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How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction

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HOW THE FEDERAL CAUSE OF ACTION RELATES TO RIGHTS, REMEDIES, AND JURISDICTION

John F. Preis*

Abstract

Time and again, the U.S. Supreme Court has declared that the federal cause of action is “analytically distinct” from rights, remedies, and jurisdiction. Yet, just pages away in the U.S. Reports are other cases in which rights, remedies, and jurisdiction all hinge on the existence of a cause of action. What, then, is the proper relationship between these concepts?

The goal of this Article is to articulate that relationship. This Article traces the history of the cause of action from eighteenth-century England to its modern usage in the federal courts. This history demonstrates that the federal cause of action is largely distinct from rights, closely related to (and sometimes synonymous with) remedies, and distinct from jurisdiction except where Congress instructs otherwise or the case implicates sovereign immunity. Sorting out these relationships provides several benefits, including refining the doctrine of prudential standing, clarifying the grounds for federal jurisdiction, and dispelling claims that Congress lacks power over certain causes of action.

INTRODUCTION..... 850
I. WHERE WE ARE..... 854
A. The Cause of Action 854
B. The Cause of Action and Rights 856
C. The Cause of Action and Remedies 859
D. The Cause of Action and Jurisdiction 860
II. HOW WE GOT HERE 864
A. Eighteenth-Century England 864
1. Rights 866
2. Remedies 867
3. Jurisdiction 870
B. Nineteenth-Century America 871
1. Rights 871
2. Remedies 875

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3. Jurisdiction	877
C. <i>Twentieth-Century America</i>	878
1. Rights	878
2. Remedies	884
3. Jurisdiction	887
III. WHERE WE SHOULD GO.....	894
A. <i>Rights</i>	895
B. <i>Remedies</i>	901
C. <i>Jurisdiction</i>	905
CONCLUSION.....	911

INTRODUCTION

There is this *thing*. Lawyers talk about it. Judges talk about it. Plaintiffs hope that they can find one. Defendants are constantly saying that it does not exist. Law students debate it in school. Scholars are always advocating its creation in this instance and its nonexistence in that instance, or they are saying that someone should at least write an article about it.

This thing is called a cause of action. Knowing a thing’s name, however, does not necessarily tell you what it really is. Consider, for example, the word “ghost.” Everyone generally knows what the word refers to, but hardly anyone knows what a ghost actually is. Where does it come from? What is it composed of? How does it relate to other objects in the world? These are all questions that a scientist would endeavor to answer, hoping to help everyone understand the world a little better one day.

This Article attempts to do something similar for the federal cause of action. Like the common understanding of apparitions, there is a generally accepted view of the federal cause of action: It is a device that allows plaintiffs to enforce a federal statutory or constitutional right.¹ Beyond this basic premise, however, that understanding becomes foggy. The fog is so thick that it is difficult to see whether the cause of action is distinct from other common adjudicatory devices like rights, remedies, and jurisdiction.

First, consider the relationship between the cause of action and rights. On one hand, the Supreme Court has declared that the two concepts are “analytically distinct.”² A right is a claim to receive certain treatment, and the cause of action is a tool for enforcing that claim in court. On the other hand, the Court often says that a cause of action, if not explicitly created by

1. See, e.g., *Davis v. Passman*, 442 U.S. 228, 239 & n.18 (1979).

2. *Gomez-Perez v. Potter*, 553 U.S. 474, 483 (2008).

Congress, can exist *within* a statute’s “rights-creating” language.³ In some situations, the Court has refused to expand the scope of a federal right because federal courts ought not to “extend [a] cause of action” that is judicially implied.⁴ Finally, the Court has strongly suggested that judicial implication of a constitutional cause of action is tantamount to judicial interpretation of constitutional rights and that such an interpretation would “hence [be] congressionally unalterable.”⁵

Now consider remedies. As with rights, the Court has emphatically declared that “the question whether a litigant has a ‘cause of action’ is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.”⁶ Yet the Court frequently speaks of causes of actions and remedies as though they are one and the same. The Court routinely refers to the popular cause of action codified at 42 U.S.C. § 1983 as a “federal remedy”⁷ or “the § 1983 remedy.”⁸ Similarly, the cause of action recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*⁹ is commonly known as a “*Bivens* remedy.”¹⁰ Moreover, the mere availability of a cause of action turns in significant part on the remedy sought. Federal courts are often willing to create causes of action where the relief sought is injunctive,¹¹ but they are much more hesitant to create causes of action where the relief sought is monetary.¹²

Finally, consider federal jurisdiction. The Court has repeatedly declared that the existence of a federal “cause of action does not implicate subject-matter jurisdiction.”¹³ Yet in a variety of circumstances, the nonexistence of a cause of action is the *exact* basis for a jurisdictional dismissal. In

3. *E.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 286, 288 (2001) (explaining this general premise and referring to the Court’s analysis of the “rights-creating” language in *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 n.13 (1979)).

4. *E.g.*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 161, 165 (2008).

5. *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1383 (2015); *see also Minneci v. Pollard*, 132 S. Ct. 617, 626 (2012) (Scalia, J., concurring) (“We have abandoned that power in the statutory field and we should do the same in the constitutional field, where (presumably) an imagined ‘implication’ cannot even be repudiated by Congress.” (internal citation omitted)).

6. *Davis*, 442 U.S. at 239.

7. *E.g.*, *Mitchum v. Foster*, 407 U.S. 225, 239 (1972) (emphasis added).

8. *E.g.*, *Hudson v. Michigan*, 547 U.S. 586, 597 (2006) (emphasis added).

9. 403 U.S. 388 (1971).

10. *E.g.*, *Minneci*, 132 S. Ct. at 624; *see also Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

11. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 n.2 (2010).

12. *See, e.g.*, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 65, 74 (2001) (rejecting the extension of the *Bivens* remedy to suits against private corporations); *see also* John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 3 (2013).

13. *See, e.g.*, *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998).

sovereign immunity cases, for example, a jurisdictional dismissal frequently flows from the nature of the cause of action.¹⁴ In certain statutory actions, a plaintiff who cannot fit her case within the available cause of action has had her suit dismissed under the doctrine of statutory standing¹⁵—a doctrine that is jurisdictional in the eyes of some courts.¹⁶ Although the Court appeared to discredit this view in a footnote this past term, it did not directly address the issue.¹⁷ Additionally, in some instances the Court has refused to create a cause of action because doing so “necessarily extends . . . [t]he jurisdiction of the federal courts.”¹⁸

This Article attempts to sort out the cause of action’s relationship with rights, remedies, and jurisdiction. It does so primarily by tracing the cause of action from its origin in English adjudication to its modern usage in the federal courts. In the process, this Article shows how the cause of action has interacted with rights, remedies, and jurisdiction, as well as why those relationships have developed and changed over time. This history, in turn, clarifies what the current doctrine should look like. In particular, this Article recommends the following:

- ♦ *The Federal Cause of Action and Rights*: Federal causes of action ought to bear no relation to the content of federal rights, outside the narrow circumstance in which the content of a statutory right assists in discerning congressional intent. Thus, the Court is correct to focus on rights-creating language in some instances¹⁹ but incorrect to apply cause-of-action principles to questions about the scope of federal rights.²⁰ Also incorrect is the Supreme Court’s suggestion that

14. See, e.g., *Sossamon v. Texas*, 131 S. Ct. 1651 (2011) (dismissing a claim arising out of a statutory cause of action for which Texas had not waived its sovereign immunity).

15. See, e.g., *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 179–80 (D.C. Cir. 2012) (dismissing challenge to EPA regulation on jurisdictional grounds because plaintiff did not fit within the “zone of interests” addressed by the statutory cause of action).

16. See, e.g., *Wight v. BankAmerica Corp.*, 219 F.3d 79, 89 (2d Cir. 2000) (“[T]he concept of standing, which in both its constitutional and prudential dimensions, is a prerequisite to federal subject matter jurisdiction.”); see also *Cnty. First Bank v. Nat’l Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994) (“If plaintiffs have standing, we have jurisdiction over this appeal from a final order of the district court pursuant to 28 U.S.C. § 1291.”).

17. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014) (calling the jurisdictional label “misleading” when it is applied to causes of action).

18. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 746–47 (1979) (Powell, J., dissenting) (internal quotation marks omitted)).

19. E.g., *Alexander v. Sandoval*, 532 U.S. 275, 286, 288 (2001).

20. See, e.g., *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2301–02 (2011); *Stoneridge*, 552 U.S. at 165–66; *Wilkie v. Robbins*, 551 U.S. 537, 549–51, 553–55, 561–62 (2007).

Congress may not modify judicially implied causes of action to enforce constitutional rights.²¹

- ◆ *The Federal Cause of Action and Remedies*: Federal causes of action authorize plaintiffs to pursue particular remedies and thus ought not to be, as a categorical matter, analytically distinct from remedies. The only situation in which remedies should be distinct is where a court has held that a cause of action exists, and the court must determine whether a particular award of damages or an injunction is proper. Thus, it is appropriate to refer to a cause of action as a “remedy”²² and to craft causes of action that are remedy-specific.²³ It is thus inappropriate to claim that causes of action and remedies are, as a categorical matter, analytically distinct.²⁴
- ◆ *The Federal Cause of Action and Jurisdiction*: For the most part, the federal cause of action ought not to have any relation to federal jurisdiction. A relationship ought to exist only in the narrow circumstances where Congress has seen fit to link the two concepts together or where the defendant arguably possesses sovereign immunity. Thus, the Court must modify its frequent statement that causes of action and jurisdiction are categorically unrelated.²⁵ Also erroneous is the application of jurisdictional principles to deciding whether to imply a cause of action.²⁶ Finally, the doctrine of “statutory standing” should in most (but not all) instances be nonjurisdictional—a point that refines the Court’s latest pronouncement on the matter.²⁷

This Article proceeds in three steps. Part I explains in greater detail the doctrinal inconsistencies and overlap between the cause of action and rights, remedies, and jurisdiction. Part II explains the origin of the cause of action and traces its development to the modern day. Part III, using this

21. See *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1383 (2015); *Minneci v. Pollard*, 132 S. Ct. 617, 626 (2012) (Scalia, J., concurring).

22. See, e.g., *id.* at 624 (referring to a “*Bivens* remedy”); *Hudson v. Michigan*, 547 U.S. 586, 597 (2006) (referring to a “§ 1983 remedy”).

23. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 n.2 (2010) (stating the rule for the availability of an implied action for constitutional injunctions); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67 (2001) (stating the rule for availability of implied action for constitutional damages).

24. *But see Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 69 (1992) (quoting *Davis v. Passman*, 442 U.S. 228, 239 (1979)).

25. See, e.g., *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998); see also *Verizon Md., Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 642–43 (2002) (quoting *Steel Co.*, 523 U.S. at 89).

26. See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008).

27. See *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151–52 (1970).

history, articulates the ways in which the cause of action should and should not relate to rights, remedies, and jurisdiction. This Article adopts an uncommon approach in this endeavor. Instead of stating the correct law in traditional law review prose, it does so in the context of three hypothetical Supreme Court opinions. By adopting the perspective of a court rather than a scholar, this Author hopes to better illustrate a path to doctrinal reform.

In the end, the value of this Article lies in its clarification of a concept that is so ubiquitous that its precise identity has perhaps been taken for granted. Courts invoke, interpret, apply, and deny federal causes of action every day. Yet through it all, the federal cause of action has escaped a rigorous investigation into its true nature. By undertaking such an investigation, this Article hopes to add coherence and consistency to the law in this field.

I. WHERE WE ARE

What does the current law look like? This Part addresses the relationship between the federal cause of action and rights, remedies, and jurisdiction as currently revealed in the case law. It does this by first defining the cause of action and then by turning to the cause's relationship with the other adjudicatory tools of this analysis. The goal of this Part is not to show that any one relationship is correct or dominant; it is simply to show that many different relationships call for clarification.

A. *The Cause of Action*

The Supreme Court's plainest description of a cause of action came in *Davis v. Passman*.²⁸ In that case, Shirley Davis sought damages from Representative Otto Passman for a violation of her right to equal protection under the Fifth and Fourteenth Amendments.²⁹ Ms. Davis worked for Representative Passman and sought a promotion to administrative assistant.³⁰ Passman refused to promote her, even though he found her "able, energetic and a very hard worker."³¹ Representative Passman explained to Ms. Davis in a letter that the reason for not promoting her was that "it was essential that . . . my Administrative Assistant be a man."³²

The issue before the Court was whether Ms. Davis could sue. As any lawyer knows, the question "can I sue?" really involves a series of queries. The first is usually, "Has someone broken a law?" If the answer to that question is yes, then a host of other questions will arise: "Who is the best

28. 442 U.S. 228 (1979).

29. *Id.* at 230–31, 242.

30. *Id.* at 230 n.2.

31. *Id.* at 230.

32. *Id.* (internal quotation marks omitted).

defendant?"; "Where should plaintiff sue?"; and so on. One of these questions in *Davis* was whether the plaintiff had a "cause of action."³³

As part of its analysis, the Court defined the concept itself. A cause of action exists, the Court explained, if the "plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court."³⁴ With the ability "to invoke the power of the court," plaintiffs who have a cause of action are thus able to enforce federal law—as in this case, by holding people like Representative Passman accountable for disobeying federal law.

Davis also makes clear that there are two ways to create a cause of action. First, Congress might create one itself. In enacting a statute, Congress might bestow on those who are injured by the violation of the statute the power to seek relief from the wrongdoer.³⁵ However, Congress can create causes of action for reasons other than to enforce statutory violations. Congress is free to create them in the constitutional realm as well, as it did with the so-called § 1983 action.³⁶ Nevertheless, if Congress does not create a cause of action, the federal courts may do so.³⁷ Such causes of action are known as "implied causes of action"³⁸ because the mere existence of a right implies, in some sense, their existence.

Although *Davis* is only a single case, both courts³⁹ and scholars⁴⁰ have frequently relied upon its formulation of the cause of action. Moreover, neither courts nor scholars have ever discredited the formulation.

33. *Id.*

34. *Id.* at 239–40 n.18.

35. *Id.* at 241.

36. *Id.* at 238 n.16.

37. *Id.* at 242.

38. *E.g., id.* at 244 n.22.

39. *See, e.g.,* *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 n.6 (1998); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 69 (1992); *Martino v. Forward Air, Inc.*, 609 F.3d 1, 4 (1st Cir. 2010); *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 188 (D.C. Cir. 2006); *BellSouth Telecomms., Inc. v. Ga. Pub. Serv. Comm'n*, 400 F.3d 1268, 1270–71 (11th Cir. 2005); *Bishop v. Tice*, 622 F.2d 349, 354 (8th Cir. 1980).

40. *See, e.g.,* Patti Alleva, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After Merrell Dow*, 52 OHIO ST. L.J. 1477, 1564 n.334 (1991); Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 NW. U. L. REV. 1413, 1437 n.131 (2002); Lumen N. Mulligan, *Jurisdiction by Cross-Reference*, 88 WASH. U. L. REV. 1177, 1184 & n.31 (2011); Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1141–42 n.242 (1992); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1728 & n.189 (2001); Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 96 (2001).

B. *The Cause of Action and Rights*

Merely defining a federal cause of action does not explain how it relates to rights. The case law on this relationship is of two minds: one sees a cause of action and rights as separate and the other sees them as related.

On one hand, a cause of action created by Congress frequently appears as unrelated to rights. Take, for example, the § 1983 action mentioned above. That cause of action permits persons who have been “depriv[ed] of any rights, privileges, or immunities secured by the Constitution” by a state officer to bring a “proceeding for redress.”⁴¹ Section 1983, the Court has explained, is “not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.”⁴² In other words, causes of action exist in one place and rights exist “elsewhere.” When lower courts have ignored that observation and mingled the two, the Court has chided them for the mistake. For example, the Court criticized a circuit court for “improperly confl[at]ing the question whether a statute confers a private right of action with the question whether the statute’s substantive prohibition reaches a particular form of conduct,” stating that “[t]hese questions [were] analytically distinct.”⁴³

On the other hand, a judicially created cause of action often relates closely to rights. When federal courts are faced with the question of whether to create a cause of action, they often look for the cause within the right itself. Federal courts have found a cause of action to enforce one’s due process rights “implicit *in* the Fifth Amendment[.]”⁴⁴ or to enforce one’s right to humane treatment in prison “implied . . . *from* the Eighth Amendment.”⁴⁵ Similarly, in statutory actions, the Court has explained that an implied cause of action “must be found, if at all, *in* the substantive provisions of the [statute].”⁴⁶ In these circumstances, it is “the right- or duty-creating language of the statute [that is] the most accurate indicator of the propriety of implication of a cause of action.”⁴⁷ Other cases in the lower courts draw on these same ideas.⁴⁸

41. 42 U.S.C. § 1983 (2012).

42. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979); *see also* *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 617–18 (1979) (stating that § 1983 provides a “cause of action for violations of the Constitution” but “does not provide any substantive rights at all”).

43. *Gomez-Perez v. Potter*, 553 U.S. 474, 483 (2008).

44. *Minneci v. Pollard*, 132 S. Ct. 617, 622 (2012) (emphasis added).

45. *Id.* (emphasis added).

46. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576–77 (1979) (emphasis added).

47. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 n.13 (1979); *see also* *Alexander v. Sandoval*, 532 U.S. 275, 288–89 (2001) (refusing to imply a cause of action in part because the statute lacked rights-creating language).

