2010

Federal Courts Not Federal Tribunals

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Printed in U.S.A.
Vol. 104, No. 1

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INTRODUCTION

"Raising up causes of action where a statute has not created them," Justice Scalia wrote for the Court in *Alexander v. Sandoval*, "may be a proper function for common-law courts, but not for federal tribunals."[1] In contrasting the term "tribunal" with "court," Justice Scalia unearths the notion that the third branch of the federal government is jurisdictionally barred from inferring causes of action from federal statutes, while state common

[*] Associate Professor, Michigan State University College of Law. I owe a great deal of thanks to many people. First, research for this paper was generously supported by the Michigan State University College of Law's research stipend program. In addition, several of the outstanding research librarians at the Michigan State University College of Law, as well as numerous student research assistants who work under their direction, slaved over research requests on my behalf, including: Barbara Bean, Jane Edwards, Hildur Hanna, and Janet Hedin. Many others have generously reviewed this work and offered insightful comments, including: Michael Allen, Brian Kalt, Barbara O'Brien, John Preis, Phillip Pucillo, Geoff Rapp, Lee Strang, and my wife, Emily Mulligan. I also received numerous helpful comments from the participants at the Indiana University Maurer School of Law's Big Ten Untenured Faculty Conference, the University of Toledo College of Law's Workshop Series, the Loyola University Chicago School of Law's Colloquia, and the Michigan State University College of Law Faculty Colloquia. All remaining errors, of course, are my own.

[1] 532 U.S. 275, 287 (2001) (citing Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment)). The Court has flirted with this "tribunals" position at other times as well. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision [i.e., causes of action].").

law courts are not. In what follows, I argue that such a jurisdictional bar lacks both statutory and constitutional foundations; to echo Justice Scalia's phrase, we have a system of federal courts, not federal tribunals.

The target of Justice Scalia's ire is the practice of inferring causes of action from federal statutory rights. A statute creates a right when, by clear language, it fashions mandatory, judicially enforceable obligations.[2] A cause of action, by contrast, is the further determination that a person falls into a class of litigants empowered to vindicate a specified right in court.[3] Of course, Congress often couples explicit statutory causes of action with federal statutory rights. But persons may hold federal rights without being authorized to enforce those rights in a federal court.[4] For example, some statutes expressly vest this ability to vindicate rights only with an administrative agency, without granting the right-holder a cause of action.[5] Or, as will be my focus, some statutes create rights without explicitly addressing the cause of action question at all.[6]

For almost a century,[7] the federal courts reviewed such statutory rights—those lacking explicit causes of action—to determine whether they

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[2] *See* Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 431–32 (1987) (holding that to be a "right" an obligation must not be vague or "beyond the competence of the judiciary to enforce"); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 (1980) (holding that to be a "right" an obligation must be mandatory as opposed to merely hortatory); *see also* Davis v. Passman, 442 U.S. 228, 241 (1979) (defining "right"). This tripartite test (viz., mandatory obligation, clear statement, and enforceability) remains the standard by which the Court determines when a federal right exists. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002); Blessing v. Freestone, 520 U.S. 329, 341–42 (1997).

[3] *See Passman*, 442 U.S. at 239 n.18 ("[A] cause 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.").

[4] *See* Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 84–104 (2001) [hereinafter Zeigler, *Integrated Approach*] (criticizing this jurisprudential move).

[5] *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 power to vindicate rights at issue rested with the Attorney General). *See also Passman*, 442 U.S. at 241 ("For example, statutory rights and obligations are often embedded in complex regulatory schemes, so that if they are not enforced through private causes of action, they may nevertheless be enforced through alternative mechanisms, such as criminal prosecutions . . . or other public causes of actions." (citing Cort v. Ash, 423 U.S. 812 (1975))).

[6] *Cf.* Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 261–62 (1951) (Frankfurter, J., dissenting) ("A duty declared by Congress does not evaporate for want of a formulated sanction. When Congress has left the matter at large for judicial determination, our function is to decide what remedies are appropriate in the light of the statutory language and purpose and of the traditional modes by which courts compel performance of legal obligations . . . . If civil liability is appropriate to effectuate the purposes of a statute, courts are not denied this traditional remedy because it is not specifically authorized." (internal quotation marks omitted)).

[7] Several Supreme Court cases cite *Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 33 (1916), as the first implied cause of action decision. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 374 (1982); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 26 & n.2 (1979) (White, J., dissenting); Cannon v. Univ. of Chi., 441 U.S. 677, 689 (1979). But some justices, including Justice Brennan, have cited cases as far back as *Marbury v. Madison*. *See* Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 742 (1989) (Brennan, J., dissenting).

could infer a cause of action from the statute in question. The United States Reporter overflows with cases in which the Court has protected the rights of individuals in just this manner. These cases touch upon many of the most pressing issues facing the nation finding implied causes of action for: racial minorities suffering from retaliatory discrimination;[8] persons disenfranchised;[9] persons defrauded in securities transactions;[10] women suffering discrimination in higher education;[11] companies bearing the costs of environmental remediation caused by third parties;[12] and employees injured while on the job.[13] This is not to say that the Court inferred a cause of ac-

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[8] CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951, 1958 (2008) (holding that 42 U.S.C. § 1981 allows an implied cause of action for retaliatory discrimination). The Court has protected the rights of racial minorities via inferred actions in other contexts as well. *See, e.g.*, *Jett*, 491 U.S. at 742 (Brennan, J., dissenting) (recognizing that for 100 years after the enactment of Section 1 of the 1866 Civil Rights Act, the Court often recognized an implied cause of action where a statute creates substantive rights without specifying a remedy); Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582, 594–95 (1983) (plurality opinion) (recognizing an implied cause of action under Title VI of the Civil Rights Act of 1964).

[9] Morse v. Republican Party of Va., 517 U.S. 186, 231–32 (1996) (finding a private cause of action to enforce a Voting Rights Act provision that prohibits a poll tax).

[10] Herman & MacLean v. Huddleston, 459 U.S. 375, 380–81 (1983) (recognizing an implied cause of action under Section 10(b) of the Securities Exchange Act). The Court has protected the rights of investors via inferred actions in other contexts as well. *See, e.g.*, Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341 (2005) (recognizing an implied cause of action for damages based on the Securities Exchange Act, as well as from SEC rules); Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286, 297–98 (1993) (finding an implied right of contribution under SEC Rule 10b-5); Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1090–91 (1991) (recognizing an implied cause of action under Securities Exchange Act Section 10(b)); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 361 (1991) (noting explicit congressional recognition that the Securities Exchange Act could have implied causes of action); Pinter v. Dahl, 486 U.S. 622, 635 (1988) (recognizing an implied cause of action in securities litigation); Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 108 (1987) (concluding that nationwide service of process was not implicit in the Commodity Exchange Act, even though that Act did give rise to an implied cause of action); *Curran*, 456 U.S. at 395 (recognizing an implied cause of action for damages under the Commodities Exchange Act for fraud); J.I. Case Co. v. Borak, 377 U.S. 426, 434 (1964) (finding an inferred cause of action for violations of the Securities Exchange Act Section 14(a)).

[11] *Cannon*, 441 U.S. at 709 (recognizing an implied cause of action under Section 901(a) of Title IX of the Education Amendments of 1972). The Court has protected the rights of women via inferred actions in other contexts as well. *See, e.g.*, Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 632–33 (1999) (finding a limited implied cause of action under Title IX); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 285 (1998) (recognizing a limited implied cause of action under Title IX, but not applying it because the school district had no notice of the teacher's sexual harassment); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 70–73 (1992) (recognizing that Congress's revision of Title IX, which it undertook after *Cannon*, showed that Congress did not intend to limit the implied remedies available in Title IX).

[12] Key Tronic Corp. v. United States, 511 U.S. 809, 816–17 (finding an implied remedy in Comprehensive Environmental Response, Compensation and Liability Act Section 107).

[13] Tex. & Pac. R. Co. v. Rigsby, 241 U.S. 33, 39–40 (1916) (inferring a cause of action under Section 2 of the Safety Appliance Act of 1910). The Court has protected the rights of workers via inferred actions in other contexts as well. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171, 183 (1967) (allowing an in-

tion in every case, but this recitation highlights the critical remedial role that inferred cause of action doctrine has played.[14] Recently, however, the Court has significantly restricted the practice of inferring causes of action from statutes.[15]

Given the pressing policy issues at stake and the Court's shifting doctrinal approaches, implied causes of action have proven fertile ground for scholars. This body of literature has almost exclusively viewed the issue as one of statutory construction,[16] separation of powers,[17] federal common

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ferred cause of action on the part of a union member against his union, where the union had a duty to fairly represent its members and allegedly failed to do so); Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 204–07 (1944) (finding an implied cause of action in the Railway Labor Act); Tex. & New Orleans R.R. Co. v. Bhd. of S.S. & Ry. Clerks, 281 U.S. 548, 569–70 (1930) (inferring a cause of action under the Railway Labor Act of 1926).

[14] Considering just the last twenty years, this provides a substantial set of cases. *See, e.g.*, Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148, 164–66 (2008) (refusing to extend an implied cause of action in Securities Exchange Act Section 10(b)); Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 171 (2004) (failing to find an implied cause of action for contribution under the Comprehensive Environmental Response, Compensation and Liability Act when the plaintiff had yet to be sued); Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (refusing to infer a disparate impact cause of action from Title VI of the Civil Rights Act of 1964); Blessing v. Freestone, 520 U.S. 329, 348 (1997) (finding no implied cause of action in Title IV-D); Lane v. Pena, 518 U.S. 187, 197–99 (1996) (failing to find an implied cause of action that expands the scope of liability for monetary damages to federal agencies based on the "equalization provision" of Section 1003 of the Rehabilitation Act Amendments of 1986); Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191 (1994) (finding no implied cause of action for aiding and abetting under Securities Exchange Act Section 10(b)); Mertens v. Hewitt Assoc., 508 U.S. 248, 262–63 (1993) (finding no implied cause of action for monetary damages under the Employee Retirement Income Security Act of 1974, where the Act explicitly authorized equitable relief); Suter v. Artist M., 503 U.S. 347, 363–64 (1992) (holding that the Adoption Assistance and Child Welfare Act does not create an implied cause of action); Karahalios v. Nat'l Fed'n of Fed. Employees, Local 1263, 489 U.S. 527, 535–37 (1989) (failing to find an implied private cause of action in the Civil Service Reform Act because that Act gives the Federal Labor Relations Authority and its general counsel exclusive enforcement authority); Thompson v. Thompson, 484 U.S. 174, 187 (1988) (finding no implied cause of action under the Parental Kidnapping Prevention Act).

[15] *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (stating that the Court has "abandoned that power to invent 'implications' in the statutory field").

[16] *See, e.g.*, Robert H.A. Ashford, *Implied Causes of Action Under Federal Laws: Calling the Court Back to* Borak, 79 NW. U. L. REV. 227 (1984) (arguing, inter alia, on statutory construction grounds for more readily inferring causes of action); Richard Creswell, *The Separation of Powers Implications of Implied Rights of Action*, 34 MERCER L. REV. 973 (1983) (predicting the Court's later focus on congressional intent as the lodestar for inferring causes of action); Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981) (similar); Thomas A. Lambert, *The Case Against Private Disparate Impact Suits*, 34 GA. L. REV. 1155 (2000) (arguing against the inference of causes of action on statutory construction, policy, and constitutional grounds); Bradford C. Mank, *Are Anti-Retaliation Regulations in Title VI or Title IX Enforceable in a Private Right of Action: Does* Sandoval *or* Sullivan *Control This Question?*, 35 SETON HALL L. REV. 47 (2004) (arguing that both Titles implicitly allow for private causes of action); Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815 (2002) [hereinafter Mank, *Legal Context*] (arguing that the determination of whether to infer a cause of action should be made in the light of judicial doctrine extant at the time the statute was passed).

law,[18] or judicial prudence more generally.[19] Recently, a new argument against the propriety of inferring causes of action has come fully to the fore, contending that "the Judiciary's recognition of an implied private right of action necessarily extends" the jurisdiction of the federal courts.[20] Borrowing Justice Scalia's phrase, I coin this the "tribunals position" as a shorthand for the view that the federal judiciary is jurisdictionally barred from inferring causes of action.[21]

Sandoval's "tribunals" metaphor has not gone without notice, however. Professor Daniel Metlzer, for example, places it alongside other nonconstitutional cases in which the Court shirked its traditional duty to create a

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[17] *See, e.g.*, George D. Brown, *Of Activism and* Erie*—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617, 631 (1984) (making an analogy to the *Erie* doctrine to support the Court's current restrictive approach to inferring causes of action); James D. Gordon III, *Acorns and Oaks: Implied Rights of Action Under the Securities Acts*, 10 STAN. J.L. BUS. & FIN. 62, 66–67 (2004) (arguing that inferring causes of action from the Securities Exchange Act is unconstitutional).

[18] *See, e.g.*, Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895 (1996) (arguing that the Court has inappropriately restricted federal common law at the expense of federal rights holders); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985) (arguing that inferring a cause of action is a species of federal common law and looking to federalism and separation of powers as limits to the same); John E. Noyes, *Implied Rights of Action and the Use and Misuse of Precedent*, 56 U. CIN. L. REV. 145 (1987) (arguing that inferred causes of action are better construed as common law modified by statutory law).

[19] *See, e.g.*, H. Miles Foy, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501 (1986) (arguing from a historical perspective that federal courts should presume that causes of action are to be inferred); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 864–65 (1996) (arguing against congressional intent as the sole focus in determinations of whether to infer a cause of action); Zeigler, *Integrated Approach*, *supra* note 4, at 68 (criticizing the Court's treatment of rights, rights of action, and remedies as separate inquiries); Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 666 (1987) [hereinafter Zeigler, *Rights Require*] (arguing that the existence of a federal right is sufficient to infer a cause of action to vindicate the right).

[20] Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 164–65 (2008) (internal citations and quotation marks omitted).

[21] As I hope to make clear, by "tribunals" I mean only an adjudicatory system that is jurisdictionally prohibited from inferring causes of action. I use the label merely because it is catchy and maps onto a pithy quote from the *Sandoval* opinion. By use of the term, I do not mean to imply any further limitations upon the powers of the federal judiciary nor do I mean to reference non-Article III courts or the like. *Cf.* James Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646–47 (2004) (employing the term "tribunal" to mean non-Article III courts). My use of the term tribunal is more closely linked to Professor Strauss's usage as a shorthand for *Sandoval* and related cases. *See* Peter L. Strauss, *Courts or Tribunals? Federal Courts and the Common Law*, 53 ALA. L. REV. 891, 892 (2002). But my jurisdictionally focused use of the term tribunal does not neatly square with Professor Strauss's usage. *See id.* at 892–93 ("[T]he more recent contentions over when, if ever, it is appropriate to infer privately enforceable judicial remedies in aid of federal statutes . . . seem[] to be about the nature of the institutions, not elements of their jurisdiction . . . .").

workable legal system designed to solve day-to-day disputes.[22] Professor Peter Strauss views *Sandoval* as an ill-conceived reaction to the ever-expanding codification of federal law, number of federal legal issues, and federal docket.[23] Nevertheless, the scholarly literature has largely ignored the jurisdictional nature of the argument advanced by the tribunals position.[24]

With *Sandoval* and the Court's deployment of the tribunals position in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta* in 2008,[25] ignoring the jurisdictional implications of the view is no longer wise. Moreover, the tribunals position is beginning to receive scholarly proponents as well.[26] As such, the time is ripe for a thorough review of the tribunals position's jurisdictional bar upon inferring causes of action.

In this Article, I reject the tribunals position. Even if it is poor judicial policy to recognize implied causes of action from statutes,[27] such inferences

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[22] Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 362 (2002) (discussing *Sandoval* in the context of the Court's overall philosophy of nonaction).

[23] Strauss, *supra* note 21, at 893–95 (discussing *Sandoval* and the tribunals position as part of the demise of common law reasoning and institutions).

[24] *See, e.g.*, *id.* at 892–93 (contending that *Sandoval* is really "about the nature of the institutions, not elements of their jurisdiction"). I believe only three scholarly pieces have addressed this jurisdictional position advocated by Justice Scalia. All of them do so in a cursory fashion. *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 931 n.220 (1986) (rejecting the jurisdictional argument in a footnote); David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 377 (2004) ("If federal courts lacked jurisdiction in such cases, then cases in which it is uncertain whether plaintiff has a valid federal cause of action would have to be adjudicated in state court, and state courts would assume primary responsibility for determining whether a federal statute creates a federal cause of action. That result makes no sense. Therefore, the remainder of this Article proceeds from the premise that the *Bell* [*v. Hood*, 327 U.S. 678 (1946),] approach to jurisdiction is justified."); Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860, 871 (1989) (similarly short treatment).

[25] *Stoneridge*, 552 U.S. at 164–65.

[26] *See* Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 838–51 (2004) (arguing that an originalist understanding of Article III of the Constitution imposes limitations upon the powers of the federal courts to infer causes of action from statutes).

[27] This discussion, of course, touches upon the practice of inferring causes of action from the Constitution as well. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (inferring a cause of action directly from the Fourth Amendment). But inferring a cause of action from the Constitution, at least to some, raises very different issues than making such inferences from statutes. *See, e.g.*, Davis v. Passman, 442 U.S. 228, 252 n.1 (1979) (Powell, J., dissenting) ("A court necessarily has wider latitude in interpreting the Constitution than it does in construing a statute. Moreover, the federal courts have a far greater responsibility under the Constitution for the protection of those rights derived directly from it, than for the definition and enforcement of rights created solely by Congress." (internal citations omitted)); Susan Bandes, *Reinventing* Bivens: *The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 322 (1995) (arguing that constitutional rights are "self-executing" and that a legislatively created cause of action is not required to enforce them); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999) (arguing that a presumption in favor of monetary damages for constitutional violations could lead to less vigorous enforcement of constitutional rights); Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1145 (1978) (arguing that the Court lacks power to infer causes of action

do not violate the jurisdictional limitations of 28 U.S.C. § 1331[28] or Article III.[29] Indeed, this issue illustrates the general impropriety of turning prudential questions into jurisdictional ones.

In Part I, I discuss the argument that to infer a cause of action is to exceed the Court's statutory federal question jurisdiction under § 1331. After tracing the origins of this variation of the tribunals position, I offer three challenges. First, I contend that the tribunals position incorrectly treats § 1331 jurisdiction as centered upon successfully establishing a federal cause of action, when § 1331 jurisdiction is better understood as centered upon the distinct notion of a federal right. Second, the Court's recent willingness to take § 1331 jurisdiction over state law causes of action with embedded federal issues further undercuts the tribunals position—indeed, taking jurisdiction in such "hybrid cases" produces a pragmatic result that is nearly equivalent to taking jurisdiction over inferred causes of actions. Third, given that the Court considers it jurisdictionally permissible under § 1331 to create federal common law, *a fortiori*, it should find jurisdiction to infer federal causes of action.

In Part II, I turn to the argument that recognizing implied causes of action violates Article III of the Constitution. This view relies on the originalist[30] notion that Article III incorporates an eighteenth-century understanding of causes of action, under the then-existing system of writ pleading. I offer two intra-originalist critiques. First, I apply the distinction between originalist interpretation and construction of the Constitution. Even assuming that the originalist view correctly depicts the eighteenth-century understanding of Article III, it does not convincingly address the more pressing question of construction: how do we translate this writ pleading understanding of Article III into the present system that has abandoned writ pleading? Second, I contend that, in practice, even the most restrictive, originalist reading of the Article III limit upon the power to infer a cause of action is entirely redundant of contemporary standing analysis. Thus even from an originalist point of view, if a plaintiff has standing, Article III places no further restrictions upon the federal courts' ability to infer a cause of action.

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without congressional authority). To keep this Article to a manageable length, I focus primarily upon inferring actions from statutory rights.

[28] The statute provides: "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 (2006).

[29] The question of whether a federal statute should be construed to imply a federal cause of action necessarily arises as a matter of federal question, not diversity, jurisdiction. This is the case as all such suits are premised upon the existence of a federal right, not a state law right coupled with diverse litigants, in which Congress did not explicitly address the cause of action issue. My inquiry into a jurisdictional bar to the implication of causes of action, then, is related uniquely to federal question jurisdiction under Article III and 28 U.S.C. § 1331.

[30] *See infra* notes 256–261 and accompanying text (defining the public-meaning originalism school of constitutional interpretation).

In Part III, I draw some general lessons regarding the adjudication of matters that are traditionally treated as judicial policy under the guise of jurisdiction. First, I consider the doctrinal and pragmatic havoc that results when jurists take seriously this jurisdictional bar upon the inference of causes of action. Second, I note that many of these same puzzles arise in other areas, such as ripeness doctrine, where the Court transformed a body of law previously considered a question of judicial prudence into one of jurisdiction. From these observations, I surmise that, as a general matter, the Court picks a poor course when it conflates matters of prudence with jurisdiction. Finally, I conclude that this long-lived argument about the wisdom of inferring causes of action should remain just that—an argument about judicial prudence, not subject matter jurisdiction.

I. THE 28 U.S.C. § 1331 ARGUMENT

The tribunals position—the notion that the federal courts are jurisdictionally barred from inferring causes of actions—has two variations. The first is predicated upon § 1331, the second upon Article III. I take up the statutory version first. I begin by tracing the evolution of this argument from dissents in the 1940s to majority opinions in this decade and by providing a synthesis of the position. I then present three criticisms. First, I contend that this statutory argument rests upon a poor understanding of § 1331 jurisdiction, focusing improperly upon successfully establishing a federal cause of action instead of merely asserting a federal right. Second, I argue that the Court's recent re-embrace of § 1331 jurisdiction over hybrid claims devalues the tribunals position by taking jurisdiction over these pragmatic cousins of inferred causes of action. I end by noting that if the much broader power of creating federal common law is consistent with § 1331 jurisdiction, then the lesser power of inferring a cause of action is as well.

A. Unearthing the Tribunals Position

It is useful to divide the Supreme Court's inferred cause of action jurisprudence into four eras.[31] The first era predates the Court's seminal 1964 *J.I. Case Co. v. Borak*[32] opinion. By most accounts, the Court first inferred a cause of action from a federal statute in *Texas & Pacific Railway Co. v. Rigsby*.[33] There is some debate over whether the Court freely, or restricted-

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[31] *Cf.* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 394 (5th ed. 2007) (dividing the Court's doctrine into three eras, but not accounting for a pre-*Borak* era).

[32] 377 U.S. 426 (1964).

[33] 241 U.S. 33, 39–40 (1916) (inferring a cause of action under Section 2 of the Safety Appliance Act of 1910); *see also* Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks, 281 U.S. 548, 569–70 (1930) (applying the *Rigsby* doctrine); *See* cases cited *supra* note 7 (noting Supreme Court opinions that cite *Rigsby* as the first inferred cause of action case). *But see* Jett v. Dallas Indep. Sch. Dist., 491

ly, inferred causes of action from federal statutes during this early era.[34] But all agree that the Court reached its zenith in terms of freely inferring causes of action from federal statutes during the *Borak* era of the 1960s. This era is characterized by the view that federal courts should infer a cause of action when doing so would further the legislative purpose of the act, even if there existed no evidence of congressional intent that a private cause of action should lie.[35] Yet a third era of inferred causes of action jurisprudence arose with the Berger Court's opinion in *Cort v. Ash*.[36] *Cort* announced a new four-prong test, which looked at, among other things, concongressional intent that a cause of action should lie.[37] Employing this standard, the Court became more restrictive in its decisions to infer causes of action from federal statutes.[38] The fourth—and present—era began at the end of the 1970s with *Touche Ross & Co. v. Redington*.[39] Although *Touche Ross* did not formally overrule *Cort*, the Court held that "our task is limited solely to determining whether Congress intended to create the private right of action."[40] As members of the Court have noted, *Touche Ross* overruled the *Cort* analysis in all but name by adopting a unitary test for the creation of an implied cause of action.[41] Although the Court has continued to infer causes of action on occasion during this era, it has generally disapproved of the practice.[42]

U.S. 701, 742 (1989) (Brennan, J., dissenting) (listing five pre-*Rigsby* inferred cause of action cases, including *Marbury*).

[34] *Compare* Zeigler, *Integrated Approach, supra* note 4, at 69, 83 (finding that the traditional view more freely recognized the functional equivalent to an inferred cause of action), *with* Cannon v. Univ. of Chi., 441 U.S. 677, 732–35 (1979) (Powell, J., dissenting) (stating that before *Borak* the Court rarely inferred a cause of action from a federal statute).

[35] *Borak*, 377 U.S. at 432–33; *see also* Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) (inferring a cause of action from SEC Rule 10b-5 using the *Borak* standard); Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969) (inferring a cause of action from the Voting Rights Act of 1965 using the *Borak* standard); Mank, *Legal Context*, *supra* note 16, at 845 (discussing *Borak*).

[36] 422 U.S. 66 (1975).

[37] The Court held that it would infer a cause of action when: (1) the statute was enacted for the special benefit of a class of persons of which the plaintiff is a member; (2) there is any indication of legislative intent, express or implied, to create a remedy; (3) inferring a private remedy would not frustrate the underlying legislative scheme; and (4) inferring a private federal remedy is appropriate because the subject matter is not solely a matter of state concern. *Id.* at 78.

[38] *See* CHEMERINSKY, *supra* note 31, at 396.

[39] 442 U.S. 560 (1979).

[40] *Id.* at 568.

[41] *See, e.g.*, Thompson v. Thompson, 484 U.S. 174, 189 (1988) (Scalia, J., concurring) (arguing, in an opinion joined by Justice O'Connor, that "[i]t could not be plainer that we effectively overruled the *Cort v. Ash* analysis in *Touche Ross & Co*" by "converting one of its four factors (congressional intent) into the *determinative factor*, with the other three merely indicative of its presence or absence").

[42] For example, the Court has inferred causes of action from statutes twice since issuing *Sandoval*. *See* CBOCS W., Inc. v. Humphries, 128 S. Ct. 1951, 1958 (2008) (holding that 42 U.S.C. § 1981 allows an implied cause of action for retaliatory discrimination); Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341 (2005) (recognizing an implied cause of action for damages based on the Securities Exchange Act,

Although the Court's substantive doctrine has shifted greatly over the decades, its jurisdictional doctrine has—until recently—been remarkably stable. If sheer volume of past Supreme Court holdings entirely controlled the issue, the question of whether the implication of a cause of action is jurisdictional would be easily answered. The cases are legion in holding that the inference, or lack thereof, of a cause of action either from a federal statute[43] or the Constitution[44] does not implicate the court's jurisdiction.

The leading case affirming the jurisdiction of federal courts to infer causes of action is *Bell v. Hood*.[45] In *Bell*, the plaintiffs brought suit against several FBI agents for illegal arrest, false imprisonment, and unlawful searches and seizures.[46] The plaintiffs asserted that these acts violated the Fourth and Fifth Amendments and asked the Court to infer a cause of action directly from the Constitution.[47] The Court assumed that the plaintiffs alleged viable constitutional violations.[48] The only question was whether the Court had jurisdiction to infer a cause of action for monetary damages.[49] The Court held that it did, stating that "where the complaint . . . is so drawn as to seek recovery directly under the Constitution . . . the federal court . . . must entertain the suit" regardless of whether the cause of action is actually inferred at the end of the day.[50] It held that the taking of jurisdiction precedes the question of whether to infer a cause of action.[51] This hold-

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as well as from SEC rules). But on the whole, the history of the *Touche Ross* era is one where such inferences are not made. *See supra* note 14 (listing cases declining to infer causes of action).

[43] The Court has squarely held that "[i]t is firmly established in our cases 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." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998). Just reviewing the past thirty years, the Court has offered this holding on numerous occasions. *See, e.g.*, Verizon Md., Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 642–43 (2002); Nw. Airlines, Inc. v. County of Kent, 510 U.S. 355, 365 (1994); Air Courier Conference v. Postal Workers, 498 U.S. 517, 523 n.3 (1991); *Thompson*, 484 U.S. at 178; Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15, 21 n.6 (1982); Burks v. Lasker, 441 U.S. 471, 476 n.5 (1979).

[44] *See, e.g.*, Davis v. Passman, 442 U.S. 228, 236 (1979); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 71–72 (1978) (holding existence of implied cause of action directly under the Constitution is not a jurisdictional question); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 279 (1977) (holding that the existence of an implied cause of action directly under the Constitution is not a jurisdictional question); Wheeldin v. Wheeler, 373 U.S. 647, 649 (1963) (same); *see also* Field, *supra* note 24, at 931–32 n.220 ("Congress has nowhere manifested an intention that federal courts exercise federal question jurisdiction only when a federal remedy exists.").

[45] 327 U.S. 678 (1946).

[46] *Id.* at 679.

[47] *Id.* at 679–80.

[48] *Id.* at 683.

[49] *Id.* at 684.

[50] *Id.* at 681–82.

[51] *Id.* at 682 ("The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.").

ing, then, distinguished jurisdiction from the on-the-merits issue of whether the Court should infer a cause of action.[52]

Despite this authority, a longstanding string of opinions assert the contrary position. Chief Justice Stone, dissenting in *Bell*, offers an apt starting point in tracing this line of argument. He argued, unexceptionally, that a nonjurisdictional dismissal is the appropriate course when a statute (or the Constitution) definitively provides a cause of action but the plaintiff's particular complaint fails to plead or prove the facts needed to succeed.[53] When, however, the federal statutory or constitutional provision in question does not "afford[] a remedy to any person," he continued, "the mere assertion by a plaintiff that he is entitled to such a remedy cannot be said to satisfy jurisdictional requirements."[54] Under Chief Justice Stone's view, then, if a cause of action would not be available to any plaintiff under any set of averred facts, then the federal court lacks jurisdiction. To hold otherwise, Chief Justice Stone contended, would raise two problems. First, it would impermissibly delegate the courts' task of evaluating their jurisdiction to the plaintiffs' unsubstantiated pleadings.[55] Second, it would raise federalism concerns by transferring traditionally state law cases to federal court.[56]

This line of reasoning emerged from time to time during the pre-*Borak* era. In *Jacobson v. New York, N. H. & H. R. Co.*, for example, the Supreme Court summarily affirmed the First Circuit's adoption of the tribunals position.[57] In *Jacobson*, the plaintiff sought to recover for an alleged negligent death in a railroad accident.[58] One of the plaintiff's theories of recovery was that the court should infer a civil remedy under the Safety Appliance Act.[59] The First Circuit declined to do so.[60] Of import to my discussion, the circuit considered this failure to infer a cause of action as a statutory jurisdictional defect. The court held that "the subject matter of the cause of action stated in the amended complaint was not within the jurisdiction of the

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[52] *Id.* ("[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.").

[53] *Id.* at 685 (Stone, C.J., dissenting).

[54] *Id.* at 686.

[55] *Id.* at 685 ("Whether the complaint states such a cause of action is for the court, not the pleader, to say.").

[56] *Id.* at 686 ("The only effect of holding, as the Court does, that jurisdiction is conferred by the pleader's unfounded assertion that he is one who can have a remedy for damages arising under the Fourth and Fifth Amendments is to transfer to the federal court the trial of the allegations of trespass to person and property, which is a cause of action arising wholly under state law.").

[57] 206 F.2d 153 (1st Cir. 1953), *aff'd per curiam*, 347 U.S. 909 (1954).

[58] *Id.* at 154.

[59] *Id.* (citing Safety Appliance Act, 45 U.S.C. § 1 (repealed 1994)).

[60] *Id.* at 157 ("But it is abundantly clear that the federal courts have not, as a matter of federal common law, developed a private right of action for damages for personal injuries resulting from a breach of the Safety Appliance Acts, in favor of persons not entitled to sue under the provisions of the Employers' Liability Acts.").

court below under 28 U.S.C. § 1331. It was not a civil action arising 'under the Constitution, laws or treaties of the United States.'"[61]

Justice Powell, in his dissenting opinion in *Cannon v. University of Chicago*,[62] provided the preeminent argument from the bench that inferring a cause of action is extrajurisdictional.[63] In *Cannon*, the Court inferred a cause of action for private individuals to enforce Section 901(a) of Title IX of the Education Amendments of 1972, which prohibits sex discrimination in educational institutions receiving federal funding.[64] Justice Powell made two arguments in dissent. First, he argued that crafting a cause of action was a uniquely legislative function and thus reserved for Congress under Article I of the Constitution.[65] Second, Justice Powell insisted that creating causes of action concomitantly expands the federal courts' § 1331 jurisdiction. In so arguing, he relied heavily upon the Holmes test,[66] which is the view that claims only arise under § 1331 if the plaintiff pleads a federal cause of action. Following this approach, Justice Powell found the Court's inference of a cause of action to be of jurisdictional dimension because the very act of inferring the federal cause of action creates the analytic hook for taking § 1331 jurisdiction.[67] But, Justice Powell reminded, the Constitution securely lodges jurisdictional control over the lower federal courts within Congress's bailiwick.[68] Thus, inferring a cause of action from a statute, in Justice Powell's view, represents an extrajurisdictional endeavor, because it necessarily vests § 1331 jurisdiction by judicial decision instead of legislative fiat.[69]

A decade later, Justice Scalia began championing the tribunals position. In *Thompson v. Thompson*, the Court held that the Parental Kidnap-

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[61] *Id.* at 158.

[62] 441 U.S. 677 (1979).

[63] *See* Field, *supra* note 24, 931 n.220 (characterizing Justice Powell's argument as jurisdictional); Noyes, *supra* note 18, at 156–57 (same).

[64] *Cannon*, 441 U.S. at 717.

[65] *Id.* at 732 (Powell, J., dissenting) ("[The] implication applied by the Court today . . . represents judicial assumption of the legislative function."); *see infra* Part II.A (providing a more detailed account of the Article III difficulty).

[66] *See infra* notes 113–119 and accompanying text (defining and discussing the Holmes test).

[67] *Cannon*, 441 U.S. at 746–47 (Powell, J., dissenting) ("Implication of a private cause of action, in contrast, involves a significant additional step. By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve. This runs contrary to the established principle that the jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction." (internal quotation marks and citations omitted)).

[68] *Id.*

[69] Justice Powell has expressed this view in other opinions as well. *See* Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15, 29–30 (1982) (Powell, J., concurring) (restating his dissent in *Cannon*); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 395 (1982) (Powell, J., dissenting) (same); Carlson v. Green, 446 U.S. 14, 26–29 (1980) (Powell, J., concurring) (same). Interestingly, Justice Powell did not view the inference of a cause of action from the Constitution as raising jurisdictional concerns. *See supra* note 27.

ping Prevention Act does not create a cause of action for individuals.[70] Justice Scalia concurred in the judgment, but wrote separately to lay out his view on crafting causes of action by inference. Justice Scalia stated that the Court should adopt "the categorical position that federal private rights of action will not be implied."[71] He supported this position with three planks. First, he offered Justice Powell's jurisdictional argument in toto by way of a substantial quotation from his dissent in *Cannon*.[72] Second, Justice Scalia offered a statutory construction argument, contending that congressional intent may not be found by inference, but only from explicit text and structure.[73] Third, he offered a policy argument, insisting that a bright-line rule—no inferred causes of action—would be welcomed by Congress, providing its members a clear background rule of construction against which to legislate.[74] Having marshaled these arguments, Justice Scalia concluded that the Court "should get out of the business of implied private rights of action altogether."[75]

Three years later, Justice Scalia renewed this argument in his concurring opinion in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*.[76] In *Lampf*, the Court declined to borrow state statutes of limitations for suits raising causes of action implied under Section 10(b) of the Securities Exchange Act, even though such borrowing is the typical mode for gaining a limitations period for implied federal causes of action.[77] Instead, the Court employed the limitations period included in the Securities Exchange Act for explicitly created causes of action.[78] Justice Scalia used this case as an opportunity to attack the entire enterprise of inferring causes of action.[79] In this short concurrence, he for the first time employed the pithy, though sphinxlike, phrase: "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals."[80] Although the meaning of this phrase is not immediately transparent, Justice Scalia's citation to the jurisdictional argument in his *Thompson* concurrence and to Justice Powell's *Cannon* dissent[81] indicate

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[70] 484 U.S. 174, 187 (1988).

[71] *Id.* at 191 (Scalia, J., concurring in the judgment).

[72] *Id.* (quoting a substantial portion of Justice Powell's *Cannon* dissent).

[73] *Id.* at 188–89, 191–92.

[74] *Id.* at 192 ("I believe, moreover, that Congress would welcome the certainty that such a rule would produce. Surely conscientious legislators cannot relish the current situation, in which the existence or nonexistence of a private right of action depends upon which of the opposing legislative forces may have guessed right as to the implications the statute will be found to contain.").

[75] *Id.*

[76] 501 U.S. 350 (1991).

[77] *Id.* at 362.

[78] *Id.*

[79] *Id.* at 365 (Scalia, J., concurring in part and concurring in the judgment).

[80] *Id.*

[81] *Id.*

that he distinguished federal tribunals from common law courts on the basis of jurisdictional competence.[82]

Until 2001, the view that inferring a cause of action is jurisdictionally problematic had yet to make its way into a majority opinion. But in *Alexander v. Sandoval*,[83] Justice Scalia introduced the notion into the holding of the majority opinion. In *Sandoval*, the Court held that it would not infer a cause of action for individuals to enforce disparate impact discrimination claims under Title VI of the Civil Rights Act of 1964 for the imposition of an English-only rule for the administration of driver's license examinations.[84] After concluding that Congress did not imply such a cause of action, the Court noted that "[i]mplicit in our discussion thus far has been a particular understanding of the genesis of private causes of action."[85] The Court then noted that statutory intent is the seminal criterion for determining whether a cause of action was extant to enforce statutory rights.[86] From this truism of the *Touche Ross* era, Justice Scalia jumps to the conclusion: "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals," quoting his own concurring opinion in *Lampf*.[87]

Again this phrase, standing on its own, does not reveal the jurisdictional nature of the argument. Indeed, the Court has at times characterized *Sandoval* as merely extending the *Touche Ross* era, which focuses solely upon congressional intent as the determinate for inferring a cause of action.[88] In line with this view, the Court has not entirely abandoned the practice of inferring causes of action after *Sandoval*.[89]

On the other hand, there is strong support for a jurisdictional reading of *Sandoval*. First, Justice Scalia quoted his concurrence in *Lampf*—an opinion which itself cited Justice Powell's *Cannon* dissent as well as Justice

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[82] Even if this is not the best reading of the phrase, it is certainly the thrust of Justice Scalia's argument. Thus I find it fair to assign this jurisdictional meaning to the phrase.

[83] 532 U.S. 275 (2001).

[84] *Id.* at 293.

[85] *Id.* at 286.

[86] *Id.*

[87] *Id.* at 287 (quoting Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991)) (internal quotation marks omitted).

[88] *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 284 n.3 (2002) ("Where a statute does not include this sort of explicit 'right- or duty-creating language,' we rarely impute to Congress an intent to create a private right of action. See . . . *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) (existence or absence of rights-creating language is critical to the Court's inquiry).").

[89] *See, e.g.*, CBOCS W., Inc. v. Humphries, 128 S. Ct. 1951, 1958 (2008) (holding that 42 U.S.C. § 1981 allows an implied cause of action for retaliatory discrimination); Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341 (2005) (recognizing an implied cause of action for damages based on the Securities Exchange Act, as well as from SEC rules). There remains a similar willingness to infer causes of action on occasion in the circuits. *See, e.g.*, Care Choices HMO v. Engstrom, 330 F.3d 786, 788–90 (6th Cir. 2003) ("Absent an express private right of action, federal courts may in certain circumstances find an implied right of action.").

Scalia's past nonmajority opinions, such as in *Thompson*, which clearly advanced a jurisdictional argument. Second, and more persuasively, both Justice Scalia and the majority in *Stoneridge Investment Partners* characterize *Sandoval* as a jurisdictional opinion.[90]

Justice Scalia made this point in his concurring opinion to *Correctional Services Corp. v. Malesko*,[91] where the Court refused to infer a cause of action directly from the Eighth Amendment in a *Bivens* action against a government contractor operating a halfway house for the Bureau of Prisons.[92] He noted that "*Bivens* is a relic of the heady days in which this Court assumed common law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."[93] Citing *Sandoval*, he asserted that the Court has "abandoned that power to invent 'implications' in the statutory field."[94] In *Malesko*, then, Justice Scalia characterized *Sandoval* both as an absolute bar upon the implication of causes of action from statutes and as a decision having to do with judicial power, a term used by the Court and commentators synonymously with jurisdiction.[95]

Finally, in a 2008 majority opinion, Justice Kennedy relied on the supposed extrajurisdictional nature of inferring a cause of action as grounds for

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[90] Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148, 164–65 (2008); *Lampf*, 501 U.S. at 365 (1991) (Scalia, J., concurring in part and concurring in the judgment).

[91] 534 U.S. 61, 75 (2001) (Scalia, J., concurring). Unlike Justice Powell, Justice Scalia finds that inferring causes of action is extrajurisdictional in the constitutional context as well. *See id.*

[92] *Id.* at 74.

[93] *Id.* at 75.

[94] *Id.*; *see also* Wilkie v. Robbins, 551 U.S. 537, 568 (2007) (Thomas, J., joined by Scalia, J., concurring) (providing a nearly verbatim restatement of Justice Scalia's *Malesko* concurring opinion).

[95] The Court and commentators define jurisdiction in terms of power with great regularity. Indeed, it is the black letter view. *See* United States v. Cotton, 535 U.S. 625, 630 (2002), *overruling Ex parte* Bain, 121 U.S. 1 (1887) ("*Bain*'s elastic concept of jurisdiction is not what the term 'jurisdiction' means today, *i.e.*, 'the courts' statutory or constitutional *power* to adjudicate the case.'"); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (holding that a court lacking jurisdiction lacks power to issue judgment); Lindahl v. Office of Personnel Mgmt., 470 U.S. 768, 793 n.30 (1985) (distinguishing venue from jurisdiction, which relates to a "power of the court"); Davis v. Passman, 442 U.S. 228, 239 n.18 (1979) (describing subject matter jurisdiction as the power of the court); McDonald v. Mabee, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power."); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 718 (1838) ("Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them . . . . If the law confers the power to render a judgment or decree, then the court has jurisdiction."). *But see* Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1620 (2003) (arguing that jurisdiction is a matter of "something like legitimate authority"); Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1470–77 (2006) (listing the three major theories which seek to explain the concept of jurisdiction as power, legitimacy, and legislative control). For a rejection of the practical import of Professor Tsen Lee's view, see Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 670–78 (2005).

dismissing a complaint. In that case, *Stoneridge Investment Partners*, the plaintiffs asked the Court to recognize an implied aiding and abetting cause of action in Section 10(b) of the Securities Exchange Act.[96] The Court declined to do so.[97] In so holding, the Court relied heavily upon the extrajurisdictional argument.[98] The Court—quoting substantially from Justice Powell's *Cannon* dissent and citing *Sandoval*—held that "the Judiciary's recognition of an implied private right of action necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve. This runs contrary to the established principle that the jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation."[99]

In light of this history, the statutory version of the tribunals position may be fairly captured as follows. The argument, at its heart, is an interpretation of statutory federal question jurisdiction under § 1331 that relies heavily upon the Holmes test.[100] The Holmes test[101] asserts that § 1331 jurisdiction vests only if the plaintiff's cause of action is federal in origin. Thus, when the judiciary infers a federal cause of action, it concomitantly expands its own jurisdiction under § 1331.[102] Putting the argument differently, under the Holmes test, until the court infers the federal cause of action there is no basis upon which to take § 1331 jurisdiction; thus, the entire inference discussion is extrajurisdictional.[103] Moreover, this jurisdiction-expanding view of inferring causes of action runs afoul of the traditional view that vests control over the jurisdiction of the lower federal courts firmly in Congress's bailiwick.[104]

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[96] 552 U.S. 148, 152–53 (2008).

[97] *Id.* at 165–66.

[98] *Id.* at 164–66.

[99] *Id.* at 164–65 (internal citations and quotation marks omitted).

[100] *See, e.g.*, *Stoneridge*, 552 U.S. at 165 ("The determination of who can seek a remedy has significant consequences for the reach of federal power.").

[101] *See infra* notes 113–119 and accompanying text (defining and discussing the Holmes test).

[102] *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 746 (1979) (Powell, J., dissenting) ("By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve.").

[103] *See* Bell v. Hood, 327 U.S. 678, 685–86 (1946) (Stone, C.J., dissenting).

[104] Snyder v. Harris, 394 U.S. 332, 341–42 (1969) ("[T]he Constitution specifically vests that power [to expand the jurisdiction of the lower federal courts] in the Congress, not in the courts."). By most accounts, Congress retains broad control of the jurisdiction of the inferior federal courts, and it may grant a narrower scope of subject matter jurisdiction than is found in Article III. *See, e.g.*, Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030–38 (1982) (espousing the traditional view that Congress is not required by Article III to vest full constitutional subject matter jurisdiction in the inferior federal courts); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 2 (1990) ("[C]ommentators mark out their individual lines defining the precise scope of Congress's authority, but no one has challenged the central assumption that Congress bears primary responsibility for defining federal court jurisdiction."); James Leonard, Ubi Remedium Ibi Jus, *or, Where There's a Remedy, There's a Right: A Skeptic's Critique of* Ex Parte Young, 54 SYRACUSE L. REV. 215, 277 (2004) ("[T]he jurisdiction of the lower courts is a matter of legislative discretion and not of 'need' defined from Article III."); Lawrence

I contest the soundness of this argument in detail below. Before moving to this critique, however, it is worth noting that adherents of the tribunals position espouse competing variations of the view. One interpretation finds that the extrajurisdictional nature of inferred causes of action creates an absolute bar to their recognition.[105] Other interpretations temper the position by finding inferences of a cause of action extrajurisdictional only when congressional intent does not justify the inference[106] (as determined only by text and structure[107] or extratextual[108] materials). Even this most welcoming position, however, makes the strong claim that statutory jurisdictional concerns, rather than judicial prudence, require the sole focus upon congressional intent as the determinate for whether a cause of action should be inferred.[109] Even under this most lenient interpretation, then, the actions of the Court during the *Cort*, *Borak*, and pre-*Borak* eras were not merely unwise, but extrajurisdictional. Moreover, even in the *Touche Ross* era with its sole focus on congressional intent, this most lenient interpretation presents the striking consequence of turning "wrongly" decided statutory construction cases into extrajurisdictional dalliances. Thus any interpretation of the tribunals position presents jurisdictional questions worthy of serious consideration.

Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 25 (1980) ("Courts and commentators agree that Congress' discretion in granting jurisdiction to the lower federal courts implies that those courts take jurisdiction from Congress and not from [A]rticle III."). Of course, some espouse the opposite view. *See, e.g.*, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 209 (1985) (arguing that Congress must vest some of the Article III heads of jurisdiction in the federal judiciary); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 134 (1981) (arguing that there are non-Article III limits to Congress's discretion in vesting inferior federal courts with subject matter jurisdiction).

[105] *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (stating that the Court has "abandoned that power to invent 'implications' in the statutory field"); Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring) (advocating that the Court "announce a flat rule that private rights of action will not be implied in statutes").

[106] *See, e.g.*, Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 164–65 (2008) (predicating the jurisdictional problem upon a lack of congressional intent).

[107] *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 289 (2001) ("We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI."); *Thompson*, 484 U.S. at 179 (critiquing, implicitly, Justice Scalia's position as creating "a virtual dead letter [doctrine,] . . . limited to . . . drafting errors when Congress simply forgot to codify its . . . intention to provide a cause of action"); *see also id.* at 190–91 (Scalia, J., concurring) (responding to the majority's critique of his view).

[108] *See, e.g.*, *Stoneridge*, 552 U.S. at 165 (citing a Senate Report, clearly a non-textualist source, as evidence of congressional intent).

[109] *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 742 (1979) (Powell, J., dissenting) ("If only a matter of statutory construction were involved, our obligation might be to develop more refined criteria which more accurately reflect congressional intent. 'But the unconstitutionality of the course pursued has now been made clear' . . . .").

One last clarification is in order before I proceed to my critique. Rejecting the tribunals position with its jurisdictional impediments to inferring causes of action does not require one to embrace the practice of inferring causes of action as otherwise legitimate. Chief Justice Rehnquist, for example, was no champion of the inferred cause of action.[110] Yet he accepted that it is "analytically correct to view the question of jurisdiction as distinct" from the question of whether to infer a cause of action in any given case.[111] His objections to the practice, weighty to be sure, were lodged in his overarching judicial minimalist philosophy rather than doctrinal arguments about jurisdiction.[112]

B. Three Challenges

I turn next to three critiques of the statutory version of the tribunals position. I begin by arguing that the tribunals position is predicated upon misunderstandings of how jurisdiction vests under § 1331. I begin by noting that the Holmes test requires only an assertion of a federal cause of action, not a successful claim to one. Further, I contend that the Holmes test offers a poor rubric for explaining § 1331 jurisdiction. I next argue that the Court's embrace of hybrid claims under § 1331 presents a serious hurdle to the tribunals position. I end by noting that the Court's jurisdictional treatment of federal common law cases presents a significant difficulty for the tribunals position as well.

1. A Faulty View of § 1331 Jurisdiction.—I turn now to § 1331 doctrine as it intersects with the tribunals position. The federal courts regard all claims to § 1331 jurisdiction as subject to the well-pleaded complaint rule.[113] Following this rule, only federal issues raised in a plaintiff's complaint, not anticipated defenses, establish federal question jurisdiction.[114] The majority of federal question cases, according to the standard view, meet the § 1331 requirements[115] because federal law creates the plaintiff's cause

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[110] *See, e.g., id.* at 718 (Rehnquist, J., concurring) ("It seems to me that the factors to which I have here briefly adverted apprise the lawmaking branch of the Federal Government that the ball, so to speak, may well now be in its court. Not only is it far better for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch." (internal quotation marks omitted)).

[111] Carlson v. Green, 446 U.S. 14, 37 (1980) (Rehnquist, J., dissenting).

[112] *See id.* ("[C]ongressional authority here may all too easily be undermined when the judiciary, under the guise of exercising its authority to fashion appropriate relief, creates expansive damages remedies that have not been authorized by Congress.").

[113] *See* Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L. J. 597, 598–99 (1987).

[114] Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (establishing the well-pleaded complaint rule).

[115] Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986).

of action.[116] Indeed, this linguistic understanding of § 1331, which places great importance upon the "law that creates the cause of action,"[117] has come to dominate all discussion of statutory federal question jurisdiction.[118] This position is generally referred to as the Holmes test, after Justice Holmes, who originally formulated the test in *American Well Works Co. v. Layne & Bowler Co.*[119]

The prominence of the Holmes test for taking § 1331 jurisdiction, I contend, explains the prima facie appeal of the tribunals position. The proponents of the tribunals position, for example, clearly adhere to the Holmes test as a basis for their conclusions.[120] If, as the Holmes test suggests, the federal origin of the cause of action is the necessary trigger for federal jurisdiction under § 1331, the statutory version of the tribunals position would be sound.

I argue, however, that the tribunals position rests upon two significant misunderstandings of § 1331 doctrine. First, I note that even under the Holmes test, § 1331 doctrine seldom requires plaintiffs to actually establish a federal cause of action in order to vest the court with jurisdiction. Rather, plaintiffs most often establish § 1331 jurisdiction by merely asserting a federal cause of action. Despite the assumption of the tribunals position, then, the actual existence of a federal cause of action is not a necessary jurisdictional element. Second, I argue that the Holmes test, with its myopic focus upon the federal origin of the cause of action as the key to vesting § 1331 jurisdiction, fails to capture the Court's actual practice in § 1331 cases. The Court's practice, I contend, finds the assertion of a federal right, not cause of action, as the indispensible jurisdictional element. As the tribunals position rests upon this Holmes-test understanding of § 1331 jurisdiction, dispensing with this understanding removes the heart of the tribunals position. In a previous piece, I lay out the case for both of these propositions in

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[116] Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) (Holmes, J.) ("A suit arises under the law that creates the cause of action.").

[117] *Id.*

[118] The classic presentation of the Holmes test was made in 1916. *See id.* A Westlaw search for citations to the "headnote" corresponding to this quote returned 408 citations on October 7, 2009. *See, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005) ("This provision for federal question jurisdiction is invoked by and large by plaintiffs pleading a cause of action created by federal law . . . ."); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808 (1988) ("A district court's federal-question jurisdiction, we recently explained, extends over only those cases in which a well-pleaded complaint establishes . . . that federal law creates the cause of action." (internal quotation marks omitted)); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (same); Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 27–28 (1983) (same).

[119] *Am. Well Works*, 241 U.S. 257.

[120] *See* Stoneridge Inv. Part., LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 165 (2008) ("The determination of who can seek a remedy has significant consequences for the reach of federal power."); Cannon v. Univ. of Chi., 441 U.S. 677, 746 (1979) (Powell, J., dissenting) ("By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve.").

greater detail;[121] while I cannot fully reargue these positions here, I rely upon a few examples to illustrate my views.

a. Section 1331 as mere assertion of federal cause of action.—I begin with the erroneous notion that the Holmes test requires plaintiffs to establish a federal cause of action in order to vest § 1331 jurisdiction. The tribunals position relies upon this notion. For example, Justice Powell argued that the

> power [to construe legislation] normally is exercised with respect to disputes over which a court already has jurisdiction, and in which the existence of the asserted cause of action is established. Implication of a private cause of action, in contrast, involves a significant additional step. . . . [because] a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve.[122]

The Holmes test, however, does not require that plaintiffs actually establish a federal cause of action in order to vest § 1331 jurisdiction. The Justice Powell propostion is an error that "frequently happens where jurisdiction depends on subject matter."[123] The error lies because "the question [of] whether jurisdiction exists has been confused with the question [of] whether the complaint states a cause of action."[124] But error it is.[125] Indeed, the assertion-only reading of the Holmes test is so ingrained that Justice Scalia espouses it from time to time in cases where the question of inferring a cause of action is not squarely before the Court.[126] The tribunals position's insistence that a plaintiff establish[127]—as opposed to merely assert—a

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[121] Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667 (2008).

[122] *Cannon*, 441 U.S. at 745–46 (Powell, J., dissenting) (footnote omitted); *see also* Bell v. Hood, 327 U.S. 678, 686 (1946) (Stone, C.J. dissenting) (when the federal statutory or constitutional provision in question does not "afford[] a remedy to any person, the mere assertion by a plaintiff that he is entitled to such a remedy cannot be said to satisfy jurisdictional requirements").

[123] Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 359 (1959) (quoting Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 249 (1951)) (internal quotation marks omitted).

[124] *Id.*

[125] *See, e.g.*, Mulligan, *supra* note 121, at 1691–1703 (reviewing § 1331 cases involving congressionally created causes of action and concluding, inter alia, that a plaintiff need only assert—not establish—the cause of action); *see also supra* note 43 (listing cases holding that successful establishment of a federal cause of action is not required under the Holmes test).

[126] *See, e.g.*, Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 642–43 (2002) (Scalia, J.) ("It is firmly established in our cases 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." (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (Scalia, J.) (not reaching the inference question))); *see also id.* at 644 (noting that the statute in question "reads like the conferral of a private right of action").

[127] The Court does require a "showing" of a federal cause of action under certain extreme circumstances not relevant here. *See* Mulligan, *supra* note 121, at 1712–24 (arguing that the Court employs this more restrictive jurisdictional standard only in certain categories of federal common law suits).

federal cause of action, then, runs counter to run-of-the-mill jurisdictional practice under the Holmes test.

This conclusion, however, could be construed by a proponent of the tribunals position as merely begging the question. In essence, I assert that standard understandings of the Holmes test are not compatible with the tribunals position. Of course, the tribunals position rejects the standard view—that's the point.[128] Proponents of the tribunals position could well argue that the better understanding of the Holmes test requires not merely an assertion of a federal cause of action, but an actual showing that the cause of action is extant.[129] I take up this rebuttal by rejecting the Holmes test altogether.

b. Section 1331 as rights, not causes of action.—I turn now to challenge this key assumption of the tribunals position: namely, that the Holmes test accurately describes the Court's § 1331 doctrine. Contrary to the Holmes test, the existence of a federal cause of action (i.e., the determination that a person falls into a class of litigants empowered to vindicate a specified right in court)[130] is neither a necessary[131] nor sufficient[132] condition for the vesting of § 1331 jurisdiction.[133] Under the analysis of § 1331 jurisdiction I advocate, the Court takes § 1331 jurisdiction based upon the federal origin of the right (i.e., clearly stated, mandatory, judicially enforceable obligation)[134] asserted. The origin of the cause of action, under my view, is not outcome determinative—contrary to the terms of the Holmes test. Rather, under my view, the assertion of a federal statutory cause of action acts only as added indicia of congressional intent to vest jurisdiction in the federal courts, allowing plaintiffs to plead merely a "colorable" federal right in

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[128] *Cf. supra* note 43 (listing cases espousing the standard view).

[129] *See* Cannon v. Univ. of Chi., 441 U.S. 677, 746 (1979) (Powell, J., dissenting).

[130] *See* Davis v. Passman, 442 U.S. 228, 239 n.18 (1979) ("[A] cause 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.").

[131] *See, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005); Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 201–02 (1921).

[132] *See, e.g.*, Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 605, 607–12 (1979); Baker v. Carr, 369 U.S. 186, 187, 218–29 (1962); Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507, 513 (1900).

[133] *See* Mulligan, *supra* note 121, at 1724–25 (providing a summary of this view).

[134] *See* Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 431–32 (1987) (holding that, to be a "right," an obligation must not be vague or "beyond the competence of the judiciary to enforce"); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 (1981) (holding that, to be a "right," an obligation must be mandatory as opposed to merely hortatory); *see also Passman*, 442 U.S. at 241 (defining "right"). This tripartite test (viz., mandatory obligation, clear statement, and enforceability) remains the standard by which the Court determines when a federal right exists. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002); Blessing v. Freestone, 520 U.S. 329, 341–42 (1997); Livadas v. Bradshaw, 512 U.S. 107, 132–33 (1994); Suter v. Artist M., 503 U.S. 347, 363 (1992); Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509–10 (1990); Golden State Transit Corp. v. City of L.A., 493 U.S. 103, 106 (1989).

such suits.[135] The absence of a congressionally created cause of action, by contrast, does not absolutely bar § 1331 jurisdiction, but plaintiffs in such suits must plead the federal right at issue more vigorously.[136] I rely on a few examples here to illustrate my view, leaving the more nuanced discussion of my anti-Holmes-test stance to my previous work.[137]

First, the existence of a federal cause of action is not sufficient for the vesting of § 1331 jurisdiction. For example, the Court refuses to take § 1331 jurisdiction over cases involving state law rights, even when Congress creates a federal cause of action to enforce them.[138] In *Shoshone Mining Co. v. Rutter*, for instance, the Court addressed a statute in which Congress authorized suits to adjudicate competing claims to mining rights.[139] The act, however, stated that state or territorial law would determine the outcome of the claims.[140] Thus, the case presented a situation where state law created the right, but Congress created the cause of action. The issue for the Court was whether the mining act created federal question jurisdiction for the adjudication of these state law rights. A straightforward application of the Holmes test would have found jurisdiction, due to the federal origin of the cause of action. Nevertheless, the Court refused jurisdiction under § 1331 because "the right of possession may not involve any question as to the construction . . . of the . . . laws of the United States, but may present simply . . . a determination of . . . local rules . . . or the effect of state statutes."[141] Thus, despite the dictates of the Holmes test, the Court held that a congressionally created cause of action to enforce state law rights does not arise under § 1331.[142]

In *Puerto Rico v. Russell & Co.*, the Court clearly held that, despite the Holmes test, the focus for § 1331 jurisdiction is the assertion of a federal

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[135] *See* Mulligan, *supra* note 121, at 1726 ("These two components—the federal right and cause of action—work in a teeter-totter manner in relation to congressional intent. That is to say, when there are other strong indicia of congressional intent to vest § 1331 jurisdiction such as the existence of a statutory cause of action, the plaintiff's assertion of a federal right may be quite weak. Conversely, when there are few other congressional indicia of an intent to vest § 1331 jurisdiction, the plaintiff must make a stronger allegation of a federal right in order for § 1331 jurisdiction to lie.").

[136] *See id.* at 1725–26 (noting that federal rights coupled with state law causes of action must be pleaded pursuant to the more vigorous "substantial" standard and so-called pure federal common law causes of action must be coupled with actual showings that the federal right applies).

[137] *See generally id.* at 1685–1726 (arguing across numerous categories of suits that the Holmes test does not describe the Court's § 1331 practice).

[138] Puerto Rico v. Russell & Co., 288 U.S. 476, 483 (1933); Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900); Mulligan, *supra* note 121, at 1687–89.

[139] 177 U.S. at 506.

[140] *Id.* at 508.

[141] *Id.* at 509.

[142] For another case that refused federal question jurisdiction, a federal cause of action notwithstanding, see *Shulthis v. McDougal*, 225 U.S. 561 (1912), which held that equitable quiet title actions, although congressionally approved causes of action, lack statutory federal question jurisdiction when the right to the land in question is controlled by state law. *Id.* at 569–70.

right—not a federal cause of action.[143] Here Puerto Rico sought to collect a tax debt in court, due to a federal statute that required the collection of such claims by a suit at law, as opposed to an attachment proceeding, and had created a cause of action to do so.[144] Puerto Rico began a suit at law in the Puerto Rican courts to collect the tax.[145] The defendant removed to federal district court, relying upon the Holmes test, contending that the case arose under § 1331.[146] The Court disagreed. Federal question jurisdiction, the Court held, may only be "invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is nonfederal, merely because the plaintiff's right to sue is derived from federal law."[147] Reinforcing the point, the Court stated that "[t]he federal nature of the right to be established is decisive [for jurisdictional purposes]—not the source of the authority to establish it."[148] Although the rhetoric of the Holmes test commands contemporary judicial discussion of § 1331 jurisdiction,[149] the rights-focused approach I advocate presents a better picture of the Court's actual practice.[150]

Further reinforcing that the nature of the federal right, not the origin of the cause of action, determines § 1331 jurisdiction, the Court refuses to hear cases under § 1331 concerning merely procedural federal rights, even when coupled with a federal cause of action such as 42 U.S.C § 1983.[151] While

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[143] 288 U.S. at 483–84.

[144] *Id.*

[145] *Id.* at 477.

[146] *Id.*

[147] *Id.* at 483.

[148] *Id.*

[149] *See, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005) ("This provision for federal question jurisdiction is invoked by and large by plaintiffs pleading a cause of action created by federal law . . . ."); City of Chi. v. Int'l Coll. of Surgeons, 522 U.S. 156, 163 (1997) ("It is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." (internal quotation marks and citation omitted)); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808 (1988) ("A district court's federal question jurisdiction, we recently explained, extends over only those cases in which a well-pleaded complaint establishes . . . that federal law creates the cause of action . . . ." (internal quotation marks omitted)); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) ("It is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law.").

[150] *See, e.g.*, *Grable & Sons*, 545 U.S. at 317 n.5; Jackson Transit Auth. v. Transit Union, 457 U.S. 15, 29 (1982) (holding that the federal courts lack § 1331 jurisdiction over claims under the Urban Mass Transportation Act because Congress instructs that these rights are to be determined by state law); Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 735 (2d Cir. 2007) (holding that the federal courts lacked § 1331 jurisdiction because although the Individuals with Disabilities Education Act empowered the plaintiff to sue the rights at issue were entirely a matter of state law); City Nat'l Bank v. Edmisten, 681 F.2d 942, 945 (4th Cir. 1982) (holding that the National Bank Act "is not a sufficient basis for federal question jurisdiction simply because it incorporates state law" when the act makes usury, as defined by local state law, illegal and the nondiverse parties were only contesting the meaning of North Carolina's usury law).

[151] Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002) ("[The removal statute] requires that a federal court have original jurisdiction over an action in order for it to be removed from a state

§ 1983 creates a statutory cause of action for the violation of federal rights by state officials, it does not create rights; rather, it merely empowers a class of persons to enforce federal rights located in the Constitution or other statutes.[152] Thus, § 1983 cases present instances where the existence of a congressionally created cause of action is not in question; only the validity of the federal right asserted is at issue. A straightforward application of the Holmes test, of course, would take jurisdiction over any federal cause of action, even to enforce procedural rights. Thus, when a plaintiff attempts to use the All Writs Act,[153] a choice of law statute,[154] or a rule of procedure[155] to vest jurisdiction, the federal courts will not find § 1331 jurisdiction. Similarly, the Court holds that it lacks jurisdiction to hear claims where the underlying rights derive from the Full Faith and Credit Clause of the Constitution.[156] This is the case, the Court ruled, because the clause does not create substantive rights, but rather provides a res judicata rule (i.e., a procedural rule) for state courts.[157] The Court applies the same reasoning to suits brought to enforce the Supremacy Clause of the Constitution, even when Congress supplies a federal cause of action.[158] As the Court noted in

court. The All Writs Act, alone or in combination with the existence of ancillary jurisdiction in a federal court, is not a substitute for that requirement."); Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979) (finding that § 1983 can be used to show that an action is "authorized by law," but that the act itself does not "provide any rights at all"); *see also* Mulligan, *supra* note 121, at 1686, 1725–26 (outlining my rights-focused, unified approach to § 1331 jurisdiction).

[152] Nevada v. Hicks, 533 U.S. 353, 404 (2001) (Stevens, J., concurring) ("Section 1983 creates no new substantive rights; it merely provides a federal cause of action for the violation of federal rights that are independently established either in the Federal Constitution or in federal statutory law." (citation omitted)).

[153] *See, e.g.*, *Syngenta*, 537 U.S. at 32, 34.

[154] *See, e.g.*, Rogers v. Platt, 814 F.2d 683, 689 (D.C. Cir. 1987) (holding that the Parental Kidnapping Prevention Act does not create colorable rights, but rather provides a choice of law rule and as such the court lacks jurisdiction).

[155] *See, e.g.*, Palkow v. CSX Transp., Inc., 431 F.3d 543, 555 (6th Cir. 2005) ("Merely invoking the Federal Rules of Civil Procedure [Rule 60] is not sufficient grounds to establish federal question jurisdiction."); Milan Express, Inc. v. Averitt Express, Inc., 208 F.3d 975, 979 (11th Cir. 2000) (holding in regard to Rule 65.1 that a "federal rule cannot be the basis of original jurisdiction"); Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 70 (2d Cir. 1990) ("The Rules do not provide an independent ground for subject matter jurisdiction over an action for which there is no other basis for jurisdiction."); Port Drum Co. v. Umphrey, 852 F.2d 148, 150 (5th Cir. 1988) (holding the court lacks jurisdiction to hear a suit directly under Rule 11).

[156] Thompson v. Thompson, 484 U.S. 174, 182 (1988); Minnesota v. N. Sec. Co., 194 U.S. 48, 72 (1904).

[157] *Thompson*, 484 U.S. at 182–83 ("Rather, the Clause only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State other than that in which the court is sitting." (internal quotation marks omitted)).

[158] *See, e.g.*, