Purpose and Promise Unfulfilled: A Different View of Private Enforcement Under the Federal Trade Commission Act

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CRITIQUE

PURPOSE AND PROMISE UNFULFILLED: A DIFFERENT VIEW OF PRIVATE ENFORCEMENT UNDER THE FEDERAL TRADE COMMISSION ACT

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The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.

Chief Justice John Marshall¹

INTRODUCTION

Consistent with this pronouncement of Chief Justice Marshall, the federal courts have historically been alert "to adjust their remedies so as to grant the necessary relief where federally secured rights are invaded."² Thus the doctrine developed relatively early in federal law that a private right of action may be implied from a federal penal or regulatory statute although the statute is silent as to the availability of a private remedy.³ The number and variety of statutes, treaties and constitutional provisions onto which a private remedy has been judicially grafted is truly amazing.⁴

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¹ Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
³ The Supreme Court first confronted the issue of whether a private right of action could be implied from a federal penal or regulatory statute in 1916 and unhesitatingly held that a private action could be grounded upon such a statute. Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916). The Court there adopted the "statutory tort" theory, stating:

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.

Id. at 39.

⁴ See, e.g., Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (fourth amendment to the United States Constitution);
Contrary to the impression that might be gained from the numerous and diverse federal statutes which have supported an implied private right of action, not every federal regulatory and penal statute has been deemed appropriate for supplemental enforcement by private parties. In a few cases the United States Supreme Court has refused to allow private enforcement of a federal regulatory or penal statute.5 These few cases, however, are exceptions to the general rule, and the results seem to be founded upon either a legislative intention that no private right of action be implied, a finding that private enforcement would frustrate the purpose of the legislation,6 or upon special circumstances that counsel exclusive administrative enforcement.7


5 No useful distinction can be drawn between regulatory and penal statutes insofar as the implication of private remedies is concerned. One need only ponder the issue of whether traffic ordinances are penal or regulatory in order to comprehend the fruitlessness of such an inquiry. But see, Ash v. Cort, 496 F.2d 416 (3d Cir. 1974), where the court implied a private right of action on behalf of a stockholder pursuant to 18 U.S.C. § 610 (1971), the federal penal prohibition on corporate campaign spending.

6 See, e.g., National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974) ("the Amtrak case"), wherein the Court held: [T]he inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act. Id. at 458 (emphasis supplied).

While some of the broad language of the Amtrak case may be troublesome, the holding of the case seems justified in light of the clear legislative intent that no private action be allowed under the Act and the serious interference with the Act's purpose which would result from the implication of a private remedy.

The theoretical framework for implying a private right of action from a federal regulatory or penal statute is known as the "doctrine of implication." In order to imply a private remedy under the doctrine, the court must determine that (1) the provision violated was designed to protect a class of persons including the plaintiff from the harm of which plaintiff complains, and that (2) it is appropriate, in light of the statute's purposes, to afford plaintiff the remedy sought.

In its September-October issue of 1974, this Review published a student comment concerning private enforcement and rule making under the Federal Trade Commission Act. The Comment took the position that a private right of action should not be implied under section 5 of the Act, which unambiguously declares that "unfair or deceptive acts or practices in commerce are . . . unlawful." The Comment thus endorsed the holding in Holloway v. Bristol-Myers

(1959) (Interstate Commerce Commission). Both cases raised the issue of whether a private right of action could be implied from the Acts' commands that "just and reasonable rates be charged." The cases are easily explained on the basis of this special circumstance, inasmuch as rate making has always been considered an area where the need for administrative expertise is paramount and the demands for uniformity compelling. Cf. Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907). Compare Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84 (1962) (where a private remedy for misrouting was implied under the same section of the Interstate Commerce Commission Act as was previously before the court in TIME.)


The court of appeals in Holloway phrased the test somewhat differently:
(1) a Federal statutory or constitutional prohibition against the acts complained of; (2) inclusion of the defendant in the class upon which the duty of statutory compliance has been imposed; (3) legislative intent to place the party claiming injury within the ambit of the statute's protection or to confer a substantive benefit or immunity upon him; (4) injury or threatened harm proximately resulting from the defendant's breach of duty; and (5) unavailability or ineffectiveness of alternative avenues of redress.

485 F.2d at 989. One commentator erroneously asserts that these criteria were offered not by the court, but by the plaintiff. This error was not a minor one since the evaluation and selection of the proper criteria was a substantial basis for the court's decision. Comment, Private Enforcement and Rule-Making Under the Federal Trade Commission Act: Expansion of FTC Responsibility, 69 Nw. U.L. Rev. 462, 465 (1974) [hereinafter cited as Northwestern Comment].

10 Northwestern Comment, supra note 9.
11 15 U.S.C. § 45(a) (1971) [hereinafter cited as FTC Act]. The operative words "unfair or deceptive acts or practices in commerce" were added by the Wheeler-Lea Amendment of 1938. Prior to that date, the act afforded no protection to consumers, but only to competitors. FTC v. Raladam Co., 283 U.S. 643 (1931).
Corp.\textsuperscript{12} that a consumer who has suffered economic harm as the proximate result of the commission of an unfair or deceptive trade practice should not be entitled to redress pursuant to the Act. To support its position, the Comment argued that a private right of action may be implied only where Congress intended one and cited legislative history as indicating that Congress did not so intend. In addition, it was argued that a private right would ultimately prove self-defeating to consumers and that the FTC was better able to enforce the Act.

The purpose of this Critique is to respond to that Comment, which, because of misapplication of legislative history, the oversight of several important cases, and an indifference to the realities of the FTC's enforcement of the statute, presented a misleading picture of this issue. Contrary to the view supported by the Comment, on first impression it would appear that there exists no valid reason why an injured consumer should not be entitled to the protection of the Act, nor why an errant business should be allowed to retain the fruits of its wrongdoing. The federal courts have nevertheless historically found that no private action could be implied from the FTC Act.\textsuperscript{13} While commentators have virtually unanimously criticized this result,\textsuperscript{14} their conclusions were again rejected in Holloway v. Bristol-Myers,\textsuperscript{15} the first modern decision to deny implication of a right of action for consumers on an analysis of the requirements of the doctrine of implication.\textsuperscript{16} The Comment, approving of the Holloway analysis, thus serves as an appropriate impetus to a reconsideration of the applicability of the doctrine of implication to the FTC Act.

\begin{itemize}
\item \textsuperscript{12} 485 F.2d 986 (D.C. Cir. 1973).
\item \textsuperscript{13} The cases are conveniently collected in Carlson v. Coca-Cola Co., 483 F.2d 279 (9th Cir. 1973).
\item \textsuperscript{15} 485 F.2d 986 (D.C. Cir. 1973).
\item \textsuperscript{16} All of the prior cases which considered the issue simply relied on the authority of Moore v. New York Cotton Exch., 270 U.S. 593 (1926). Moore, however, is not strong precedent since its consideration of the issue of a private right of action under the FTC Act was mere dicta, and no authority was cited in support of its cursory treatment of the question.
\end{itemize}
THE NECESSITY OF A PRIVATE RIGHT OF ACTION

It is beyond dispute that consumer victimization by the unscrupulous practices of many businesses has become a matter of grave national concern.\textsuperscript{17} It has been estimated that 20 percent of the gross national product reaches consumers at above standard prices and under terms that are misrepresented; absent such insidious practices, consumers could save $70 billion annually.\textsuperscript{18} Although the American marketplace today resembles more a trap for the unwary than an honest exchange of goods and services,\textsuperscript{19} no adequate remedy is currently available to the wronged consumer. Surveying the inadequacy of state law remedies, Philip Engman concluded:\textsuperscript{20}

The simple fact is that for a vast and increasing number of consumers with valid complaints there is nothing to be done after two hours of haranguing the salesman, the department chief, the customer service girl, the store manager, other than for the poor guy to drive the 15 miles back home, kick his dog, yell at his children and curse his wife.

On the federal level the major consumer protection legislation is the Federal Trade Commission Act, to which the Wheeler-Lea Amendment of 1938 was added for the express purpose of protecting consumers.\textsuperscript{21} Upon the introduction of that amendment in the House, Representative Lea, Chairman of the Committee on Inter-


The Kerner Commission found that 23 percent of ghetto families in New York City "had experienced serious exploitation." Report of the National Advisory Commission on Civil Disorders 276 (1968).


\textsuperscript{19} Mussel, The Neighborhood Consumer Center: Relief for the Consumer at the Grass Roots Level, 47 Notre Dame L. 1093 (1972).


\textsuperscript{21} The Amendment added the words "and unfair or deceptive acts or practices in commerce" to the proscription of section 5, 15 U.S.C. § 45(a) (1971).
state and Foreign Commerce and cosponsor of the amendment, stated:

Indeed, the principle of the act is carried further to protect the consumer as well as the competitor. In practice the main feature will be to relieve the Commission of this burden [of having to prove competition where it has jurisdiction], but we go further and afford a protection to the consumers of the country that they have not heretofore enjoyed.

If the promise of the Act were fulfilled, it would return the marketplace to the honest businessman. Unfortunately, however, as the Comment failed to recognize, the agency explicitly empowered to enforce the FTC Act, the Federal Trade Commission, has not fulfilled its legislative mandate. Indeed today it stands as a monument to bureaucratic inefficiency and incompetence.

The saga of the Commission's efforts to cope with the practices of the Holland Furnace Company has become a classic example of the agency's ineffectiveness. The FTC first issued a cease-and-desist

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22 83 CONG. REC. 391-92 (1938) (emphasis supplied). The Supreme Court has recognized that the purpose of the Wheeler-Lea Amendment was to protect consumers. FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965).

23 The Comment did recognize the FTC's failings in a section on Commission rule making. Northwestern Comment, supra note 9, at 478-87. Unfortunately, it ignored these same failings in its discussion of private enforcement, in which they are more relevant.

24 The FTC is empowered to prevent unfair or deceptive acts or practices in commerce through the issuance of "cease and desist orders," the violation of which subjects the wrongdoer to civil penalties up to $10,000 per day. 15 U.S.C. § 45(1) (1971).

order against Holland in 1936. Complaints against the company continued unabated, but the Commission did not institute enforcement proceedings until 1965 for violation of the cease-and-desist order. While the average delay between the issuance of a complaint by the FTC and a cease-and-desist order is a "mere" four years, the Holland Furnace case is by no means atypical. In the case of Bristol Myers Corporation, the Commission began its investigation in the 1950's. The agency finally issued a complaint in 1973, presumably spurred to action by the Holloway suit.

The Commission, apparently recognizing its failings, has consistently advocated that private actions by consumers be sanctioned under the Act. The Commission itself thus disagrees with the position of the Comment that, because of "its over-view of the national economy," the FTC is peculiarly situated to enforce the Act.

The Comment also suggested that the failures of efficient enforcement by the FTC can be cured by the use of the agency's rule-making power, which has recently been upheld in National Petroleum Refiners Association v. FTC. Upon reflection, however, this position appears somewhat naive. While rule making would obviously simplify the agency's burden of proof in a cease-and-desist proceeding, such a proceeding would still be necessary where a busi-

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26 In re Holland Furnace, 24 F.T.C. 1413-14 (1936). A cease-and-desist order, the Commission's major enforcement tool, is a prospective command not to violate the law again. It does not exact a penalty. Violation of an order constitutes a civil violation, but only the Commission can institute enforcement proceedings. 15 U.S.C. §§ 45(b), (d) (1971).
28 In re Holland Furnace Co., 341 F.2d 548 (7th Cir. 1965), cert. denied, 381 U.S. 924 (1965).
30 485 F.2d at 1000.
31 In what must be termed ludicrous understatement, the court refers to the delay in FTC action as "extreme caution." Id.
33 Northwestern Comment, supra note 9, at 475. See text accompanying note 53 infra.
34 Id. at 486-88.
36 See 16 C.F.R. § 1.12(c) (1974): Where a trade regulation rule is relevant to any issue involved in an adjudicative proceeding . . . the Commission may rely upon the rule to resolve
ness refuses to comply with the rule.\textsuperscript{37} The experience of the FTC with the "octane rule," which was at issue in \textit{National Petroleum Refiners}, suggests that FTC rule making may very well have the opposite of the intended effect. In that case, the FTC first proposed an "octane rule" on July 30, 1969.\textsuperscript{38} It was not until over two years later that the Commission at last published the final version of the rule.\textsuperscript{39}

The simple fact is that the FTC Act as amended in 1938, was designed to protect consumers from being victimized by unfair and deceptive acts in the marketplace. The failure of the FTC to enforce the Act has, however, denied the consumer the protection originally promised by the Act. Perhaps it would not be inappropriate to suggest that, as a result of lack of effective administration, the Act is itself a consumer fraud.

An obvious manner by which the consumer could regain the protection promised by the Act would be for the federal judiciary to imply a private right of action under the Act and allow consumers to act as "private attorneys general" by bringing civil actions against violators of the statutory prohibition. This development would have several beneficial results. It would provide for full enforcement of the Act by enlisting thousands of interested as well as informed persons and would be a powerful deterrent to potential violators.\textsuperscript{40} The genius of the common law has always been its ability to solve problems through private remedies rather than government regulation.\textsuperscript{41} Private enforcement would also have the side effect of freeing the Commission from much of the burden of enforcement so that it could devote its limited resources to developing policy through informal consultation and rule making.

\textsuperscript{37} The most informative statement of the FTC on the effect of Trade Regulation Rules is found in its explanation of its "Cigarette Rule," 29 Fed. Reg. 8324, 8364-73 (1964), wherein the agency candidly observed, "To be sure, one who violates such rules incurs no immediate sanction thereby." \textit{Id.} at 8371.


\textsuperscript{40} The Comment seems to argue that private enforcement would place businesses in the position of being civilly liable for offenses which they did not realize were illegal. Northwestern Comment, \textit{supra} note 9, at 475. The FTC Act, however, has been the subject of 60 years of administrative interpretation through adjudication and over ten years by rule making. There is little doubt that a conscientious businessman can quickly determine the precise strictures of the Act.

\textsuperscript{41} W. LIFFMAN, \textbf{THE GOOD SOCIETY} at 268-73, 282 (1937).
Private enforcement has other benefits in relation to deterrence which are not generally appreciated. Enforcement by an administrative agency is almost inevitably somewhat arbitrary unless the agency proceeds against all known violators with equal vigor and dispatch.\(^42\) On the other hand, private remedies provide not only the necessary impetus for full enforcement but also assure that, to the extent that not all violations are prosecuted, those that are prosecuted will be chosen in the free market, essentially at random.\(^43\)

The implication of a private right of action under the Act would serve another equally important policy of compensating the victimized consumer for his losses. Of course, the alternative, and presently existing state of affairs, is that the wrongdoer in the marketplace is allowed, by virtue of the default of the FTC, to retain the fruits of his wrongdoing. In another context, the Supreme Court has explicitly and firmly rejected the theory that federal law should countenance such a result:\(^44\)

Denial of such a remedy . . . would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his [wrong] onto his victim. . . . We do not believe that Congress intended to withhold from the [wronged party] a remedy that ensures the full effectiveness of the Act.

It would seem that as a matter of social policy, the implication of a private right of action would be highly desirable. The Comment suggested, however, that the cost of effective protection to consumers via this method would be prohibitive because the wrongdoing merchant would pass the cost of such a lawsuit on to his customers, concluding that:\(^45\)

The FTC, with its over-view of the national economy, is in a better position than a private litigant to gauge the injury a deceptive practice will cause to the public and to balance this against the likely cost of eliminating the practice.

\(^42\) The FTC has not been immune from criticism for arbitrary enforcement. Universal Rundle Corp. v. F.T.C., 352 F.2d 831, 834 (7th Cir. 1965), rev'd, 387 U.S. 244 (1967).

\(^43\) The Comment itself in its discussion of rule making recognized this shortcoming of FTC enforcement—that generally only a few of many violators are prosecuted. Northwestern Comment, supra note 9, at 486-87. Although the Comment argues that rule making would cure this defect, private enforcement would seem to be at least as effective a solution to the unfairness caused by the present method.


\(^45\) Northwestern Comment, supra note 9, at 475.
This argument seems to ignore the basic premise of the free enterprise economy which is that consumers have the opportunity to choose between competing merchants on the basis of price, quality and service. This model is broken down, however, by the existence of unfair and deceptive trade practices because they subvert the ability of the consumer to make a rational choice in the marketplace. Frequently such practices are so subtle that consumers fail to perceive the reality of the situation until after the transaction is consummated. Of course it is then too late unless adequate remedies exist. Enforcement by consumers would go far to restoring the free market economy since the natural penalty incurred as a result of private litigation against a wrongdoer would be roughly proportional to the nature and extent of the violation, resulting in a natural price differential according to the conduct of the merchant, unless of course the free market forces make it unfeasible for the merchant to pass on the cost of the litigation. Allowing private enforcement according to this analysis would be far more compatible with our economic system than allowing a federal bureaucracy artificially to alter this balance by enforcement which is inherently selective.

As the foregoing illustrates, the implication of a private right of action under the Act would be consistent with the fundamental purposes of the law of torts and with our private enterprise system. The arguments against the doctrine of implication of a private right of action from any statute, on the other hand, prove illusory upon reasoned examination. The two major arguments against the doctrine of implication are that it is an inappropriate exercise of judicial activism and would result in an unacceptable burden of litigation on the federal judiciary. As shall be shown, these two arguments are somewhat intertwined.

The most important factor is the distinction between “primary” and “remedial” law. In the case of the FTC Act, the legislative branch has unambiguously declared that the primary conduct, unfair

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46 See D. CAPLOVITZ, THE POOR PAY MORE (1963):

"I don't know how they do it," [one New York merchant commented], "They advertise three rooms of furniture for $149 and the customers swarm in. They end up buying a $400 bedroom set for $600, and none of us can believe how easy it is to make these sales."

Id. at 29.

47 Although these arguments were not made by the Comment, a refutation of them is necessary to a complete discussion of this issue.

and deceptive trade practices, is unlawful. The invocation of the
doctrine of implication seeks only to have the judiciary adjust the
remedy in order to make effective the statutory prohibition and
thereby achieve the purpose of the legislative enactment. Inas-
much as the judiciary is merely effectuating the legislative purpose,
it is not usurping the legislative function of policy making. As Justice
Harlan concluded, in a discussion of whether a private right of action
should be implied under the fourth amendment in Bivens v. Six Un-
known Named Agents of Federal Bureau of Narcotics—a case ig-
ored by the Comment:48

The contention that the federal courts are powerless to ac-
cord a litigant damages for a claimed invasion of his federal con-
stitutional rights until Congress explicitly authorizes the remedy
cannot rest on the notion that the decision to grant compensa-
tory relief involves a resolution of policy considerations not sus-
ceptible of judicial discernment.

Justice Harlan’s conclusion is founded on the premise that the
Court is merely exercising a choice between traditionally available
remedies in order to effectuate the social policy embodied in an act
of positive law.50 It has also become apparent through experience
that in choosing between available remedies, the courts are in a bet-
ter position to determine whether a need exists for supplemental
remedies than was the legislature at the time of enactment.51 Fi-
ally, if the courts’ assessment of the social policy embodied in the
statute is incorrect, the legislature is always able to correct the courts’
“mistake.”52

The “floodgate” argument, on the other hand, presents the very
problems of judicial activism which are absent if the judiciary simply
effectuates the social policy embodied in the legislative enactment.
Where a judicial decision on the appropriateness of an implied rem-
edy is influenced by a consideration of the impact of the remedy
on the calendar of the court, then the court is making just the sort
of legislative judgments on the relative importance of individual
rights which are reserved to Congress. Again, Justice Harlan, in
Bivens, recognized this clearly, stating:53

48 403 U.S. at 402.
50 Id. at 402-03 n.4.
51 Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 HARV. L.
52 See Friendly, In Praise of Erie and of the New Federal Common Law, 39
53 403 U.S. at 411.
Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests.

Implying a private right of action for consumers under the Act would thus appear to be entirely consistent with the requirements of the doctrine of implication. Unless there is some contrary intent manifested by the legislature, or some special circumstance counseling otherwise, the implication of a private remedy would be entirely appropriate to effectuate the Act's purpose of protecting consumers.

THE FTC AND THE DOCTRINE OF IMPLICATION

The Comment applauded Holloway's twin grounds for denial of a private right of action under the FTC Act—that Congress did not intend such a private remedy and that the judicial creation of a private right of action would be incompatible with administrative enforcement of the Act by the Commission. Upon analysis, however, it would seem that neither ground supports the court's conclusion.

It is undoubtedly true that the choice of a beginning point in an opinion will generally determine the conclusion reached. In the case of the Holloway decision the court's initial premise—and that adopted by the Comment—was that legislative intent to create a private right of action was necessary before the doctrine of implication could be utilized. Of course, if this conclusion were correct, there would be no need for the doctrine of implication, and the judicial inquiry could be limited solely to statutory interpretation. It was precisely because of the unreliability of statutory interpretation, however, that the doctrine of implication was judicially developed to apply to those situations where the legislature simply did not consider the issue of a private remedy, and in some cases even where the legislative intent was that no private remedy be allowed.

54 485 F.2d at 989.
55 Id. at 989, 997-99.
57 In Kardon the court rejected the argument that no private right of action was legislatively intended:
The proper test of whether a private right of action should be implied under a federal regulatory statute is whether the judicial implication of a supplemental private remedy will effectuate not the intent, but the purpose of the legislative enactment. This is illustrated by an examination of the precedent. In *J. I. Case Co. v. Borak*, the leading case on the doctrine of implication, the Supreme Court implied a private right of action under section 14(a) of the Securities Exchange Act of 1934 on the grounds that the purpose of the legislation was the protection of investors and private enforcement of the statutory prohibition was necessary to effectuate the statutory purpose. The Court stated:

> While this [statutory] language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result.

Justice Harlan, commenting on *Borak* several years later, confirmed this analysis:

> The exercise of judicial power involved in *Borak* simply cannot be justified in terms of statutory construction . . . nor did the Borak court purport to do so.

In *Bivens*, the Supreme Court implied a private right of action under the fourth amendment. That case illustrates the irrelevance of legislative intent to the doctrine of implication inasmuch as it cannot seriously be contended that the founding fathers intended private enforcement of that amendment.

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The argument is not without force. Were the whole question one of statutory interpretation it might be convincing, but the question is only partly such.

69 F. Supp. at 514.

58 The failure throughout the Comment to recognize that the terms "legislative intent" and "Congressional purpose" are not interchangeable is one of its major errors. See Gomez v. Florida State Employment Services, 417 F.2d 569 (5th Cir. 1969). Thus the Comment erroneously interprets the following statement of the Court in *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964), as authorizing an examination of legislative intent:

> We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose.

Northwestern Comment, supra note 9, at 468 (emphasis supplied by Comment).


62 Id.

63 See also *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967), wherein the Court implied a private right of action under the Rivers and Harbors
The emphasis on the effectuation of the major purpose of the legislation rather than legislative intent also appears in another case unaccountably ignored by the Comment, *Gomez v. Florida State Employment Service*, 64 wherein the court implied a private right of action for migratory workers to enforce the labor standards contained in the regulations issued pursuant to the Wagner-Peyser National Employment System Act. 65 This legislation was enacted in 1933 when Congress was believed to have no power to take direct action to improve the working conditions of the American worker, 66 and the stated intention of Congress was simply to create an interstate employment service for the recruiting of labor. 67 The Fifth Circuit in *Gomez* did not attempt to justify its use of the doctrine of implication on the basis of legislative intent, but instead found that such intent was not relevant inasmuch as a private remedy was essential to the achievement of the law's purpose. 68

The foregoing cases demonstrate that the federal judiciary will employ a legal fiction if necessary to avoid imputing to Congress the intention that an Act be "an empty promise." 69 It is for this reason that in order for the doctrine of implication not to be applicable there must be a clear indication of congressional intent that private enforcement is inappropriate. The federal judiciary will not lightly infer that Congress enacted a statute with the intention that its broad remedial purpose be frustrated. 70

Insofar as the legislative history of the Act is concerned, it discloses no clear congressional intent that private enforcement be pre-
cluded. It would serve no useful purpose to review that legislative history again since it has been done by commentators several times.\textsuperscript{71} Unfortunately, the Comment's discussion of legislative history was irrelevant since it failed to evaluate the correct history. Instead, it discussed the legislative history of the original Federal Trade Commission Act.\textsuperscript{72} The discussion should have been directed to the Wheeler-Lea Amendment,\textsuperscript{73} which added the crucial words "unfair or deceptive acts or practices in commerce" to a statute which had previously prohibited only unfair methods of competition. It was the Wheeler-Lea Amendment onto which the plaintiff in Holloway was attempting to engraft a private right of action and the legislative history of which was important. In any event, the Comment concludes that the "legislative history of the FTC Act proves equivocal."\textsuperscript{74}

The significance of one aspect of the legislative history, however, has not been adequately explored. The House Report on the Wheeler-Lea Amendment to the Act states:\textsuperscript{75}

[T]his amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.

When this Report was written in 1937 the federal courts had developed an extensive body of federal common law of unfair competition under which private litigation was permitted.\textsuperscript{76} While it is hazardous to place too much reliance on the language of the House Report, it is nevertheless a logical inference that the development of a federal common law of consumer protection was contemplated. The overruling in 1938 of Swift v. Tyson,\textsuperscript{77} which had permitted the federal courts to develop federal common law, in 1938 hindered this development.

The second ground for the Holloway decision was that private enforcement would interfere with the administrative enforcement by the Federal Trade Commission.\textsuperscript{78} This view is heavily undercut by

\textsuperscript{71} See note 4 supra.
\textsuperscript{74} Northwestern Comment, supra note 9, at 474.
\textsuperscript{75} H.R. REP. No. 1613, 75th Cong., 1st Sess., 3 (1937).
\textsuperscript{78} The Comment makes the same point in its discussion of legislative history. Northwestern Comment, supra note 9, at 473.
the fact that the Commission has never believed it to be true and has urged that private enforcement of the Act be authorized.\(^7^9\) There is also evidence that the legislature did not necessarily believe this to be the intent. As Professor Bunn has observed, the prohibition of unfair or deceptive acts or practices is absolute while FTC enforcement is allowed only when the public interest so requires.\(^8^0\) An inference is thereby created that the scope of FTC enforcement of the Act is not exclusive. Interestingly, the federal courts have never held that the Commission has exclusive jurisdiction; rather, its jurisdiction has been held to be primary.\(^8^1\)

The doctrine of implication has never been deemed inapplicable simply because of potential interference with a regulatory scheme or agency regulation. Commenting on Borak, Justice Harlan observed that the Court had implied a private right of action\(^8^2\) in an area where federal regulation has been singularly comprehensive and elaborate administrative machinery had been provided.

Indeed, a brief history of the relationship between the FTC Act and the two securities acts illustrates a fundamental relationship between the acts which casts doubt on the distinctions drawn by Holloway.\(^8^3\) Historically, the Acts are inseparable. When Congress enacted the Securities Act of 1933,\(^8^4\) it used the FTC Act as a model, and entrusted its enforcement to the Federal Trade Commission pri-

\(^7^9\) See note 32 supra.


arily because of the similarity of the deceptive acts prohibited. When the Securities Exchange Act of 1934\textsuperscript{85} was enacted, Congress created the Securities Exchange Commission, not because of any distinction between the newly created agency and the FTC but simply because of an awareness of the increased workload created by the 1934 Act. Indeed, of the original five members of the SEC, three were appointed from the membership of the FTC.\textsuperscript{86} In light of these precedents and this administrative history, private enforcement of the FTC Act would appear to be fully justified by the doctrine of implication.

\textbf{CONCLUSION}

As the Comment recognized, the legislative history of the FTC Act is ambiguous and inconclusive; there is, however, no manifest legislative intent that private enforcement of the Act should be precluded. Thus, inasmuch as private enforcement would effectuate the purpose of the Act and assure that the Act's now-empty promise to consumers would not remain unfulfilled, it would be entirely appropriate, under the prevailing case law, for the federal judiciary to imply a private right of action under the Federal Trade Commission Act.\textsuperscript{87}

\textsuperscript{85} Id. §§ 78a et seq. (1971).
\textsuperscript{87} Late last year, Congress passed and the President signed into law the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 88 Stat. 2183 (1974), which expanded consumer remedies in two aspects. First, Title I of the Act, after setting forth substantive standards for product warranties, provides for consumer actions under certain circumstances. A consumer or class of consumers may sue in state or federal court for legal and equitable relief, including costs and attorney's fees, against any supplier, warrantor or service contractor who violates a requirement of that Title or fails to comply with a written or implied warranty or service contract. 15 U.S.C.A. § 2310(d) (Supp. 1, 1975). Second, Title II amends the FTC Act to expand the power of district courts to grant relief to consumers. The courts may, in civil proceedings brought by the Commission, award such relief as they find necessary to redress certain injuries to consumers, including rescission or reformation of contracts, refund of money and payment of damages, but not punitive damages. Such relief may be granted where the Commission brings a proceeding against a defendant for violation of a rule concerning a section 5 violation or violation of a cease-and-desist order applicable to him. 15 U.S.C.A. § 57b (Supp. 1, 1975).

These provisions do not affect the availability of a private right of action for a section 5 violation for several reasons. First, the intent of Congress to expand consumer remedies under limited circumstances does not alter the congressional purpose of the FTC Act which would be carried out by a private right of action in
consumers. Indeed, only Title I of the new Act, dealing with warranties, grants consumers any right to bring proceedings on their own, and Title I is not an amendment to the FTC Act at all. Therefore it does not affect the rights of persons injured by a violation of section 5 of the FTC Act. Title II is an amendment to the FTC Act, but it does not give consumers the right to bring proceedings on their own. Consumer redress may be awarded only where the Commission brings an action. Thus the rights of consumers are subject to the Commission's decision as to whether to sue. To facilitate the congressional purpose behind the FTC Act, therefore, it is still necessary to recognize a private right of action in consumers. Congress, moreover, in enacting the Magnuson-Moss Act made clear that the remedies provided by Title II are to be in addition to any other right of action provided by state or federal law. 15 U.S.C.A. § 57b(e) (Supp. 1975). As the Conference Report stated:

It is not the intention of the conferees that private actions for redress based on the acts or practices which are the subject of a Commission redress action be barred by a Commission action.

CONF. REP. NO. 93-1408, 93d Cong., 2d Sess. (1974), in 15 U.S. CODE CONG. & AD. NEWS 8883 (1975). In this passage the Conference was dealing with a consumer action based on acts against which the Commission had actually proceeded. The reasoning would appear equally to apply to violations of rules or orders against which the Commission had not yet proceeded. It would also seem to apply to acts violating section 5 but not violating a Commission rule or cease-and-desist order. For these types of acts the Commission may not seek consumer redress.