48. *See, e.g.,* *McGovern v. City of Phila.*, 554 F.3d 114, 117 (3d Cir. 2009) (“When a rights-creating statute contains no express cause of action, courts may either find that a private cause of

Other implied-cause-of-action cases mix the two concepts in a different way. *Wilkie v. Robbins*⁴⁹ is a good example. In *Wilkie*, Robbins, a landowner in Wyoming, claimed that federal officials harassed him in relatively small but annoying ways for years on end because he declined—as was his right—to grant the federal government an easement over his land.⁵⁰ Robbins sued the offending officers for damages, claiming that the accumulated annoyances amounted to a deprivation of his due process rights.⁵¹ The government argued that its behavior was nothing more than “hard bargaining,” something it claimed was permissible under the Constitution.⁵²

The question before the Court was thus whether the government’s “hard bargaining” for an easement amounted to a constitutional violation.⁵³ The Court answered in the negative.⁵⁴ To say that the government, pursuing its own business interests, violates the Constitution by “hard bargaining” invites “line-drawing difficulties” that would be “endlessly knotty to work out.”⁵⁵ This reasoning appears coherent, at least until one understands that the Court believed it was answering the question “whether the landowner has . . . a private action for damages.”⁵⁶ Believing the case presented a cause of action issue rather than a rights issue, the Court drew on cause-of-action doctrine rather than doctrine pertaining only to the Due Process Clause.⁵⁷ The Court thus noted in its conclusion that “Congress is in a far better position than a court to evaluate the impact of a new species of litigation,” which is an, if not *the*, animating principle behind the Court’s implied cause of action jurisprudence.⁵⁸ *Wilkie* thus leaves one with the impression that a landowner’s right to be free from “hard bargaining” depends on the advisability of a cause of action—an arrangement that most certainly does not treat the right and cause of action as analytically distinct.

action is implicit in the rights-creating statute or that a means of enforcing that right is contained elsewhere in federal law.”); *Arendale v. City of Memphis*, 519 F.3d 587, 594 (6th Cir. 2008) (“When Congress creates a right, but provides no means of enforcing that right, then a private cause of action is implicit in the rights-creating statute.”).

49. 551 U.S. 537 (2007).

50. *Id.* at 541–43.

51. *See id.* at 547–48.

52. *See id.* at 554.

53. *See id.* at 541.

54. *Id.*

55. *Id.* at 557, 562.

56. *Id.* at 541.

57. *See id.* at 574.

58. *Id.* at 562 (quoting *Bush v. Lucas*, 462 U.S. 367, 389 (1983) (internal quotation marks omitted)). For an explanation of the separation of powers logic in cases like *Wilkie*, see Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens after Minneci*, 90 WASH. U. L. REV. 1473, 1476–77 (2013).

Wilkie involved constitutional rights, but the same phenomena appear in the statutory arena. In *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*,⁵⁹ the Court endeavored to determine “the reach of the private right of action [to enforce] . . . § 10(b) of the Securities Exchange Act.”⁶⁰ Phrased this way, it is unclear whether the issue is the reach of the cause of action or the reach of section 10(b)’s prohibition of fraudulent securities practices. The substance of the opinion does little to dispel this confusion. The Court declined to find liability because the defendant’s alleged fraudulent acts were indirectly related to the plaintiff’s harm and thus “too remote for liability.”⁶¹ This appears to be an analysis of rights available under section 10(b), but later in the case, the analysis switches to the cause of action. The Court explained that the plaintiff’s case should fail, in part, because the Court ought not to “extend [a] cause of action” that is judicially implied.⁶² As in *Wilkie*, the Court’s skepticism of implied causes of action is brought to bear on the question of whether a right exists.

A final instance of the connection between causes of action and rights lies in the recent case, *Armstrong v. Exceptional Child Center, Inc.*⁶³ In *Armstrong*, a plaintiff wished to enforce a federal statutory obligation, § 30(A) of the Medicaid Act,⁶⁴ against a state.⁶⁵ However, the statutory obligation was not supported by a cause of action. Knowing that the federal courts rarely imply causes of action to enforce statutes, but much more frequently imply causes of action to enforce constitutional guarantees, the plaintiff asked the Court to imply a cause of action directly from the Supremacy Clause.⁶⁶ It is the Supremacy Clause, the plaintiff argued, that requires the state to obey the federal statute and ignore its local law.⁶⁷

The Supreme Court declined to find a cause of action implied in the Supremacy Clause. Writing for the majority, Justice Scalia noted that such an implication, inasmuch as it was meant to implement a constitutional right, would be “congressionally unalterable.”⁶⁸ This was not a surprising statement from Justice Scalia, who has long believed that implied causes of action to enforce constitutional rights are somehow *part* of the rights

59. 552 U.S. 148 (2008).

60. *Id.* at 152.

61. *Id.* at 159.

62. *See id.* at 165.

63. 135 S. Ct. 1378 (2015).

64. 42 U.S.C. § 1396a(a)(30)(A) (2012).

65. *Armstrong*, 135 S. Ct. at 1382.

66. *Id.* at 1383.

67. *Id.* Notably, the Ninth Circuit agreed with the plaintiff. *Id.* at 1382.

68. *Id.* at 1383.

themselves.⁶⁹ Thus, according to Justice Scalia and a majority of the current Court, the cause of action is not always analytically distinct from rights.

C. *The Cause of Action and Remedies*

As with the cause of action's relationship with rights, its relationship with remedies is also unclear. On one hand, the cause of action has nothing to do with remedies. As the Court explained in *Davis*, “the question whether a litigant has a ‘cause of action’ is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.”⁷⁰ The Court continued in a footnote: “A plaintiff may have a cause of action even though he be entitled to no relief at all”⁷¹ This could happen, for example, if a plaintiff failed to show irreparable harm in a case for injunctive relief⁷² or failed to prove an actual injury in a case for damages.⁷³ In cases since *Davis*, the Court has repeated the same declaration,⁷⁴ and lower courts have followed suit.⁷⁵

On the other hand, causes of action and remedies appear closely related. First, simply as a matter of nomenclature, the Court frequently conflates the two. Consider, for example, the cause of action codified at 42 U.S.C. § 1983, which authorizes suits against state officers for federal constitutional violations.⁷⁶ The Court has stated plainly that “Section 1983 provides a federal remedy”⁷⁷ and frequently refers to the § 1983 action as a “federal remedy”⁷⁸ or “the § 1983 remedy.”⁷⁹ The federal-officer analog to

69. See *Minneeci v. Pollard*, 132 S. Ct. 617, 626 (2012) (Scalia, J., concurring) (arguing against implying a cause of action to enforce the Eighth Amendment because “(presumably) an imagined ‘implication’ cannot even be repudiated by Congress” (internal citation omitted)).

70. *Davis v. Passman*, 442 U.S. 228, 239 (1979).

71. *Id.* at 239 n.18.

72. See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391–92 (2006).

73. See, e.g., *Carey v. Phipus*, 435 U.S. 247, 248 (1978).

74. *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 65–66 (1992) (“As we have often stated, the question of what remedies are available under a statute that provides a private right of action is ‘analytically distinct’ from the issue of whether such a right exists in the first place.”).

75. See, e.g., *Williamson v. Recovery Ltd. P’ship*, 731 F.3d 608, 627 (6th Cir. 2013) (“[I]t is a basic legal principle that the right and the remedy are two analytically distinct aspects of a suit.”); *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 299 (2d Cir. 1998) (“And even if we were to imply a private right of action, we would then be faced with the analytically distinct question of whether a monetary damages remedy is available in a suit brought pursuant to this implied right.”).

76. 42 U.S.C. § 1983 (2012).

77. *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 105 (1989).

78. E.g., *Zinerman v. Burch*, 494 U.S. 113, 124 (1990) (emphasis added); *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 733 (1989) (emphasis added), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 1981(c)(2); *Daniels v. Williams*, 474 U.S. 327, 338 (1986) (emphasis added); *Mitchum v. Foster*, 407 U.S. 225, 239 (1972) (emphasis added).

§ 1983 is an implied cause of action created in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.⁸⁰ That cause of action is commonly known as the “*Bivens* remedy.”⁸¹

Second, and beyond mere nomenclature, a close relationship between the two concepts is borne out in the doctrine. In determining whether to imply a cause of action, the federal courts look to “congressional intent to provide a private *remedy*.”⁸² Similarly, the availability of a cause of action often turns on the nature of the remedy sought. For example, the Administrative Procedure Act (APA) provides a cause of action to challenge agency action, but the cause of action only allows plaintiffs to seek “relief other than money damages.”⁸³ Also, the availability of implied causes of action differs considerably depending on whether the plaintiff is seeking injunctive relief⁸⁴ or damages.⁸⁵ In these cases, no one can say that the cause of action and the remedy have nothing to do with each other.

D. *The Cause of Action and Jurisdiction*

As with rights and remedies, the cases suggest that the cause of action is both related and unrelated to jurisdiction. On one hand, “[i]t is firmly established . . . that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts’ statutory or constitutional power to adjudicate the case.”⁸⁶ Thus, “the nonexistence of a cause of action [is] no proper basis for a jurisdictional dismissal.”⁸⁷

79. *Hudson v. Michigan*, 547 U.S. 586, 597 (2006); *Blessing v. Freestone*, 520 U.S. 329, 339 (1997); *Golden State Transit Corp.*, 493 U.S. at 108; *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 427 (1987).

80. 403 U.S. 388, 397 (1971).

81. *E.g.*, *Minneeci v. Pollard*, 132 S. Ct. 617, 624 (2012); *Hui v. Castaneda*, 130 S. Ct. 1845, 1850 (2010); *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001); *FDIC v. Meyer*, 510 U.S. 471, 484 (1994); *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988).

82. *Astra USA, Inc. v. Santa Clara Cnty., Cal.*, 131 S. Ct. 1342, 1347 (2011) (emphasis added) (quoting *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991)).

83. 5 U.S.C. § 702 (2012).

84. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 n.2 (2010) (stating that plaintiffs seeking injunctive relief for a constitutional violation have a “right to relief as a general matter”).

85. *See, e.g.*, *Malesko*, 534 U.S. at 66–67 (explaining that a court will imply a cause of action for constitutional damages only where the plaintiff lacks alternative remedies and no “special factors” stand in the way of the implied cause).

86. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (emphasis omitted).

87. *Id.* at 96; *see also Verizon Md., Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 642–43 (2002) (rejecting the argument that the lack of a cause of action implied that the Court lacked jurisdiction); *Nw. Airlines, Inc. v. Cnty. of Kent, Mich.*, 510 U.S. 355, 365 (1994) (“The question whether a federal statute creates a claim for relief is not jurisdictional.”); *Air Courier Conference v.*

On the other hand, the cause of action and jurisdiction seem to be connected in a variety of ways. For instance, the doctrine of sovereign immunity is a jurisdictional doctrine that bars suit against a state or the federal government unless the party waives the immunity or Congress abrogates it.⁸⁸ In *Edelman v. Jordan*,⁸⁹ for example, a group of plaintiffs sought damages from a state official for wrongfully withholding funds that they should have received under a federal program.⁹⁰ The Court held that the defendant was immune, but the immunity holding appeared to hinge on the existence of a cause of action.⁹¹ Pointing to *J. I. Case Co. v. Borak*,⁹² a prominent implied cause of action case, the Court explained its reasoning: “[W]hile this Court has, in cases such as *J. I. Case Co. v. Borak*, authorized suits by one private party against another in order to effectuate a statutory purpose, it has never done so in the context of the Eleventh Amendment and a state defendant.”⁹³ Therefore, *Edelman* held that the Court could not imply a cause of action because the defendant was entitled to sovereign immunity. The plaintiffs had their suit dismissed for lack of jurisdiction⁹⁴ because they had no cause of action. *Edelman* is by no means an outlier in sovereign immunity law. Indeed, the standard analysis in such cases is for the Court to scrutinize the existing or putative cause of action in order to determine whether it may lawfully subject a sovereign to suit.⁹⁵

Postal Workers, 498 U.S. 517, 523 n.3 (1991) (“Whether a cause of action exists is not a question of jurisdiction . . .”); *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 21 n.6 (1982) (finding federal question jurisdiction for the purposes of deciding whether the union stated a cause of action); *Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979) (“The question of whether a cause of action exists is not a question of jurisdiction . . .”); *Bell v. Hood*, 327 U.S. 678, 682 (1946) (“Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.”).

88. *Sossamon v. Texas*, 131 S. Ct. 1651, 1657–58 (2011) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996)) (stating that sovereign immunity is a limitation on “federal jurisdiction”).

89. 415 U.S. 651 (1974).

90. *Id.* at 653–55.

91. *See id.* at 675–78.

92. 377 U.S. 426 (1964), *abrogation recognized by* *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001).

93. *Edelman*, 415 U.S. at 673–74 (citations omitted); *see also id.* at 678 (stating that sovereign immunity “partakes of the nature of a jurisdictional bar”).

94. *Id.* at 677–78.

95. *See, e.g., Sossamon v. Texas*, 131 S. Ct. 1651, 1658 (2011) (analyzing the scope of the cause of action against Texas to determine whether Texas waived its sovereign immunity); *United States v. Georgia*, 546 U.S. 151, 159 (2006) (emphasis omitted) (“[I]nsofar as Title II [of the Americans with Disabilities Act] creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.”); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (dismissing the suit because the congressionally created cause of action did not validly abrogate state sovereign immunity); *Emps. of the Dept. of Pub. Health & Welfare of Mo. v. Dept. of Pub. Health & Welfare*

Another area of law where jurisdiction and the cause of action seem to cross paths is in the doctrine of statutory standing. Constitutional standing is a jurisdictional doctrine that inquires into whether the plaintiff is the “proper party to invoke judicial resolution of the dispute.”⁹⁶ A plaintiff distressed by the violation of law but not personally injured has no standing to sue, and the court will dismiss his suit for lack of jurisdiction.⁹⁷ While the plaintiff must demonstrate standing in every case, the plaintiff must only demonstrate statutory standing in certain cases. Such cases are those where the cause of action authorizing suit is broadly phrased. For instance, the APA authorizes suit for injunctive relief by any person “aggrieved by agency action.”⁹⁸ Similarly, the Lanham Act authorizes suit by “any person who believes that he or she is or is likely to be damaged” by trademark infringement.⁹⁹ These causes of action authorize suit on such broad terms that courts have thought it appropriate to narrow the class of eligible plaintiffs by discerning whether the plaintiff is “aggrieved” or “damaged” enough.¹⁰⁰ The tests that implement these goals are varied, but all of them inquire into similar factors as a traditional constitutional standing analysis.¹⁰¹

Many lower courts have declared statutory standing to be jurisdictional.¹⁰² This makes sense to a degree, both because courts have long considered the traditional standing doctrine jurisdictional, and

of Mo., 411 U.S. 279, 284–85 (1973) (holding that the cause of action to enforce the Fair Labor Standards Act did not validly abrogate state sovereign immunity); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 622 (6th Cir. 2000) (conducting sua sponte inquiry into the existence of federal cause of action because the “court must [assure itself] that it has jurisdiction”).

96. *Spencer v. Kemna*, 523 U.S. 1, 11 (1998) (citations omitted).

97. *Id.* at 7.

98. 5 U.S.C. § 702 (2012).

99. 15 U.S.C. § 1125(a)(1) (2012). The Clayton Act creates a similarly broad cause of action. 15 U.S.C. § 15(a) (2012) (permitting suit by “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws”).

100. *See, e.g., Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529–30, 534–40 (1983) (analyzing the “directness or indirectness of the asserted injury,” the plaintiff’s “proxim[ity]” to the alleged violation, and whether the injury is “of a type that Congress sought to redress in providing a private remedy” in Clayton Act violations).

101. *E.g., id.* at 534–40; *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (asking whether the plaintiff’s interests are “arguably within the zone of interests to be protected or regulated by the [APA]”). The Supreme Court reviewed the standard in Lanham Act cases in a recent 2014 case, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1383, 1385 (2014).

102. *See, e.g., Grocery Mfr. Ass’n v. EPA*, 693 F.3d 169, 179 (D.C. Cir. 2012) (dismissing the challenge to EPA regulation on jurisdictional grounds because plaintiff did not fit the “zone of interests” addressed by the statutory cause of action); *Wight v. BankAmerica Corp.*, 219 F.3d 79, 90 (2d Cir. 2000); *Cnty. First Bank v. Nat’l Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994). For a review of the cases considering this issue, see Bradford C. Mank, *Is Prudential Standing Jurisdictional?*, 64 CASE W. RES. L. REV. 413 (2013).

because the statutory standing doctrine operates very similarly to the traditional standing doctrine. Just last term, however, the Court called the jurisdictional label “misleading” in this context.¹⁰³ Yet in doing so, the Court quoted its familiar mantra that a “cause of action does not implicate subject matter jurisdiction,” a view that, as illustrated above, is at odds with other aspects of its jurisdictional doctrine.¹⁰⁴

Finally, another example of the link between causes of action and jurisdiction exists in certain implied cause of action cases. Consider again *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*¹⁰⁵ In that case, the plaintiffs asked the Court to imply a damages remedy for a violation of a federal securities statute.¹⁰⁶ As shown above, the Court seemed to think that the existence of a cause of action turned on the substantive prohibitions in the statute.¹⁰⁷ In another portion of the opinion, however, the Court shifts the inquiry to one of jurisdiction.¹⁰⁸ To imply a cause of action, the Court explained, would “necessarily extend[the Court’s] authority to embrace a dispute Congress has not assigned it to resolve.”¹⁰⁹ An extension of such authority worried the Court because “[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation.”¹¹⁰ Put another way, implying a cause of action would plainly “conflict[] with the authority of Congress under Art. III to set the limits of federal jurisdiction.”¹¹¹

However, one should be careful not to over-read *Stoneridge* and other opinions making a similar argument.¹¹² Despite *Stoneridge*’s professed refusal to expand federal jurisdiction, the Court did not appear to dismiss the suit on jurisdictional grounds.¹¹³ Nonetheless, *Stoneridge* and related cases are still notable for their application of jurisdictional principles to cause-of-action questions. Regardless of whether such jurisdictional principles should be relevant, it is difficult for the Court to maintain in

103. *Lexmark*, 134 S. Ct. at 1387 n.4 (2014).

104. *Id.* (citations omitted) (quoting *Verizon Md. Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 642–43 (2002)).

105. 552 U.S. 148 (2008).

106. *See id.* at 152.

107. *See supra* notes 60–62 and accompanying text.

108. *Stoneridge*, 552 U.S. at 164–65.

109. *Id.* at 164 (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 746–47 (1979) (Powell, J., dissenting) (internal quotation marks omitted)).

110. *Id.* (quoting *Cannon*, 441 U.S. at 747).

111. *Id.* at 164–65 (same).

112. *See, e.g.*, *Thompson v. Thompson*, 484 U.S. 174, 191 (1988) (Scalia, J., concurring in the judgment); *Cannon*, 441 U.S. 677 at 746 (Powell, J., dissenting).

113. *See Stoneridge*, 552 U.S. at 164, 165–67 (dismissing the case for failure to show the requisite reliance).

such cases that the “cause of action does not implicate subject-matter jurisdiction.”¹¹⁴

* * *

In sum, the relationship between the federal cause of action and rights, remedies, and jurisdiction is unclear. Although it is common to claim that the four concepts are distinct, they appear to be related in several different ways. The following Part explores their historical relationship to better understand the current doctrine and how it should be reformed.

II. HOW WE GOT HERE

Forget everything you just read, for a while at least. Forget that, in the year 2015, there is something called a “cause of action” that may or may not be related to rights, remedies, and jurisdiction. Instead, allow this Part to tell you the story of how the cause of action originated and how, over time, it came to operate as it does today. This story is divided into three eras—eighteenth-century England, nineteenth-century America, and twentieth-century America—and it demonstrates that some modern understandings of the cause of action are well-founded, and others require revision.

A. Eighteenth-Century England

The cause of action, as a concept, is at least half a millennium old. It originated in England as part of the common law—the law that dominated English life from its founding in 1066. From its inception and through the eighteenth century, the common law of England was a complicated jumble of different legal proceedings. It looked far different from the common law of today, which in comparison is a highly organized and coherent set of legal rules.

In England’s earliest days, there were few formal ways for citizens to resolve disputes. Disputants sometimes presented their problems to an informal gathering of local citizens or offered their disputes up to a deity for resolution.¹¹⁵ Once a monarchy was established in the eleventh century, however, a new opportunity arose: an appeal to the king. A citizen with a dispute might approach the all-powerful king and ask him to intervene on the citizen’s behalf.¹¹⁶ The king, for personal and political reasons, was often willing to help out, and his assistance came in the form of a letter called a “writ.”¹¹⁷ For example, if a property owner was troubled by a

114. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998).

115. J. H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 4–5 (4th ed. 2002).

116. *See* S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 23 (1969).

117. MAX RADIN, *HANDBOOK OF ANGLO-AMERICAN HISTORY* § 116 (1936); *see also* MILSOM, *supra* note 116, at 22–23.

trespasser fishing in his lake, then the king might issue a writ ordering that the trespasser shall not fish there.¹¹⁸ The owner could then use that letter to expel the trespasser.¹¹⁹

Over time, more and more citizens turned to the king for help.¹²⁰ This became burdensome for the king, so he passed off the responsibilities to his close assistant, the “Lord Chancellor.”¹²¹ As the requests continued to flow in, it became clear that certain fact patterns were more common than others. To address these common situations, the chancellor developed a set of standardized writs.¹²² One writ resolved intentional injuries to the person, another writ resolved ownership of real property, and so on.¹²³ If the terms of a standardized writ covered a citizen’s dispute, the plaintiff would take the writ to a local judge who would then decide the case according to the specific terms of the writ.¹²⁴ If there was no standardized writ for the dispute, the plaintiff was out of luck.¹²⁵

To have a writ was to have a “cause of action.” The phrase is numbingly familiar to our ears—so much so that it can seem like a single word: *causeofaction*. If each word is considered separately for a moment, however, the phrases core meaning becomes clear. The existence of a writ gave the plaintiff “cause” for taking some “action” in a royal court. If a writ existed, a cause of action existed; if a writ did not exist, a cause of action did not exist.¹²⁶

If a cause of action depended on the existence of a writ, how did writs relate to rights, remedies, and jurisdiction? These relationships are covered below.

118. W. Farrer, *An Outline Itinerary of King Henry the First*, 34 ENG. HIST. REV. 303, 370 (1919), available at <http://www.jstor.org/stable/551070> (subscription required) (describing the dispute between Richard the Abbot of York and Geoffrey de Spineto over de Spineto’s fishing in the monastery’s lake).

119. See BAKER, *supra* note 115, at 54.

120. R.C. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL 241 (1959) (stating that by the twelfth century, “knights and abbots [were] constantly rushing to the king, trying to obtain a writ of prompt redress for some alleged wrong”).

121. Sherman Steele, *The Origin and Nature of Equity Jurisprudence*, 6 AM. L. SCH. REV. 10, 11 (1926).

122. *Id.* at 10–11 (“An action was begun by the issuance of a writ appropriate to the form of action; in time these writs became standardized.”).

123. *Id.*

124. See *id.* at 11.

125. *Id.*

126. Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 786 (2004) (“To establish that one had a cause of action under English common law, then, one had to establish the facts that entitled one to judicial relief through an established form of proceeding [i.e., writ].”).

1. Rights

To say that a writ (or cause of action) existed in eighteenth-century England was usually to say that the plaintiff had a common law right. In defining the circumstances in which a court would intervene to protect a plaintiff, the existence of a writ bestowed on the plaintiff a “right”—a claim to be treated in a particular way. In this way, writs frequently appeared identical to rights. The collection of writs addressing harm to the person (e.g., the writs of trover, trespass, and case) amounted to the law of tort in England, though “tort law” did not emerge as a coherent concept for another century.¹²⁷ This is the reason that the phrase “cause of action” is still used to refer to substantive rights. When a woman slips on ice in a store parking lot, we often say that she has “a cause of action for negligence,” meaning that her right to be free from unreasonable interference with her person has been invaded.

Thus, rights and writs were identical in the realm of the common law. The common law was not the only law of England, though. Parliament participated in the lawmaking enterprise as well. This presented a problem for lawyers and jurists, however: how were statutes to be enforced in the courts? Sometimes Parliament solved this problem by creating a writ for a statute or directing that courts enforce the statute in a particular fashion.¹²⁸ But, quite often Parliament failed to do this, and the courts had to determine on their own whether and how the statute would be enforceable.¹²⁹

The judicial approach to this problem involved the marriage of common law writs with statutory rights. The famous case of *Ashby v. White*¹³⁰ best illustrates this practice. The case arose out of Matthew Ashby’s attempt to vote in a Parliamentary election.¹³¹ A government officer refused to count Ashby’s vote, which violated a statute.¹³² Possessing no writ from Parliament to enforce the statute, Ashby sued the officer using a writ of trespass on the case.¹³³ This was the ordinary method of statutory enforcement in England when an explicit cause of action was missing.¹³⁴ The statute supplied the right, and the writ of trespass supplied the cause of

127. See JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 888 (2009).

128. See, e.g., *Underhill v. Ellicombe*, (1825) 148 Eng. Rep. 489 (Exch. Div.) 491; M’cle. & Yo. 451, 454.

129. See generally BAKER, *supra* note 115, at 209, 211.

130. (1703) 92 Eng. Rep. 126 (K.B.) 129; 2 Ld. Raym. 938.

131. See 92 Eng. Rep. at 129; 2 Ld. Raym. at 942.

132. *Id.*

133. *Id.* at 137; 2 Ld. Raym. at 955.

134. Bellia, *supra* note 126, at 839.

action.¹³⁵ Plaintiffs could not enforce every statutory right through a writ of trespass, however.¹³⁶ The writ of trespass could only be used where the harm caused by the statutory violation was of the sort normally addressed by the writ of trespass.¹³⁷ This created a problem for Ashby because the writ of trespass typically only addressed physical injury to one's person, a contention Ashby could not make.¹³⁸ The King's Bench thus rejected Ashby's claim over an energetic dissent by Lord John Holt.¹³⁹ The House of Lords, sitting as a superior court in the case, overturned the King's Bench.¹⁴⁰ In its view, Ashby suffered a personal deprivation that fit within the writ's traditional understanding of harm.¹⁴¹ Regardless of how one defines injury in the writ of trespass, it is clear from the case that some statutory violations caused "injury" and others did not.

The practice of statutory enforcement in eighteenth-century England thus helps illustrate the relationship between writs and rights. Where the right to be enforced came from the writ itself (i.e., a common law right), the right was generally indistinct from the writ. However, where the right came from a different source (i.e., a statutory right), the writ and the right appeared as conceptually distinct.

2. Remedies

A different relationship obtains in the world of remedies. In general, writs were not separate from remedies; they were remedies.¹⁴² On this, as on many other matters of English law, William Blackstone is helpful. In writing his *Commentaries*, Blackstone endeavored to "set forth a systematic exposition of English law for teaching purposes."¹⁴³ He was determined to organize English law into a coherent whole and to define the essential concepts of English adjudication. When it came to remedies, it is clear that Blackstone viewed the writ as quintessentially remedial.

135. *Id.* at 839–40.

136. *See id.* at 840.

137. *Id.* at 841.

138. Courts occasionally recognized strict pecuniary loss as "harm" in trespass actions, but there could be no such allegation in Ashby's case because votes had no cash value. *See Ashby*, 92 Eng. Rep. (K.B.) at 133; 2 Ld. Raym. at 949 ("[I]t would be criminal for the plaintiff to sell his vote.").

139. *Id.* at 137; 2 Ld. Raym. at 955 (Holt, J., dissenting) (arguing that Ashby's injury was no different than a "cuff on the ear").

140. *Id.* at 138; 2 Ld. Raym. at 958.

141. *Ashby v. White*, (1703) 1 Eng. Rep. 417 (H.L.) 418; 1 Brown 62, 63–64.

142. *See CAENEGEM*, *supra* note 120, at 180; *see also* Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 175 (2008).

143. Alan Watson, *The Structure of Blackstone's Commentaries*, 97 YALE L.J. 795, 810 (1988).

When a person hath received an injury, and thinks it worth his while to demand a satisfaction for it, he [must choose] . . . that particular specific remedy which he is determined or advised to pursue. As, for money due on bond, an action of debt; for goods detained without force, an action of detinue or trover; or, if taken with force, an action of *trespass vi et armis*; or, to try the title of lands, a writ of entry or action of trespass in ejectment; or, for any consequential injury received, a special action on the case.¹⁴⁴

In Blackstone's view, therefore, obtaining the proper remedy required one to choose the proper writ. The writ not only dictated the remedy, but the writ was in fact how harms were remedied.¹⁴⁵

Still, Blackstone's view leaves some ambiguity, for as noted, the writ contained not just remedies but rights as well.¹⁴⁶ This was not so, however, where the rights were anchored in a statute. In those situations—*Ashby*, for instance—the remedy came from the writ.¹⁴⁷

Another case, *Melan v. Duke of Fitz James*,¹⁴⁸ illustrates this point and explicitly labels the writ as the remedy.¹⁴⁹ In *Melan*, a plaintiff filed suit in England to collect a debt that arose from a contract entered into in France.¹⁵⁰ If the plaintiff filed suit in a French court, he would only have been entitled to seizure of the debtor's property.¹⁵¹ English courts, conversely, enforced debts by seizing the property, the debtor himself, or both.¹⁵² The question before the court, therefore, was whether to jail the defendant for his unpaid debt.¹⁵³ In contract cases, the conflict of law rule dictated that “the nature of the [contractual obligation] must be determined

144. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 272–73 (1768) (emphasis omitted), available at http://avalon.law.yale.edu/18th_century/blackstone_bk3ch18.asp.

145. See 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 20 (8th ed. 1861) (“In the courts of common law, both of England and America, there are certain prescribed forms of action [i.e., writs], to which the party must resort to furnish him a remedy; and, if there be no prescribed form to reach such a case, he is remediless . . .”); Bellia, *supra* note 126, at 783 (“At the time of the American Founding, the question whether a plaintiff had a cause of action was generally inseparable from the question whether the forms of proceeding at law and in equity afforded the plaintiff a remedy for an asserted grievance.”); Laycock, *supra* note 142, at 175 (noting that in Blackstone's time “a remedy was a writ or a cause of action”); *id.* (“Blackstone implicitly equated the choice of remedy with choice of the proper form of action [i.e., writ].”).

146. See *supra* notes 120–27 and accompanying text.

147. See *supra* notes 130–38 and accompanying text.

148. (1797) 126 Eng. Rep. 822 (C.P.); 1 Bos. & Pul. 138.

149. 126 Eng. Rep. at 823; 1 Bos. & Pul. at 139.

150. 126 Eng. Rep. at 822–23; 1 Bos. & Pul. at 138–39.

151. 126 Eng. Rep. at 823; 1 Bos. & Pul. at 139.

152. See 126 Eng. Rep. at 823; 1 Bos. & Pul. at 139–40.

153. See 126 Eng. Rep. at 823; 1 Bos. & Pul. at 139.

by the law of the country where it was entered into, and then this country [i.e., England] will apply its own law to enforce it.”¹⁵⁴ In the view of the majority, the French law pertaining to enforcement of debts pertained to the obligations of debtors—substantive law.¹⁵⁵ Thus, the French law limiting seizure only to debtor’s property had to apply in English courts.¹⁵⁶ The dissent saw it differently. Admitting at the outset that “this [is] a very hard case,” the dissenting judge nonetheless believed that the matter of imprisonment was one of remedy, not obligation.¹⁵⁷ As he put it:

[W]e all agree, that in construing contracts, we must be governed by the laws of the country in which they are made. . . . But when we come to remedies it is another thing, they must be pursued by the means which the law points out where [the suit is brought]. The laws of the country where the contract was made can only have a reference to the nature of the contract, not to the mode of enforcing it.¹⁵⁸

It is unimportant here whether the majority or dissent was correct in *Melan*. What is important, however, is that both sides agreed that courts should apply the English “mode of enforcement”—the writ—alongside the French law of “obligations.” Put differently, the writ supplied the remedy, while French law supplied the substantive right.

There was one aspect of the remedy, however, that was not synonymous with the existence of a writ. Even if a writ applied to the circumstances of a plaintiff’s case, the writ did not guarantee him the recovery of any particular quantity of damages or any particular scope of injunctive relief.¹⁵⁹ For example, in *Ash v. Lady Ash*,¹⁶⁰ a girl sued her mother for tying her up for two hours.¹⁶¹ The plaintiff pursued the case through the proper writ and obtained a jury award of £2,000.¹⁶² Thinking £2,000 excessive for two hours imprisonment, the judge demanded the jury’s

154. 126 Eng. Rep. at 824; 1 Bos. & Pul. at 141–42.

155. See 126 Eng. Rep. at 824; 1 Bos. & Pul. at 141.

156. *Id.*

157. 126 Eng. Rep. at 824–25; 1 Bos. & Pul. at 142 (Heath, J., dissenting).

158. *Id.* (Heath, J., dissenting).

159. See MILSOM, *supra* note 116, at 22. Note that injunctions were not normally obtainable through a writ submitted to a court of law. Instead, they were obtainable through a “bill in equity” submitted to a Court of Equity. See Preis, *supra* note 12, at 11. This Article avoided discussion of equity rules for the sake of simplicity. Although courts of equity lacked the rigid approach to the law as common law judges, equity became rule-bound by the eighteenth century. *Id.* at 24. Thus, the rules of equity do not affect the conclusions described in this Section.

160. (1695) 90 Eng. Rep. 526 (K.B.) 526; Comberbach 357.

161. *Id.*

162. *Id.*

reason for its award.¹⁶³ Finding them “shy of giving a reason,” he ordered a new trial.¹⁶⁴ A jury does not, he explained, have “absolute despotick power” to issue whatever quantity of damages it sees fit.¹⁶⁵

It is too much to say that, as of the eighteenth century, there was a distinct body of law that controlled remedies, at least as the topic is treated today in casebooks and treatises. The quantity of damages recoverable by a plaintiff was a question of fact that the jury decided, and only in the rarest of cases would a judge upset the award.¹⁶⁶ It was not until the nineteenth century—in both England and America—that courts developed specific rules for the nature of relief available for a breach of contract, tort, and the like.¹⁶⁷ For the present purposes, it is only important to note that in eighteenth-century England, access to the writ opened the door to recovery of a remedy but did not guarantee that recovery would actually occur.

3. Jurisdiction

Like remedies, subject-matter jurisdiction was also related to the writ, although not nearly as directly. Unlike remedies, which the writ created and contained, subject-matter jurisdiction simply depended on the identity of a writ.

Like modern day America, eighteenth-century England had a number of different courts. There was the King’s Bench, Chancery, the Court of Common Pleas, the Court of the Exchequer, and a wide variety of inferior courts.¹⁶⁸ Each of these courts had its own defined jurisdiction.¹⁶⁹ Often, the jurisdiction turned on factors such as the nature of the dispute, the identity of the parties, or the location of the harm.¹⁷⁰ In some cases, however, jurisdiction depended on the nature of the writ.¹⁷¹ Plaintiffs could

163. *Id.*

164. 90 Eng. Rep. at 526; *Comberbach* 357–58.

165. *Id.*

166. See CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* 24–28 (1935) (describing the history of judicial supervision of damage awards in England).

167. See, e.g., *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145; 9 Ex. 341 (addressing the availability of consequential damages for breach of contract); see also Laycock, *supra* note 142, at 175–215 (describing the transition of the field of remedies from one dominated by writs to one separate and apart from writs or causes of action).

168. See Anthony J. Bellia Jr., *The Origins of Article III “Arising Under” Jurisdiction*, 57 DUKE L.J. 263, 273 (2007).

169. *Id.* at 274.

170. *Id.*

171. *Id.*; see also *Smith v. Wilmer*, (1747) 26 Eng. Rep. 1143 (Ch.) 1145; 3 Atk. 595, 598. (“[W]hat is the nature and foundation of original writs? To be sure they were commissional to courts of common law, for without an original none of these courts had a commission to hold plea; and a judgment where there is no original is void, unless by reason of privilege”); 1 GEORGE SPENCE, *THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY* 227 (1846) (“The writ . . . alone gave jurisdiction to the justices, and equally defined its limits.”).

bring most ordinary civil writs in the Court of Common Pleas.¹⁷² Plaintiffs could bring a somewhat more limited variety before the King’s Bench, but the King’s Bench entertained writs that other courts did not, such as the writs of prohibition and mandamus.¹⁷³ Chancery’s jurisdiction was less particularized, but it would not act on matters that a plaintiff could bring before the Court of Common Pleas or the King’s Bench.¹⁷⁴ The Court of the Exchequer exercised jurisdiction mainly over matters of taxation and revenue, but it developed a limited civil jurisdiction in later centuries.¹⁷⁵

The precise details of which writs were actionable in which courts is unimportant here. All that matters for this Article’s purposes is that writs—i.e., causes of action—affected jurisdiction. Thus, a plaintiff might have “cause” for taking “action” in one court but not another.

B. *Nineteenth-Century America*

When the English colonists put down roots in America, they did not attempt to reinvent the legal wheel. They borrowed heavily from the English model of adjudication, including the central importance of writs.¹⁷⁶ Thus, the relationship between the cause of action and rights, remedies, and jurisdiction was largely similar.

1. Rights

Recall that in England, the relationship between the right and cause of action depended on the source of the applicable law. If a suit was purely common law—an ordinary trespass action, for example—the right and the cause of action were more or less indistinguishable inside the writ. If a suit was to enforce a statutory right that was unsupported by its own cause of action, however, the cause of action and right came from separate sources. That is, the statute supplied the right, and the writ supplied the cause of action.

The relationship between the federal cause of action and federal rights similarly depended on whether the cause of action and the right came from the same source of law. Obviously, statutory and constitutional rights came from statutes and the Constitution. But where did causes of action come

172. LANGBEIN ET AL., *supra* note 127, at 119.

173. *See id.* at 120; 1 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 228–30 (3d ed. 1922).

174. *See* LANGBEIN ET AL., *supra* note 127, at 287 (“Following the law meant that the Chancellor deferred to common law outcomes unless he saw good reason not to.”).

175. HOLDSWORTH, *supra* note 173, at 238–40.

176. *See* Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1131, 1139 n.135 (1969).

from? Congress occasionally dictated the causes of action.¹⁷⁷ But quite often, a plaintiff sought to enforce a federal right unaccompanied by an explicit cause of action. In these situations, federal courts handled the matter in two different ways, both of which relied upon common law writs. The distinction depended on whether the right was statutory or constitutional.

First, when it came to *statutory* rights, the federal courts handled the matter much in the same way as England. When a plaintiff desired to enforce a federal statutory right, the court simply drew on traditional common law writs.¹⁷⁸ As long as the injury sustained by the statutory violation was of the sort normally addressed by the common law writ, the federal courts used the writ to supply a cause of action for the enforcement of the statute.¹⁷⁹

This practice, however, begs an important question: where did the federal courts—not organized as common law courts¹⁸⁰—get the power to wield common law writs? The answer is that Congress gave it to them.¹⁸¹ At this nation’s founding, Congress ordered the federal courts to use the “modes of process” of the courts in the state in which the federal court was sitting.¹⁸² These “modes of process” were understood to be the writs themselves. Thus, a federal court in Maryland, for example, could adjudicate an ordinary tort action using the writ of trespass recognized by Maryland state courts.

In practice, however, federal courts were not always attentive to the precise contours of state law. A writ of trespass applied in federal court might mirror the writ applied in Maryland state court, or it might vary in subtle but important ways. Over time, federal courts felt increasingly free to put their own gloss on state writs (and Congress eventually gave them

177. See, e.g., Ku Klux Act of 1871, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2012)) (providing a cause of action to victims of federal constitutional violations committed by state officers).

178. See, e.g., *Bullard v. Bell*, 4 F. Cas. 624, 633 (C.C.D.N.H. 1817) (No. 2121).

179. See, e.g., *id.* at 632.

180. See generally Edward A. Hartnett, *Not the King’s Bench*, 20 CONST. COMMENT. 283, 284–85 (2003) (describing the development of the federal courts through the Judiciary Act of 1789).

181. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 1651 (2012)).

182. Temporary Process Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93 (stating that the “modes of process . . . in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same”). Congress made the Temporary Process Act permanent two years later in the Permanent Process Act. See Permanent Process Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (stating that the procedures followed in the federal courts “shall be the same as are now used in the [federal] courts [as prescribed by the Temporary Process Act]”).

permission to do so in some situations).¹⁸³ This practice of varying the terms of the writ led to the development of a body of writ pleading that was distinctively federal—today’s “federal common law.”¹⁸⁴ Thus, when a federal court adjudicated a writ in the nineteenth century, it was difficult to say with any certainty whether the writ was federal or state law. Oftentimes, the writ was an amalgam of the two but not explicitly labeled as either. This means that courts enforced federal rights through causes of action that were not distinctively state or federal, although the writs were distinct from federal statutory rights.

Second, when it came to *constitutional* rights, federal courts relied on the same common law writs used in statutory cases. Unlike with statutory rights, however, the constitutional right was not incorporated into a particular writ. A constitutional right was involved in the suit, if at all, as a defense.¹⁸⁵ An example is provided by *Wise v. Withers*.¹⁸⁶ In *Wise*, a federal militia officer—Withers—attempted to collect a fine allegedly owed by Wise.¹⁸⁷ With the approval of a federal judge, Withers entered Wise’s home and seized his personal property as payment for the fine.¹⁸⁸ As it turned out, however, Wise was exempt from paying the fine.¹⁸⁹ Withers had thus violated Wise’s Fourth Amendment rights. To collect damages for this infraction, Wise did not bring a trespass action incorporating his Fourth Amendment rights; he brought an ordinary trespass action.¹⁹⁰ The Fourth Amendment would have entered the suit only if the defendants argued that their conduct was proper.¹⁹¹ The Court would have measured the proffered justification against the Fourth Amendment, for any justification that violates the Fourth Amendment is

183. The Conformity Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197 (ordering federal courts to follow state methods of proceeding “as near as may be”).

184. See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1040–42 (1982) (describing how federal modes of proceeding, though based on state law by instruction of Congress, often failed to follow state law).

185. See Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 399 (1987) (explaining that although the complaint often spoke in common law terms, “[t]he issue of whether the action was authorized by existing statutory or constitutional law was introduced by way of defense and reply when the officer pleaded justification”).

186. 7 U.S. (3 Cranch) 331 (1806).

187. *Id.* at 331.

188. *Id.*

189. *Id.* at 335.

190. *Id.* at 331.

191. See Michael G. Collins, “*Economic Rights, Implied Constitutional Actions, and the Scope of Section 1983*,” 77 GEO. L.J. 1493, 1512 (1989).

per se void.¹⁹² Finding no justification for the defendants' actions, the *Wise* Court declared that "[t]he court and the officer [were] all trespassers."¹⁹³

Wise v. Withers is typical of the constitutional actions of the era.¹⁹⁴ It is a bit jolting to modern sensibilities to see *Wise*'s civil rights action reduced to lowly common law status, but this was not nearly as odd as it might seem. Many of our constitutional rights are modeled English common law—law that (unlike modern American common law) was the primary tool for the maintenance of liberty in England.¹⁹⁵ James Madison, when drafting the Bill of Rights, did not create new rights out of whole cloth but simply drew on “traditional guarantees already recognized in state bills of rights or English common law.”¹⁹⁶ Speaking of the Fourth Amendment in particular, Justice Joseph Story stated that the Amendment was “little more than the affirmance of a great constitutional doctrine of the common law.”¹⁹⁷ Thus, to the extent that constitutional rights mirrored traditional common law rights, there was no reason that common law writs would be insufficient for enforcing constitutional rights.¹⁹⁸

In sum, federal courts in the nineteenth century enforced federal statutory and constitutional rights through ordinary common law writs. The rights enforced were clearly distinguishable from the writs themselves and, in the case of constitutional rights, potentially even absent from the suit altogether.

192. *See id.*

193. *Wise*, 7 U.S. (3 Cranch) at 337.

194. *See* Collins, *supra* note 191, at 1510 (explaining that government officers “were liable at common law for injuries inflicted in the course of their employment,” including constitutional injuries); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1400 (2007) (stating that in early America, “there was no distinctively federal cause of action to remedy constitutional violations,” so “[a]ctions against officers typically alleged a common law harm”).

195. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 53 (2d ed. 1998).

196. *Id.*

197. 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1895, at 748 (1833). The English case thought to have inspired the Fourth Amendment, *Entick v. Carrington*, was an English trespass case. (1765) 95 Eng. Rep. 807 (K.B.) 807–08; 2 Wils. K.B. 275, 275; *see also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 n.54 (1994) (stating that cases similar to *Entick* were “a cause célèbre in the colonies” and “became a rallying cry for all those who hated government oppression”).

198. Other examples exist, such as the Fifth Amendment’s Confrontation, Takings, and Double Jeopardy Clauses. *See* Crawford v. Washington, 541 U.S. 36, 49 (2004) (discussing the common law history of the Confrontation Clause); ELY, JR., *supra* note 195, at 53 (addressing the takings clause); *see also* 3 STORY, *supra* note 197, § 1781, at 659 (calling the prohibition on double jeopardy “another great privilege secured by the common law”).

2. Remedies

If federal causes were distinct from federal statutory and constitutional rights, how did causes of action relate to remedies? The answer again mirrors English practices, though the distinct law of remedies had developed significantly throughout the nineteenth century. As explained above, in England the writ opened the door to recovery of a remedy but did not guarantee that recovery would actually occur.¹⁹⁹ Put differently, the existence of a writ signaled to potential plaintiffs that the harm suffered was remediable in the eyes of the law. Mere availability of a writ, however, did not guarantee that a remedy would issue, even if a plaintiff proved her case.²⁰⁰ A plaintiff's recovery might be subject to a separate body of law, still in its infancy in eighteenth-century England, that defined the quantity of damages or nature of injunctive relief.²⁰¹

An instructive example is *Marbury v. Madison*.²⁰² The facts in *Marbury* are familiar. William Marbury was appointed and confirmed as a judge at the close of John Adams' presidency.²⁰³ Before the delivery of Marbury's commission, however, incoming President Thomas Jefferson took office and refused to deliver the commission.²⁰⁴ Marbury brought suit to compel James Madison, Jefferson's Secretary of State, to deliver the commission.²⁰⁵ Of great importance here is how Marbury asked the Court for relief: Marbury sought a writ of mandamus.²⁰⁶ Like all writs, the writ of mandamus was available under certain conditions; namely, the writ was only available to compel ministerial acts, such as an official's duty to comply with explicit law.²⁰⁷ If the action sought to be compelled was instead political or discretionary, the writ would not lie.²⁰⁸ In *Marbury*, the Court held that Madison's obligation to install Marbury in the judgeship was ministerial.²⁰⁹ As such, the suit was "a plain case for a mandamus," and Marbury was thus "entitled to the remedy for which he applie[d]."²¹⁰ The correlation between writ and remedy in *Marbury* is clear: the writ was "the remedy for which [Marbury] applie[d]."²¹¹

199. See MILSOM, *supra* note 116, at 22.

200. See *id.*

201. See *supra* Subsection II.A.2.

202. 5 U.S. (1 Cranch) 137 (1803).

203. *Id.* at 138.

204. *Id.*

205. *Id.* at 137–38.

206. *Id.* at 146.

207. *Id.* at 150.

208. *Id.* at 170–71.

209. See *id.* at 173.

210. *Id.* at 168, 173.

211. *Id.* at 168.

Marbury's analysis should not be surprising. As noted in the prior Section, the federal courts effectively inherited the English model of adjudication—a model which treated the writ and the remedy as one and the same.²¹² Beyond *Marbury*, writ and remedy appear interchangeably in the U.S. Reports,²¹³ as well as in major treatises.²¹⁴

Although courts understood writs as remedies for defined harms, a separate body of remedial law developed in America during the nineteenth century. As in eighteenth-century England, the writ opened the door to a remedy, but there were instances in which courts loosely superintended the quantity of damages or scope of injunctive relief issued.²¹⁵ There was not a distinct body of remedies law in the eighteenth century, but such a body of law did develop during the nineteenth century in America. Christopher Columbus Langdell summed up the development well when he wrote in 1887 that “[t]he term ‘remedy’ is applied either to the action or suit by means of which a right is protected [i.e., writ], or to the protection which the action or suit affords.”²¹⁶ Under Langdell’s first definition, the remedy for a battery is a writ of trespass; under his second, the remedy for a battery is damages. Confirming Langdell’s description, Professor Douglas Laycock has explained: “In the nineteenth century, we begin to see transsubstantive treatises on damages—treatises that addressed damages for many causes of action and proposed some general principles for measuring damages. Nineteenth-century treatises on injunctions also had a transsubstantive scope.”²¹⁷ Beyond treatises, there were also “[c]ollections

212. *Supra* note 145 and accompanying text.

213. *See, e.g.,* *Rees v. Watertown*, 86 U.S. (19 Wall.) 107, 117 (1873) (“The appropriate remedy of the plaintiff was and is a writ of mandamus.”); *Hodges v. Vaughan*, 86 U.S. (19 Wall.) 12, 13 (1873) (“[T]he writ of certiorari is not a proper remedy for the alleged defect.”); *Hannewinkle v. Georgetown*, 82 U.S. (15 Wall.) 547, 548 (1872) (“The remedy was held to be at law by writ of certiorari or by action of trespass.”); *Bd. of Comm’rs of Knox Cnty. v. Aspinwall*, 65 U.S. (24 How.) 376, 376 (1860) (“[A] writ of mandamus is the proper legal remedy.”); *Ex parte Kearney*, 20 U.S. (12 Wheat.) 38, 44 (1822) (“[A] writ of *habeas corpus* was not deemed a proper remedy”); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 354 (1816) (“[A] writ of error is the proper remedy”).

214. *See, e.g.,* 1 JOSEPH HENRY BEALE, *A TREATISE ON THE CONFLICT OF LAWS* § 164, at 188 (1916); RALEIGH C. MINOR, *CONFLICT OF LAWS; OR, PRIVATE INTERNATIONAL LAW* § 205, at 505 (1901); JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC* §§ 556–57, at 772–74 (8th ed. 1883); 2 FRANCIS WHARTON, *A TREATISE ON THE CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW* § 675a, at 1432–36 (3d ed. 1905). Indeed, this usage persisted well into the twentieth century, though it was the minority usage. *See* Laycock, *supra* note 142, at 175–81.

215. *See supra* notes 159–67 and accompanying text.

216. Christopher Columbus Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 111, 111 (1887).

217. Laycock, *supra* note 142, at 171 & nn.32–33 (providing examples of such sources).

of leading cases [that] were marketed to nineteenth-century practitioners,” some addressing damages and some addressing equitable relief.²¹⁸

Thus, in nineteenth-century America, writs were still tightly connected with remedies, but remedies began to develop into a separate body of law as well. Put differently, the writ still signaled that a particular injury was remediable in court, but a growing body of law began to define the precise ways to measure the remedy.

3. Jurisdiction

Just as in England, federal jurisdiction sometimes depended on the cause of action alleged—the writ. *Marbury* is again instructive. After concluding that Marbury had made a “plain case for a mandamus”²¹⁹ and that he was consequently “entitled to the remedy for which he applie[d],”²²⁰ Chief Justice John Marshall then considered “whether [the writ] can issue from this court.”²²¹ This, as any first-year law student knows, is the issue for which the case is remembered. The Court held that it did not have jurisdiction to issue the writ because the statute giving the Court jurisdiction contradicted the Constitution.²²² The precise analysis supporting this holding is unimportant here; what is important, though, is that the writ of mandamus was *jurisdictional*. Thus, *Marbury* demonstrates that the Court had jurisdiction to adjudicate certain writs but not others.²²³

In understanding *Marbury*, it is important to grasp why writs could be jurisdictional: because Congress or the Constitution said so.²²⁴ It follows that if Congress does not make writs or causes of action jurisdictional, the federal courts ought not to give them that effect. Take, for example, *Osborn v. Bank of the United States*,²²⁵ a famous case in which the Court charted the outer boundaries of federal question jurisdiction. In *Osborn*, the Bank of the United States (Bank) suffered a theft of money and brought suit against the persons responsible for the theft.²²⁶ The Bank pursued a writ of replevin (a writ seeking return of the money) in federal court,²²⁷ and the issue was whether the case presented a federal question sufficient to

218. *Id.* at 172 & nn.43–44 (providing examples of such sources).

219. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803).

220. *Id.* at 168.

221. *Id.* at 173.

222. *Id.* at 176.

223. *Id.*

224. *Id.* at 176–77.

225. 22 U.S. (9 Wheat.) 738 (1824).

226. *Id.* at 741.

227. *See id.* at 743–44 (“[T]he Court pronounced a decree directing [Osborn] to restore to Bank the sum of 100,000 dollars . . .”).

permit the federal court to hear the suit.²²⁸ The Court held that, although the writ was simply an ordinary common law writ apparently grounded in state law, a question of federal law “form[ed] an ingredient of the . . . cause.”²²⁹ Where adjudication of a state law writ would require a court to adjudicate a federal question, federal question jurisdiction was available.²³⁰ Importantly, the jurisdictional statute at issue in *Osborn* did not grant federal courts jurisdiction to issue writs of replevin; the statute simply granted the court jurisdiction to hear cases involving the Bank.²³¹ Some cases involving the Bank might involve federal ingredients, thus permitting federal jurisdiction, and some might not, thus prohibiting federal jurisdiction.²³² Either way, jurisdiction did not turn on the writ because Congress did not dictate that it should.²³³

Thus, federal jurisdiction sometimes did and sometimes did not turn on the nature of the writ (or cause of action) in nineteenth-century America. The jurisdictional nature of the writ, however, turned on the choices of Congress. If Congress desired that a particular cause of action be jurisdictional, the federal courts were bound to, and did in fact, respect that choice.

C. Twentieth-Century America

In the twentieth century, the cause of action finally starts to behave in the ways explained in Part I. The implied cause of action, which had thus far been separate from statutory and constitutional rights, came to be located *inside* those rights. Similarly, the cause of action, which was tightly connected with remedies, began to appear as analytically distinct from remedies. Lastly, the cause of action, which had always been associated with jurisdiction in some ways, came to be associated with it in several other ways.

1. Rights

As this Article sets out above, in the nineteenth century, statutory and constitutional rights were separate from the cause of action used to enforce those rights. The cause of action came from the common law (though it was often unclear whether these common law causes of action were state

228. *Id.* at 819.

229. *Id.* at 823.

230. *See id.* at 819.

231. *Id.* at 817–18 (noting that, according to the statute at issue, the Bank of the United States could “sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State Courts having competent jurisdiction, and in any Circuit Court of the United States” (internal quotation marks omitted)).

232. *Id.* at 826–27.

233. *See id.*

or federal), and plaintiffs could use them as long as the right claimed was similar to a common law right.²³⁴ This method of enforcement thus depended significantly on (1) the similarity between the common law and statutory or constitutional rights, and (2) the viability of common law causes of action in federal court. As explained below, changes in both of these areas led federal courts to refer to causes of action as part of substantive rights themselves.

Similarity of Rights: During the twentieth century, federal rights came to look less and less like traditional common law rights. As an illustration, consider the law of takings. A takings action in the nineteenth century would work as follows: A plaintiff, upon concluding that the state was taking his property in violation of law, would bring an ordinary trespass action against the relevant state officials.²³⁵ The defendants would then often assert a defense of justification, arguing that their actions were proper according to a legislative directive to claim land for a new railroad, street, or whatever the ultimate legislative purpose was.²³⁶ The reviewing court would then have to determine whether the directive ran afoul of the prohibition on takings,²³⁷ for there could be no justification for an unconstitutional act.

In the late nineteenth century, this common law model began to break down. As Professor Robert Brauneis has explained, between 1870 and 1910, over half the states amended their just compensation laws to protect not just the taking of property but also “damage” to it.²³⁸ These new “taking or damaging” laws threw a wrench into the ordinary common law process of adjudicating takings claims.²³⁹

Looking to the terms of the amendments themselves, courts “conclude[d] that liability under [these new] clauses was . . . broader . . . than the liability of private parties at common law.”²⁴⁰ The common law, for example, would provide compensation for the actual dispossession of property, but it did not always compensate landowners for harm to the property remaining in their possession, such as the “increased

234. See *supra* Subsection II.B.1.

235. See, e.g., *City of St. Louis v. Gurno*, 12 Mo. 414 (1849) (ruling on an action against the City of St. Louis for damages to plaintiff’s property caused by city improvements); *Radcliff’s Ex’rs v. Mayor of Brooklyn*, 4 N.Y. 195, 198–99 (1850); see also Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 67–68 (1999) (“First, a property owner would bring a common law action of trespass . . . against a government official or a corporation.”).

236. See, e.g., *Radcliff’s Ex’rs*, 4 N.Y. at 198.

237. See, e.g., *id.* at 207–08.

238. Brauneis, *supra* note 235, at 115.

239. See *id.*

240. *Id.* at 125–26.

risk of fire and loss of privacy occasioned by railroad operation.”²⁴¹ The new amendments appeared to encompass these types of injuries, which in turn made common law actions insufficient. As Professor Brauneis summarized, the common law model “would no longer work when the constitution afforded protection greater than that afforded by the common law.”²⁴²

Professor Brauneis’s study focuses largely on takings claims under state constitutions, but his insights are certainly relevant to this Article’s discussion of federal law. To the degree that federal law “afforded protection greater than that afforded by the common law”²⁴³ or even significantly differed from the common law, the ordinary common law mode of enforcement would fall apart.²⁴⁴ This is what appears to have happened in many respects.²⁴⁵

Take, for example, the development of substantive due process rights under the Fourteenth Amendment. In the late nineteenth century, people thought that these rights, to the extent they existed as discrete rights, mirrored the protections afforded English citizens under the common law.²⁴⁶ By the early twentieth century, the Court had left the common law behind as the model for the Due Process Clause. In *Lochner v. New York*,²⁴⁷ for example, the Court declared that the Fourteenth Amendment protects one’s freedom of contract²⁴⁸—a right whose basis in the common law is traditionally considered dubious.²⁴⁹

Outside the realm of constitutional law, however, statutory rights and prohibitions expanded as well. For example, the rights of workers multiplied. In his study of implied causes of action, Professor Miles Foy noted that the typical employee is no longer only “complaining about mere carelessness” by the employer, but rather “[h]e is complaining, for example, that he lost his job because he filed a worker’s compensation claim and his employer fired him in retaliation. . . . The negligence theory

241. *Id.* at 126–27.

242. *Id.* at 127.

243. *Id.*

244. *See id.*

245. *See* Collins, *supra* note 191, at 1532 (noting, with respect to common law actions to enforce constitutional rights, that “[s]tate tort law . . . did not always reach the constitutional harm”); Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 161 (2012) (noting that common law actions became less useful in part because “the common law’s conception of actionable injuries did not keep in neat accord with those contemplated by the Constitution”).

246. *See, e.g.,* *Munn v. Illinois*, 94 U.S. 113, 124 (1877).

247. 198 U.S. 45 (1905).

248. *Id.* at 53. *But see* DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 3 (2011) (arguing that *Lochner* did not create new law but simply applied long standing principles of economic liberty).

249. *See* BERNSTEIN, *supra* note 248, at 1–3.

simply does not fit a case like that”²⁵⁰ The same is true in the realm of financial regulation. In *J.I. Case v. Borak*,²⁵¹ for example, the Court considered whether the Securities and Exchange Act of 1934 “authorizes a federal cause of action for rescission or damages to a corporate stockholder with respect to a consummated merger which was authorized pursuant to the use of a proxy statement alleged to contain false and misleading statements violative of § 14(a) of the Act.”²⁵² One can barely imagine attempting to fit this claim within a negligence or trespass cause of action. The same is also true for the statutory right at issue in *Texas & New Orleans Railroad Co. v. Railway & Steamship Clerks*.²⁵³ The Railway Labor Act empowered railroad employees to designate their union representatives “without interference, influence, or coercion.”²⁵⁴ If a railroad threatens to reduce employee hours unless they choose a particular representative, there is no common law cause of action for this harm.²⁵⁵

Common Law Causes in Federal Court: If an ordinary trespass action fell short of enforcing new federal rights, why not just reform the action to accommodate the new rights? Two events in 1938 made that impossible. First, in *Erie Railroad Co. v. Tompkins*,²⁵⁶ the Supreme Court declared that “[t]here is no federal general common law.”²⁵⁷ This meant that federal courts no longer had the power to create and manage a body of federal common law. Federal courts could not modify tort law to accommodate the changing shape of federal rights. If Congress gave shareholders a right to be free from fraud in the midst of a corporate merger or gave union members the right to choose their representatives without harassment, then the cause of action would have to come from somewhere besides the old-fashioned common law actions.²⁵⁸

250. H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 568–69 (1986).

251. 377 U.S. 426 (1964).

252. *Id.* at 427–28 (implying an action under section 14(a) of the Securities Exchange Act of 1934, 48 Stat. 895 (codified at 15 U.S.C. § 78n(a) (2012)).

253. 281 U.S. 548, 551 (1930).

254. Railway Labor Act of 1926, ch. 347, 44 Stat. 577, 578 (codified as amended at 45 U.S.C. § 152 (2012)).

255. *See, e.g., Tex. & New Orleans R.R.*, 281 U.S. at 551 (noting petitioner’s argument that “suggestion or advice by officers and agents of the railroad to employees with respect to their organization or selection of representatives, is not unlawful, nor violative of the Railway Labor Act of 1926, nor subject to be enjoined”).

256. 304 U.S. 64 (1938).

257. *Id.* at 78.

258. *See Collins, supra* note 191, at 1532 (“Once *Erie* compelled parties to conceive of the source of law that supplied the right to sue strictly in terms of state or federal law, constitutional damage actions became problematic. If state law were the source, then plaintiffs could incorporate the constitutional ingredient into their pleadings only when state law permitted.”).

Second, at the same time that federal common law was on the wane, procedural reform was on the rise. In 1938, Congress abolished writ pleading and replaced it with the Federal Rules of Civil Procedure (FRCP).²⁵⁹ Under the FRCP, a single, unified “civil action” replaced the long list of available writs.²⁶⁰ Despite appearances, these reforms did not push common law claims out of federal court. To bring an ordinary common law claim under the FRCP, a plaintiff simply had to state the elements of the claim.²⁶¹ Thus, plaintiffs could plead a negligence claim by alleging duty, breach, causation, and injury. Importantly, plaintiffs did *not* need to allege the existence of a cause of action.²⁶² The cause of action had always been one with the right in the realm of the common law.²⁶³ Thus, to allege the elements of negligence was to allege that the plaintiff was entitled to enforce his right in court. Although the abolition of the writs did not affect common law actions, it did affect actions based on statutory or constitutional rights.²⁶⁴ Those rights had long enforced through the old-fashioned common law writs. When the writs disappeared, federal rights that lacked an explicit cause of action from Congress suddenly appeared unenforceable by private citizens.²⁶⁵

A Cause Within the Right: What could be done to make these federal rights enforceable? Congress could have taken the lead and enacted a large number of explicit causes of action. That was the path not taken, however. Instead, federal courts addressed the problem not by modifying writs (which was no longer possible after *Erie*), but by claiming that a cause of action was *implicit in the right itself*.²⁶⁶ A shareholder’s right to be free from fraud *implied* a remedy for that fraud. The remedy was inside the right itself. A union member’s protection from coercion was not “merely an abstract right” but a concrete right that “Congress intended . . . should be enforced.”²⁶⁷

In this way, federal courts were able to create causes of action without violating prohibitions on judicial lawmaking. Courts did not conjure up causes of action out of thin air as common law courts might have done; instead, the courts “discovered” them within the text of the statute or constitutional right itself. The difference between judicial lawmaking and

259. See FED. R. CIV. P. 2.

260. *Id.*

261. See Bellia, *supra* note 126, at 853.

262. See *id.* at 799.

263. See *id.*

264. See *id.* at 850–51.

265. *Id.* (noting how the creation of the FRCP gave rise to the practice of implying causes of action).

266. See *id.* at 847–48.

267. *Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 558, 568 (1930).

interpretation is sometimes vanishingly small. But that criticism is irrelevant to the story here. What is important is that interpretation—the only avenue left open to the Court after 1938—brought the implied cause of action into the realm of substantive rights. Thus, when federal courts today focus on a statute’s rights-creating language to determine whether to imply a cause of action, it is not because the existence of a right includes a mandate for enforcement, but for the historical reason that the old-fashioned causes of action became defunct in the first part of the twentieth century.²⁶⁸ The implied cause of action is no more a part of the right today than it ever was; courts simply refer to it that way.²⁶⁹

Once it is evident that causes of action are not impliedly within rights, but rather are separate doctrinal devices to enforce rights, the Court’s analysis in cases like *Wilkie v. Robbins*²⁷⁰ and *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*²⁷¹ is shown to be erroneous.²⁷² As explained in Part I, each of those cases involved a plaintiff’s request for a new right that, if recognized by the Court, the plaintiff would have had to enforce through an implied cause of action.²⁷³ The coupling of these two features led the Court to take its focus off the issue presented. There was no need in those cases to discuss implied causes of action, whether they existed within the rights or elsewhere. All that mattered was whether each plaintiff’s claim to a right was appropriate according to ordinary rules of statutory or constitutional interpretation.

Also incorrect is the Court’s recent assertion that implied constitutional actions cannot be modified by Congress.²⁷⁴ This view (which Justice Scalia has espoused before)²⁷⁵ seems to hold that because implied constitutional actions exist within constitutional rights and Congress has no authority to

268. See *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001).

269. See Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 735–42 (2013) (observing this dynamic and noting how the survival of state common law actions after 1938 allowed enforcement of federal statutes without requiring federal courts to find causes of action implied in the text of federal rights).

270. 551 U.S. 537 (2007).

271. 552 U.S. 148 (2008).

272. See *Wilkie*, 551 U.S. at 554, 567 (“Because neither *Bivens* nor RICO gives [plaintiff] a cause of action, there is no reason to enquire further into the merits of his claim”); *Stoneridge*, 552 U.S. at 165 (“Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries.”).

273. See *supra* notes 49–62 and accompanying text.

274. *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1383 (2015) (stating that a “constitutional . . . right to enforce federal laws against the States,” if implied by the federal courts, would be “congressionally unalterable”).

275. *Minnecci v. Pollard*, 132 S. Ct. 617, 626 (2012) (Scalia, J., concurring) (“We have abandoned that power in the statutory field and we should do the same in the constitutional field, where (presumably) an imagined ‘implication’ cannot even be repudiated by Congress.” (internal citation omitted)).

modify constitutional rights, then Congress has no authority to modify implied constitutional actions.²⁷⁶ But the syllogism fails from the outset. Implied causes of action are not, and never have been, contained inside rights. The retiring of common law causes of action in the first part of the twentieth century gave rise to a new vernacular, but it did not—indeed, it could not—deprive Congress of its centuries-old powers to create or abolish constitutional remedies.

2. Remedies

When it came to remedies and the cause of action, the federal courts in the twentieth century initially held true to the approach of the prior century. That approach, as shown above, saw the cause of action as an authorization to pursue a remedy for a particular harm, but it did not define the precise amount of damages or scope of injunctive relief.²⁷⁷

*Tipton v. Atchison, Topeka & Santa Fe Railway Co.*²⁷⁸ exemplifies the cause of action as authorization to pursue a remedy. In that case, the plaintiff asked the Court to enforce a federal statute regulating safety in the railroad industry.²⁷⁹ The statute did not contain an explicit cause of action, but the Court found one implied nonetheless.²⁸⁰ The Court cited an earlier decision²⁸¹ in which it had stated that the “right to recover the damages from the party in default is implied, according to a doctrine of the common law.”²⁸² The Court’s view is clear here: A cause of action amounts to the right to recover damages.²⁸³

This approach did not change with the arrival of the FRCP in 1938. While it is true that the FRCP abolished writ pleading, they did not abolish the existence of, and relationship between, causes of action and remedies. After the FRCP, it was still entirely possible, in fact ordinary, to talk of causes of action as remedies. The 1946 case of *Bell v. Hood*²⁸⁴ illustrates this well. In *Bell*, a plaintiff asked the Court to imply a cause of action for damages against several federal officials who had violated his Fourth and

276. *See id.*

277. *See supra* Subsection II.B.2.

278. 298 U.S. 141 (1936).

279. *Id.* at 145.

280. *See id.* at 146.

281. *Id.* at 146 n.6 (citing *Tex. & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916)).

282. *Rigsby*, 241 U.S. at 39.

283. *See Tipton*, 298 U.S. at 154; *see also* *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 343 (1937) (stating that the Merchant Marine Act of 1920 “gives a cause of action for damages”); *Terminal Warehouse Co. v. Pa. R.R. Co.*, 297 U.S. 500, 514 (1936) (stating that the Commerce Act provides a “cause of action for damages”); *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 215–16 (1934) (describing the “right to recover damages” provided by the Safety Appliance Acts and reflected in the Federal Employers’ Liability Act).

284. 327 U.S. 678 (1946).

Fifth Amendment rights.²⁸⁵ The specific issue in the case was whether a federal court had subject-matter jurisdiction over such a request, but the Court had occasion to provide its view of an implied cause of action.²⁸⁶ The Court explained that an implied cause of action to enforce constitutional rights is not a radical proposition given that “where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”²⁸⁷ This approach would be consistent with that in the statutory realm where “federal courts may use any available remedy to make good the wrong done.”²⁸⁸

Tipton, Bell, and similar cases thus show that when modern federal courts refer to a federal cause of action as a “federal remedy,”²⁸⁹ they have not conflated two concepts that have historically been separate. They have simply described causes of action as they had been understood for centuries.

As this Article has established, however, a body of remedial law developed in the nineteenth century that was disconnected with the cause of action. This body of law did not displace the cause of action or minimize its remedial nature; it simply refined the nature or amount of relief that claimants with legitimate causes of action would receive. This aspect of remedies remained present in the twentieth century and remains today. Take *Carey v. Piphus*,²⁹⁰ for example. In *Carey*, a student suspended from school without due process sued a school administrator for damages.²⁹¹ There was no concern with the cause of action, for 42 U.S.C. § 1983 plainly authorized the student to pursue “an action at law, suit in equity, or other proper proceeding for redress.”²⁹² The concern instead was with the quantity of damages to which the student was entitled.²⁹³ The student sought \$5,000 but had not shown that he had suffered any actual loss as a result of the constitutional violation.²⁹⁴ This was fatal to his claim because “[t]he cardinal principle of damages in Anglo-American law is

285. *Id.* at 679.

286. *Id.* at 680–81.

287. *Id.* at 684.

288. *Id.*

289. *See* *Mitchum v. Foster*, 407 U.S. 225, 239 (1972); *see also* *Zinermon v. Burch*, 494 U.S. 113, 124 (1990); *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 733 (1989); *Daniels v. Williams*, 474 U.S. 327, 338 (1986).

290. 435 U.S. 247 (1978).

291. *Id.* at 248.

292. 42 U.S.C. § 1983 (2012).

293. *Carey*, 435 U.S. at 248.

294. *Id.* at 251–52.

that of *compensation* for the injury caused to plaintiff.”²⁹⁵ To recover damages, the student had to prove with evidence his “mental and emotional distress,” something he had not done.²⁹⁶ Thus, the Court limited the student’s damages to the nominal sum of \$1, even though he had a legitimate cause of action.²⁹⁷

Now, consider *Davis v. Passman*,²⁹⁸ a case discussed at the outset of this Article that declared causes of action and remedies to be analytically distinct.²⁹⁹ An inspection of footnote 18 is central to the Court’s view:

[C]ause of action is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and *relief* is a question of the various remedies a federal court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the “preconditions” for such equitable remedies.³⁰⁰

This excerpt seems to suggest that the analytically distinct bodies of law were, on one hand, the law controlling whether a cause of action would exist, and on the other hand, the law controlling whether a particular remedy was appropriate in a given case. It is certainly true that these bodies of law are analytically distinct, but it is in no way true that causes of action are analytically distinct from remedies. For centuries, the existence of a cause of action has signaled to plaintiffs that a remedy is available for a particular type of harm. Moreover, a cause of action has been, and remains today, remedy-specific. For example, a plaintiff may have a cause of action for injunctive relief but not damages.³⁰¹

Thus, *Davis* misapprehended the relationship between causes of action and remedies.³⁰² The proper relationship, as typically applied before and

295. *Id.* at 254–55 (quoting 2 FOWLER HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 25.1, at 1299 (1956)).

296. *Id.* at 263–64.

297. *Id.* at 266–67.

298. 442 U.S. 228 (1979).

299. *Id.* at 239.

300. *Id.* at 239 n.18.

301. *Compare* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151 n.2 (2010) (recognizing the general availability of implied private rights of action for injunctive relief against unconstitutional action), *with* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001) (refusing to extend a *Bivens* action to an Eight Amendment claim against a private corporation because plaintiffs normally have alternative remedies).

302. Importantly, the mistake went beyond mere nomenclature, for the Court undertook two separate inquiries in the case: one into whether a cause should exist and another into whether damages are an appropriate form of relief. *Davis*, 442 U.S. at 240–48.

throughout the twentieth century, holds that the cause of action authorizes plaintiffs to pursue a particular remedy but does not exempt them from rules defining the quantity of damages or scope of injunctive relief recoverable.

3. Jurisdiction

During the twentieth century, the cause of action's relationship with jurisdiction, like its relationship with rights and remedies, persisted in some ways and changed in others. What persisted was the view that federal jurisdiction could depend on the existence of a cause of action if Congress dictated that approach. Changes came in relation to the twentieth-century development of general federal question jurisdiction, sovereign immunity, and justiciability. Each of these three areas of jurisdictional law came to rely, in part, on the cause of action for its operation.

By Order of Congress: As described above, federal jurisdiction sometimes depended on the nature of the plaintiff's cause of action. Importantly, the relevance of the cause of action to federal jurisdiction in these circumstances was a product of congressional choice. If Congress wished to expand or restrict federal jurisdiction, it was free to do so by specifying the particular causes of action that federal courts could or could not adjudicate. Congress did this often, though admittedly it did not always use the specific phrase "cause of action." More often, Congress referred to the cause of action in the remedial sense that was prevalent throughout English and American history.

In the 1930s, for example, Congress enacted several statutes that barred the federal courts from hearing causes of action for injunctive relief. In 1932, Congress ordered that "no court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute."³⁰³ Then, in 1934, Congress ordered that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement . . . of an administrative board or commission of a State, or any rate-making body of any political subdivision."³⁰⁴ And finally, in 1937, Congress ordered that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy or collection of any tax . . . of any State."³⁰⁵

303. Norris-LaGuardia Act, ch. 90, § 1, 47 Stat. 70, 70 (1932) (codified as amended at 29 U.S.C. § 101 (2012)).

304. Rate Injunction Act (Johnson Act), ch. 283, 48 Stat. 775 (1934) (codified as amended at 28 U.S.C. § 1342 (2012)).

305. The Tax Injunction Act, ch. 726, 50 Stat. 738 (1937) (codified as amended at 28 U.S.C. § 1341); *see also* Frederick C. Lowinger, Comment, *The Tax Injunction Act and Suits for Monetary Relief*, 46 U. CHI. L. REV. 736, 765 (1979) (discussing congressional intent of § 1341 to "protect the continuity of state and local tax collection from disruptive interference by suits in federal courts").

These statutes all declared that federal courts would have no jurisdiction over causes of action for injunctive relief. In cases implicating these statutes, the Supreme Court adhered to Congress's instructions and treated the statutes as jurisdictional.³⁰⁶ In more modern times, the Court has reaffirmed its commitment to this approach. The Court has developed a "clear statement" test under which courts shall deem a statutory requirement jurisdictional if Congress "clearly states" that it is so.³⁰⁷ If Congress does not clearly state so, however, then "courts . . . treat the restriction as nonjurisdictional" in character.³⁰⁸ Thus, if Congress were to say that federal courts have jurisdiction to hear certain causes of action but not others, then one should fully expect a court to give that statute jurisdictional effect.

General Federal Question Jurisdiction: In 1875, Congress bestowed on the district courts so-called general federal question jurisdiction.³⁰⁹ Prior to that time, federal courts had jurisdiction over some federal questions, but they never had blanket jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States."³¹⁰ On its face, the statute has nothing to do with the cause of action.³¹¹ Yet the Court, in its struggle to interpret "arising under," sometimes drew on the cause of action during the twentieth century.

This first occurred in 1916 in *American Well Works Co. v. Layne and Bowler Co.*³¹² In that case, a plaintiff brought suit for defamation, alleging that the defendant had falsely claimed that he owned the plaintiff's patent.³¹³ Thus, although the case involved questions of federal patent law (i.e., who owned the patent?), the cause of action was simply a state defamation action.³¹⁴ The question before the Court was whether a state law cause of action that required determination of a federal question "arose under" federal law for the purposes of federal question jurisdiction.³¹⁵ The

306. See, e.g., *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, 108–09 (1939) (stating that the Johnson Act, if applicable, would deprive the court of jurisdiction); *S. Pac. Co. v. Gallagher*, 306 U.S. 167, 170 n.3 (1939) (stating that the Tax Injunction Act, if applicable, would deprive the court of jurisdiction); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329 (1938) (holding that the Norris-LaGuardia Act deprived it of jurisdiction).

307. *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012); see also *Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515–16 (2006).

308. *Gonzalez*, 132 S. Ct. at 648 (quoting *Arbaugh*, 546 U.S. at 516).

309. Jurisdiction and Removal Act of 1875, 18 Stat. 470 (codified at 28 U.S.C. § 1331 (2012)).

310. 28 U.S.C. § 1331 (emphasis added).

311. See *id.* ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.")

312. 241 U.S. 257 (1916).

313. *Id.* at 258.

314. *Id.* at 260.

315. *Id.* at 258.

Court, in an opinion by Justice Oliver Wendell Holmes Jr., held that the suit did not arise under federal law.³¹⁶ “A suit arises under the law that creates the cause of action,” Justice Holmes announced,³¹⁷ coining the “Holmes test.”³¹⁸ Because it was state law that created the defamation action, federal question jurisdiction was unavailable.³¹⁹

Soon after *American Well Works*, however, the Court abandoned the Holmes test. Just five years later in *Smith v. Kansas City Title & Trust Co.*,³²⁰ the Court held that federal jurisdiction existed if the plaintiff presented a substantial federal question even if there was no federal cause of action.³²¹ Two decades after *Smith*, in *Bell v. Hood*, the Court reaffirmed its approach in a case where a plaintiff sought an implied cause of action to enforce his constitutional rights.³²² The defendants argued that because a federal cause of action did not yet exist, federal jurisdiction was unavailable.³²³ The Court rejected this argument using the now-familiar phrase: “[T]he failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.”³²⁴ The Court may imply a cause of action, but either way the Court had jurisdiction because the complaint alleged a violation of federal law.³²⁵ In the decades since, the Court has repeatedly reaffirmed this rule, stating that “the nonexistence of a cause of action [is] no proper basis for a jurisdictional dismissal.”³²⁶

The Court’s rejection of the Holmes test explains two aspects of the relationship between the cause of action and jurisdiction discussed in Part I. First, Part I compared the Court’s claim that the “cause of action does not implicate subject-matter jurisdiction” to numerous instances where jurisdiction seemed to depend on the existence of a cause of action.³²⁷ When one understands that the Court made those statements simply to reaffirm the rejection of the Holmes test, one can see that the statements only apply to the *judicial interpretation of 28 U.S.C. § 1331*. Such statements are not a global declaration that the two can never be related, for that is not the context in which the Court made those statements. Thus,

316. *Id.* at 260.

317. *Id.*

318. *E.g.*, Christopher A. Cotropia, *Counterclaims, the Well-Pleaded Complaint, and Federal Jurisdiction*, 33 HOFSTRA L. REV. 1, 6 & n.23 (2004).

319. *Am. Well Works*, 241 U.S. at 260.

320. 255 U.S. 180, 201 (1921).

321. *See id.* at 201.

322. *See* 327 U.S. 678, 684 (1946).

323. *Id.* at 680–81.

324. *Id.* at 682.

325. *Id.* at 685.

326. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 96 (1998).

327. *See supra* Section I.D.

when the Court stated that “the nonexistence of a cause of action [is] no proper basis for a jurisdictional dismissal,”³²⁸ one ought to read that statement as “the nonexistence of a cause of action is no proper basis for a jurisdictional dismissal *under 28 U.S.C. § 1331*.”

Second, Part I considered whether the Court’s application of jurisdictional principles to implied cause of action questions was appropriate.³²⁹ In certain cases, both the Court and individual Justices have argued that because federal courts are courts of limited jurisdiction, they should not imply causes of action because to do so would be to “extend[a federal court’s] authority to embrace a dispute Congress has not assigned it to resolve.”³³⁰ It is apparent now, however, that this approach is essentially the Holmes test in disguise. Under the original Holmes test, federal jurisdiction is unavailable unless a federal cause of action exists.³³¹ Under the modern version of the test, however, an implied cause of action is unavailable unless Congress permits an enlargement of federal jurisdiction.³³² Cases that make this argument are thus out of step with the Court’s long-standing and repeated rejection of the Holmes test.³³³

Sovereign Immunity: Another way in which federal jurisdiction became connected with causes of action in the twentieth century was through sovereign immunity law—law that is understood as jurisdictional.³³⁴ Parties have litigated sovereign immunity in federal courts since the founding of the courts,³³⁵ but its adjudication did not implicate the cause of action until questions of abrogation and waiver became common in the twentieth century.³³⁶

To understand how the cause of action came to inform sovereign immunity law, one needs to understand what exactly a sovereign is immune from. Under sovereign immunity doctrine, sovereigns are not just immune from liability, they are immune from *being sued*.³³⁷ As the

328. *Steel Co.*, 523 U.S. at 96.

329. *See supra* Section I.D.

330. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008); *see also* *Thompson v. Thompson*, 484 U.S. 174, 191 (1988) (Scalia, J., concurring); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 746 (1979) (Powell, J., dissenting).

331. Lumen N. Mulligan, *You Can’t Go Holmes Again*, 107 NW. U. L. REV. 237, 247 (2012).

332. *See id.* at 248–49.

333. *See id.* For further discussion of the Holmes test, *see id.*

334. *Edelman v. Jordan*, 415 U.S. 651, 673–74 (1974).

335. *See, e.g.*, *Osborn v. Bank of the U.S.*, 22 U.S. 738, 764 (1824).

336. *See* John Harrison, *State Sovereign Immunity and Congress’s Enforcement Powers*, 2006 SUP. CT. REV. 353, 358 (“[W]hether Congress could create a cause of action for a private person against a nonconsenting state, seems not to have arisen in the nineteenth century.”); *see also* Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 525–36 (2008) (explaining the rarity of congressional waiver of immunity during the nineteenth century).

337. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 712–13 (1999).

Supreme Court explained in the context of state sovereign immunity, “[t]he Eleventh Amendment does not exist solely in order to ‘preven[t] federal-court judgments that must be paid out of a State’s treasury,’ it also serves to avoid ‘the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.’”³³⁸

If sovereign immunity is violated merely by the filing of a lawsuit, the cause of action naturally becomes relevant because that is what authorizes a plaintiff to file suit. For example, states enjoy sovereign immunity from suit unless Congress, using its enforcement power under the Thirteenth, Fourteenth, or Fifteenth Amendments, abrogates state sovereign immunity.³³⁹ But when Congress abrogates this immunity, it does not typically say “the state of Ohio’s immunity is hereby abrogated.” Instead, Congress creates a cause of action that allows plaintiffs to sue Ohio.³⁴⁰ The creation of the cause of action is what actually accomplishes the abrogation.³⁴¹ Thus, when a federal court attempts to discern whether a state is immune from suit and further attempts to determine whether it has subject-matter jurisdiction over the suit, the court looks for the existence of a valid cause of action.³⁴²

Aside from abrogation, sovereign immunity also became linked with the cause of action through the doctrine of waiver. A state or the federal government is free to waive its immunity from suit.³⁴³ Although waiver could come through a plain statement to that effect (e.g., “The federal government hereby waives its immunity to suit.”), waiver more often occurs through the creation of or consent to causes of action. In *Sossamon v. Texas*,³⁴⁴ for example, the question before the Court was whether the State of Texas had, by accepting federal funds, waived its immunity to suit for damages based on a violation of a federal religious freedom law.³⁴⁵ To

338. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) (alteration in original) (citation omitted).

339. See Jennifer Mason McAward, *The Scope of Congress’s Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77, 78–80 (2010).

340. See Mulligan, *supra* note 331, at 251.

341. *Id.*

342. See, e.g., *United States v. Georgia*, 546 U.S. 151, 159 (2006) (“[I]nsofar as Title II [of the Americans with Disabilities Act] creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.”); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (dismissing the suit because the congressionally created cause of action did not validly abrogate state sovereign immunity); *Emps. of the Dept. of Pub. Health & Welfare of Mo. v. Dept. of Pub. Health & Welfare of Mo.*, 411 U.S. 279, 286–87 (1973) (holding that the cause of action to enforce the Fair Labor Standards Act did not validly abrogate state sovereign immunity).

343. See, e.g., *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33–34 (1992).

344. 131 S. Ct. 1651 (2011).

345. *Id.* at 1657.

determine whether Texas had waived its immunity (and thus whether the Court had jurisdiction), the Court analyzed the federal statute's cause of action.³⁴⁶ The cause of action stated that "[a] person may assert a violation of [the statute] as a claim or defense in a judicial proceeding and obtain appropriate relief against a [state] government."³⁴⁷ Whether Texas waived its immunity to a suit for damages turned on whether the phrase "appropriate relief" embraced a suit for damages.³⁴⁸ The Court held that the phrase did not embrace such a suit and accordingly held that Texas was immune.³⁴⁹ *Sossamon's* analysis is common in waiver cases.³⁵⁰

Thus, in the twentieth century, the cause of action affects jurisdiction in the realm of sovereign immunity. This relationship came into existence not because the Court misinterpreted a particular rule or case but because of the nature of sovereign immunity itself. Sovereign immunity protects governments from suit, not just liability; thus, the tool that authorizes suit (the cause of action) will naturally be relevant.

Statutory Standing: The cause of action also crossed paths with jurisdiction, or what appears to be jurisdiction, in the doctrine of statutory standing. Statutory standing, like all standing doctrines, is a twentieth-century development. Standing doctrine in general arose in the 1940s due in large part to the abolition of writ pleading in 1938.³⁵¹ By abolishing these writs and replacing them all with a single "civil action," the new FRCP appeared to open the door to all manner of suits.³⁵² This was especially concerning as the federal administrative state grew by leaps and bounds. Agencies were promulgating all types of rules and regulations, and it was unclear whether the federal courts would be open to any challenge that could resemble a "civil action."

Statutory standing arrived in 1970 in *Association of Data Processing Service Organizations v. Camp*.³⁵³ In that case, an association challenged the lawfulness of a new federal regulation that allowed banks to sell data processing services to each other and their clients.³⁵⁴ The association, which feared a loss of demand for its members' services, sought review

346. *Id.* at 1658.

347. 42 U.S.C. § 2000cc-2(a) (2012); *cf.* § 2000bb-1(c) (providing judicial relief against a government that, without a compelling interest, substantially burdens a person's religious exercise).

348. *Sossamon*, 131 S. Ct. at 1658-61.

349. *Id.* at 1663.

350. *See, e.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Lane v. Pena*, 518 U.S. 187 (1996); *Parden v. Terminal Ry. of Ala. State Docks Dep't*, 377 U.S. 184 (1964).

351. *See Bellia, supra* note 126, at 797, 817-18.

352. For a history of constitutional standing as it relates to the cause of action, see *id.* at 827-38.

353. 397 U.S. 150 (1970).

354. *Id.* at 151.

using the cause of action provided by Congress in section 702 of the APA.³⁵⁵ Section 702 provided a cause of action to any person “aggrieved by agency action.”³⁵⁶ The association claimed it was aggrieved, but lower courts rejected this assertion.³⁵⁷ Importantly, these courts dismissed the suit for lack of standing.³⁵⁸

The Court reversed.³⁵⁹ The Court considered the case a “question of standing,” though not of the constitutional sort, and held that the plaintiff’s interest was “arguably within the zone of interests to be protected or regulated” by the newly promulgated regulation.³⁶⁰ In finding that the association was “aggrieved” by the new regulation, the Court cited examples from standing law showing permissible interests, such as “aesthetic, conservational, and recreational” interests.³⁶¹ In effect, the Court seemed to be holding that it had jurisdiction to hear the plaintiff’s suit because the plaintiff was aggrieved.³⁶² Yet in other cases, the Court seemed to be holding that it had no jurisdiction to hear a suit if the plaintiff was not “aggrieved.”³⁶³

Outside of the zone of interest test used in APA actions, there are other statutes with broadly worded causes of action that the Court has narrowed through a statutory standing analysis.³⁶⁴ In 2014, the Court considered one such cause of action in *Lexmark International, Inc. v. Static Control Components, Inc.*³⁶⁵ That cause of action arose under the Lanham Act and authorized “any person who believes that he or she is likely to be

355. *Id.* at 153.

356. 5 U.S.C. § 702 (2012).

357. *Data Processing*, 397 U.S. at 151.

358. *Id.*

359. *Id.* at 158.

360. *Id.* at 153.

361. *Id.* at 154 (quoting *Scenic Hudson Pres. Conference v. Fed. Power Comm’n*, 354 F.2d 608, 616 (2d Cir. 1965)).

362. *See, e.g., Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 394–95 (1987) (holding that plaintiff fell within the “zone of interests” and thus was “aggrieved” within the meaning of § 702).

363. *See, e.g., Air Couriers Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 523, 530 (1991) (finding that plaintiff lacked statutory standing).

364. For example, the Clayton Act grants a cause of action to “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.” 15 U.S.C. § 15(a) (2012). In *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983), the Court held that prudential standing considerations required an analysis of “directness or indirectness of the asserted injury,” the plaintiff’s “proxim[ity]” to the alleged violation, and whether the injury is “of a type that Congress sought to redress in providing a private remedy” for Clayton Act violations. *Id.* at 540, 532, 538. Like the Clayton Act, the Lanham Act has an exceedingly broad cause of action. *See* 15 U.S.C. § 1125(a)(1) (providing a cause of action to “any person who believes that he or she is or is likely to be damaged”).

365. 134 S. Ct. 1377, 1385 (2014).

damaged” by false advertising to sue the purveyor of the advertising.³⁶⁶ The precise issue before the Court was the nature of harm that a plaintiff must allege to invoke this cause of action—a so-called statutory standing issue.³⁶⁷ Nonetheless, the Court observed in a footnote that the jurisdictional label sometimes used in statutory standing situations is “misleading” because a “cause of action does not implicate subject matter jurisdiction.”³⁶⁸ Though it is dicta, this observation appears to chart the correct approach in this field. As discussed above, Congress is free to dictate whether a cause of action shall be jurisdictional.³⁶⁹ If Congress “clearly states” that the Lanham Act cause of action is jurisdictional, then the Court ought to give the act that effect.³⁷⁰ But where Congress did not “clearly state[]” that desire, as with this cause of action, “courts should treat the [statutory provision] as nonjurisdictional” in character.³⁷¹

Although *Lexmark* seems to be a step forward, the Court still makes the unfortunate statement that a “cause of action does not implicate subject-matter jurisdiction.”³⁷² As laid out above, this blanket declaration is simply not true. Therefore, in attempting to remove statutory standing from the realm of jurisdiction, the Court has also reinforced the incorrect view that causes of action can never be jurisdictional.

* * *

Thus was the relationship between the cause of action and rights, remedies, and jurisdiction beginning in eighteenth-century English courts and continuing in twentieth-century federal courts. How should the federal cause of action operate in the twenty-first century? This Article now turns to that topic.

III. WHERE WE SHOULD GO

Sometimes peering backward can help point the way forward. This is why, when people misplace their keys, they retrace their steps until they can remember where they had them last. They then return to that point and work forward. This discussion has charted the cause of action from eighteenth-century England to modern day America and is poised to put it back on track. This Article now proceeds to work forward.

366. 15 U.S.C. § 1125(a) (2012).

367. *Lexmark*, 134 S. Ct. at 1385–86.

368. *Id.* at 1387 n.4 (quoting *Verizon Md. Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 642–43 (2002)).

369. *See supra* notes 303–08 and accompanying text.

370. *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006)).

371. *Id.* (quoting *Arbaugh*, 546 U.S. at 516).

372. *Lexmark*, 134 S. Ct. at 1387 n.4 (quoting *Verizon Md. Inc.*, 535 U.S. at 642–43).

One test of the value of legal scholarship is whether it offers any realistic help to judges. It is certainly good to expose failures in the law and call for reform, but unless that call comes with a set of practical rules to fold into existing doctrine, it has faint hope of finding traction in a court. Mindful of that, this Article takes practicality one step further than usual. Instead of recommending that the Supreme Court adopt one approach or another, this Article illustrates how the Court might actually implement that approach in an opinion. In taking this approach, this Author hopes to emphasize that the insights of Part II, though unsettling to current doctrine, can take effect in an orderly, incremental fashion.

The discussion below unfolds in three parts that should, by now, be familiar to the reader. This Part first discusses the cause of action's relationship with rights, followed by its relationship with remedies, and then finally by its relationship with jurisdiction. A summary of the key insights and doctrinal changes precedes the hypothetical opinion in each Section.

A. Rights

The hypothetical opinion below describes the proper relationship between federal rights and causes of action. The opinion emphasizes that the two concepts ought to remain largely distinct, except where courts properly look to rights-creating language as one indication of whether Congress intended that a private cause of action be available. Thus, the Court's analysis in *Wilkie v. Robbins*³⁷³ and *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*³⁷⁴ is erroneous, as is Justice Scalia's argument that Congress may not modify constitutional actions created by the federal courts.³⁷⁵

I

The Petitioner asks us to imply a cause of action to enforce her statutory and constitutional rights. In considering this request, we begin first with a discussion of the relationship between substantive rights, on the one hand, and causes of action enforcing those rights, on the other. This discussion is particularly apt, for our cases could appear to point in different directions on this topic. Compare *Gomez-Perez v. Potter*, 553 U.S. 474, 483 (2008) (declaring causes of action and rights "analytically distinct"), with *Alexander v. Sandoval*, 532 U.S.

373. 551 U.S. 537 (2007).

374. 552 U.S. 148 (2008).

375. *Minnecci v. Pollard*, 132 S. Ct. 617, 626 (2012) (Scalia, J., concurring).

275, 288 (2001) (looking to a statute’s “rights-creating language” for authority to imply a cause of action).

To begin, a right is a claim to be treated in a particular way. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L.J.* 16, 30 (1914). To say that a right exists, however, is not to say how courts should enforce that right. That is a matter for the cause of action. One type of cause of action, the private cause of action, entitles one who has suffered a violation of her rights to bring suit for relief. With the private cause of action, enforcement of federal law occurs through an army of “private attorneys general.” *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269–70 (1992). Another type, the public cause of action, bestows the power to bring suit on a public official. *See, e.g., Nat’l R.R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers*, 414 U.S. 453, 457 (1974) (holding that the statutory right was enforceable only by the U.S. Attorney General).

In determining whether to create a private or public cause of action, we normally defer to Congress’s enforcement choices. This is particularly true in the realm of statutory enforcement, for “when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated.” *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 80 (1982). Even in the realm of constitutional rights, however, where Congress lacks the power to define rights, we still normally defer to Congress’s choices. *Ibid.* at 83. Thus, for example, we have often refused to create a constitutional cause of action out of deference to the enforcement schemes designed by Congress. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988); *Bush v. Lucas*, 462 U.S. 367, 368 (1983). Where Congress has not specified whether private individuals may bring suit to enforce their rights, it falls to the federal courts to determine whether a private cause of action should exist. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008). Our approach to this issue differs according to the nature of the right at stake.

A

In the field of statutory rights, our approach has been to “interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.” *Alexander*, 532 U.S. at 286. Thus, even though a private cause of action may not be explicit, we will nonetheless

imply one if the statute and its surrounding context make clear that Congress intended the statute to be privately enforceable.

Our search for congressional intent focuses in part on the existence of rights-creating language. *Ibid.* at 288; *see also Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 n.13 (1979); *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916). Our presumption has been that where Congress bestows on individuals a personal right to be free from particular conduct, Congress may have intended that affected individuals have the authority to bring suit. *See Rigsby*, 241 U.S. at 39; *Alexander*, 532 U.S. at 294 (Stevens, J., dissenting). Such language is not sufficient on its own to confer a private cause of action, but where it is missing, we can be sure that Congress did *not* intend its statutory enactment to be privately enforceable. *Alexander*, 532 U.S. at 288, 291 (majority opinion).

Our focus on rights-creating language in implied-cause-of-action cases thus forges a bridge between two concepts that we have otherwise treated as analytically distinct. *See Gomez-Perez*, 553 U.S. at 483. To say that a court may imply a cause of action only upon the existence of rights-creating language, however, is not to say that causes of action are in some sense rights themselves or that the cause of action contains the rights.

To be sure, we have not always attended closely to this distinction. In *Stoneridge*, 552 U.S. at 152–53, for example, we considered the “reach of the private right of action [for securities fraud] . . . implied in § 10(b) of the Securities Exchange Act of 1934,” and held that “the implied right of action does not reach the customer/supplier companies because the investors did not rely upon their [fraudulent] statements or representations.” Properly understood, our holding pertained only to the reach of § 10(b) itself, not the implied cause of action supporting § 10(b). That a plaintiff must “rely upon” fraudulent representations is a requirement imposed by § 10(b), *ibid.* at 159, not a requirement attached to the implied cause of action. A cause of action, whether implied or explicit, specifies how a plaintiff shall enforce a right but does not specify the content of that right. We thus had no need in *Stoneridge* to defer to Congress as we often do in implied cause of action cases. *Ibid.* at 164–66 (holding that “[t]he decision to extend the cause of action is for Congress, not for us”). Our task was to interpret § 10(b) according to our traditional rules of statutory interpretation.

Stoneridge demonstrates that courts must be diligent to keep the analysis of rights separate from an analysis of causes of action. Where a case concerns the existence of a right, courts

should not consider whether the putative right will be enforced through a private cause of action. The “reach” of the cause of action simply has no relevance to the reach of the right. In contrast, where a case concerns the existence of an implied cause of action, courts should consider, among other factors, whether the applicable statute contains rights-creating language. *Alexander*, 532 U.S. at 288. Beyond this limited circumstance, however, rights and causes of action are properly understood as analytically distinct. *Gomez-Perez*, 553 U.S. at 483.

B

When asked to imply a constitutional cause of action, our approach depends on the nature of the remedy. Where a plaintiff seeks an injunction, we presume that a cause of action is available unless Congress has ordered otherwise. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 n.2 (2010). Where a plaintiff seeks damages, however, we demand a higher showing. First, we consider whether the plaintiff has access to alternative remedies for the harm alleged. Where such remedies exist, we do not imply a cause of action but instead allow the plaintiff to pursue those remedies. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72–73 (2001) (refusing to imply a cause of action under the Eighth Amendment because plaintiff possessed state law remedies for the harm alleged); *Schweiker*, 487 U.S. at 425–27 (refusing to imply a cause of action for deprivation of due process rights because Congress “provide[d] meaningful safeguards or remedies for the rights of persons situated as respondents were”). This approach is especially appropriate when the alternative remedies have been designed by Congress, for “Congress is in a far better position than a court to evaluate the impact of a new species of litigation.” *Bush*, 462 U.S. at 388–89 (1983).

But even where an alternative remedy is unavailable, we have not automatically created a cause of action. Instead, our practice is to “weigh [the] reasons for and against the creation of a new cause of action, the way common law judges have always done.” *Wilkie v. Robbins*, 551 U.S. 537, 554 (2007). Adopting this perspective, we have refused to imply causes of action where they would upset the ordered nature of military life, *United States v. Stanley*, 483 U.S. 669, 679 (1987), where they would potentially impose enormous liability on the federal government, *FDIC v. Meyer*, 510 U.S. 471, 486 (1994), and where the cause of action would fail to deter individual officers. *See Malesko*, 534 U.S. at 70.

Our common law approach—“weighing [the] reasons for and against the creation of a new cause of action”—is well adapted to the varied and complicated circumstances in which plaintiffs seek causes of action. *E.g.*, *Wilkie*, 551 U.S. at 554. Nonetheless, this approach bears the risk that the right and cause of action will appear to be a single concept, as is the case at common law.

From its earliest days to the present, the common law has amounted to the circumstances in which a court will intervene on behalf of the plaintiff. The law of negligence, for example, holds that if a person suffers injury on account of another’s unreasonable behavior, the plaintiff may recover damages through an action in court. *See* BLACK’S LAW DICTIONARY 1133 (9th ed. 2009). The law of negligence, like all of the common law, thus merges the right (freedom from injury caused by unreasonable behavior) with the cause of action (recovery of damages through a judicial action). When a court creates a cause of action for intentional infliction of emotional distress, for example, the court creates *both* a right to be free from intentionally inflicted distress *and* an avenue for judicial enforcement of that right. *See, e.g.*, *Twyman v. Twyman*, 855 S.W.2d 619, 622–23 (Tex. 1993).

In contrast, when a federal court creates or implies a cause of action, it does not create a new right. Rather, it creates only an avenue for judicial enforcement. Substantive rights are subject to judicial interpretation, but the rules that guide the process of interpretation are distinct from the rules that guide our approach to implied causes of action. Occasionally, we have been less than attentive to the distinction between these two sets of rules.

Wilkie v. Robbins provides an example of such an instance. In *Wilkie*, the owner of a ranch brought suit for damages caused by a petty but persistent campaign of government harassment. *Wilkie*, 551 U.S. at 541. We described the issue presented there as “whether the landowner has . . . a private action for damages,” *ibid.*, but as in *Stoneridge*, we should have separated that issue into its component parts: first, whether such harassment violates the Constitution and second, if it does, whether the plaintiff ought to be able to sue for relief. *See Stoneridge*, 552 U.S. at 152. Had we separated the cause of action question from the rights question, we would have been less likely to apply cause-of-action doctrine to what was essentially a rights question. For example, after finding that the plaintiff’s harassment claim involved “line-drawing difficulties” that would be “endlessly knotty to work out,” we nonetheless

noted—with a quote from a cause of action case—that “Congress is in a far better position than a court to evaluate the impact of a new species of litigation’ against [federal officials].” *Wilkie*, 551 U.S. at 557, 562 (quoting *Bush*, 462 U.S. at 389). By applying a cause of action principle to resolve a rights question, *Wilkie* suggests that as long as Congress can enact a statutory analog to a proposed constitutional right, federal courts ought not to recognize the right at all. Needless to say, this is not our approach to constitutional interpretation and, to the extent *Wilkie* suggests otherwise, we disavow that interpretation.

Another example of confusion between constitutional rights and causes of action can be seen in our recent decision in *Armstrong v. Exceptional Child Center*, 135 S. Ct. 1378 (2015). In that case, we were asked to enforce the federal Constitution’s Supremacy Clause by enjoining a state from disobeying a federal statute. At issue was whether the Supremacy Clause implied a cause of action for injunctive relief. We ultimately decided that our authority to create a cause of action did not derive from the Supremacy Clause but rather from our power as “courts of equity.” *Ibid.* at 1384. In reaching that conclusion, however, we suggested that a judicially created cause of action to enforce the Supremacy Clause would itself become constitutional in nature and “hence congressional unalterable.” *Ibid.* at 1383. That suggestion stems from the belief that constitutional causes of action sit on the same plain as constitutional rights. This is simply not the case, however. While the federal courts are the final arbiters of the scope of constitutional rights, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), they are not (and never have been) the final arbiters of whether constitutional rights are privately enforceable. It is Congress that enjoys that authority—an authority it has not been shy to use before. *See, e.g.*, 28 U.S.C. § 1342 (2012) (barring the federal courts using a judicially implied cause of action to enjoin state tax collection, even where the collection violates constitutional rights.) To the extent our opinion in *Armstrong* suggests that Congress lacks the authority to abrogate constitutional causes of action implied by the courts, we believe that suggestion is unfounded in our precedent.

In sum, although our approach to implying constitutional causes of action sometimes bears a resemblance to the common law process, it is essential that we avoid the common law merger of rights and causes of action. When considering the shape of a particular constitutional right, federal courts should limit their inquiry to the ordinary sources of constitutional meaning and leave to the side any law pertaining to the implied causes of

action. Similarly, when considering whether to imply a cause of action, federal courts ought to consider only the cause-of-action doctrine described above and ignore doctrine pertaining to the content of a particular right.

Having thus explained the distinction between causes of action and rights, we now turn to the specific questions presented in this case.

* * *

B. Remedies

The hypothetical opinion below emphasizes that causes of action and remedies are related in that the cause of action *authorizes* the plaintiff to pursue a particular remedy. The two concepts are not related, however, when a court must determine the appropriate quantity of damages or scope of injunctive relief in a given case. Therefore, the Supreme Court should disavow the contrary approach followed in *Davis v. Passman*³⁷⁶ and *Franklin v. Gwinnett County Public Schools*.³⁷⁷

I

Petitioner filed a suit for damages caused by a violation of a federal statutory right. The district court dismissed her suit, and the Court of Appeals affirmed. The Court of Appeals reasoned that (1) Congress did not authorize a private cause of action for damages, and (2) a court may not imply a private cause under the rules established in *Alexander v. Sandoval*, 532 U.S. 275 (2001). Petitioner claims that the Court of Appeals erred because a cause of action already exists (albeit one for injunctive relief), and a federal court has the power to “order any appropriate relief.” *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992).

Petitioner’s argument rests on a distinction between private causes of action and remedies—a distinction that has mixed support in our case law. Compare *Davis v. Passman*, 442 U.S. 228, 239 (1979) (stating that the cause of action is “analytically distinct” from the remedy), with *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991) (holding that the existence of a private cause of action turns on “congressional intent to provide a private remedy”). Given this confusion, we begin with a general discussion of the relationship between private causes

376. 442 U.S. 228, 234 (1979).

377. 503 U.S. 60, 65–66 (1992).

of action and remedies, and then we discuss the plaintiff's specific arguments.

A

A private cause of action is, at its core, a tool for enforcing federal statutory or constitutional rights. The existence of a cause of action enables a private person, rather than a government official, who has suffered a violation of her federal rights to bring suit and obtain relief from the wrongdoer. By bestowing on individual victims the power to bring suit, the private cause of action, in effect, turns ordinary citizens into "private attorneys general." *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269–70 (1992). Victims of violations of federal law will prosecute the wrongdoers in civil actions out of self-interest. *See ibid.* Of course, the private cause of action would have little effect if the action did not hold out the promise of monetary or injunctive relief. *See Davis*, 442 U.S. at 244–45; *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396–97 (1971). We would not expect that a citizen would bring suit or that a defendant would modify his conduct if a judicial action cannot effect a change in the parties' status quo. *See Davis*, 442 U.S. at 242.

Understood in this way, it becomes plain that private causes of action signal the availability of a remedy. *Ibid.* at 245. When Congress or this Court creates a cause of action, the effect is to grant victims a personal remedy for their injury. *Ibid.* This explains why we so often refer to causes of action as remedies in and of themselves. We routinely refer to the cause of action codified at 42 U.S.C. § 1983 as a "federal remedy," e.g., *Mitchum v. Foster*, 407 U.S. 225, 239 (1972), or "the § 1983 remedy," e.g., *Hudson v. Michigan*, 547 U.S. 586, 597 (2006). Likewise, the cause of action created in *Bivens*, 403 U.S. at 389, is commonly known as a "*Bivens* remedy." E.g., *Minneci v. Pollard*, 132 S. Ct. 617, 624 (2012); *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). And our approach to implied statutory causes of action focuses on "congressional intent to provide a private remedy." *Va. Bankshares*, 501 U.S. at 1102 (emphasis added).

The connection between causes of action and remedies is also evident in the fact that causes of action are often *remedy-specific*. Thus, a plaintiff may have a cause of action for injunctive relief but not for damages. *See* 5 U.S.C. § 702 (2012) (providing a cause of action for relief "other than money damages"); *Edelman v. Jordan*, 415 U.S. 651, 665 (1974) (refusing to extend the action for injunctive relief approved in *Ex Parte Young*, 209 U.S. 123 (1908), to actions for monetary relief). Alternatively, a plaintiff

may have a cause of action for injunctive relief under one rule and have a cause of action for monetary relief under an entirely different rule. *Compare Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 n.2 (2010) (stating that a plaintiff seeking a cause of action for injunctive relief has a “right to relief as a general matter”), *with Minneci*, 132 S. Ct. at 621, 624 (stating that a plaintiff seeking a cause of action for monetary relief must show that he has no “alternative remedies” and that no “special factors counsel[] hesitation”).

The close connection between causes of action and remedies does not mean that the cause of action inquiry must include every remedial question presented in a case. There is a large body of law that controls not whether a plaintiff can sue for relief but instead what shape that relief may take if the plaintiff’s suit is successful. Therefore, a plaintiff may have a cause of action for injunctive relief but fail to obtain it because, in keeping with the ordinary rules of injunctive relief, a compelling public interest overrides the plaintiff’s private interest. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70, 89, 100 (1995) (holding that an injunction ordering an increase in teacher salaries was not a “proper means” for remedying racial segregation in schools). Similarly, a plaintiff may have a cause of action for damages but fail to obtain a monetary award because he has not proven his injury to the satisfaction of the court. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 262–63 (1978) (rejecting “presumed damages” in the context of procedural due process violations). When a plaintiff fails to obtain a remedy for one of these reasons, we do not say that the plaintiff lacks a cause of action; we simply say that the plaintiff, who is before the court pursuant to a valid cause of action, has failed to prove that the facts of his case justify the specific remedy he seeks. *See, e.g., ibid.* at 265.

In sum, a private cause of action is related to remedies in that it authorizes a plaintiff to pursue a particular remedy. Without a cause of action, persons injured by a violation of federal law have no remedy. An authorization to pursue relief, however, does not guarantee that the relief sought will eventually issue. Courts properly refuse relief where rules specific to the nature and form of remedies bar relief in a particular case.

B

Against this explanation, we now consider the plaintiff’s specific argument in this case. The plaintiff claims she is entitled to damages in this case under the authority of *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992).

Franklin involved a claim for money damages by a student who suffered sexual harassment in violation of Title IX of the Education Amendments of 1972. *Ibid.* at 62–63 (citing 20 U.S.C. §§ 1681–1688 (1988)). In a prior case, *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979), we held that victims of Title IX violations were entitled to a private cause of action. *Ibid.* at 709. We did not specify in *Cannon*, however, the particular remedies available under that cause of action. *See ibid.* at 717. *Franklin* thus presented the question of “what remedies are available in a suit brought pursuant” to the Title IX cause of action. *Franklin*, 503 U.S. at 65.

In considering whether the plaintiff in *Franklin* was entitled to damages, we declared that “the question of what remedies are available under a statute that provides a private right of action is ‘analytically distinct’ from the issue of whether such a right [of action] exists in the first place.” *Ibid.* at 65–66 (quoting *Davis*, 442 U.S. at 239). The existence of a cause of action to enforce a federal statute, we explained, depended on “whether Congress intended to create a right of action.” *Ibid.* at 66. The availability of remedies, however, was a different matter. Once the Court determines that a cause of action exists, the Court “presume[s] the availability of all appropriate remedies unless Congress has expressly indicated otherwise.” *Ibid.* Applying this framework, we held that damages were an appropriate remedy, *ibid.* at 76, that Congress had not expressly barred. *Ibid.* at 72–73.

The result in *Franklin*—that a plaintiff who has suffered a Title IX violation may bring a damages action, *ibid.* at 76—still stands on firm ground today. The framework used to reach that result, however, is no longer good law, if it ever was. The analytical error in *Franklin* lay in its distinction between causes of action and remedies. As we have explained above, a cause of action is not, in the words of the *Franklin* Court, “analytically distinct” from the remedy. *See ibid.* at 65–66. A cause of action is an authorization to pursue a remedy. *See, e.g., Bell v. Hood*, 327 U.S. 678, 684 (1946). A cause of action for injunctive relief does not authorize a suit for damages, and a cause of action for damages does not authorize a suit for injunctive relief. To pursue the remedy of damages, therefore, the plaintiff in *Franklin* had to locate not just a cause of action but a cause of action *for damages*.

Whether such a cause of action exists is a matter of “congressional intent.” *Va. Bankshares*, 501 U.S. at 1102. Where that intent is absent, we do not “presume” that we may issue “all appropriate remedies,” which would be tantamount to presuming

that we can imply a cause of action whenever we see fit. *Contra Franklin*, 503 U.S. at 66. Instead, we presume the opposite—that “courts may not create [a cause of action], no matter how desirable that might be as a policy matter, or how compatible with the statute.” *Alexander*, 532 U.S. at 286–87. This is not to say that federal courts have no discretion in their administration of remedies. For example, we often say that federal courts have “equitable discretion” to craft injunctions as appropriate in a given case. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982). This discretion, however, pertains only the terms of the injunction that may issue, not whether to create a cause of action for injunctive relief. It is thus not surprising that in cases where we have discussed our equitable discretion, it has been clear that a cause of action exists. See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391–92 (2006); *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 541–45 (1987). To repeat, the existence *vel non* of that cause of action is not simply a matter of judicial discretion.

In sum, the plaintiff may pursue a damages action for her statutory violation only if a cause of action for damages exists. That cause of action must exist, if at all, in the text of the statute or in Congress’s intent to create the cause of action. Judicial discretion over remedies does not include the discretion to authorize causes of action. With that, we turn to whether a cause of action should exist in this particular case.

* * *

C. Jurisdiction

This Section emphasizes that the cause of action should only impact subject-matter jurisdiction where Congress dictates that result or in cases where the sovereign immunity of the defendant is at stake. It follows from this that the doctrine of statutory standing ought not be considered jurisdictional, and that the Court’s use of jurisdictional principles to reject an implied cause of action in cases like *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*³⁷⁸ is erroneous.

I

This case concerns the decision of the Department of Interior (DOI) to phase out logging in the Tongass National Forest

378. 552 U.S. 148 (2008).

(Forest) in Alaska. The plaintiff operates a restaurant adjacent to the Forest and stands to suffer significant financial losses if the DOI follows through with its planned phase-out. The plaintiff filed suit against the DOI arguing that the phase-out plan violates federal law. She claims a cause of action under 5 U.S.C. § 702, which permits persons who are “aggrieved by agency action” to bring suit against federal agencies for injunctive relief.

The district court held that the plaintiff lacked a cause of action and it dismissed her suit on the merits. The Court of Appeals affirmed. The plaintiff then sought our review, and we granted certiorari to clarify the circumstances in which federal causes of action implicate a court’s subject-matter jurisdiction. Compare *Bell v. Hood*, 327 U.S. 678, 682 (1946) (stating that whether a plaintiff has a “cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction”), with *Stoneridge Investment Partners, LLC v. Scientific-Atlantic, Inc.*, 552 U.S. 148, 164 (2008) (stating that judicial “recognition of an implied private right of action ‘necessarily extends . . . [t]he jurisdiction of the federal courts’” (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 746–47 (1979) (Powell, J., dissenting))).

We have frequently said that the “cause of action does not implicate subject-matter jurisdiction,” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998), but this is not strictly true. There are two circumstances in which the existence of a federal cause of action, or lack thereof, affects the subject-matter jurisdiction of a federal court. These include circumstances where (1) Congress has affixed a jurisdictional label to a cause of action or (2) sovereign immunity has either been waived or abrogated. We consider each of these circumstances in turn.

A

“Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). As such, they possess “only that power authorized by Constitution and statute.” *Ibid.* Under this arrangement, Congress may place within the lower federal courts any case enumerated within Article III of the Constitution. See *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448 (1850). Though Congress may bestow the district courts with such jurisdiction, it is not obligated to do so. *Ibid.* at 449. Thus, Congress may impose limits on federal jurisdiction not enumerated in Article III. Congress has seen fit to do this, for example, by limiting diversity jurisdiction to cases valued over \$75,000. 28 U.S.C. § 1332 (2012). Article III does not make

federal jurisdiction contingent on a particular amount in controversy, but neither does it forbid Congress from imposing that requirement on its own. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514–15 (2006).

Just as Congress can make the amount-in-controversy requirement jurisdictional, it is free to make federal causes of action jurisdictional as well. To determine whether Congress has made an element of a claim jurisdictional, we have adopted a “clear statement rule.” Under that rule, if Congress “clearly states” that a particular statutory requirement is jurisdictional, then courts should treat it as jurisdictional. *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012). In contrast, if Congress has not “clearly state[d]” its desire, “courts should treat the restriction as nonjurisdictional” in character. *Ibid.*; see also *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011).

We have applied this clear statement rule in the context of a cause of action. In 1932, Congress ordered that “[n]o court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute.” Norris–LaGuardia Act, ch. 90, § 1, 47 Stat. 70, 70 (1932) (codified at 29 U.S.C. § 101 (2012)). Several years later, a plaintiff involved in a labor dispute brought suit using a cause of action for injunctive relief. *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 325 (1938). In that suit, we held that the jurisdictional nature of Congress’s order was clear and that we accordingly had no jurisdiction. *Ibid.* at 329–30.

Consider another, much more familiar jurisdictional statement from Congress: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (2012). Nothing in that statute explicitly mentions causes of action, and if the clear statement rule is to mean anything, then the nonexistence of a cause of action ought to have no effect on the existence of jurisdiction under § 1331. Indeed, our cases bear that out. As we have often said, “[T]he nonexistence of a cause of action [is] no proper basis for a jurisdictional dismissal.” *Steel Co.*, 523 U.S. at 96. It is important to note in this context that such statements pertain only to the scope of jurisdiction under § 1331. As our discussion of Congress’s prerogative to make causes of action jurisdictional illustrates, it would be improper to

state, as a global matter, that causes of action are *always* irrelevant to jurisdiction.³⁷⁹

B

Even if Congress has not “clearly state[d]” that a cause of action is jurisdictional, *Gonzalez*, 132 S. Ct. at 648, there is one particular circumstance in which the existence *vel non* of a cause of action will have jurisdictional consequences. That circumstance is where the defendant may be entitled to the defense of sovereign immunity. Sovereign immunity is jurisdictional; if a defendant is entitled to the defense of sovereign immunity, the court must dismiss the suit for lack of jurisdiction. *See Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (stating that sovereign immunity “partakes of the nature of a jurisdictional bar”).

Unlike most defenses, however, sovereign immunity not only protects states and the federal government from liability, it also protects them from “the indignity of subjecting [them] to the coercive process of judicial tribunals at the instance of private parties.” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). Thus, the very act of suing a state or the federal government implicates sovereign immunity.

Depending on the sovereign, sovereign immunity can be waived or abrogated. State governments can waive their sovereign immunity and often do so in exchange for federal financial assistance. *See Sossamon v. Texas*, 131 S. Ct. 1651, 1656, 1658 (2011). The federal government can also waive its immunity from suit. *See Lane v. Pena*, 518 U.S. 187, 192 (1996). Finally, Congress is entitled to abrogate state sovereign immunity in certain circumstances. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 447–48 (1976).

The cause of action is relevant to sovereign immunity because the waiver or abrogation of immunity often occurs through the creation of a cause of action. When a state government waives its

379. This insight calls into question an approach taken in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008). There, we suggested that a federal court ought not to imply a cause of action because doing so would “extend[a federal court’s] authority to embrace a dispute Congress has not assigned it to resolve.” *Ibid.* The implication is that jurisdiction either exists or does not according to whether a cause of action exists. This is a dubious application of our approach in this field. Federal courts indeed ought to be hesitant to imply causes of action, *see Alexander v. Sandoval*, 532 U.S. 275, 287, 293 (2001), but that hesitancy ought not to be based on, or informed by, jurisdictional doctrine.

immunity, it does so by agreeing to a cause of action created by Congress; when the federal government waives its immunity, it does so by creating a cause of action against itself; and when Congress abrogates state sovereign immunity, it does so by creating a cause of action imposing liability on a state.

Thus, to determine whether a governmental defendant is entitled to sovereign immunity, we must consider the scope of the cause of action created. If the plaintiff can fit her case within the valid cause of action, then the defendant will have waived or abrogated his immunity with regard to *that plaintiff*. If the plaintiff cannot fit her case within a cause of action aimed at waiver or abrogation, then our duty is to dismiss the suit for lack of jurisdiction. Therefore, to the degree that a cause of action waives or abrogates sovereign immunity, the cause of action has jurisdictional implications.

II

Given this introductory discussion, it is possible to discern whether the plaintiff's cause of action, 5 U.S.C. § 702, is jurisdictional. Our first inquiry is whether Congress has "clearly state[d]" that our jurisdiction depends on the existence of the cause of action. *See Gonzalez*, 132 S. Ct. at 648. Section 702 states, in relevant part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States

5 U.S.C. § 702 (2012).

Nowhere in this statute is there any indication, by use of the word "jurisdiction" or otherwise, that Congress meant to make district court jurisdiction contingent on a plaintiff's well-pleaded cause of action. That is, nowhere has Congress indicated that the plaintiff must allege and prove his status as "a person suffering legal wrong . . . or adversely affected or aggrieved by agency action" for the district court to obtain jurisdiction over the suit. *See ibid.* Just last term, we noted in *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), that

the jurisdictional label is “misleading” when applied to a broadly worded cause of action found in the Lanham Act. *Ibid.* at 1387 n.4; *see also* 15 U.S.C. § 1125(a) (2012) (granting a cause of action to “any person who believes that he or she is likely to be damaged” by the defendant’s conduct). Nothing in the Lanham Act cause of action hinted at its jurisdictional nature; thus, there was no clear statement that the cause of action was jurisdictional. *Gonzalez*, 132 S. Ct. at 648. Consistent with that decision and our general approach in this field, we find that a cause of action created by 5 U.S.C. § 702 is not jurisdictional according to any “clearly state[d]” requirement.

Congress’s clear statement is only one part of our analysis, however. We must also consider whether the cause of action was created to waive or abrogate the sovereign immunity of the defendant. *See Edelman*, 415 U.S. at 672. Where that is the case and we find that the plaintiff cannot fit her case within the cause of action, we must dismiss the suit for failure of jurisdiction because the plaintiff is suing a sovereign that is immune, and as with every such case, we have no jurisdiction to resolve that dispute. *See Seminole Tribe of Fla.*, 517 U.S. at 72–73.

In this case, it is clear to us that Congress created this cause of action in an effort to waive its sovereign immunity. Just after authorizing suit against the federal government, Congress made clear that the suit “shall not be dismissed . . . on the ground that it is against the United States.” 5 U.S.C. § 702 (2012). Although this provision does not mention the phrase “sovereign immunity,” it is plain from the statute and circumstances surrounding its enactment that its purpose was a waiver of sovereign immunity. In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), for example, we noted that “it is undisputed” that Congress’s enactment of “§ 702 was intended to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity.” *Ibid.* at 891–92; *see also Lane*, 518 U.S. at 196 (noting that the grant of a cause of action to “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action” amounts to a waiver of sovereign immunity).

Therefore, we hold that the district court’s jurisdiction over this case depended on the cause of action alleged. While Congress did not render the cause of action jurisdictional by a clear statement, the cause of action is an effort to waive sovereign immunity. Thus, if the plaintiff cannot demonstrate that she is actually “aggrieved” within the meaning of § 702, her suit will fall outside Congress’s waiver of immunity, and this

Court must dismiss her suit for lack of jurisdiction. We now turn to the question of whether the plaintiff is, in fact, “aggrieved” by the agency action in this case.

* * *

CONCLUSION

The phrase “cause of action” can be heard every day in courthouses and classrooms or read in countless judicial opinions and academic articles. Yet it means different things to different people. Even more troubling, it sometimes means different things within the same court. This Article represents an effort to bring some consistency to the understanding of the federal cause of action. It proposes that the federal cause of action be differentiated from rights except where a court must determine whether to imply a cause of action from a statute, in which case the existence of a statutory right becomes relevant. With regard to remedies, it proposes that causes of action be understood as authorizations to pursue a particular remedy but not as exemptions from remedial doctrine controlling the quantity of damages or scope of injunctive relief. Finally, with regard to jurisdiction, it proposes that causes of action have no jurisdictional consequences except where Congress specifically intends that result or where the defendant may be subject to sovereign immunity.

