Statutes in Derogation of Common Law: The Canon as an Analytical Tool

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A number of important nineteenth-century Wisconsin decisions explicitly applied the canon that statutes in derogation of the common law should be strictly construed. In addition many more decisions apparently relied on this canon of statutory construction, although they did not expressly invoke the rule. Though there was not a large number of these cases,[1] their effect was profound in shaping the law in important areas of legislation—cases concerning the Code of Civil Procedure, the married women's property acts, and the Workmen's Compensation Act, all relied heavily on the doctrine during early periods of the history of these statutes. Only one area of major change in the law—the property field, of future interests and estates—seemed to show an absence of reliance upon the canon.

Orton v. Noonan & McNab[2] contained one of the clearest statements of the derogation rule: "The maxim of construction is familiar, that a statute to abrogate or change any rule or principle of the common law, must be clearly expressed so as to leave no doubt of the intention of the legislature." As phrased, the rule vested its conclusion on a showing of two prerequisite terms: (1) that there was a common law doctrine in existence or potentially in existence, relevant to the issue presented by the parties; (2) that if that statute in issue were

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[1] A study of the flow of business through the Wisconsin Supreme Court for six sample years revealed that only four cases specifically relied on this canon of construction. See PAGE, COMMON LAW AND STATUTE BEFORE THE SUPREME COURT OF WISCONSIN: A STUDY IN THE CANONS OF CONSTRUCTION, c. 1, Table XXVI (unpublished S.J.D. thesis in the University of Wisconsin Law Library 1955).

[2] 29 Wis. 541, 545 (1872). For other statements of the rule see Ekern v. McGovern, 154 Wis. 157, 261, 142 N.W. 595, 626 (1913); Meek v. Pierce, 19 Wis. 300, 303 (1865). At times the derogation canon has been phrased as if it were a special rule applying to public corporations: "Legislation in derogation of the common law should be strictly construed most favorably to the public corporation and not to the claimant for damages." Sullivan v. School District, 179 Wis. 502, 506, 191 N.W. 1020, 1022 (1923); Schaefer v. City of Fond du Lac, 99 Wis. 333, 341, 74 N.W. 810, 813 (1898).

construed as the party pleading it contended, it would produce some change in (*i.e.*, would "derogate" from or abrogate) the common law.

In the *Orton* case, for example, the issue was whether a counterclaim might state a cause of action which arose after the original complaint was served. The common law permitted counterclaims only of a cause of action which existed at the commencement of the plaintiff's suit. However, the Code of Civil Procedure provided that:

> [A counter-claim shall be allowed with reference to—]
>
> 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.
>
> 2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action.[3]

Justice Dixon, for the court, conceded that section 1 of the statute applied. But then he read into that section the common law requirement, though this had been specifically written into section 2. Hence, he refused to allow the pleading of any cause of action, justifying that refusal by invocation of the derogation canon.[4]

Later cases added another qualification to the statement of the derogation rule. Before that canon of construction would be used, it must be shown that the statute was ambiguous on its face.[5] It shall be our purpose to analyze these propositions, to attempt to show the conclusions that courts reached by applying them, and to discuss the policies that the court felt it was carrying out by relying on the canon. Finally we shall evaluate how useful the canon really was.

The Derogation Rule in Operation

Proposition 1: To make the derogation rule apply, there must be a common law doctrine in existence or potentially in existence, relevant to the issue presented by the parties

The common law of Wisconsin included basically the English common law as it existed on the eve of the American Revolution together with English statutes which had been enacted before 1776. However there were certain exceptions: (1) No common law doctrine would

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[3] Wis. Rev. Stat. c. 125 § 11 (1858).
[4] 29 Wis. 541, 545 (1872).
[5] See Abbot v. City of Milwaukee, 148 Wis. 26, 30, 134 N.W. 137, 138 (1912).

be accepted that was not suitable to the conditions of the people of Wisconsin. What was suitable to the conditions of the people involved an evaluation of custom, economic conditions, natural resources, and constitutional guarantees. (2) The common law was also inapplicable where the legislature had taken over an area formerly governed by the common law. The Married Women's Property Act, for example, superseded the common law rule that a wife was under a disability of coverture that prevented her from transacting business in her own behalf. In addition to this inheritance from English common law, by the time Wisconsin attained statehood (1848) there had been time for the growth of a native American common law. By our legal tradition, this body of judge-made doctrine was, of course, also available to the Wisconsin courts.

At least part of the common law of Wisconsin had the sanction of the state constitution, which provided that:

> Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature.[6]

This constitutional clause was not drawn into question until 1864, when Justice Paine, writing for the court, in *Coburn v. Harvey*[7] held that the English common law remedy of distress for failure to pay rent existed in Wisconsin. Paine was not sure whether the Wisconsin Constitution or the Northwest Ordinance of 1787 furnished the technical basis for the adoption of the common law.[8] The reports on the constitutional convention of 1846 were silent on the background of this provision, and show only that the matter was considered by the committee on miscellaneous provisions before it was adopted by the convention.[9]

Probably the constitutional provision merely continued a condition recognized by the Northwest Ordinance, whose requirements that the governor and judges of the territory adopt existing statutes from the original states and that judicial proceedings be conducted according to the common law were generally interpreted as establishing the English common law in the new territory. The courts of Michigan held, for example, that English common law obtained in that state and territory without an express declaration to that effect either by terri-

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[6] WIS. CONST. art. XIV, § 13.
[7] 18 Wis. *147 (1864).
[8] *Id.* at *151.
[9] QUAIFE, THE CONVENTION OF 1846, at 524, 550, 578-579 (1918).

torial or state lawmakers.[10] Since the State of Wisconsin served a period of tutelage under Michigan Territory, the same results could have been expected in the absence of constitutional provision; it may be that the Wisconsin constitution makers inserted the section through excessive caution. Also in the background was the fact that an explicit reception statute had also been enacted by the original legislative authorities of the Northwest Territory. One commentator observes of this enactment that

> [T]he governor and the judges of the territory apparently gave the phrase [requiring that statutes of existing states be adopted and that judicial proceedings be conducted according to the common law] a restricted connotation because in 1795 they felt it necessary to adopt a law declaring what general law should be considered in force in the territory, and the resulting enactment was a copy of the original reception statute passed by Virginia in 1776.[11]

Whatever the authoritative source of Wisconsin's common law, Justice Paine admitted in the *Coburn* case that the court, when the case was first presented, believed that the English common law was altogether inapplicable. Paine remarked, too, that although he had sometimes heard it claimed that no part of the common law was in force in Wisconsin, he had never heard the reasoning behind that conclusion.[12] That the court later changed its mind and declared the common law in force demonstrated the obviously important policy considerations moving the judges.

Paine spelled out these reasons rather fully. First, long reliance upon the existence of the common law—both by the territorial legislature and the people—had permitted the creation of rights and titles founded on common law principles. Now to declare this reliance unjustified would cause widespread confusion and uncertainty.[13] Second, the court was realistic. It admitted that in a newly developing country the legislature could not adequately anticipate all of the needs of the people. A complete legal system was required at once. The courts

[10] A detailed account of the acceptance of the English common law in the United States, with special reference to the Northwest Territory, is contained in Hall, *The Common Law: An Account of Its Reception in the United States,* 4 VAND. L. REV. 791, 802, 803 (1951).

[11] *Id.* at 801. As the author points out, the validity of this more explict act was dubious: (1) The Virginia reception act had been repealed at the time the 1795 act of the Northwest Territory was adopted, and the Ordinance only permitted adoption of existing laws. (2) Congress probably intended that only single acts cou'd be adopted. The territorial officials were therefore acting in excess of their powers.

[12] Coburn v. Harvey, 18 Wis. *147, *148, *149 (1864).

[13] *Id.* at *150.

and legislatures relied, therefore, on an underlying "substratum" of common law:

> It would require considerable hardihood in a court, in the face of such a series of decisions, in the face of the plain implications pervading our system of laws, and in the face of the express assumption in the constitution itself, to hold that no part of the common law is in force in this state.[14]

Finally, a refusal to recognize the English common law at this date would be equivalent to a repeal of a body of doctrine actually operative in the life of the community. Only the legislature could properly effect such a repeal.[15] This last argument bears ironic comparison with later applications of the derogation rule, where deference to the legislative desire appeared to be the least concern of the courts.

Not all of the English common law was adopted in Wisconsin. Most of the states formed from the Northwest Territory fixed the cut-off date for reception of English statutes at the year 1607, the founding year of Jamestown, in Virginia. The only exception to this current of doctrine was that stated in the Wisconsin *Coburn* opinion, which held that the cut-off date was the year of national independence.[16] Paine reached this result by applying several common sense principles. It was realistic for the original states to establish the date of their settlement as the reception date for the English common law, but in Wisconsin the settlers came from many different states or directly from overseas; there was no time of settlement common to them all. They could not, therefore, be said to have framed their institutions with reference to any particular cut-off date in English law.[17]

Although *Coburn* did establish 1776 as the reception date, probably neither the court in that case nor the framers of the state constitution intended that common law decisions after 1776 could not be considered as useful precedent by Wisconsin judges. Undoubtedly the constitutional clause was inserted only to aid the new state in equipping itself rapidly with a complete legal order by provision for a ready-made body of common law. It was unthinkable that the framers of the constitution would desire to cut off future development of this case-by-case approach to legal problems that was traditional to most of the residents of the state. Such action would have prevented adjustment of law to meet new conditions. Several opinions,

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[14] *Id.* at *151.
[15] *Id.* at *154.
[16] Dale, *The Adoption of the Common Law by the American Colonies*, 21 AM. L. REG. (n.s.) 553 (1882).
[17] 18 Wis. at *152.

involving property rights of various kinds, confirmed this view, and implied that there could be a "home-grown" variety of common law. An early decision of this type was *McCall v. Chamberlain*[18] in 1861. There Justice Paine noted that the English rule was that owners of domestic animals must fence them in or be liable in trespass for any damages. In some of the eastern states the courts developed a new common law. Persons who wanted to protect their property must fence-out the cattle. This new rule the Wisconsin court preferred.

> The rule of the common law requiring everyone to fence in his own animals, under pain of their being considered trespassers, if they entered even on the unenclosed lands of another, if strictly enforced, is often productive of hardship in a new country like ours.[19]

One of the factors that influenced Justice Winslow to find in 1899 that the doctrine of ameliorating waste existed in Wisconsin was the recognition throughout the United States that what constituted waste in some parts of the country did not constitute waste in other areas. Community customs and usages largely determined the question:

> This is entirely consistent with, and in fact springs from, the central idea upon which the disability of waste is now, and has always been, founded, namely, the preservation of the property for the benefit of the owner of the future estate without permanent injury to it.[20]

A dissenting opinion by Justice Marshall in *Pearson v. School District No. 8*[21] offered another good indication that the framers of the constitution did not intend to prevent development of modern common law for situations not covered by statute. A statute required filing of the teaching certificate with the teacher's annual contract. The majority of the court ruled that such impliedly compelled the contract to be written. Obviously, they argued, it would be impossible to file a copy of a teaching certificate with an oral contract. But Marshall criticized this conclusion in a dissenting opinion.

> Above all, [the derogation canon] obtains rather with reference to the common law of England supplemented for this country by such portions of the written law of the mother country as were, by the unwritten method, adopted here, not with reference to mere modern unwritten departures therefrom.[22]

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[18] 13 Wis. *637 (1861).
[19] *Id.* at *640.
[20] Melms v. Pabst Brewing Co., 104 Wis. 7, 11, 79 N.W. 738, 739 (1899).
[21] 144 Wis. 620, 129 N.W. 940 (1911).
[22] *Id.* at 623, 624-625, 129 N.W. at 941 (dissenting opinion).

This dissenting opinion was also the only instance discovered suggesting that the derogation rule was more properly applicable to one type of common law than to another.

In *Diana Shooting Club v. Husting*[23] plaintiff argued that since he owned the bed of a navigable stream crossing his land he had exclusive hunting and fishing rights in the waters. Some of the states in the Northwest Territory ruled that title to the beds of the streams remained in the state. Wisconsin found that title rested in the riparian land owners. But in either case, Justice Vinje ruled, the public retained hunting and fishing rights in the waters, in contrast to the English rule:

> It would no doubt have been more logical to hold, as English courts do, that private ownership ends where navigability begins, but there is nothing inconsistent in the doctrine of private ownership of beds of navigable streams subject to all the burdens of navigation and the incidents thereof.[24]

A reference in *Coburn* to the Wisconsin Territorial Statutes of 1839, which had recognized the common law right of distress, apparently was misread by a later case, where the last date for adoption of the English law by virtue of the constitutional provision was set at the time of the enactment of the Wisconsin constitution in 1848.[25] The offhand manner in which the constitution was referred to fortifies the feeling that the *Coburn* case was misread. Certainly no other case had expressly gone this far. However, *Spaulding v. Chicago and Northwestern Railway Company*[26] implicitly expanded the applicable body of English common law to the year 1847,[27] by invoking an 1847 English decision to determine the meaning to be given an English statute of 1707.[28] Plaintiff sued to recover for the alleged negligence of defendant railroad in setting fire to plaintiff's croplands. The problem was whether the 1707 statute or a later statute[29] was in force in Wisconsin. The earlier one, permitting recovery against persons setting fires, was originally interpreted to preclude recovery for fires caused by negli-

[23] 156 Wis. 261, 145 N.W. 816 (1914).
[24] *Id.* at 269, 145 N.W. at 819.
[25] Huber v. Merkel, 117 Wis. 355, 94 N.W. 354 (1903).
[26] 30 Wis. 110 (1872).
[27] *Id.* at 120. It is possible that the *Spaulding* case recognized the approach suggested above (pp. 000 *supra*) that the constitutional provision was only intended to provide the base of applicable law; that common law developed after the Revolution could be considered by the court but was not binding upon it. The only effect of the later decisions was to provide argument as to the correct policy for the court to accept.
[28] 6 Anne, c. 31, § 6 (1707).
[29] 14 Geo. III, c. 78 (1774).

gence. However, interpretations of the English court after the Revolution were more liberal, allowing recovery in cases of negligence. The later English statute, on the other hand, clearly excluded recovery. Justice Dixon first found that the second one passed in 1774 was not a part of the law of Wisconsin; statutes passed on the eve of the Revolution could not be a part of the common law. The entire theory of reception of certain English statutes as a part of the common law of the state rested on the premise that the colonial settlers ratified them as part of the jurisprudence of the colonies. But, a statute passed immediately before the Revolution was of a date when colonial tempers were so high that it would not be reasonable to presume that any such ratification occurred.[30] Dixon then found that the earlier statute passed in 1707 applied as interpreted in light of an 1847 English case. This result Dixon rationalized on the theory that the 1847 case was the correct decision; judges only interpreted the law, they did not make it; hence all prior interpretations were incorrect and had never been the law.[31]

That the cut-off date for acceptance of English statutes as part of the common law might be earlier than that indicated by any of the other cases was intimated in *Webster v. Morris*.[32] The court settled on the date 1707, the year England and Scotland were united. In support of this conclusion, the court cited the declaration of the Wisconsin Territorial Laws of 1839, that "none of the statutes of Great Britain shall be considered as law of this territory, . . ."[33] Great Britain was not formed until 1707; therefore only English statutes proper were received in Wisconsin as part of the common law.[34] The 1886 decision distinguished *Coburn* on the ground that the precise problem had not been considered there.[35]

It will be noted that this dispute as to the reception date occurred only where the court was required to determine which old English statutes formed part of Wisconsin law. This would suggest the possibility that the court had two separate legal doctrines in mind when it referred to acceptance of the English common law—one referring

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[30] 30 Wis. at 117, 118.
[31] See Kocourek and Koven, *Renovation of the Common Law Through Stare Decisis*, 29 ILL. L. REV. 971, 972 (1935).
[32] 66 Wis. 366, 28 N.W. 353 (1886).
[33] WIS. TERRIT. LAWS OF 1839 § 8, p. 407 (1839).
[34] 66 Wis. at 390, 28 N.W. at 362.
[35] *Ibid.*

to statutory and the other to judge-made law.[36] However, only one case even hinted at this distinction. In *Coburn v. Harvey*[37] Justice Paine quoted New York's Chancellor Kent, who spoke of the two situations as governed by separate rules. Counsel apparently had the same distinction in mind in *Webster v. Morris,*[38] when he argued that Wisconsin legislative history barred the acceptance of English statutes as part of the state common law; when Wisconsin was made a part of the Michigan Territory in 1818, it was subjected to all Michigan statutes, including an 1810 act abrogating all English statutes; although once repealed by the 1849 Wisconsin legislature this provision was re-enacted the same year.[39] However, the *Webster* case rejected this reasoning; the provisions cited by counsel, said the court, referred only to statutes passed after 1707.[40]

All of the cases agreed that no English law would be accepted unless it suited the conditions of the country.[41] The English law rejected on this count fell into two general categories. The first included those cases where English law doctrine ran afoul of some constitutional provision—by providing for taking of property for private purposes,[42] interfering with freedom of speech and press,[43] or sanctioning measures incompatible with traditional notions of sovereignty.[44] In the other group were rules of law that had been developed to meet the needs of a different kind of society—a society, for example, where the

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[36] Conceivably, this question might have had another practical relevance. Insofar as a given doctrine of common law was enshrined under the constitutional clause, it would, by the terms of that clause, be beyond the power of the court to overrule or upset. Justice Marshall offered the only hint that this might be the case. See Pearson v. School District No. 8, 144 Wis. 620, 623, 625, 129 N.W. 940, 941 (1911) (dissenting opinion).

