Federal Common Law Remedies under the Occupational Safety and Health Act of 1970

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Violations of a statutory norm often have legal consequences beyond those expressly provided by the statute. At Anglo-American common law a statutory violation may be considered either evidence of negligence or negligence per se, subjecting the violator to possible tort liability. The source of the right to recover in these cases is not the statute but the common law. In other cases, state statutes are held to give rise to "implied" causes of action in which the right to recover is considered to be created by the statute itself and not by the courts. Similarly, Acts of Congress have long been held to create implied federal causes of action. The federal courts, however, have not yet utilized their power to create federal common law remedies for violations of a federal statute. The two rationales—statutory implication and federal common law—differ in their effect on federal jurisdiction and on the substantive right which is created. These differences are

1. See: Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317 (1914); Lowndes, Civil Liability Created by Criminal Legislation, 16 Minn. L. Rev. 361 (1932); Williams, The Effect of Penal Legislation in the Law of Tort, 23 Modern L. Rev. 233 (1960); Restatement (Second) Of Torts § 286 (1965).


3. See Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv. L. Rev. 285 (1963); Note, 48 Colum. L. Rev. 1090 (1948); note 38, infra. A separate set of problems, not discussed in this Comment, is presented when suit is brought in state court to redress injuries caused by the violation of a federal statute. Three types of state court suits may be distinguished. First, the defendant's conduct may have been independently actionable under local law prior to the federal enactment. Concerning the survival of local remedies in such cases see O'Neil, Public Regulation and Private Rights of Action, 52 Calif. L. Rev. 231 (1964). Second, the federal norm may be incorporated into local standards of conduct. See, e.g., Moore v. Chesapeake & Ohio Ry., 291 U.S. 205 (1934). See generally Note, 66 Harv. L.Rev. 1498 (1953). Third, federal law may create the cause of action. For a discussion of the power of a state to enforce federal rights see Note, State Remedies for Federally-Created Rights, 47 Minn. L. Rev. 815 (1963); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 241 (1969) (Harlan, J., dissenting).

Called by one of its sponsors "a safety bill of rights for close to 60 million workers,"\footnote{\textit{Legislative History}, supra note 4, at iii.} the 1970 Act is a landmark in American labor history. In essence, the Act gives the Secretary of Labor authority to promulgate and enforce standards for the enhancement of occupational safety and health. The immense importance of the Act derives from its all-encompassing scope. The standards apply, with minor exceptions,\footnote{The 1970 Act does not apply to "working conditions of employees with respect to which other federal agencies, and State agencies acting under section 2021 of Title 42 [section 274 of the Atomic Energy Act of 1954], exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1) (Supp. 1971).} to all employers and employees in any business which affects commerce.\footnote{29 U.S.C. § 652 (Supp. 1971).} It is clear from the legislative history that Congress intended to exercise its commerce power to the fullest extent permitted by the Constitution.\footnote{\textit{Legislative History}, supra note 4, at 1216.} Moreover, the occupational safety and health standards which thus far have been promulgated give every indication that the regulatory power vested by the Act in the Secretary of Labor will be liberally utilized.\footnote{36 Fed. Reg. 10466 (1971). Amendments to the first regulations and standards are contained in 36 Fed. Reg. 15101-07, 15437-38, 18080-81, and 23207-08 (1971).} In the words of Congressman Steiger, the Act "will affect virtually every man, woman, and child in this country who holds a job or operates a business now or in the future."\footnote{\textit{Legislative History}, supra note 4, at 987.}


(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
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(2) shall comply with occupational safety and health standards promulgated under this Act.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

Subsection (a) of section 5 expressly was made enforceable by the assessment of civil penalties by the Secretary of Labor, subject to review first by a three-man commission established by the Act and then by the United States Court of Appeals. No other means of enforcement is mentioned in the Act for subsection (a), and none at all is mentioned for subsection (b).

The purpose of this comment is to determine the extent to which section 5 is enforceable by private suit in federal court. Of particular concern is whether compensatory damages are available as a matter of federal law to persons injured as a result of violations of the section. The conclusion reached is that compensatory relief for violations of subsection 5(a) is available under federal common law when recovery is inadequate or unavailable under local law and the plaintiff's injuries exceed $10,000 in value. In this way, the 1970 Act provides a needed supplement to state workmen's compensation systems.

It will be useful at the outset briefly to examine the requirements of section 5. Subsections 5(a)(2) and 5(b), requiring compliance with occupational safety and health standards promulgated by the Secretary of Labor, require no explanation. The employer's "general duty" in section 5(a)(1), however, is more ambiguous. The legislative history of that provision sheds light on its meaning and also provides an in-
sight into the concern for safety in employment which motivated the 1970 Act.

As originally reported out of the House Committee on Education and Labor the general duty clause read: "Each employer shall furnish to each of his employees employment and a place of employment which is safe and healthful . . . ."16 The committee report explained the provision as follows:17

Under principles of common law, individuals are obliged to refrain from actions which cause harm to others. Courts often refer to this as a general duty to others. Statutes usually increase but sometimes modify this duty. The Committee believes that employers are equally bound by this general and common duty to bring no adverse effects to the life and health of their employees throughout the course of their employment. Employers have primary control of the work environment and should insure that it is safe and healthful. Section 5(1) merely restates that each employer shall furnish this degree of care.

Objections to the vagueness and breadth of the House committee versions of section 5 were raised,18 and Congressmen Steiger and Sikes offered the following amendment which was later adopted by the House: "Each employer shall furnish to each of his employees employment and a place of employment which are free from any hazards which are readily apparent and are causing or likely to cause death or serious physical harm to his employees . . . ."19 Congressman Steiger argued on the House floor in support of his amendment as follows:20

In tort law the general duty of care does not exist in isolation. It is surrounded by other factors which sharply limit it, and thus give it real meaning and practical application . . . . If we are to include any sort of general-care duty in this legislation, Mr. Chairman, we should also limit its terms so that persons upon whom it would impose a duty are not unjustly held accountable for situations of which they are completely unaware.

Meanwhile the Senate passed its version of the bill which contained

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17. LEGISLATIVE HISTORY, supra note 4, at 851.
18. E.g., id. at 884.
20. LEGISLATIVE HISTORY, supra note 4, at 992.
the following phraseology of the employer's general duty: "Each employer shall furnish to each of his employees employment and a place of employment free from recognized hazards so as to provide safe and healthful working conditions . . . ."\textsuperscript{21} The conference committee adopted the House version, but substituted the Senate's "recognized hazard" for the House's "readily apparent hazard."\textsuperscript{22} The difference between these phrases was explained by the unsuccessful House proponent of a phrase similar to that in the Senate version, Congressman Daniels: "A recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry . . . . I am afraid that 'readily apparent' . . . means apparent without investigation, even though a prudent employer would investigate under the circumstances."\textsuperscript{23}

From the evolution of the general duty clause in the legislative history, it is clear that it is intended to be narrower than the common law duty of care insofar as it is limited to hazards which are likely to cause "death or serious physical harm," but that it nevertheless holds an employer responsible for hazards of which he reasonably should be aware, without regard to his actual awareness. Furthermore, while the general duty was intended to cover situations for which no standard has been promulgated,\textsuperscript{24} it imposes no additional obligations upon employers in situations to which a standard does apply. This is made clear by the legislative history\textsuperscript{25} and by regulations which have been promulgated by the Secretary of Labor. The regulations state: "An employer who is in compliance with any standard in this part shall be deemed to be in compliance with the requirement of section 5(a)(1) of the Act, but only to the extent of the condition, practice, means, method, operation, or process covered by the standard."\textsuperscript{26}

The following discussion of private remedies for violations of section 5 is divided into two main parts. Part I is an analysis of the

\textsuperscript{22} LEGISLATIVE HISTORY, supra note 4, at 1157.
\textsuperscript{23} Id. at 1007.
\textsuperscript{24} Id. at 150, 851-52. Contrary to these statements in the committee reports, the 1970 Act as ultimately enacted permits the Secretary to impose civil penalties for initial and non-serious violations of the general duty clause. See Hornberger, supra note 4, at 6-8.
\textsuperscript{25} LEGISLATIVE HISTORY, supra note 4, at 854.
sources and limits of federal judicial power to award private relief under the 1970 Act, while Part II is an evaluation of the extent to which the federal courts are bound to exercise this power in private suits to enforce section 5.

I. THE POWER OF FEDERAL COURTS TO ENFORCE SECTION 5

There are two aspects to the power of federal courts to enforce section 5. First, the court must have jurisdiction of the case. Although underlying limitations on the jurisdictional power of federal courts are imposed by the Constitution, the limitations of concern here are those which have been superimposed by Congress. Second, the court must have power to award the remedy asked. While Congress has limited the power of federal courts to award remedies in other cases, this Part is concerned with limitations on remedial power which, since the existence of a remedy is a question of law, result from constitutional restrictions on the power of federal courts to create decisional law. Since the effect of statutory limitations on federal jurisdiction depends upon the source of the remedy, the power of the federal courts to remedy violations of section 5 will be discussed first, followed by an examination of federal jurisdiction over private suits to enforce that section.

A. Remedial Power

The usual source of federal remedial power is congressional authorization. While Congress often expressly creates private remedies, it may also do so by implication. The first instance of a private remedy

27. These limitations are concomitant upon the constitutional grant in Article III of jurisdiction over only certain classes of cases.
28. Even in federal question cases the statutory grant of jurisdiction to the lower federal courts has been construed as narrower than the nearly identical language in article III would allow. See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 176-82 (1969) [hereinafter cited as ALI STUDY].
29. See, e.g., note 91 and accompanying text, infra.
30. See text accompanying note 60, infra.
31. Perhaps the most prominent example of an enforcement scheme which expressly includes private litigation is section 4 of the Clayton Act, 15 U.S.C § 15 (1970), which grants the federal district courts jurisdiction of suits by persons injured by violations of the anti-trust laws and permits the recovery of treble damages.
implied from a federal statute was in *Texas & Pacific Railway v. Rigsby*, where the employer's criminal violation of section 2 of the Federal Safety Appliance Act—failing to provide secure handholds beside ladders on railroad cars—entitled an injured employee to recover damages. In the half-century since *Rigsby* the federal courts have shown little hesitation in finding implied causes of action under federal statutes. Perhaps the best-known of recent cases is *J. I. Case Company v. Borak*, in which the Supreme Court held that section 27 of the Securities Exchange Act of 1934 created an implied cause of action in investors for violations of the proxy solicitation requirements of section 14(a) of the Act. While undoubtedly the largest share of implied remedies have been awarded under statutes governing the securities market and the employment relation, potentially the most prolific statutes are those regulating the distribution of gov-

36. Section 27 of the Act, 15 U.S.C. § 78aa (1970), provides in part: "The district courts of the United States ... shall have exclusive jurisdiction of violations of this chapter, or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder ... ."
ernment largess. Still, not all suits for implied remedies have been successful. There can be no doubt that Congress has power under the commerce clause to provide federal remedies for injured workers. Whether it did so by implication in section 5 is discussed in Part II.

Statutory implication is not the only rationale whereby compensatory relief for violations of section 5 might be awarded by a federal court as a matter of federal law; remedial power may exist through the power to create federal common law. Despite Justice Brandeis' dictum in *Erie Railroad Co. v. Tompkins* that "[t]here is no general federal common law," it is now clear that there are at least two distinct bases upon which federal courts may constitutionally create decisional federal law.

One basis is a delegation of law-making power from Congress to the federal courts. Although the Supreme Court suggested in *Erie* that this power of delegation did not extend to all issues in cases within the constitutional jurisdiction of the federal courts, the Court subsequently made clear at least that "Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate." Since Congress plainly has power to create private causes of action in employees who

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42. 304 U.S. 64 (1938).

43. Id. at 78.

44. "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature, or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." Id.

are injured while working at jobs affecting commerce, it may delegate to federal courts the power to create decisional law governing such remedies.

