* at 186.

111. *See* Jefferies v. District of Columbia, 917 F. Supp. 2d 10, 47 (D.C. Cir. 2013) (noting an inconsistency with any federal legislative scheme "to imply a private cause of action where the legal right invoked is one traditionally left to state law. It would be hard to find an area of law in which states have a greater interest . . . than in the legal area of landlord-tenant.") (internal citation omitted).

112. 414 U.S. 453, 465 (1974).

113. 45 U.S.C. §§ 501–02 (repealed 1994).

114. Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 463 (1974).

115. San Juan Cable LLC v. P.R. Tel. Co., 612 F.3d 25, 32 (1st Cir. 2010).

116. *Id.* at 31.

117. First Pac. Bancorp, Inc. v. Helfer, 224 F.3d 1117, 1126 (9th Cir. 2000).

However, it is important to note that statutory purpose alone *cannot* be used to create an implied private right of action. The Court abandoned the "legislative purpose" theory as the sole basis for implied private right of action analysis some time ago in favor of a theory based on legislative intent.[118]

J. FACTOR TEN: Requirement of Legislative Intent: Enforcement Provisions Already Contained in a Statute as an Indicator of Legislative Intent

No matter how strong a case can be made that an implied private right of action will further a statutory purpose, a court will not imply a private right of action from a federal statute unless it can be demonstrated that Congress intended to create a private right of action.[119] Indeed, the Supreme Court has declared legislative intent to be the central inquiry.[120] Unfortunately, no precise test has been developed to determine legislative intent. What there is instead are indicators of legislative intent. A primary indicator of legislative intent has already been discussed. This is whether the statute contains rights-creating language.[121] In addition to rights-creating language, enforcement provisions already present in a statute can also provide an indication of legislative intent.

Examples of enforcement provisions which can provide an indication of legislative intent are: (a) whether the statute provides an *express* private right of action in one section, but not in another; (b) whether the statute at issue already provides a comprehensive and detailed enforcement mechanism; and (c) whether the statute at issue delegates enforcement to a federal agency. Each of these "enforcement" indicators will be discussed below.

1. Indication of Legislative Intent: Express Private Right of Action Already Contained in Other Parts of the Statute at Issue

One indication of legislative intent is whether the statute that Congress

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118. Lest there be any doubt about the viability of statutory purpose as the sole basis for an implied private right of action today, the Court has characterized statutory purpose analysis as something we "abandoned" forty years ago. Alexander v. Sandoval, 532 U.S. 275, 287 (2001); *see also* Olmsted v. Pruco Life Ins. Co. of N.J., 283 F.3d 429, 434 (2d Cir. 2002) (describing statutory purpose, in the context of implied private right of action analysis, as something belonging to an "*ancien regime*").

119. *See* Bellikoff v. Eaton Vance Corp., 481 F.3d 110, 116 (2d Cir. 2007) ("Congressional intent is the keystone as to whether a federal private right of action exists for a federal statute.").

120. Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1102 (1991) ("[R]ecognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy.") (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979)).

121. *See supra* text accompanying notes 68–86.

enacted *already contains* an *express* private means of enforcement.[122] This would appear to indicate that Congress did not intend to leave open the possibility of the implied addition of another private remedy.[123] For example, when the Ninth Circuit refused to imply a private right of action under Section 304 of the Sarbanes-Oxley Act, it noted that Congress had already expressly created a private right of action under Section 306 of the same Act.[124] The court went on to declare that, "we cannot find in Congress' silence in section 304 an intent to create a private right of action where it was not silent in creating such a right . . . in other sections of the same Act."[125]

Similarly, when a cable operator asked a federal court to imply a private right of action under section 541(b)(1) of the Cable Communications Policy Act, the court refused.[126] The court found it "particularly noteworthy" that Congress provided a private right of action in an *adjacent provision of the same statute*.[127]

2. Indication of Legislative Intent: Statute Already Contains a Detailed Enforcement Mechanism That Expressly Prescribes Other Remedies

The presence of an elaborate enforcement mechanism in a statute also tends to contradict any legislative intent to create additional private remedies. For example, in a case involving the Federal Water Pollution Control Act[128] and the Marine Mammal Protection Act,[129] the Supreme Court announced that, in view of the "elaborate enforcement provisions" each statute contained, "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens. . . ."[130]

In short, if a statute already contains a comprehensive enforcement scheme, then this becomes a factor in discerning legislative intent.[131]

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122. Winding Creek Solar LLC v. Peevey, No. 13-cv-04934-JD, 2015 WL 675388, at *6 (N.D. Cal. Feb. 17, 2015) ("[T]he existence of [] express remedies demonstrates . . . that Congress intended to foreclose implied private actions. . . .") (alteration in original).

123. City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 121 (2005).

124. *In re* Digimarc Corp. Derivative Litig., 549 F.3d 1223, 1230–31 (9th Cir. 2008).

125. *Id.* at 1233.

126. San Juan Cable LLC v. P.R. Tel. Co., 612 F.3d 25, 34 (1st Cir. 2010).

127. *Id.* at 30.

128. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–75 (2012).

129. Marine Mammal Protection Act, 33 U.S.C. §§ 1401–45 (2012).

130. *See* Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14 (1981); *see also* Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 97 (1981) ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.").

131. *See* Wisniewski v. Rodale, Inc., 510 F.3d 294, 303 (3d Cir. 2007) (exploring possible boundaries for determining congressional intent).

Similarly, if a statute "expressly prescribes other remedies," then this also "belies congressional intent to create an implied right of action. . . ."[132]

3. Indication of Legislative Intent: Statute Delegates Enforcement to a Federal Agency

Another indicator of legislative intent is whether a statute has delegated enforcement to a federal agency. In *Acara v. Banks*,[133] a court held that the Affordable Care Act could not provide patients with an implied private right of action to remedy improper disclosure of their medical records because the Act delegated enforcement to the Department of Health and Human Services ("HHS").[134] The court found the specific delegation to HHS to be a "strong indication that Congress intended to preclude private enforcement."[135]

Finally, it is important to emphasize that delegating enforcement to a federal agency is not conclusive of a congressional intent to preclude private actions. For example, as the beginning of this Article noted, although the SEC is the agency charged with enforcing various securities laws, implied private actions have been allowed to play a significant role alongside the agency's own enforcement actions.[136]

K. FACTOR ELEVEN: Presumption Against the Creation of an Implied Private Right of Action

The reason that legislative intent must be established as the foundation for an implied private right of action is not only because of the obvious separation of powers issue (courts are not supposed to "usurp" Congress' power to legislate),[137] but also because of the presumption against the

132. Alabama v. PCI Gaming Auth., 801 F.3d 1278, 1297 (11th Cir. 2015).

133. 470 F.3d 569 (5th Cir. 2006).

134. *Id.* at 571 ("The express provision of one method of enforcing [a statute] suggests that Congress intended to preclude others.") (alteration in original) (quoting Alexander v. Sandoval, 532 U.S. 275, 290 (2001)).

135. *Id.* It should be noted that an indication that Congress intended to preclude private enforcement becomes particularly strong when a statute delegates enforcement to a *federal agency with expertise in a complex area*. Such a complex area is rate setting for reimbursement to providers of Medicaid services. In *Armstrong*, which involved an attempt by providers to bring a private enforcement action "to enjoin unlawful executive action," the Supreme Court refused private enforcement of the relevant statute. Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1385 (2015). The Court found that "[t]he *sheer complexity associated with enforcing* § 30(A) . . . shows that the Medicaid Act precludes private enforcement of § 30(A) in the courts." *Id.* (emphasis added).

136. *See supra* note 12.

137. *See In re* Digimarc Corp. Derivative Litig., 549 F.3d 1223, 1230–31 (9th Cir. 2008) ("In the absence of clear evidence of congressional intent, we may not usurp the legislative power by unilaterally creating a cause of action.").

creation of new private actions. [138]

A plaintiff seeking to imply a private action today has the burden of proof to overcome the presumption against the judicial creation of new implied actions.[139] The old presumption in favor of the implication of new private actions has been discarded.[140] A new "presumption against implying private rights comes into play" today.[141] Unless a plaintiff can offer evidence of congressional intent, the presumption will not be overcome. [142]

L. FACTOR TWELVE: Congressional Silence, or Acquiescence, Cannot Be Used as a Substitute for Legislative Intent

1. Silence

The Supreme Court has declared that where a statute is "silent on the question of a private remedy, 'implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best.'"[143] Other courts have observed that legislative silence is not enough. Instead, a plaintiff seeking to have a court imply a private action must provide evidence of legislative intent. For example, one court noted that "legislative silence is often encountered in implied right of action cases . . . *[b]ut unless 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*."[144]

2. The Acquiescence Doctrine

Similarly, congressional acquiescence cannot provide the basis for an

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138. *See* San Juan Cable LLC v. P.R. Tel. Co., 612 F.3d 25, 30 (1st Cir. 2010) ("The baseline rule is that a federal statute ordinarily should be read as written, in effect creating a presumption against importing, by implication, a private right of action. This de facto presumption has considerable bite; it 'can be overcome only by compelling evidence of a contrary congressional intent.'") (quoting Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 68 (1st Cir. 2002)).

139. *See, e.g.*, Acara v. Banks, 470 F.3d 569, 571 (5th Cir. 2006) ("[P]laintiff has the relatively heavy burden to show Congress intended private enforcement, and must overcome the presumption that Congress did not intend to create a private cause of action.").

140. Long Term Care Pharmacy All. v. Ferguson, 362 F.3d 50, 57 (1st Cir. 2004) ("Private rights of action were once freely inferred from federal statutes . . . but the ready inference in favor of private enforcement no longer applies.").

141. United States v. Jimenez-Nava, 243 F.3d 192, 197 (5th Cir. 2001).

142. Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017) ("[W]hen deciding whether to recognize an implied cause of action, the 'determinative' question is one of statutory intent.").

143. Till v. Unifirst Fed. Sav. & Loan Ass'n, 653 F.2d 152, 160 (5th Cir. 1981) (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 571 (1979)).

144. Baker v. Montgomery Cty., 50 A.3d 1112, 1125 (Md. 2012) (emphasis in original) (quoting Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 94 (1981)).

implied private right of action either. For example, in *Central Bank of Denver v. First Interstate Bank of Denver*,[145] plaintiffs argued that, since Congress had failed to amend certain securities laws to provide that a cause of action for aiding and abetting was not available, then Congress had acquiesced to a judicially implied private cause of action recognized by some lower federal courts. The Supreme Court disagreed. It held that § 10(b) of the Securities Exchange Act[146] could not provide the basis for an implied private right of action for aiding and abetting.[147] In making its ruling, the Court declared: "[O]ur observations on the *acquiescence doctrine* indicate its *limitations* as an expression of congressional intent. . . . 'Congress may legislate, moreover, only through the passage of a bill . . . Congressional *inaction cannot amend* a duly enacted statute.'"[148]

M. FACTOR THIRTEEN: Agency Position in Favor of Implication

Another factor, although a minor one, is whether the federal agency charged with enforcing the statute at issue is in favor of implication. For example, when the Court decided to imply a private right of action under Title IX, it noted that the department which administered the statute had taken the position that a private cause of action should be implied.[149] It is important to note that courts do not always give weight to an agency's position. Courts are supposed to decide cases based on legislative intent, not what the agency charged with enforcing a statute thinks. For example, although the SEC filed an amicus brief in support of a plaintiff who sought to establish an implied private action for aiding and abetting,[150] the Supreme Court refused to imply a private right of action.[151]

N. FACTOR FOURTEEN: Cause of Action or Remedy

Courts are more reluctant to imply a brand new cause of action than to imply a remedy for a cause of action that already exists. For this reason,

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145. 511 U.S. 164, 186 (1994).

146. 15 U.S.C. § 78j (2012).

147. *Cent. Bank of Denver*, 511 U.S. at 191 ("Because the text of § 10(b) does not prohibit aiding and abetting, we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b).").

148. *Id.* at 186 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 175, n.1 (1989)) (emphasis added), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

149. Cannon v. Univ. of Chi., 441 U.S. 686, 687 (1979).

150. Brief for the Securities Exchange Commission as Amicus Curiae in Support of Respondents at 5, Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994) (No. 92-854), 1993 WL 13006275, at *5.

151. *Cent. Bank of Denver*, 511 U.S. at 191.

a plaintiff seeking to have a court imply a remedy should say so. For example, when a plaintiff asked the Third Circuit to imply a private action for contribution, the court began by declaring that, "we must determine if a right of contribution is a right of action in itself or whether it is a remedy."[152] In that particular case, the plaintiff strenuously argued that he was merely seeking a remedy.[153] The court observed that by characterizing an action for contribution as a remedy, the plaintiff was trying to avail himself of "the principle that once a right and cause of action are established, the federal courts are empowered broadly to award any appropriate relief."[154]

O. FACTOR FIFTEEN: Public Defendant as a Factor

Whether the defendant is a government entity is another factor that determines if a court will imply a private action. Implying a cause of action against a government entity is dramatically different from seeking to imply an action against a private defendant.[155] This is because the *immunities* available *to* a government entity, as well as the restricted *remedies* available *against* a government entity, differ significantly from those available to and against a private party.

1. The United States Enjoys Immunity from Suit Under the Doctrine of Sovereign Immunity

As a general rule, "the United States enjoys immunity from suit."[156] The origin of this immunity is the doctrine of sovereign immunity.[157] What this means, as a practical matter, is that unless a plaintiff can produce a statutory waiver of immunity, any action naming the United States as a defendant will fail.[158] This is because the United States cannot

152. Bowers v. NCAA, 346 F.3d 402, 419 (3d Cir. 2003).

153. *Id.* ("Temple argues that the right of contribution is a remedy.").

154. *Id.* at 420. Characterization of whether a plaintiff is seeking a new right of action, or a remedy, will not necessarily determine the outcome. *See id.* ("[T]his case should not turn on our characterization of the nature of contribution as the Supreme Court has not determined whether contribution is available by clearly distinguishing among rights, rights of action, and remedies.").

155. Sossamon v. Texas, 563 U.S. 277, 291 n.8 (2011) ("[R]emedies against the government differ from 'general remedies principles' applicable to private litigants.").

156. Roman-Cancel v. United States, 613 F.3d 37, 41 (1st Cir. 2010).

157. Muirhead v. Mecham, 427 F.3d 14, 17 (1st Cir. 2005) ("It is beyond cavil that, *as the sovereign*, the United States is immune from suit without its consent.") (emphasis added). Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims against the United States*, 71 GEO. WASH. L. REV. 602, 606 (2003) ("The concept of 'sovereign immunity'—that is, the immunity of the federal government from suit without its express permission . . . underlies and permeates the subject of litigation against the federal government.").

158. In deciding whether a statutory waiver exists, three factors should be taken into account. First, there is a "general rule that 'a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.'" Dolan v. U.S. Postal Serv., 546 U.S.

be sued without consent from Congress.[159] Native American tribes within the United States also enjoy sovereign immunity, and this can provide a defense to an implied private right of action. For example, in *Santa Clara Pueblo v. Martinez*,[160] the Supreme Court refused to imply a private right of action under the federal Indian Civil Rights Act ("ICRA") because "suits against the tribe under the ICRA are barred by its sovereign immunity from suit."[161]

2. The Doctrine of Sovereign Immunity Applies to Federal Agencies and to Federal Officials Acting in Their Official Capacities

Just as the United States cannot be sued, federal agencies and federal officers acting in their official capacities cannot be sued either.[162] This is why the implied private right of action plaintiff in the famous *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*[163] case did not name the Federal Bureau of Narcotics or the drug enforcement officers in their official capacities as defendants. It is because "an action against a federal agency or federal officers in their *official capacities* is essentially a suit against the United States[.]"[164] For a potential plaintiff, this means that many public defendants are immune from suit.[165]

3. The Doctrine of Sovereign Immunity Does *Not* Apply to Federal Officials Sued in Their *Personal* Capacities

As indicated above, federal employees acting in their official

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481, 491 (2006) (citation omitted). Second, jurisdictional statutes, standing alone, "do not operate as waivers of sovereign immunity." Munaco v. United States, 522 F.3d 651, 653 n.3 (6th Cir. 2008). Third, a waiver of sovereign immunity cannot be implied. *Sossamon*, 563 U.S. at 288 (citation omitted).

159. Freeman v. United States, 556 F.3d 326, 334 (5th Cir. 2009) (citing Block v. North Dakota *ex rel*. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 287 (1983)); *see also* Williamson v. U.S. Dep't of Agric., 815 F.2d 368, 373 (5th Cir. 1987) (noting the United States is immune from suit except when it consents).

160. 436 U.S. 49 (1978).

161. *Id.* at 59.

162. *See* Lane v. Pena, 518 U.S. 187, 191–92 (1996) ("equalization provision" of Rehabilitation Act Amendments of 1986 does not indicate congressional intent to subject federal agencies to liability for money damages); *see also* Griggs v. LaHood, 770 F. Supp. 2d 548, 551 (E.D.N.Y. 2011) ("[T]he federal government, and by extension, federal employees acting in their official capacities, are entitled to absolute sovereign immunity from suit.").