[37] 18 Wis. *147, *152-154 (1864).

[38] 66 Wis. 366, 28 N.W. 353 (1886).

[39] This legislative history is given in full detail in Webster v. Morris, 66 Wis. 366, 376, n. 1 (1886). The notation does not appear in the Northwestern Reporter.

[40] *Id.* at 390, 28 N.W. at 362.

[41] Coburn v. Harvey, 18 Wis. *147 (1864) gave lip service to this qualification, but since it declared applicable the ancient common law remedy of distress, the sincerity of the recognition was questionable. Distress would appear to be more suitable to a class conscious society than to the newly developed state.

[42] *E.g.*, Huber v. Merkel, 117 Wis. 355, 94 N.W. 354 (1903) (owners of artesian wells prohibited from permitting more water to escape than reasonably necessary for use of owner).

[43] *E.g.*, State *ex rel* Attorney General v. Circuit Court for Eau Claire County, 97 Wis. 1, 72 N.W. 193 (1897) (newspaper men sentenced for constructive contempt of court as result of article criticizing manner in which judge conducted court; contempt statute involved directly but court also impressed with free speech implications).

[44] State *ex rel.* Rodd v. Verage, 177 Wis. 295, 187 N.W. 830 (1922) (common law power of executive to pardon criminals); Ekern v. McGovern, 154 Wis. 157, 142 N.W. 595 (1913) (common law power of executive to remove officials from office).

chancellor had prerogative powers[45] or where a standard of non-negligent conduct could be established without reference to destructive powers of modern machinery.[46]

Dodge v. Williams[47] afforded one of the best examples of this culling process. The question before the court was whether the common law rule against perpetuities of personalty had been repealed by implication by a statute limiting suspension of alienation of realty. In the course of that discussion the subordinate question was raised, whether the statute of mortmain which restricted gifts to charities was in force in Wisconsin. Justice Ryan made an extensive analysis of the theoretical justification of the mortmain statute, and concluded that the statute had never applied to any of the British colonies. Ryan noted that Parliament apparently intended that the statute apply only in England; specific provisions excepted estates in Ireland and real and personal estates in Scotland. The English courts had generally conceded that the statute did not apply to the British colonies. Ryan quoted approvingly from an opinion by Sir William Grant in the Court of Chancery:

> I conceive that the object of the statute of mortmain was wholly political—that it grew out of local circumstances, and was meant to have merely a local operation. It was passed to prevent what was deemed a public mischief, and not to regulate, as between ancestor and heir, the power of devising, or to prescribe, as between grantor and grantee, the forms of alienation. It is incidentally only, and with reference to a particular object, that the exercise of the owner's dominion over his property is abridged.[48]

Ryan concluded that there was thus never any reason for the adoption of the mortmain statute in Wisconsin. It was totally unsuited to a wilderness, where the only ownership of property was by Indian tribes or the British crown.[49] Since the mortmain statute was inapplicable while Wisconsin "was part of or appendant to an English colony, it seems very certain that it has never since had any force here."[50]

Generally, the existence of common law doctrine on a particular subject was merely assumed. Of 107 cases examined in the present study only 43 made any attempt to discuss what was the common law

[45] *E.g.*, Webster v. Morris, 66 Wis. 366, 28 N.W. 353 (1886) (meaning of *cy pres* doctrine). Conceivably Coburn v. Harvey, 18 Wis. *147 (1864) (distress for rent) could have been fitted into the same category.

[46] *E.g.*, Spaulding v. Chicago and Northwestern Railway Company, 30 Wis. 110 (1872) (application of Statute of 6 Anne to fires caused by negligence).

[47] 46 Wis. 70 (1879).

[48] Attorney General v. Stewart, 2 Mer. 143, 161, 35 Eng. Rep. 895, 900 (Ch. 1817), quoted in 46 Wis. at 93.

[49] 46 Wis. at 94, 95.

[50] *Ibid.*

on a particular point. The Wisconsin judges often relied heavily upon Blackstone as the correct exponent of the common law.[51]

And at times the derogation rule was applied even though there was no applicable common law. In *Abbot v. Milwaukee*[52] counsel urged that a statute authorizing special assessments be narrowly construed, because the statute was in derogation of the common law. Justice Marshall refused to apply the canon. He did so on the ground that the special assessment statute was "remedial," and hence to be liberally construed. Further to support his position, Marshall theorized that the rule of strict construction properly applied to ". . . a law imposing a burden on a person or his property, out of the ordinary."[53] By this view, apparently an act was in derogation of common law, if it effected a change diminishing a common law right. This was one of the few opinions to indicate the philosophy envisaged in the word "derogation." However, the impact of Marshall's discussion is lessened considerably by his failure to see that there was a short answer to any effort to invoke the derogation rule in the kind of situation before him. This was a tax statute; by Anglo-American constitutional tradition, taxation is a field exclusively for the legislature; hence there is no common law of taxation to be preserved by invoking the derogation rule. Marshall's failure to see this in *Abbot* is odd, in view of his recognition of the same point in another field, in *Byington v. Merrill*.[54]

Byington v. Merrill[55] involved a personal injury action against the city for damages sustained in a fall on a defective sidewalk. Counsel argued that the city charter provisions giving the right of action should be strictly construed, as in derogation of the common law. Marshall rejected this contention:

> The meaning of the words of the statute is not to be restrained at all because of any interference thereof with common-law rights, because the liability of municipalities in cases like this is wholly a creature of the statute.[56]

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[51] *E.g.*, State *ex rel.* Rodd v. Verage, 177 Wis. 295, 187 N.W. 830 (1922) (common law power of executive to pardon criminals); Ekern v. McGovern, 154 Wis. 157, 142 N.W. 595 (1913) (common law power of executive to remove officials from office); State *ex rel.* Attorney General v. Circuit Court for Eau Claire County, 97 Wis. 1, 72 N.W. 193 (1897) (common law power of judge to punish for constructive contempt); Dodge v. Williams, 46 Wis. 70 (1879) (applicability of mortmain statute).

[52] 148 Wis. 26, 134 N.W. 137 (1912).

[53] *Id.* at 29, 134 N.W. at 138.

[54] 112 Wis. 211, 88 N.W. 26 (1901).

[55] *Ibid.*

[56] *Id.* at 220, 88 N.W. at 29. *Cf.* Kappers v. Cast Stone Construction Co., 184 Wis. 627, 200 N.W. 376 (1924) (statute defining voting rights strictly construed as in derogation of common law, yet corporations were strictly statutory creatures).

This second view of Marshall's seems obviously the more logical approach. Nothing in the canon as traditionally stated envisaged application of this construction rule to a situation in which there was no common law.

Proposition 2: To make the derogation rule apply, the statute in issue must be one which, construed as the party pleading it contended, would operate to change the common law

The term "derogation" carried with it the connotation of action of derogatory or dubious worth, something that usurped basic law. But neither the canon as traditionally stated nor the cases which applied it ever discussed extensively what was meant by the term "derogation." A statute in derogation of common law might be so in any of four possible senses. These four meanings might fall into two broad categories, according as they referred to legislation (1) in which there was some change in the common law or (2) in which there could not accurately be said to be a "change" of the common law, because the statute either used words having an established common law meaning, or relied on the availability of a common law doctrine or rule to fill out the content of the legislative rule or standard. In the first category are two possible situations: (a) a change broadening common law rights or remedies; (b) a change diminishing rights at common law.

Derogation as Change in Common Law

a. *Change broadening common law rights or remedies.* The majority of cases involved disputes over a construction that would broaden common law rights or remedies.[57] They may be divided into two categories: For the most part the statute was seen clearly to make some change in the common law. That change being established, it was then presumed that there was no intention to make any change other than that clearly detectable from an examination of the statute. The question was, therefore, how much of a change had the statute made? For example, it was clear under the Married Women's Acts that the legislature intended to increase a wife's rights to transact business in her own name. But in *T. T. Haydock Carriage Co. v. Pier*[58] Justice Taylor refused to read into the statutory provisions a right on the part of a married woman to take an assignment for the benefit of creditors. The assignment was void, he held, because a wife might not bind herself by bond:

[57] In the cases examined for this essay, 60 of 107 were of this type.
[58] 74 Wis. 582, 43 N.W. 502 (1889).