The delegation argument has been successfully applied to special jurisdictional provisions in particular statutes. The foremost example is section 301(a) of the Taft-Hartley Act, which states: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties . . . ."46 The Supreme Court held in *Textile Workers Union v. Lincoln Mills*47 that this provision impliedly authorized the federal courts to create a federal common law of collective bargaining contracts: "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor law."48 On the other hand, a special jurisdictional provision in the Securities Exchange Act of 1934 was held, in *J. I. Case Company v. Borak*,49 impliedly to create a private cause of action for violations of that Act's proxy solicitation requirements rather than to delegate common law power to the federal courts with respect to conduct covered by the Act.49 Although the 1970 Act does not contain a special jurisdictional provision there is nothing to suggest that such a provision is essential to the delegation of common law power.

The second basis of federal common law is the protection of "essentially federal" interests. In *United States v. Standard Oil Co.*,50 the Supreme Court stated: "although federal judicial power to deal with common law problems was cut down . . . [in some areas by *Erie*] . . . that power remained unimpaired for dealing independently, whenever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question."51 Here, unlike the delegation-of-power basis of federal common law, congressional intent to authorize decisional law is not necessary. While the power of federal courts to protect essentially fed-

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47. 353 U.S. 448 (1957).
48. Id. at 456.
49. See note 36 and accompanying text, supra.
50. 332 U.S. 301 (1947). The Court held in this case that the right of the United States to recover for injuries to a soldier was not governed by state law.
51. Id. at 307.
eral interests has been utilized in such undeniably national matters as international relations and the interstate apportionment of navigable streams, the power originated in a case involving the arguably less important interests of the United States in its commercial paper. It has been argued that these cases are explained by the doctrine of constitutional preemption: federal courts should have law making power in areas where state laws are preempted by express or implied grants of federal authority. If constitutional preemption is a necessary condition for the exercise of common law power in the absence of a congressional delegation, such power does not extend to the private enforcement of section 5 since states clearly are not preempted from compensating injured workers. But the interpretation of these cases as based on constitutional preemption is not accepted generally. In fact, the Supreme Court, in cases involving non-delegated common law power, has emphasized not the vacuum that would exist if state law was preempted, but rather the need for uniformity in whatever law applies. Certainly uniformity will result from federal preemption. The compensation of injured workers presents an area, however, in which uniformity can be achieved just as surely by leaving primary responsibility to the states and intervening, through federal common law, only where the recovery under state law is inadequate. Federal common law remedial power should extend to cases in which the essential uniformity is achieved interstitially as well as preemptively. It is argued in Part II that the interest in assuring minimum levels of workmen's compensation is essentially federal and, therefore, that this basis of federal common law power should be utilized to enforce section 5 in private suits for damages that would not be available under local law.

The following section explores the differences in federal jurisdiction which are dependent upon whether the source of the remedy is statutory or judicial.

B. Jurisdiction

The jurisdiction of the court is generally independent of the merits of the plaintiff's claim. The principal exception to this rule is for claims which are "insubstantial"; insubstantiality is considered a jurisdictional defect. Factual deficiencies in the plaintiff's case may render the federal claim insubstantial, or the claim may be foreclosed by the stare decisis effect of a prior decision by the Supreme Court or the controlling court of appeals. The Supreme Court has made clear, however, that a claim for damages caused by the violation of a federal norm is not insubstantial. The leading case is *Bell v. Hood*, an action brought in federal district court against a federal officer to recover damages resulting from alleged violations of the fourth and fifth amendments. Reversing a dismissal which has been entered for lack of jurisdiction, the Court said: "Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy."

In *Bell v. Hood*, the Court did not distinguish between a claim that the remedy exists by implication from the Constitution and a claim that the remedy has its source in federal common law. In other contexts, however, it may be necessary to differentiate claims for implied remedies from claims for judicially-created remedies. In private suits to enforce section 5 of the 1970 Act, the distinction will determine whether a minimum amount in controversy is required for federal jurisdiction and it may determine the collateral effects if the claim is dismissed. These two consequences of the source of the remedy are discussed in the following two subsections.

1. The Amount in Controversy

The jurisdiction of the federal district courts must be conferred by Congress. Unlike many federal statutes the 1970 Act contains no

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58. ALI Study, supra note 28, at 176.
59. 327 U.S. 678 (1946). The Supreme Court has recently answered, in the affirmative, the question it left open in *Bell*: does the violation of the fourth amendment guarantee against unreasonable searches and seizures give rise to a federal cause of action for damages? Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).
60. *Bell*, 327 U.S. at 682.
61. "Courts created by statute can have no jurisdiction but such as the statute con-
special jurisdictional provision which could fairly be construed to create federal jurisdiction over private suits to enforce section 5. Therefore federal jurisdiction over such suits must result, if at all, from the general statutory grants.

There are two general statutory grants of jurisdiction which may apply to private suits to enforce section 5. One is 28 U.S.C. § 1337, which gives the district courts original jurisdiction "of any civil action or proceeding arising under any Act of Congress regulating commerce . . . ." The other is the broader grant of federal question jurisdiction in 28 U.S.C. § 1331, which provides in part: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The 1970 Act was enacted pursuant to Congress's power to regulate commerce, and although the Supreme Court has not yet discussed the scope of section 1337 it seems undeniable that the Act is one "regulating commerce" within the meaning of that section. Thus, if the plaintiff alleges that a private remedy is impliedly authorized by section 5 such cause of action clearly is one "arising under" the 1970 Act, and the federal court would have jurisdiction under section 1337 without regard to the amount in controversy. Moreover, since the Act is certainly a "law" of the United States within the meaning of section 1331, that section would furnish an alternative basis for jurisdiction of suits for remedies allegedly implied under section 5 in which the jurisdictional amount is present.

Suppose instead that the plaintiff's claim is based upon federal common law, alleging either a congressional delegation of common law power or that the interest to be vindicated is essentially federal. The Supreme Court very recently held, in Illinois v. City of Milwaukee, that "laws" in section 1331 includes federal common law. Thus a suit for a judicially-created remedy "arises under the Constitution, laws, or treaties of the United States" for purposes of section 1331.

63. Cf. 29 U.S.C. §§ 660(a), (c)(2), and 662(d) (Supp. 1971).
64. 29 U.S.C. § 651(b) (Supp. 1971).
65. 92 S.Ct 1385 (1972).
This explains why it was not necessary in *Bell v. Hood* to consider whether a federal remedy for violations of the fourth amendment would have been created by the Constitution or the courts; both sources are within section 1331 and the jurisdictional amount was present.

Is a suit seeking a federal common law remedy for violation of section 5 also one “arising under any Act of Congress regulating commerce” within the meaning of section 1337? Here the vague word “laws” is not available to construe as in section 1331, and the pivotal phrase becomes “arising under.” Although case law on the meaning of this phrase in section 1337 is scant, there is some authority which suggests that “arising under” has the same meaning as similar phrases in section 1331 and 28 U.S.C. § 1338, where case law is more abundant. With respect to those sections, Justice Holmes’ test that a suit arises under the law which creates the cause of action (here, federal common law rather than a congressional act) is sufficient rather than necessary; sections 1331 and 1338 apparently encompass suits for remedies created by state law wherein the only federal question is the meaning or application of a federal statute. It is arguable that a suit for damages caused by a violation of section 5 calls into question the meaning or application of the Act so as to confer federal jurisdiction under section 1337, even though the right to recover is not created by that Act.

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66. The United States Supreme Court has never discussed the scope of section 1337. The most recent court of appeals to do so said: “Jurisdiction under § 1337 does not attach on the bare assertion that a right under an act regulating commerce is infringed. Facts must be alleged to show that federal law in the particular cases creates a duty or remedy.” Russo v. Kirby, 453 F.2d 548, 551 (2d Cir. 1971).


68. 28 U.S.C. § 1338 (1970) provides in part: “The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trade-marks.”


71. This assumes that causes of action exist only for violations of the Act. It is possible to argue that the federal courts should not be limited to remedying only violations but should merely draw upon the Act for guidance in the exercise of their power to protect essentially federal interests, so that conduct which violated the spirit but not the letter of the Act would be subject to remedial enforcement. But it is doubtful that a court would go so far, especially when it can quite easily find that conduct which vio-
Nevertheless there are two reasons to believe that even this interpretation of "arising under" is not sufficient for jurisdiction under section 1337. The first is that, according to the doctrine of primary jurisdiction,\textsuperscript{72} the question of whether the 1970 Act was violated must be referred to the regulatory mechanism established by the Act rather than decided by the court in a civil suit.\textsuperscript{73} Thus the meaning or application of the Act would not be an issue for the court to decide. Second, the Supreme Court held in\textit{Moore v. Chesapeake & Ohio Railway}\textsuperscript{74} that the incorporation by reference of the Federal Safety Appliance Act\textsuperscript{75} into state tort law did not enable the federal court to take other than diversity jurisdiction of suits brought to redress violations of that Act, except where the injury occurred in interstate commerce, in which cases the Federal Employers' Liability Act\textsuperscript{76} created a civil remedy. The same reasoning should apply when a federal statute is incorporated by reference into federal common law: just as a state-created claim based upon an intra-state violation of the Federal Safety Appliance Act does not arise under the "laws" of the United States for purposes of section 1331, neither should a judicially-created claim based upon a violation of the 1970 Act or any federal statute arise under "an Act of Congress regulating commerce" for purposes of section 1337. Judge Friendly recognized the possibility of a similar argument with respect to section 1338, granting the district courts exclusive jurisdiction of suits "arising under any Act of Congress relating to patents, copyrights and trademarks,"\textsuperscript{77} when he said: "If this 'federal common law' governed some disputed aspect of a claim to ownership of a copyright or for the enforcement of a license, federal jurisdiction might follow—though one would wish to consider whether this might be founded on 26 U.S.C. § 1331 rather than § 1338 and thus be concurrent and require a jurisdictional amount."\textsuperscript{78} For these reasons federal jurisdiction of private suits to redress violations of section 5 in the 1970 Act should be based only upon section 1331, and not

\textsuperscript{72} See generally L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS (639-97) (1968).
\textsuperscript{73} See notes 11-13 and accompanying text, supra.
\textsuperscript{74} 291 U.S. 205 (1934).
\textsuperscript{75} 27 Stat. 531 (1893), as amended, 45 U.S.C. §§ 1-16 (1070).
\textsuperscript{76} 45 U.S.C § 51 (1970).
\textsuperscript{77} See note 68, supra.
\textsuperscript{78} T. B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir. 1964).
upon section 1337, if the alleged source of the remedy is federal common law.

The effect of relegating such suits to section 1331 is that the amount in controversy must then exceed $10,000. This requirement may have two effects. First, of course, it may help to insulate the court from a flood of small claims. Some protection against inflated claims is provided by the plaintiff's statutory liability for costs if he ultimately recovers less than $10,000,79 although the effectiveness of this provision has been questioned.80 Second, it may operate to preclude, at the jurisdictional level, prospective private relief from violations of section 5; for example, decrees ordering the abatement of hazardous conditions. The proper measure of the amount in controversy in suits for specific relief is not clear.81 However, unless the courts are to permit boundless speculation about the potential degree of personal injury which might result from violations of section 5, the proper measure in this case should be the cost to the defendant of complying with the decree sought. Whether the source of a remedy is statutory or judicial may in other cases determine whether the federal court's jurisdiction is exclusive of the states'. In *Borak*, for example, if the remedy for proxy violations had been created under federal common law rather than implied from the statute, the provision granting the federal courts exclusive jurisdiction of suits "to enforce any liability or duty created by this title"82 apparently would not apply and state courts could exercise concurrent jurisdiction. A similar result would follow if the statute in question was one relating to patents or copyrights.83

These differences in jurisdiction which are dependent upon the source of the right to recover probably cannot be avoided, in suits to recover less than the jurisdictional amount or to abate a violation of the Act, by pleading both sources in the alternative, as permitted by Rule 8(a) of the Federal Rules of Civil Procedure. If the court finds that the remedy sought exists, but only by implication from the statute, section 1337 would apply and no jurisdictional amount would be necessary. Suppose, however, that the court finds that no implied

80. *ALI Study*, *supra* note 28, at 172-76.
82. *See* note 36, *supra*.
cause of action exists but that the claim does lie as a matter of federal common law. If the complaint sought less than $10,000 the court would seem to be without jurisdiction to proceed. Of course the complaint might be amended to pray for additional damages, but a similar attempt was rejected by one court of appeals as showing that the claim was not made with the requisite good faith.\textsuperscript{84} Thus a plaintiff should not be able to create jurisdiction over a small claim for a common law remedy by pleading an alternative statutory source.