163. 403 U.S. 388 (1971). The case held "the Fourth Amendment implies a private right of action against government officials engaged in illegal searches." *See also* John P. Cronan, Comment *Subjecting the Fourth Amendment to Intermediate Scrutiny*: *The Reasonableness of Media Ride-Alongs*, 17 YALE L. & POL'Y REV. 949, 951 n.16 (1999) (citing *Bivens* for the same proposition).

164. Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir. 1994) (emphasis added).

165. *Griggs*, 770 F. Supp. 2d at 551–52.

capacities enjoy sovereign immunity from suit. However, if a federal employee is sued in his or her individual capacity, "sovereign immunity does not apply."[166] This is why the federal agents in *Bivens* were only named as defendants in their individual capacities.[167]

4. If the Defendant is a State, a Plaintiff Must Also Confront Sovereign Immunity

Just as the United States enjoys sovereign immunity, each of the fifty states also enjoy immunity from suit. A state enjoys two different species of immunity. First is the Eleventh Amendment,[168] which presents a bar to an action against a state by a private individual in federal court.[169]

In addition to Eleventh Amendment immunity, states also enjoy "a broader sovereign immunity, which applies against *all* private suits, whether in state or federal court."[170] What this means for a private right of action plaintiff is that, if the defendant is a state, the first issue the plaintiff must face is whether the state has waived its sovereign immunity.[171] If it has not, then any implied private right of action case is at an end. For example, in *Sossamon v. Texas*,[172] a prisoner tried to bring an implied private action against the State of Texas under the federal Religious Land Use and Institutionalized Persons Act. The Supreme Court refused, holding that a private cause of action "does not include suits for damages against a State."[173]

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166. *Id.* at 552.

167. In *Bivens*, the plaintiff sued the federal agents in their individual capacities as six unknown agents. 403 U.S. at 391. "*Bivens* authorizes a private cause of action against federal officials *in their individual capacity* who violate an individual's constitutional rights while acting under color of federal law." Mullen v. Bureau of Prisons, 843 F. Supp. 2d 112, 116 (D.D.C. 2012) (citing Simpkins v. District of Columbia, 108 F.3d 366, 369 (D.C. Cir. 1997)) (emphasis added).

168. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by Citizens of another State. . . . ").

169. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001) (noting a state's Eleventh Amendment immunity can be abrogated by Congress in situations involving enforcement of the Fourteenth Amendment); *see also* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (stating that the Eleventh Amendment is limited by the Fourteenth Amendment).

170. Beaulieu v. Vermont, 807 F.3d 478, 483 (2d Cir. 2015); *see also* Alden v. Maine, 527 U.S. 706, 713, 722 (1999) (discussing state sovereign immunity generally, including that beyond the Eleventh Amendment).

171. Turner v. Boyle, 116 F. Supp. 3d 58, 73 (D. Conn. 2015) ("A suit generally may not be maintained directly against the State itself, or against any agency or department of the State, unless the State has waived its sovereign immunity.") (quoting Fla. Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 684 (1982)).

172. 563 U.S. 277 (2011).

173. *Id.* at 288.

5. A State Agency, Which is an "Arm of the State," Cannot Be Sued, Nor Can the Agency's Employees Acting in Their Official Capacities

Just as states cannot ordinarily be sued, most state agencies cannot be sued either. Specifically, the Eleventh Amendment protects state administrative agencies, which are "arms of the state," from being sued. For example, the Nevada State Bar Association is immune from suit under the Eleventh Amendment because it was found to be an "arm of the state."[174] Immunity also extends to state agency employees "acting in their official capacities as agents of the state."[175]

6. State Employees Sued in Their *Individual* Capacities May Be Entitled to "Qualified" Immunity

Potential implied private right of action plaintiffs should be aware that it makes a difference whether a state employee is sued in an official capacity or in an individual capacity. While the Eleventh Amendment provides a form of absolute immunity to state employees sued in their official capacities, a state employee sued in his or her *individual* capacity is only entitled to *qualified* immunity.[176] Qualified immunity protects public employees from liability for conduct the employee could not have reasonably known would violate a "clearly established" constitutional or statutory right.[177] The purpose of qualified immunity is to give "government officials breathing room to make reasonable but mistaken judgments. . . ."[178]

P. FACTOR SIXTEEN: Subject Matter as a Factor

In addition to the identity of the defendant, another factor courts look to is subject matter. The hospitality of a court toward the creation of a

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174. Mirch v. Beesely, 316 F. App'x 643, 643 (9th Cir. 2009); *see also* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002) (affirming dismissal of an action against the South Carolina States Port Authority ("SCSPA") on sovereign immunity grounds after finding that the SCSPA was an "arm of the State of South Carolina"). It is important to note that the determination of whether a state agency is an "arm of the state" is a matter of federal law, not state law. Pub. Sch. Ret. Sys. of Mo. v. State St. Bank & Tr. Co., 640 F.3d 821, 827 (8th Cir. 2011).

175. *Mirch*, 316 F. App'x at 643 (citing Pena v. Gardner, 976 F.2d 469, 472 (9th Cir. 1992)).

176. Walker v. Bd. Trs. Reg'l Trans. Dist., 76 F. Supp. 2d 1105, 1109 (D. Colo. 1999) (qualified immunity is "only available to those defendants sued in their personal capacities").

177. Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'") (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); *see also* Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014) ("An official . . . is entitled to qualified immunity unless it is shown that the official violated a statutory or constitutional right that was 'clearly established' at the time of the challenged conduct.").

178. City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1774 (2015).

new implied private right of action seems to depend, in part, on subject matter. Specifically, courts appear to be more hospitable to claims based on civil rights,[179] as opposed to bare claims involving property or economic loss.[180] This is not unusual if one considers the fact that, in some procedural due process cases involving "mere" property rights, the Court is willing to postpone a constitutionally required hearing in cases where "only property rights are involved."[181] A hint of this preference is already visible in the power of Congress to abrogate a state's sovereign immunity if a claim arises from a Fourteenth Amendment civil rights violation.[182] The same understandable preference exists in Congress' decision to award attorneys' fees to certain plaintiffs who bring civil rights actions because they are "vindicating a policy that Congress considered of the highest priority."[183]

No case holds that courts should be more sympathetic to a plaintiff who brings an implied action to enforce a civil right, rather than an economic right. However, a 2005 Supreme Court case, *Jackson v. Birmingham Board of Education*,[184] is instructive. Although the case was decided during the modern era, which burdens a plaintiff with a

179. *See, e.g.*, Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969) (finding private right of action implied under the Voting Rights Act of 1965), *abrogated on other grounds by* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969) (finding private right of action implied under 42 U.S.C. § 1982 for discrimination in the sale of real property), *abrogated by* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017); Peters v. Jenney, 327 F.3d 307, 315 (4th Cir. 2003) ("It is well-settled that there is an implied private right of action to enforce § 601's [of Title VI of the Civil Rights Act of 1964] core prohibition of discrimination. . . . ").

180. With this in mind, it does not seem to be coincidental that the most expansive era of implied private rights activity coincided with the passage of civil rights legislation in the 1960s. Indeed, Justice Rehnquist commented on the expanded role of courts in deciding whether to imply private actions during the Civil Rights Era: "Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act[,] tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself." Cannon v. Univ. of Chi., 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) (italics in original). Similarly, Cass Sunstein calls this the period of the "rights revolution of the 1960's and 1970's." Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 409 (1989) (referring to the increased number of statutes designed to protect, e.g., the environment, consumers, and "victims of discrimination").

181. Bowles v. Willingham, 321 U.S. 503, 520 (1944) (emphasis added) (citations omitted). This is not to suggest that the Court will always postpone a due process hearing involving property rights. As the famous case of *Goldberg v. Kelly* held, it is unconstitutional to deny welfare recipients a pre-termination due process hearing when the property right at stake involved "the very means by which to live." Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

182. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (explaining that Congress can abrogate a state's sovereign immunity "*for the purpose of enforcing the provisions of the Fourteenth Amendment* [and to] provide for private suits against States[.]") (emphasis added).

183. Fox v. Vice, 563 U.S. 826, 833 (2011) (citing Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968) (per curiam)).