> The immunity which the common law gave to the married woman of not being bound by her personal obligations was rather in the nature of a privilege and protection than of a disability, and this court, . . . in giving construction to statutes which are intended to remove the disabilities of married women, has been careful not to construe them so as to remove the protection which the common law afforded; . . . .[59]

He continued:

> [T]here has been no disposition to so construe the law as to take away the protection which such law gave to her in relieving her from liability on her personal contracts; and it is only when the removal of such protection as to her personal liability upon her contracts becomes necessary to the full enjoyment of her rights under the statute that she has been held capable of binding herself by a personal contract.[60]

This same attitude was expressed with extreme frankness in *Supervisors of Kewaunee County v. Decker*[61] when the issue was whether a complaint sufficiently stated a cause of action. The complaint would not have satisfied the common law requirements for a cause of action in trover. Plaintiff maintained that under the new Code of Civil Procedure, the complaint stated a good cause of action for money had and received. Justice Dixon curtly dismissed the argument: "We do not think it is the law, and, unless the legislature compels us by some new statutory regulation, shall hereafter be very slow to change this conclusion."[61a]

A smaller number of cases seemed to hold that if an argued interpretation of a given statute amounted to a change in the common law, that fact was enough in itself to justify the requirement that the change be very clear or explicit. In other words the problem was

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[59] *Id.* at 585-586, 43 N.W. at 503.

[60] *Id.* at 589, 43 N.W. at 505. See also Farrell v. Ledwell, 21 Wis. *182 (1866) (statute permitting husband and wife to testify when parties to action did not permit them to testify in each other's behalf at any other time); Stimson v. White, 20 Wis. *562 (1866) (since wife's earnings belong to husband, wife may not maintain action on note purchased with those earnings); Edson v. Hayden, 20 Wis.*682 (1866) (statute permitting wife to transact business for family where husband unable to support through "drunkenness, profligacy, or any other cause of same nature" did not permit wife to transact business where husband's inability arose from general incompetence). The same phenomenon occurred in cases respecting employee's safety legislation. *E.g.*, Schmidt v. Wisconsin Sugar Co., 175 Wis. 613, 186 N.W. 222 (1922) (since no specific statute declared expressly that driving an automobile was a dangerous occupation or employment, a chauffeur, who was a minor, was not engaged in "employment dangerous to life or limb," condemned by statute); Hartford v. Northern Pacific R. Co., 91 Wis. 374, 64 N.W. 1033 (1895) (foreman not a "superintendent" within meaning of railroad safety act.)

[61] 30 Wis. 624 (1872). See also Gunn v. Madigan, 28 Wis. 158(1871).

[61a] *Id.* at 626.

whether the statute had changed the law at all. *Bonesteel v. Bonesteel*[62] illustrated this attitude. The plaintiff held a promissory note from defendant. To assure payment of the debt, the circuit court issued a writ *ne exeat* against defendant, on the complaint that he was leaving the state permanently. The Supreme Court, speaking through Justice Lyon, found that the writ had been improperly issued, because no equitable cause of action was pleaded. The Code of Civil Procedure had not wiped out the differences between equitable and legal substantive remedies, the court ruled in language which sounds more like the announcement of constitutional limitations than of a canon of construction:

> There are certain essential and inherent distinctions between actions at law and in equity, to abolish which is beyond the power of legislative enactment.[63]

b. *Change diminishing common law rights or remedies.* Only 31 of 107 derogation cases examined in this study defined a statute in derogation of common law as one that restricted or entirely repealed the common law on a particular subject. Perhaps the most interesting example of this situation was *Webster v. Morris*.[64] As we have seen, counsel contended that no English statutes were in force in Wisconsin, because an act of the Wisconsin territorial legislature had declared that "None of the statutes of Great Britain shall be considered as law of this territory; nor thall they be deemed to have had any force or effect in this territory since the fourth day of July, 1816;"[65] the provision had been re-enacted by the 1849 state legislature.[66] Justice Cassoday, in rejecting this contention, construed narrowly the word "statutes" in the 1839 Act. The word "did not include English statutes proper, which were enacted prior to 'the union of the crown of England with that of Scotland' by Act of Parliament in 1707, ..."[67] This

[62] 28 Wis. 245 (1871).

[63] *Id.* at 250. See also Duffies v. Duffies, 76 Wis. 374, 45 N.W. 522 (1890) (Married Women's Acts could not be construed to give a right of action by wife for alienation of affections or loss of services of husband); Lonstorf v. Lonstorf, 118 Wis. 159, 95 N.W. 961 (1903); Fuller & Fuller Co. v. McHenry, 83 Wis. 573, 53 N.W. 896 (1892) (Married Women's Acts referred only to use and enjoyment by wife of her separate estate; there was no change in the common law prohibition against a husband and wife forming a partnership); McKivergan v. Alexander & Edgar Lumber Co., 124 Wis. 60, 102 N.W. 332 (1905) (railroad safety act did not cover private railway operated as adjunct of lumber business).

[64] 66 Wis. 366, 28 N.W. 353 (1886).

[65] Wis. Territ. Stat. § 8, p. 407 (1839).

[66] The law was first repealed by Wis. Rev. Stat. 750, line 6 (1849). However, the provision was reenacted by Wis. Rev. Stat. c. 157, § 5 (1849): "All statutes . . . abrogated by . . . any law hereby repealed . . . shall be deemed abrogated."

[67] Webster v. Morris, 66 Wis. 366, 390, 28 N.W. 353, 362 (1886).

interpretation stemmed, no doubt, from a desire to preserve for Wisconsin use as much as possible of the general body of English law. Had the court adopted a contrary interpretation, Wisconsin would have been forced to accept an archaic form of common law, law which Parliament had rejected as unsuited to the needs of the British people. Moreover, the old English statutes were so much a part of the law that colonists were familiar with, that they had attained the same sanction as common law principles. Probably the colonists did not make fine distinctions between statutes and common law; in shaping their institutions and conduct, their concern was with the laws of England, not with the common law of England.

Often the court followed this concept of legislation in "derogation" of common law, in constitutional cases or cases where an economic interest was at stake. *Huber v. Merkel*[68] illustrated both of these situations. The court here held unconstitutional a statute making it unlawful for the owner of an artesian well to allow more water to escape than was reasonably necessary for his use. The court's idea of what regulations were consistent with due process seems clearly to have been affected by its belief that the statute, if upheld, would take from the well-owner a common law right to use his water in any way he desired.

In *Pearson v. School District No. 8*[69] a school teacher sued to recover for breach of contract. As a defense the district contended that the plaintiff had no written contract; the governing statute required that the contract specify the wages to be paid and provided that the contract be placel on file with a copy of the employee's teaching certificate; these stipulations were argued to require by clear implication that the contract be in writing. At common law an oral contract was sufficient. The court dismissed the defense, arguing:

> [T]he court cannot read into the statute provisions not found there for the purpose of rendering an oral contract, otherwise unobjectionable, void because not in writing, in the absence of express statutory requirement. . . . Courts cannot by judicial construction read into statutes provisions not found there for the purpose of changing the rules of the common law.[70]

"Derogation" Where the Statute Did Not Change Common Law

a. *Reliance by statute on words having common law meaning.* There were some cases where though the statute did not actually

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[68] 117 Wis. 355, 94 N.W. 354 (1903).
[69] 144 Wis. 620, 129 N.W. 940 (1911).
[70] *Id.* at 622, 623, 129 N.W. at 941.

change the common law, judicial opinions nonetheless spoke as if they relied on the derogation rule. The usual situation arose when the statute used words having established common law meanings, as was often true of statutes dealing with property. For instance, the Wisconsin Statutes prohibit "waste," but do not positively define what that term means, although five instances are mentioned which the statute says do not comprise waste.[71] In *Melms v. Pabst Brewing Co.*[72] the remainderman claimed that a life tenant had committed waste by razing property which had become useless for residential purposes and converting it into valuable business property. The court, through Justice Winslow, held that the doctrine of ameliorating waste obtained in Wisconsin; there was no waste, therefore, where the change enhanced the value of the property. Winslow reasoned that, since the statute recognized "waste" by providing a remedy in the form of double damages, but did not define what "waste" was, reference must be made to the common law.

> Thus the ancient English rule which prevented the tenant from converting a meadow into arable land was early softened down, and the doctrine of meliorating waste was adopted, which, without changing the legal definition of waste, still allowed the tenant to change the course of husbandry upon the estate if such change be for the betterment of the estate.[73]

The cases interpreting the Wisconsin rule against perpetuities very forcibly demonstrated this kind of resort to common law to give content to statutory language. The statute used the phrase "restraint on alienation," but did not define it. When Justice Marshall was faced with the problem of determining the meaning of the section, he turned to the common law. A 1672 English case had defined the object of the rule as being to limit the power to suspend the alienation of estates, and the doctrine had remained unchanged in England until 1881. This Wisconsin statute had been passed in reference to this early English doctrine (since repudiated by the English courts). Therefore, the English law, as it existed at the time the statute was passed, governed.

b. *Reliance on availability of common law doctrine.* Again, a statute might tacitly rely on the availability of a common law doctrine or rule to supplement or complement its provision. Such was the case of *Meek v. Pierce.*[74] The statute creating the office of justice of the

[71] WIS. STAT. § 279.09 (1953).
[72] 104 Wis. 7, 79 N.W. 738 (1899).
[73] *Id.* at 10, 79 N.W. at 739. See also Watts v. Owen, 62 Wis. 512, 521, 22 N.W. 720, 723 (1885) (court read requirement of good faith into adverse possession statute).
[74] 19 Wis. *300 (1865).

peace was silent as to his powers. Adopting a rather mechanistic approach, the court held that (1) since there were no negative words prohibiting the direction of warrants to private persons, and (2) since there was no "manifest intention" to modify the common law, the common law rule that permitted the justice of the peace to issue warrants to be executed by private persons still prevailed.

The most colorful illustration of this point was *Ekern v. McGovern*.[75] The governor, a member of the Progressive wing of the Republican party, and his insurance commissioner, a member of another faction of the same wing, had a political falling out. Acting under a statute authorizing the chief executive to remove certain officers while the legislature was not in session the governor conducted removal proceedings. Because the legislature was to convene within a few hours' time, the proceelings were so speeded up that Commissioner Ekern received less than an hour's notice of the charges against him, and had no opportunity to present his own witnesses or to cross examine witnesses in opposition. The governor found that the commissioner had engaged in political activity in violation of statute, and ordered him removed for this cause. Until Commissioner Ekern obtained an injunction restraining his removal, it appeared that his ouster might be consummated by physical violence. The Supreme Court, through Justice Marshall, held the removal void; the procedure had not conformed to due process. In the absence of specific statutory removal procedure, the common law requirements of notice and hearing must be met:

> One of the cardinal rules for construction of a statute, especially where it affects private rights, when so obscure as to require the meaning to be read out of it by construction, is that it should be viewed favorably to continuation of the common law rather than as a repeal of it, where there is a permissible choice between the two.[76]

Marshall's statement thus indicated another criterion for determining when the derogation rule should be used: Did the particular statute detract from the common law rights of individuals? This consideration undoubtedly motivated the court in interpreting a constitutional provision in another case. The question was whether the governor might remove a sheriff who refused to honor a pardon issued by the governor. That question turned on the power of the chief executive to pardon for civil contempt. The relevant constitutional

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[75] 154 Wis. 157, 142 N.W. 595 (1913).
[76] *Id.* at 261, 142 N.W. at 626.

provisions stated simply that the "governor shall have power to grant reprieves, commutations and pardons, after convictions . . . ."[77] The Supreme Court divided on the merits, but both the majority and minority agreed that the constitution had been framed with reference to the common law. The majority maintained that

> Their only guide and mentor should be the fundamental law and the traditions of our institutions, which should be the only standard for the determination of private rights.[78]

A governor, the majority concluded, therefore had no power to pardon for civil contempt. The dissenting judge, on the other hand, felt that there was greater moral value in the common law, which gave to the king the power to forgive the commission of a criminal offense.[79]

Proposition 3: If the derogation canon is to be employed, the statute must be ambiguous on its face

The courts have long declared that a statute may not be construed unless its words are ambiguous or obscure.[80] The principle is typically applied to determine whether evidence extrinsic to the statute may be introduced to show a legislative intention.[81] Whether the principle also operates to limit resort to general canons of construction has not often been made clear. The doctrine stems from a desire to respect the separation of powers—an objective which would seem equally involved in any issue of statutory interpretation.

Justice Owen in 1923 apparently regarded the existence of an ambiguity as an established prerequisite to invoking the general canons of construction. In the absence of such a showing he rejected a plea for narrow construction:

> Could we discover any doubt concerning the legislative purpose in this respect, this rule [that canons in derogation of common law are to be strictly construed] would require consideration, but we do not consider the legislative intent ambiguous, obscure, or doubtful and there is no room for the application of such rule.[82]

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[77] Wis. Const. art. 5, § 6.

[78] State *ex rel.* Rodd v. Verage, 177 Wis. 295, 310, 187 N.W. 830, 836, 837 (1922).

[79] *Id.* at 342, 351, 187 N.W. at 848, 851-852 (dissenting opinion of Doerfler, J.)

[80] See, *e.g.*, United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 83 (1932).

[81] See, *e.g.*, Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, 300 U.S. 440, 463, 464 (1937).

[82] Cousins v. Flertzheim, 182 Wis. 275, 282, 196 N.W. 250, 253 (1923) (statute making shareholders of trust companies individually liable to creditors applied retroactively to companies incorporated under statute exempting shareholders from personal liability).

However this proposition was by no means as clear as Justice Owen thought. It was not until Justice Marshall took the bench that the requirement of showing an ambiguity became firmly established as prerequisite to invoking canons of construction. He hammered home this requirement in important cases under the code of civil procedure, the safe place legislation, the married women's acts, and legislation concerning future interests. He spoke first to this point in 1902. The problem raised was the meaning of the statutory phrase, "restraint on alienation." Marshall observed:

> At the outset, . . . , we should look to the statute itself, determine its scope and purpose, and not, as some courts have done, and textwriters as well, assume that the legislative policy embodied therein was intended to be in harmony with the common law on the subject of perpetuities as a whole, and give effect thereto accordingly.[83]

Marshall warned, however, that the finding of an ambiguity was often an excuse for a judge to read into a statute some interpretation he liked. In particular he blamed this attitude for certain definitions of the word "transaction" as used in the Code of Civil Procedure,[84] and of "employment" in safety legislation.[85] He was especially bitter in *Chapman v. Piechowski*,[86] when the majority of the court held that the words "other place of employment" in an act requiring the guarding of machines did not include farms. He asked:

> [W]hy should courts survey an enactment from a viewpoint, disclosing to the judicial vision obscurity, when from a different point of sight there is none, and then apply the rules for construction affording an easy pathway to a restrictive result?[87]

But Marshall was guilty of the same error himself. In *Ellison v. Straw*[88] he quoted a rather involved statute defining the rights of a married woman named as beneficiary in an insurance policy taken out by her husband. Apparently on the basis of that quotation he concluded that ambiguity was too plain to permit of argument. And on one occasion Justice Dodge believed that Justice Marshall's personal bias toward the desirability of charitable trusts led him to find an ambiguity where none actually existed.[89]

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[83] Becker v. Chester, 115 Wis. 90, 106, 91 N.W. 87, 93 (1902).
[84] Emerson v. Nash, 124 Wis. 369, 387, 102 N.W. 921, 926 (1905). The same thought was expressed by Justice Winslow in McArthur v. Moffet, 143 Wis. 564, 566, 128 N.W. 445, 446 (1910).
[85] Chapman v. Piechowski, 153 Wis. 356, 141 N.W. 259 (1913).
[86] *Ibid.*
[87] *Id.* at 360, 141 N.W. at 260 (dissenting opinion).
[88] 116 Wis. 207, 92 N.W. 1094 (1903).
[89] Danforth v. Oshkosh, 119 Wis. 262, 97 N.W. 258 (1903).

In spite of Marshall's defections from the rule he had set for himself, the fact remains that he was one of the foremost exponents of the proposition that a statute must be ambiguous on its face before a canon of construction could be applied to it.

Conclusion: A statute in derogation of the common law should be strictly construed, to the end of minimizing the extent to which it changes common law doctrine

After a party had proved (1) the existence of a relevant common law doctrine in the jurisdiction, (2) that the statute derogated from that common law, and (3) that the statute was ambiguous on its face, according to the derogation rule the court was then warranted in proceeding to interpret the statute narrowly, to have as little effect as possible in altering the common law. But this conclusion was in itself open to various practical meanings. It might mean that (1) the derogation canon prohibited any implied change in the common law, or (2) provided some allocation in the relative burdens of proof or argument between parties; this might take the form either of placing on the opponent of narrow construction the burden of going forward with some evidence that this would be contrary to the legislature's policy, or of saddling him with a full burden of proving that this was so.

No Implied Change in the Common Law

The conclusion that was most often reached seemed to be that the canon prohibited the court from recognizing any implied statutory change in the common law. If the legislature desired a certain change, it should have made it expressly; such at least, many judicial opinions seemed to say. Perhaps the best Wisconsin example of judicial reluctance to recognize amendments of the common law by implication was the relatively late case of *Sullivan v. School District*.[90] The language used there was cited often thereafter as properly stating the rule:

> [I]t is not to be presumed that the legislature intended to abrogate or modify the rule of the common law by the enactment of a statute upon the same subject; it is rather to be presumed that no change in the common law was intended, unless the language clearly indicates such an intention.[91]

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[90] 179 Wis. 502, 191 N.W. 1020 (1923).

[91] *Id.* at 506, 191 N.W. at 1022. See also Kappers v. Cast Stone Construction Co., 184 Wis. 627, 633, 200 N.W. 376, 378 (1924) ("no clear intention of the legislature

One reason for the rigid statement in the *Sullivan* case may have rested in the particular facts of the controversy there presented. The issues involved the liability of a municipal corporation. A decision finding liability here could furnish persuasive precedent for a potentially large area of litigation. A pupil sued the school district for injuries sustained because the district had failed to put protective devices on the machinery in the manual training department. The pupil maintained that the district was liable to him under the Wisconsin Safe Place Statute, which made employers and owners of buildings owned by the public responsible to "employees" and "frequenters" for the safe construction of buildings and the maintenance of safe conditions therein. The court, through Justice Doerfler, held for the district. The pupil was not a "frequenter," because he did not attend school voluntarily. The opinion justified this position by reliance on the derogation rule, but possibly Doerfler had also in mind the related canon of construction, that a statute in derogation of the sovereign status should be strictly construed. In any case, reliance upon *some* abstract canon of construction seems to have blinded Justice Doerfler to the interpretative arguments available from the particular legislative history of this act.

Originally the Safe Place Statute referred only to employers,[92] but in 1913 coverage was extended to owners of public buildings, who were required to maintain the buildings in a safe condition for both employees and frequenters.[93] The policy implications of this change alone might have justified bringing the pupil under the act. But in 1918, in *Juul v. School District,*[94] the court held that the school district was neither an "owner" nor an "employer" within the meaning of the act.

The legislature reacted again in 1917, when it specifically defined school districts as within the class designated by "employers" subject to the act.[95] Further, in 1921, shortly after the *Juul* case, the legislature passed another statute that no "machine, mechanical device, or steam boiler shall be installed or used in this state which does not fully

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is made manifest to modify the common-law doctrine." The more sympathetic treatment given in this opinion indicated, however, that the canon could be refuted by the introduction of extrinsic evidence.); Ekern v. McGovern, 154 Wis. 157, 263, 142 N.W. 595, 627 (1913) ("[A] repeal of the common-law safeguards in such a situation as the one [now] under discussion requires clear, express legislative action or its equivalent."); Gunn v. Madigan, 28 Wis. 158, 166 (1871) ("inherent differences" between law and equity not to be amended by implication).

[92] WIS. STAT. § 2394-48 (1911).

[93] Wis. Laws 1913, c. 588, § 1.

[94] 168 Wis. 111, 169 N.W. 309 (1918).

[95] WIS. STAT. § 2394-4(1) (1917).

comply with the requirements of the law of this state enacted for the safety of employes and frequenters in places of employment and public buildings. . . ."[96] Here was the clearest type of legislative rebuke to the narrow bounds the court had been setting to the safe place laws. But in the *Sullivan* case the judges ignored these clear implications of legislative policy. There was nothing in the legislative history, thought the court, to indicate that the legislature desired to erase the exemption from tort liability with which the common law favored municipal corporations or their instrumentalities.

Even if this past history of the interplay of statutes and decisions could be ignored, it was difficult to explain the court's failure to comply with the very words of the statute. As we have seen, the 1917 amendments had expressly included a school district within the definition of "employer" bound by the safe place laws. Moreover, a pupil seemed well within the definition of a "frequenter [as] every person, other than an employee, who may go in or be in a place of employment or public building under circumstances which render him other than a trespasser."[97] The words on their face spoke the intention that the protected class should be a very broad one, evidently including everyone who had legitimate business on the premises.

At times the court invoked the derogation rule in denial of the recognition even of express changes in the common law. For example, the Civil Code of Procedure provided that the distinctions between *actions* and *forms* were abolished. [Emphasis supplied].[98] *Joseph Dessert Lumber Co. v. Wadleigh*[99] disregarded this provision, and nonsuited a plaintiff because his cause of action was stated in trespass rather than in trover. Where the court did not go so far, still it sometimes treated its insistence on an express legislative mandate for a change in common law, as if this precept had acquired almost constitutional force. Thus Justice Dixon admitted that the Code of Civil Procedure was remedial legislation, but in 1872 he solemnly refused to construe a statute intended to state a cause of action in trover as stating one for money had and received:

> We do not think it is the law, and, unless the legislature compels us by some new statutory regulation, shall hereafter be very slow to change this conclusion.[100]

But Dixon's pronouncement lost much of its force in view of his

[96] WIS. STAT. § 2394-72 (1921).
[97] *Id.* § 2394-41 (1921).
[98] WIS. REV. STAT. c. 122, § 8 (1858).
[99] 103 Wis. 318, 79 N.W. 237 (1899).
[100] Supervisors of Kewaunee County v. Decker, 30 Wis. 624, 626 (1872).

equally emphatic voicing of an opposite view in *Morse v. Gilman*,[101] another civil procedure case:

> Contrary to the common law rule, every reasonable intendment and presumption is to be made in favor of the pleading, and it will not be set aside on demurrer unless it be so fatally defective, that, taking all the facts to be admitted, the court can say they furnish no cause of action whatever.[102]

In the *Gilman* case, therefore, the court sustained the complaint even though plaintiff failed to list the specific provision of the contract at issue. And in the overall picture, the court generally was willing to recognize a change, but usually required that change to be spelled out carefully. The judicial arrogance displayed in the *Wadleigh* case was exceptional; ordinarily the court at least cloaked any hostility it might feel.

Allocation of Burdens in the Demonstration of Legislative Policy

a. *The burden of going forward with some evidence.* The cases which applied the derogation rule in a fashion most consistent with good judicial administration and sound regard for the legislature's prerogative were those which viewed the derogation canon as a device to promote the production and ordering of evidence of public policy, by requiring the proponent of statutory change to produce tangible, objective evidence to support his position. This evidence might consist in related statutes, material from the legislative history of the particular act in question, or policy evidence from the context of the act itself. If, for example, it could be shown that early legislation in the field merely declared the common law and that gradually bolder or more innovating provisions were engrafted upon the statute, the court might well conclude that there was a definite legislative policy of correcting the common law where it proved defective. The interpretation the court eventually reached would then be shaped to carry out this policy.[103]

Wallace v. St. John[104] is instructive in illustrating how one party overcame the conclusion that the statute should be narrowly construed. A husband petitioned to set aside his wife's conveyance of her undivided half interest in certain realty. He maintained that the Married

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[101] 16 Wis. *504 (1863).
[102] *Id.* at *508.
[103] Kappers v. Cast Stone Construction Co., 184 Wis. 627, 200 N.W. 376 (1924) (strict interpretation, but result reached on basis of legislative history). For another possible interpretation of the rationale of this case see note 91 *supra*.
[104] 119 Wis. 585, 97 N.W. 197(1903).

Women's Acts had not altered the common law rule that joint tenants might not singly alienate their respective interests in jointly held property. In refusing to adopt this construction, the court correlated the chapter on married women's rights and the chapter on the quality of estates in realty. Originally the latter by its terms declared its provisions applicable only to the subject matter of "this chapter." In the 1878 revision of the statutes, however, provisions of that same chapter were declared applicable to "these statutes."[105] But there was even stronger evidence to support a broad interpretation of the Married Women's Acts. The 1878 Revisor's Notes read:

> Section 2067 is amended by writing "these statutes" instead of "this chapter" at the end, as there are other provisions besides those in this chapter affecting such estates, *e.g.*, in the chapter on the rights of married women . . . .[106]

Corroborating changes occurred in the Married Women's Acts. Until 1858 the title of this portion of the Wisconsin statutes was "Of the Rights of Married Women." After 1878 the title was "The Property Rights of Married Women." And, more persuasive, originally the act provided simply that a married woman's "real estate . . . shall be her sole and separate property . . . ." The 1878 changes made this section applicable to "the real estate of every description, including all held in joint tenancy, with her husband . . . ."[107] Then, too, the third section of the act, which permitted a married woman to receive property, was amended so that she might receive property from anyone "other than her husband . . . [including] . . . estate . . . of any description, including all held in joint tenancy with her husband . . . ."[108] In view of this overwhelming evidence it was no wonder that Justice Cassoday did not apply the derogation rule.

b. *Burden of proof.* At times some burden-of-proof connotation was given the derogation canon. This attitude was most forthrightly expressed by Justice Marshall in *Abbot v. Milwaukee:*

> . . . If there are two or more reasonable meanings within the scope of the words, all things bearing on the question being considered, giving rise to some uncertainty respecting which was intended, then the one which does not impose the burden is to be taken rather than the one which does, but if after all, the latter is more reasonable than the former, it is to be accepted as speaking the legislative intent.[109]

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[105] WIS. REV. STAT. c. 83, §§ 43-45 (1858); WIS. REV. STAT. § 2067 (1878).
[106] WIS. REV. STAT. § 2067 (1878).
[107] *Id.* c. 108, § 2340.
[108] *Id.* § 2342.
[109] 148 Wis. 26, 30, 134 N.W. 137, 138 (1912).

Generally however the courts never fully spelled out any theory of the meaning of the derogation rule from a burden of proof standpoint. The *Abbot* case serves to indicate that this was a possibility that the courts did not develop.

Unfortunately this tendency to rely on a canon of construction rather than develop some burden of proof approach became so exaggerated in some cases that the court failed to make real use of interpretative arguments available from the words of the statute or from the general context of the act. In such instances the results became most ludicrous indeed. We have seen one illustration in the *Sullivan* case. But one of the strangest cases occurred in 1918 when the wife sued the estate of her deceased husband to assert her dower rights. The wife had long ago deserted her husband. But she returned some 40 years and 10 children later, after having adulterous relations with two other men. The estate defended against the erring wife's demand for a dower interest by relying upon the Statute of Westminster II [13 Ed. 1, c. 34] which provided that a woman who deserted her husband to live in adultery with another man was barred from her dower unless the husband consented to her act.[110] But the Wisconsin court held that the wife was entitled to dower. It reasoned that the statutory provision permitting divorce on grounds of adultery by implication repealed the common law on this point of dower; the divorce statute provided a broader remedy than that existing at common law. The public policy that the court felt it was implementing was obscure. The court failed to face up to the deep moral issues involved and superficially at least seemed to condone adultery. The primary interest here would seem to be the general community interest in the protection of the morals of its citizens. Even though the husband elected not to follow his remedy of divorce, the community policy deserved implementation. The fact that the state chose to make adultery a cause for divorce was in itself a strong evidence of a general public interest against adultery, for not every marital complaint was actionable in a suit for divorce. In this aspect, the existence of a statutory remedy for the husband would enforce rather than supersede the common law method of punishing the adulteress.

Had the court examined dower rights in terms of purpose, it could have easily concluded that dower was created to permit a wife's means of support to continue after the death of her husband and to

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[110] Davis v. Estate of Davis, 167 Wis. 328, 167 N.W. 819 (1918).

recognize her contribution to the family economic unit.[111] From either standpoint the net result would have led to the finding of a strong community policy against allowing the faithless wife to recover.

Derogation Rule vs. Liberal Construction

As formulated and explained by the cases, the derogation rule was surrounded with an aura of logical precision. In practice, however, the canon failed to explain scores of important decisions. The same statutes which at times were interpreted strictly, at other times were construed liberally. When the construction was narrow, this was explained as an application of the derogation rule. But where the interpretation was liberal, the court solemnly pronounced the statute involved to be a remedial one; hence, it was to be interpreted liberally. It shall be our purpose here only to highlight the attributes of a remedial statute, for our major attention is focused on the derogation canon.

There was little discussion in the cases explaining what elements were necessary to create a remedial statute. The clearest instances, probably, lay in the statutes enlarging common law rights or dealing with troubles unknown to, or at least unrecognized by, the common law. The obvious example was workers' safety legislation. Justice Marshall summed up the attitude:

> The court has spoken several times before on this subject and endeavored to make it plain that the common rule as to construing legislation in derogation of the common law strictly against a purpose to change it has little or no application to the efforts to create a new system for dealing with personal injuries to employees. History leaves no fair room for doubt as to the purpose being to approach the ideal of affording compensation for loss in substantially all cases of accidental injury to employees in the course of their employment. Therefore the legislative language, where open to construction, should be read liberally in favor of that purpose.[112]

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[111] Some legislative evidence of this policy could have been deduced from Wis. Stat. §§ 2225, 2226 (1917), which provided for release of the dower rights of an insane wife when proper provision was made for her support. Couple these provisions with the holding of the court that a husband had no obligation to support a wife who lived apart from him by her fault. Steffenson v. Steffenson, 259 Wis. 51, 47 N.W.2d 445 (1951); Richardson v. Stuesser, 125 Wis. 66, 103 N.W. 261 (1905).

[112] Sadowski v. Thomas Furnace Co., 157 Wis. 443, 449, 146 N.W. 770, 773 (1914). For an application of this view to married women's legislation see also Dayton v. Walsh, 47 Wis. 113, 2 N.W. 65 (1879) (statute "remedial" because it was intended to remove disabilities which common law attached to married women's capacity to have, hold or acquire property in own right).

It was Justice Marshall, also, who suggested that, technically speaking, neither workmen's compensation nor safe place acts could be considered "remedial." These statutes created new rights rather than new remedies, but because they dealt with situations that the court was prepared to concede needed correction the legislation would be construed liberally anyway:

> "[I]t recognizes as a right that which was before, through a harshness of system now regarded, quite widely, as unsuitable to modern conditions, thought to be unworthy of such dignity, and affords a remedy. So in a just and proper sense, such a law is remedial in character.[113]

Statutes were also considered remedial, at least in the twentieth century, if the subject matter was wholly procedural. Throughout cases interpreting the Code of Civil Procedure ran this thread.[114] But, again, it was largely through the efforts of Justice Marshall that this class of cases was recognized as deserving of special treatment. He emphasized that the framers of the Code wanted to make it possible for a simple complaint to enable a court to grant any judicial relief within its competence.[115] The presence in the Code of Civil Procedure of two statutory provisions expressly requiring liberal construction aided the court in reaching this conclusion,[116] but it was significant that these statutory supports were not generally cited until later years.[117]

As in derogation cases, so with the canon dealing with remedial statutes the court gradually developed the requirement that an ambiguity must exist on the face of the statute before the rule of interpretation might be invoked.[118] After the court had concluded that

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[113] Koepp v. National Enameling and Stamping Co., 151 Wis. 302, 317, 139 N.W. 179, 185 (1912).

[114] *E.g.*, Scholtz v. Kerschensteiner, 194 Wis. 92, 215 N.W. 889 (1927) (rule recognized but not applied, because court convinced that pleader intended to state only a cause of action in fraud); Young v. Juneau County, 192 Wis. 646, 212 N.W. 295 (1927) (failure to plead corporate existence not fatal to complaint); Rideout v. Winnebago Traction Co., 123 Wis. 297, 101 N.W. 672 (1904) ("Very strict technical rules" rejected in favor of "proper rules").

[115] Laun v. Kipp, 155 Wis. 347, 354, 145 N.W. 183, 186 (1914). See also Manning v. School District No. 6, 124 Wis. 84, 91, 102 N.W. 356, 358 (1905).

[116] WIS. REV. STAT. c. 125, §§ 21, 40 (1858).

[117] *E.g.*, Latton v. McCarty, 142 Wis. 190, 125 N.W. 430 (1910).

[118] See, *e.g.*, Saxhaug v. Forsyth Leather Co., 252 Wis. 376, 31 N.W.2d 589 (1948) (Court refused to interpret safe place statute to apply only to buildings built after passage of act); Wiesner v. Zaun, 39 Wis. 188 (1875) (disability recognized as having several possible meanings; broad meaning given to carry out policies of act); McVey v. Green Bay & Minnesota Ry. Co., 42 Wis. 532 (1877) ("grant" recognized as having several meanings; bargain and sale interpreted as a grant within meaning of Married Women's Acts).

a statute was remedial, it handled the issue of interpretation in a fashion that appropriately paralleled or complemented the treatment under the derogation canon: (1) Some cases demonstrated a positive favor toward extending the scope of the statute by implication;[119] (2) Other cases found a requirement that he who argued for a narrower construction of a remedial statute must produce at least some evidence to support his view;[120] (3) Some cases treated the matter as one of some burden of proof.[121]

Policy Considerations

Since the various court-formulated tests typically failed to explain satisfactorily as to when the derogation canon should be invoked, we turn to an analysis of the policy reasons that the court advanced. Attempts to rationalize use of the derogation rule fell into either of two general categories: (1) application of the rule would serve institutional policies of the legal order, *i.e.*, would make government work better; or (2) some reason of substantive policy existed to support the result obtained by either applying or disregarding the canon.

Estoppel is a doctrine usually applied to prevent one litigant from benefiting by conduct on his part that another person relied upon to the latter's detriment. Certain Wisconsin cases announced that a doctrine of at least analogous import might limit the court in its interpretation of statute law. The view was defective, if a court were considered as an instrumentality for discovering law rather than for making it; thus if an earlier decision was wrong, the prospective litigants never had a right to rely upon it.[122] Justice Marshall took a contrary view. In *Becker v. Chester*[123] he admitted that an 1879 decision was probably wrong in holding that the common law rule against

[119] The court was especially frank in McVey v. Green Bay & Minnesota Ry. Co., 42 Wis. 532, 536 (1877) ("bargain and sale" constituted a "grant" within meaning of Married Women's Acts):

> But were the correct construction of the word as used in the statute more doubtful, it would still be our duty to give it its largest signification. The statute was enacted to remove, in some measure, the harsh discriminations of the common law against married women, and in obedience to the spirit and demands of a higher civilization than obtained when the rules of the common law in that behalf were in the process of formation.