2. \textit{The Effect of a Dismissal}

If the court determines as a matter of law that a violation of section 5 does not give rise to an implied cause of action, or that it does not entitle the plaintiff to relief as a matter of federal common law, should its dismissal be for lack of jurisdiction or for failure to state a claim? If the dismissal is for lack of jurisdiction the plaintiff is not barred by the doctrine of res judicata from bringing his action in another, perhaps more sympathetic, court with jurisdiction of the defendant;\textsuperscript{85} this is not true of a dismissal on the merits. Conversely, the federal court has power to retain pendent jurisdiction of a parallel claim under state law if the dismissal is for failure to state a claim but not if it is for lack of jurisdiction\textsuperscript{86} (although in practice the court is not likely to exercise this power since the determination that no federal remedy exists would probably be made before hearing other evidence). There may be a difference in the characterization of the dismissal as between a claim for an implied statutory remedy and a claim based on federal common law.

With respect to a claim for an implied statutory remedy, whatever doubt \textit{Bell v. Hood} may have left about the form of dismissal of such claims was dispelled in \textit{Montana-Dakota Utilities Co. v. Northwestern Public Service Co.},\textsuperscript{87} a suit for damages allegedly caused by the defendant's violation of the prohibition in the Federal Power Act against charging unreasonable rates.\textsuperscript{88} In holding that no private cause of action was implied from the statute, the Supreme Court said that "the

\textsuperscript{84} Arnold v. Troccoli, 344 F.2d 842 (2d Cir. 1965).
\textsuperscript{85} See Note, 48 COLUM. L. REV. 1090, 1092 n.10 (1948).
\textsuperscript{87} 341 U.S. 246 (1951).
mere claim confers power to decide that it has no merit, as well as to
decide that it has."
Accordingly the Court dismissed for failure to state a claim.

Whether a claim based on federal common law must also be dis-
missed on the merits is less clear. Professors Hart and Wechsler
pointed out that the jurisdiction of a federal court and its power to
award the remedy sought may be equivalent. For example, the
Norris-LaGuardia Act withdraws from the federal courts "jurisdiction
to issue any restraining order or temporary or permanent injunction in
any case involving or growing out of a labor dispute . . . ." Up-
holding the constitutionality of the provision the Supreme Court said
simply that "there can be no question of the power of Congress thus to
define and limit the jurisdiction of the inferior courts of the United
States." It is arguable that there should be no distinction between the
express withdrawal by Congress of power to award a remedy and a
limitation on remedial power imposed by the Constitution. Thus, if a
court finds that it has power to award a common law remedy but that
the plaintiff's claim is faulty on its particular merits, the dismissal
would be for failure to state a claim. If, however, the court finds that
its power to create decisional law does not extend to the awarding of
the remedy sought—either because Congress attempted to delegate
such power with respect to a subject over which it did not have power
to legislate or because the interest sought to be protected is not essen-
tially federal—the dismissal of that claim would be for lack of juris-
diction, in which event the claim could be brought before another
court but would not alone empower the court to decide parallel state
claims.

Despite this argument, it is likely that a dismissal for lack of
common law power would be classified as being on the merits for
purposes of res judicata and pendent jurisdiction. The Supreme Court
has indicated its intention of preserving a sharp distinction between
jurisdictional power and remedial power. In *Avco Corp. v. Aero
Lodge No. 735* the Court held that a suit in a state court seeking an

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89. 341 U.S. at 249.
antistrike injunction that under the Norris-LaGuardia Act would be beyond the "jurisdiction" of the federal courts to grant nevertheless could be removed to federal court and there dismissed on the merits: "The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy."94 Thus it appears that, regardless of whether the dismissed claim is for a statutory or a judicial remedy, the dismissal should be for failure to state a claim.

It may be helpful to summarize what has been said about federal power to enforce section 5 of the 1970 Act in private actions. If the remedy is alleged to be implied from the statute, jurisdiction is conferred by section 1337 without regard to the amount in controversy. If, on the other hand, the remedy is alleged to exist as a matter of federal common law, section 1331 is the sole source of jurisdiction, thereby excluding claims for less than $10,000 and many suits to abate hazards. Although either a statutory or a common law claim is substantial for jurisdictional purposes until precluded by a controlling decision in another case, it will not be possible to obtain a federal common law remedy in suits where the jurisdictional amount is not present merely by alleging a statutory remedy in the alternative. Finally, the dismissal of either claim must be on the merits if substantial, so that res judicata bars the claim in other courts but permits pendent jurisdiction of parallel state claims.

II. THE DUTY OF FEDERAL COURTS TO ENFORCE SECTION 5

The central issue in a private suit in federal court to obtain relief from violations of section 5 will be, of course, whether the remedy sought should be awarded. Recall section 5:

(a) Each employer—
   (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
   (2) shall comply with occupational safety and health standards promulgated under this Act.

94. Id. at 561.
(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

Section 5 imposes three separate obligations: the employer's "general duty" in section 5(a)(1) to provide the specified degree of safety in employment; the employer's obligation in section 5(a)(2) to comply with all occupational safety and health standards; and the employee's obligation in section 5(b) to comply with standards and other regulations. Potential plaintiffs may be divided into three classes: employers; employees; and persons outside the employment relation in question, such as guests, licensees, business invitees, and trespassers. Potential remedies include: prospective relief, such as orders to comply with a particular standard or to abate a hazard; compensatory damages for injuries caused by the violation of the section; and even punitive damages for violations.96

Which of these several possible causes of action under section 5 should be held to exist as a matter of federal law? The extent to which either the 1970 Act or federal common law permit private enforcement of section 5 is the subject of this Part. The possibility of implied statutory remedies is examined first.

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95. This was the term used throughout the legislative history of the 1970 Act. E.g., LEGISLATIVE HISTORY, supra note 4, at 149. It is arguable that this choice of terminology supports an inference that Congress intended that section 5 should be privately enforceable. In Hohfeldian terms, a "duty" is the correlative of a "right," and the latter is defined as an "affirmative claim against another." W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 60 (1923). By using the word "duty" Congress, it may be argued, intended to create an "affirmative claim" in an employee injured by a violation of the provision. A similar argument was relied upon in Burke v. Compania Mexicana De Aviacion, S.A., 433 F.2d 1031 (9th Cir. 1970), where the court implied a private cause of action from a provision in the Railway Labor Act giving the majority of any craft of employees "the right to determine who shall be the representative of the craft...." 45 U.S.C. § 152 Fourth (1970). One reason the court offered for its result was the use of the word "right" in the statute. Yet the "right" to choose representatives is not a right in the Hohfeldian sense, but a "power" through the exercise of which legal relations can be changed. HOHFELD, supra, at 50. The impairment of a power is not necessarily actionable; Congress, which created the power, could withdraw it with impunity. Still, the court found that because Congress had used the term "right" it had intended a private cause of action to exist for impairment by the employer.

It is highly desirable that Congress, and the courts, use language precisely and consistently. In referring to conduct subject to private enforcement the term duty is appropriate; conduct enforceable criminally or in some manner other than privately might be called an "obligation." Until that time, however, the use of a particular word should not be relied upon as an indication of intention concerning private causes of action.

A. The Traditional Approach: Statutory Implication

In ascertaining whether a federal statute impliedly creates private causes of action it does not expressly authorize, the obvious starting point is the legislative history. The voluminous history of the 1970 Act contains few references to private suits and none that could be considered relevant to the issue of implied remedies. Although it is possible to argue that if Congress had contemplated private enforcement of section 5 there would be some mention of this fact, the dangers of drawing conclusions from legislative silence have been well documented. Rather, in cases such as this where the legislative history is silent or ambiguous, the federal courts have created rules for presuming the congressional intent from the fact of the Act.

The widely-followed general rule in suits for implied remedies, which amounts to a presumption of affirmative Congressional intent, was stated long ago by the Supreme Court in *Texas and Pacific Railway v. Rigsby*:

"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..." The first observation to be made about this rule is that it furnishes no help in implying the availability of prospective relief. Implied prospective remedies under the 1970 Act are unnecessary, however, in view of the provision made in the Act for employees to request inspections by the Secretary of Labor, to challenge the time fixed by the Secretary for abatement, and to seek mandamus to compel the Secretary to investigate or commence proceedings to abate an imminent danger.

Applying the Rigsby special benefit rule to section 5, it is clear that one class intended to be specially benefitted by the obligation imposed on employers in section 5(a) consists of employees, in whose favor Congress is presumed by this rule to have created an implied cause of action for damages caused by the violation of the subsection. Considerably more doubt, however, surrounds (1) the application of the rule to the employee's obligation in section 5(b) and (2) the extent to

97. See notes 16 and 19 and accompanying text, *supra*.
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which persons outside the employment relation are specially protected by either section 5(a) or section 5(b).

Section 5(b) is something of an enigma, absent from the original House version of the Act and even as enacted not expressly within the power of the Secretary to enforce.\(^{103}\) Theoretically, the absence of an express penalty should not prevent a conclusion that Congress intended a statutory command to be privately enforced, and in fact the courts have implied private remedies from such provisions in federal statutes.\(^{104}\) It is arguable that one class for whose special benefit section 5(b) was enacted is that of a worker’s fellow employees, who, under *Rigsby*, would be presumed to have recourse against the worker for damages caused by his violation of an occupational safety and health standard. Another class arguably intended to benefit specially by the subsection is employers, who might therefore argue by analogy to the contributory negligence rule that an employee’s violation of a standard is a defense in a suit brought by that employee for damages resulting from the employer’s violation of another standard if compliance by the employee would have averted the accident. Some support for this argument is derived from the Act’s characterization of the responsibilities of employers and employees as “separate but dependent.”\(^{105}\)

The special benefit rule yields only a presumption, however, which may be rebutted by contrary inferences drawn from the legislative history or elsewhere. Both arguments based on applying the special benefit rule to section 5(b)—the liability of a worker to his co-workers and the employer’s defense of a contributory violation—are forcefully countered by the statement of the Senate Committee on labor and Public Welfare: “The committee does not intend the employee-duty provided in section 5(b) to diminish in any way the employer’s compliance responsibilities or his responsibility to assure compliance by his employees.”\(^{106}\) Although this statement was addressed to the express enforcement mechanism in the Act, it does express a clear policy which is contrary to both arguments. First, it is clear that Congress did not intend employee violations to be used as a defense of any sort by employers. Second, it shows that the responsibility for employee


\(^{106}\) LEGISLATIVE HISTORY, *supra* note 4, at 150.
violations was intended to rest primarily with the employer rather than the employee. In short, the employee's obligation under section 5(b) is not privately enforceable either affirmatively or defensively, but was inserted by the Senate as a cautionary device for the protection of the worker himself.

The second doubt raised by the application of the special-benefit rule to section 5 centers on the extent to which persons outside the employment relation—guests, licensees, business invitees, or trespassers—are specially protected by either the employer's obligation in section 5(a) or the employee's obligation in section 5(b). To determine whether this class is within the special benefit rule requires a more thorough examination of the rule itself.

The phrase "especial benefit" is not free of ambiguity. Clearly excluded by this qualification are those "ideological" plaintiffs who seek to enforce a statutory command, such as one requiring the payment of taxes, which presumably benefits all persons equally and the violation of which injures all persons equally. At the other extreme, the qualification clearly includes plaintiffs seeking redress for actual injuries caused by the breach of such provisions as the proxy solicitation requirements in Borak, which primarily protect only certain persons including the plaintiff. But what if the statute, like the tax statutes, benefits all persons equally so long as it is obeyed, but, like the proxy rules, may result in specific personal injury when violated? That is the description of section 5 insofar as it protects persons outside the employment relation. It is true that employees are more likely than other persons to be injured by statutory violations, but unlike the proxy rules (protecting shareholders) it is possible for anyone to be injured by a violation of section 5. The issue seems to be whether the plaintiff must have been in a special position before the violation occurred (by being a member of an identifiable class for whose primary protection the statute was enacted) or whether the qualification is satisfied if the plaintiff is in a special position after a violation has occurred (as a result of special injury).

The interpretation requiring merely special injury appears generally preferable since it would not discriminate among those injured by the violation of the statute. Under this construction of the special benefit

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rule, both employees and third persons would be presumed entitled to recover damages caused by the violation of section 5(a). It may be argued that this presumption is overcome by the regulations which have been promulgated under the 1970 Act, which state: "In the event a standard protects on its face a class of persons larger than employees, the standard shall be applicable under this part only to employees and their employment and places of employment."" The purpose of this regulation is not clear. It is unlikely that it is addressed to the question of implied remedies and the special benefit rule, for no reference is made to private enforcement. Instead, the more reasonable interpretation is that the regulation is simply a poorly worded restatement of one limitation on the scope of the Act, that the standards do not govern conduct or conditions which occur outside a business context. Therefore the special benefit rule supports a presumption that Congress intended the employer's obligation in section 5(a) to be privately enforceable by any person injured by the violation of the subsection.

Can the presumption that section 5(a) was intended to be privately enforceable for damages be overcome? Unlike section 5(b), there is nothing in the legislative history which might nullify the presumption; counterarguments must be drawn from other sources. The two counterarguments most frequently made are based upon (1) negative inferences drawn from the express creation of certain, private remedies and (2) the effect given by courts to similar language in other statutes.

The first counterargument is based on the venerable maxim _expressio unius exclusio alterius_: the express creation of certain remedies evidences an intention to deny all others. This argument might be made under the 1970 Act. In section 11(c), employers are prohibited from discriminating against employees who participate in the enforcement of the Act, and the federal district courts are given jurisdiction, in suits brought by the Secretary of Labor, to grant "all appropriate relief" including reinstatement with back pay to enforce the subsection. It is possible to argue that section 11(c) demonstrates Congress considered the redress of employee injuries but decided to create a federal remedy on behalf of employees only in that particular case. A sufficient answer to this argument is provided by another maxim

with opposite effect, *ejusdem generis*: the enumeration of certain remedies implies an intention to create additional remedies of a similar nature. Indeed, a nearly identical provision in the Fair Labor Standards Act has been held to be privately enforceable for damages. Thus it would appear not only that section 11(c) is no obstacle to implied remedies under section 5 but that it may itself be privately enforceable.

The second argument often urged in determining congressional intent with respect to the enforceability of a statutory provision is based upon the extent to which similar provisions in other statutes have been held to create implied causes of action. Congress, it is argued, must have intended similar effect to be given to the statute in question. Obligations similar to that of section 5 appear in the Longshoremen's Act, the Walsh-Healy Act, and the Service Contracts Act. The Longshoremen's Act must be disregarded, for that provision merely restated the duty owed under admiralty law which traditionally has been enforceable in federal courts independently of the statute. Likewise, the provisions in the Walsh-Healy Act and the Service Contracts Act shed no light on section 5 since apparently no court has faced the issue of whether they are privately enforceable. In suits for implied remedies under other provisions of the Walsh-Healy Act, however, the courts have stated in dicta that no private cause of action exists under any provision of that Act. This is hardly support for the proposition that Congress intended section 5 not to be privately enforceable. In any event, Congress' failure to react to judicial interpretations of statutory language does not necessarily indicate its approval.

The presumption that Congress intended section 5(a) to be enforceable for damages by employees or third persons, created by applying

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110. 29 U.S.C. § 215(a)(3) (1970). Although, unlike the comparable provision in the 1970 Act, this provision does not expressly authorize the Secretary to seek personal relief for the aggrieved employee and thus might appear distinguishable, the Supreme Court has held that lost wages may be included in the relief sought by the Secretary. Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288 (1960).


117. See note 98, supra.
the Rigsby special benefit rule to the statutory language, stands unrebutted. But is the rule itself appropriate to its purpose? It is submitted that it is not.

B. The Role of Federal Common Law

Rigsby was decided more than twenty years before Erie Railroad Co. v. Tompkins, while the federal courts were still exercising unrestrained power to create and apply their own rules of common law. If a federal court of that era were to borrow a doctrine from local tort law and apply it as a matter of federal common law, its power to do so would have gone unquestioned. That is exactly what happened in Rigsby. The authority relied upon by the Rigsby Court consisted of English cases holding that a criminal statute merely set the standard of conduct required of the defendant by the statutory tort doctrine.118 The rationale of that doctrine, however, is not that the statute creates the private remedy by implication, but that the defendant will not be heard to argue that his judgment about the proper standard of conduct takes precedence over that of the legislature. "When the community has thus officially determined that certain risks are foreseeable and are reasonably to be avoided by taking a prescribed precaution, no reasonable man would thereafter omit the precaution, so there is no room for jury judgment in the matter."119 Thus a rule of common law negligence has gradually been distorted into a device for presuming what Congress "would have intended on a point not present to its mind, if the point had been present."120

Courts in recent years are beginning to move away from the special benefit rule and its correlative reliance on congressional intent. A paradigm case was Brown v. Bullock,121 where the court said: "Implied rights of action are not contingent upon statutory language which affirmatively indicates that they are intended. On the contrary,

118. For example, one case cited by the Court in Rigsby was Couch v. Steel, 3 El. & Bl. 402, 23 L. & Q. B. 121 (1854), in which Lord Campbell stated that "the plaintiff's right, by the common law, to maintain an action on the case for special damage sustained by the breach of a public duty is not taken away by reason of the statute which creates the duty imposing a penalty recoverable by a common informer for neglect to perform it..." 3 El. & Bl. at 415 (emphasis added).
they are implied unless the legislation evidences a contrary intention."\textsuperscript{122} A less dogmatic and more authoritative test was recently enunciated by the Supreme Court in \textit{Chicago and North Western Railway Company v. United Transportation Union}: "Our cases reveal that where the statutory language and legislative history are unclear, the propriety of judicial enforcement turns on the importance of the duty in the scheme of the Act, the capacity of the courts to enforce it effectively, and the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory."\textsuperscript{123}

In moving away from reliance on congressional intent, however, the courts have continued to cling to the view that the remedy has its source in the statute. A more candid assessment of the cases would lead to the conclusion that the source of the remedy is often not statutory but judicial. In the words of the late Justice Harlan: "The notion of 'implying' a remedy, therefore, as applied to cases like \textit{Borak}, can only refer to a process whereby the federal judiciary exercises a choice among \textit{traditionally available} judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law."\textsuperscript{124}

A judicial source has important advantages in the private enforcement of section 5. If a federal remedy were implied for the violation of section 5(a), the indiscriminate displacement of state workmen's compensation systems would create an intolerable disruption of federal-state relations. Every employee whose injuries were traceable to a violation of that subsection could bypass local workmen's compensation procedures and recover his damages in federal court. On the other hand, the adequacy of workmen's compensation laws is increasingly being questioned.\textsuperscript{125} Indeed, the 1970 Act created a national commission to investigate "State workmen's compensation laws in order to

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\item \textsuperscript{122} \textit{Brown}, 194 F. Supp. at 224.
\item \textsuperscript{123} 402 U.S. 570, 578 (1971), The Court held that the Union's obligation under the Railway Labor Act "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions," was enforceable in a private suit for an anti-strike injunction. See 45 U.S.C. § 152 First (1970).
\item \textsuperscript{124} Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 403 n. 4 (1971) (Harlan, J. concurring) (italics in original).
\item \textsuperscript{125} See, e.g., Bernstein, \textit{The Need for Reconsidering the Role of Workmen's Compensation}, 119 U. PA. L. REV. 992 (1971). The author cites the following problems with the present system: wide gaps between workmen's compensation awards and actual losses; high and increasing operating costs of present programs; the increasing proportion of workers employed in occupations designed for workmen's compensation coverage, accompanied by the decreasing proportion of personal injuries that are job-related:
\end{enumerate}
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determine if such laws provide an adequate, prompt, and equitable system of compensation for injury or death arising out of or in the course of employment.”

In order to meet the varying defects in local compensation laws without displacing those laws in areas where they are effective, the federal court must have a flexibility to adjust and condition its remedies which the statutory implication rationale does not provide.

The necessary flexibility is provided by federal common law. Two bases were noted in Part I for judicially-created federal law: (1) delegation of power from Congress and (2) protection of essentially federal interests. Just as it is unrealistic under the 1970 Act to found private remedies upon inferences that Congress intended to create the particular remedy sought, so it is unrealistic to infer a delegation of common law power. There is simply no evidence of such an intent. If private remedies for violations of section 5(a) are to be awarded as a matter of federal common law, the power of federal courts to do so must be based upon the protection of essentially federal interests.

Is the compensation of injured employees an essentially federal interest? The answer to that question must be no; centuries of local control over compensation for job-related injuries attest to that. But that is a different question than to ask whether it is essentially in the federal interest to ensure that job-related injuries are adequately compensated. To that question the 1970 Act provides an emphatically affirmative answer. The Act states: “The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.”

The availability of private federal remedies will certainly aid in deterring violations of section 5 and thus in preventing these burdens upon commerce. The deterrent aspect of private relief is not the only federal interest; Congress was also concerned about the adequacy of compensation for injuries caused by violations after they have occurred. The Act declares “that the full protection of American workers from job-related injury or death requires an adequate,

difficulties in determining whether such injuries as heart attacks are job-related; the distortion in costs and benefits caused by the current tendency to compensate chronic, non-work-related illnesses out of workmen's compensation funds; and the greater adverse affect of injury and illness on poorer workers.


prompt, and equitable system of workmen's compensation as well as an effective program of occupational health and safety regulation.\textsuperscript{128} In short, federal law is to provide a backstop for the compensation laws of the several states.

The backstop principle was written into the Act's mechanism for public enforcement. Procedures are provided whereby the individual states may reassume the enforcement responsibility presently exercised by the Secretary of Labor if the local plan "will be at least as effective in providing safe and healthful employment and places of employment"\textsuperscript{129} as the standards promulgated by the Secretary.\textsuperscript{130} Moreover, although the employer is relieved of the obligation in section 5(a)(2) to comply with parallel federal standards after a state plan has been approved, the Act carefully avoids also relieving him of his general duty in section 5(a)(1).\textsuperscript{131} This residuum of federal obligation lends further support to invoking the backstop principle as a matter of federal common law for the protection of all persons injured by violations of section 5(a) where compensation is shown to be inadequate under local law.

The remedial flexibility afforded by federal common law will also permit the courts to establish both procedural and substantive limitations and conditions on the federal cause of action. In this way the courts might treat some third persons injured by violations differently than others as circumstances warrant, and might occasionally award prospective relief when the statutory provisions for abatement appear inadequate.

CONCLUSION

The thesis of this comment is that, while the power of federal courts to enforce federal statutes in manners not expressly authorized has long been recognized, the source of this power has received insufficient attention. Whether the source of the remedy is the statute itself or federal common law often will determine the scope of federal juris-

\textsuperscript{130} 29 U.S.C. § 667(e) (Supp. 1971).
\textsuperscript{131} 29 U.S.C. § 667(e) (Supp. 1971). Similarly, the employee is not relieved of his duty in section 5(b) by the approval of a state plan. \textit{Id.} This residual obligation is less significant than that of the employer, however, in view of the largely precatory nature of section 5(b). See notes 103-106 and accompanying text, supra.
diction and the court's flexibility in shaping and conditioning relief. Where a statute contains an incidental requirement, specific in content and limited in scope, the remedy can reasonably be held to exist by implication from the statute. Congress, if it had considered the question, would have assumed that the courts would give it effect. Such incidental provisions, moreover, are rarely of sufficient importance to be characterized as essentially federal for purposes of federal common law. An example of such a provision for which a private remedy might reasonably be implied in the 1970 Act is the anti-discrimination provision in section 11(c). Where, however, as in section 5, the obligation is central to the statutory scheme and would infringe other interests if subject to indiscriminate private enforcement, it is less likely that Congress intended to create such wholesale remedies. Yet obligations such as these are more likely to protect essentially federal interests. Remedial flexibility is assured by candidly recognizing that the source of the remedy exists in federal common law.

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