184. 544 U.S. 167 (2005).

presumption against the creation of new implied private actions, the Court nevertheless used Title IX to imply a private action for retaliation in favor of a plaintiff who was not himself the victim of gender discrimination.[185] Title IX is a civil rights statute designed to enforce the Equal Protection Clause by prohibiting educational institutions from discriminating on the basis of gender.[186] The origin of the new implied private action in *Jackson* began when a male high school coach complained that his school discriminated against members of the female basketball team he coached.[187] He successfully went on to claim that he was entitled to bring an implied private right of action under Title IX because the school "retaliated" against him after he complained.[188]

The case was unusual, not just from a factual point of view (the plaintiff himself was not the victim of discrimination), but also from a statutory interpretation point of view. This is because, although other civil rights statutes contain specific prohibitions against retaliation,[189] Title IX does not. Nevertheless, the Court held that the plaintiff could bring an implied private right of action for retaliation under Title IX, despite the fact that the word "retaliation" does not appear anywhere in the statute.[190]

Four members of the Court dissented.[191] They claimed that the Court established "a prophylactic enforcement mechanism designed to encourage whistle-blowing about sex discrimination."[192] The dissent concluded that, by creating its own enforcement mechanism "out of

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185. The Court held:

> Nor is the Court convinced by the Board's argument that . . . Jackson is not entitled to invoke it [Title IX] because he is an 'indirect victi[m]' of sex discrimination. . . . The statute is broadly worded; it does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint.

Id. at 179.

186. 20 U.S.C. § 1681(a) (2012) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." absent statutory provisional exceptions.).

187. Jackson v Birmingham Bd. of Educ., 544 U.S. at 171 ("Jackson began complaining to his supervisors about the unequal treatment of the girls' basketball team, but to no avail.").

188. *Id.* at 183 ("Title IX . . . supplied sufficient notice to the Board that it could not retaliate against Jackson after he complained of discrimination against the girls' basketball team.").

189. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a).

190. Specifically, the Court held "Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex." *Jackson*, 544 U.S. at 178. About the fact that the word "retaliation" does not appear anywhere in the statute, the dissent argued: "Congress enacted a separate provision in Title VII to address retaliation . . . Congress' failure to include similar text in Title IX shows that it did not authorize private retaliation actions." *Id.* at 189 (Thomas, J., dissenting).

191. *Id.* at 184. The dissent was written by Justice Thomas, and joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy.

192. *Id.* at 185.

whole cloth," what the Court did was to "substitute[] its policy judgments for the bargains struck by Congress, as reflected in the statute's text."[193] Some commentators have questioned whether the Court in *Jackson* "overstated its boundaries in finding that Title IX created a private right of action for retaliation in the absence of a clear Congressional intent to do so."[194]

Finally, while courts may be understandably hospitable to implied private claims when the subject matter involves civil rights, they are reluctant to entertain claims when the subject matter involves foreign affairs. For example, when an informer sought to have a federal court imply a private action under the Neutrality Act,[195] a federal court refused. Before dismissing the claim, it declared that "courts 'must be especially certain . . . before inferring a private cause of action' in the realm of foreign affairs."[196]

CONCLUSION

The shortcomings of the current approach to implied private rights of action, anchored on vague notions of legislative intent, have created a situation of unpredictability and confusion. As a result, implied private rights of action can be viewed from two extremes. On one hand, is the picture painted by some courts that believe a private right of action is the only recourse that remediless plaintiffs, like the 14-year-old student in *Gwinnett,* have against officials who refuse to enforce a federal law, or to enforce a statute that contains a legal right, but does not contain an express remedy to enforce that right. On the other hand, is the critical view of implied private rights of action painted by the dissent in *Jackson.* Under this view, the judicial creation of implied private actions allows a court to disregard policies adopted by Congress and substitute its own policy judgments. The practical result of this effort is to allow a private plaintiff to create not just a remedy for an already existing legal right, but instead, as the Court did in *Jackson,* to create the legal right itself. Depending on the circumstances of each particular case, it appears that elements of both extremes may be correct.

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193. *Id.* at 195 (Thomas, J., dissenting).

194. Charles J. Russo & William E. Thro, *The Meaning of Sex: Jackson v. Birmingham School Board and Its Potential Implications,* 198 W. EDUC. L. REP. 777, 778 (Aug. 11, 2005).

195. Neutrality Act, 18 U.S.C. § 962. The case involved an attempt by a plaintiff to obtain money, under an implied private right of action theory, for informing the U.S. government about vessels that had violated an Israeli naval blockade. Bauer v. Marmara, 942 F. Supp. 2d 31 (D.D.C. 2013), *aff'd,* 774 F.3d 1026 (D.C. Cir. 2014).

196. *Bauer*, 942 F. Supp. 2d at 42. Specifically, the court held that the Neutrality Act "lacks an express private cause of action, and the court declines the plaintiff's invitation to imply one." *Id.* at 43.