[120] See, *e.g.*, Ellison v. Straw, 116 Wis. 207, 92 N.W. 1094 (1903) (court stressed Revisor's Notes and prior New York interpretations in holding a married woman under an absolute disability to part with her interest in policy).

[121] See, *e.g.*, Kollock v. Scribner, 98 Wis. 104, 73 N.W. 776 (1897) (although Code of Procedure designed to provide complete system in itself, code was at least as broad as old practice).

[122] Kocourek and Koven, *Renovation of the Common Law Through Stare Decisis*, 29 Ill. L. Rev. 971, 972 (1935).

[123] 115 Wis. 90, 91 N.W. 87 (1902).

perpetuities of personalty had been repealed by a statute regulating perpetuities of realty. But, he argued:

> It has stood as so established . . .—long enough to be regarded as a rule of property and safe from danger of change except by the legislative enactment. Whether the decision was right or wrong, to disturb it now by mere judicial power would be a far greater mistake than the making thereof, if it were clearly erroneous. When such a question has been so long settled as to have become firmly impressed upon property, the maxim, *Stare decisis, et non quieta movere,* should be regarded as a governing principle in respect thereto.[124]

Neither Marshall nor any of the other judges discussed how many cases over what length of time were necessary to transform a precedent in statutory construction into a rule of property that could be overturned only by the legislature. But Justice Dodge apparently regarded one decision as enough. *Duffies v. Duffies*[125] had held that the Married Women's Acts did not give the wife a cause of action for alienation of affection or loss of services. The issue came up again in *Lonstorf v. Lonstorf.*[126] Justice Dodge quoted Blackstone, that in some cases certainty is better than absolute correctness in the law, and concluded:

> In the light of all these considerations, we feel constrained by the rule *stare decisis* to adhere to the law as declared in that case [*Duffies v. Duffies*], regardless of whether we should now resolve the questions there decided in the same way, were they presented before us as *res integra.*[127]

It will be observed that in this case no property rights were involved. The minority characterized the decision in the *Duffies* case as one that could be overruled because it was "flatly absurd or unjust:"

> It cannot be asserted that the decision in *Duffies v. Duffies* is the basis of a rule of property or contract. In its effect it has stood to withhold from a class of persons a right to compensattion for an injury without forming the basis of any important right of others. Before the submission of the instant case, it

[124] *Id.* at 130, 91 N.W. at 101. See also Town of Stinnett v. Noggle, 148 Wis. 603, 610, 135 N.W. 167, 170 (1912) (concurring opinion of Marshall, J.; since no property rights involved, court might overrule earlier decision). Even courts which adopt the declaratory theory of law will follow the doctrine of stare decisis strictly in cases involving interests in real property, because they do not wish to disturb vested rights. Kocourek and Koven, *op. cit. supra* note 122, at 987.

[125] 76 Wis. 374, 45 N.W. 522 (1890).

[126] 118 Wis. 159, 95 N.W. 961 (1903).

[127] *Id.* at 163, 95 N.W. at 963. Justice Dodge argued in this same manner in Brader v. Brader, 110 Wis. 423, 85 N.W. 681 (1901) (statute of limitations did not run between husband and wife).

> stood as the single occasion where this court passed upon the point.[128]

Aside from this concept of estoppel, the opinions showed very few attempts to find some rational basis by which the derogation rule could be justified. Justice Marshall gave one of the most cogent explanations. He pointed to the separation of powers principle as a basic idea of American government. Under this doctrine only the legislature could make laws. The judiciary, therefore, adopted the strict construction rule as a device for leaving policy choices in the legislature, and confining the court to its proper sphere. Marshall rather plaintively castigated critics of the canon who did not recognize this purpose.[129] In early days he felt that the rule had been essential:

> The legislature . . . either through want of knowledge of its power or want of appreciation of the necessity for use of it for more than half a century, so tardily responded to the demands of the times that it is not to be wondered at that the court dealt with the early efforts in that regard with such conservatism that ambiguity was seen, often, where it would not be now observed, and then by use of the rule, good in its place, that an act in derogation of the common law, if open to two or more meanings, should be construed most strongly against change . . . .[130]

Perhaps the substantive policies the judges attempted to enforce had greater long-run significance. As one scans the cases one phenomenon stands out—the tendency to protect vested, economic interests. A tabulation of all the cases examined confirms this impression. The table below lists, according to the economic interests involved, the numbers of cases decided according either to the derogation or remedial rules. It will be observed that approximately 75 per cent of the cases involved issues relevant to economic interests—concerning land, industry, individual property questions, or powers and duties of municipal corporations such as the power to issue bonds.

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[128] *Id.* at 168, 95 N.W. at 963, 965 (dissenting opinion).

[129] Koepp v. National Enameling and Stamping Co., 151 Wis. 302, 139 N.W. 179 (1912). Later on in the same opinion, Marshall noted that many of the objectionable features of negligence resulted from the slowness of the legislature to act and not from any failure by the courts. *Id.* at 320, 139 N.W. at 186. For other examples of this separation of powers notion see Sullivan v. School District, 179 Wis. 502, 509, 191 N.W. 1020, 1023 (1923); State *ex rel.* Rodd v. Verage, 177 Wis. 295, 310, 187 N.W. 830, 836 (1922); Ekern v. McGovern, 154 Wis. 157, 207, 210, 213, 214, 142 N.W. 595, 607, 608, 609 (1913).

[130] Chapman v. Piechowski, 153 Wis. 356, 361, 141 N.W. 259, 260 (1913) (dissenting opinion of Marshall, J.).

STRICT AND LIBERAL CONSTRUCTION
ACCORDING TO ECONOMIC OR SOCIAL INTEREST INVOLVED*

Type of Interest	*Derogation Rule*	*Remedial Rule*	*Total*
I. Economic			
A. Land			
1. Exchange Transaction	12	20	32
2. Land Control Issues (Easements, Adverse Possession also included)	7	13	20
3. Taxes	1	1	2
Totals	20	34	54
B. Industry	25	43	68
C. Individual Property			
1. Estates (Wills and Trusts)	8	54	62
2. Contracts, Torts, Issues Arising from Use of Property Not Included Above	19	45	64
3. Taxes	1	2	3
Totals	28	101	129
D. Powers and Duties of Municipal Corporations	3	9	12
TOTAL ECONOMIC INTERESTS	76	187	263
II. Non-Property			
A. Family Relations	7	20	27
B. Integrity of Individuality	18	40	58
TOTAL NON-PROPERTY INTERESTS	25	60	85
TOTAL OF CASES EXAMINED	101	247	348

Many cases, as we have seen, indicated that the policy behind the derogation rule was nothing other than a judicial preference for common law and a belief in the moral superiority of that law. A good example occurred when civil liberties questions were raised. In *State* ex rel. *Rodd v. Verage*[131] the governor attempted to remove a sheriff because the sheriff had refused to release a prisoner pardoned by the governor. The defense maintained that the governor had no power to pardon for civil contempt; hence, the sheriff could not be removed for refusing to acquiesce in the governor's unauthorized action. During the discussion, the court indicated its belief in the moral superiority of the common law:

* The text refers to 107 cases involving the derogation rule, but of this number, 6 were actually instances in which no common law existed. Hence, they have been excluded from this tabulation.

[131] 177 Wis. 295, 187 N.W. 830 (1922).

> The courts stand as the buffer between the majority and the minority, protecting sacred and fundamental rights from confiscation and destruction at the hands of either. Under such circumstances the courts cannot expect, and should not court, public acclaim or approval. Their only guide and mentor should be the fundamental law and the traditions of our institutions, which should be the only standard for the determination of private right.[132]

This attitude was sound when a constitutional issue arose and the common law, if it were recognized, would give greater protection than the statute in issue. In other instances, however, a belief in the superiority of the common law appeared irrelevant and in direct contradiction to the court's avowed purpose of keeping to its proper role in the separation of powers. The use of a canon of construction to enforce a particular policy was objectionable, moreover, where it masked the real reasons for judicial action; such technique of decision derogated from that clearcut responsibility for decision which is itself a basic requirement of sound government.

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[132] *Id.* at 310, 187 N.W. at 836-837. *Cf.* Doerfler, J., dissenting, where he argued that there was a greater moral value in the common law which gave to the king the power to forgive the commission of a criminal offense. *Id.* at 351, 187 N.W. at 851 (dissenting opinion). A similar reason seemed controlling in Ekern v. McGovern, 154 Wis. 157, 207, 142 N.W. 595, 607 (1913).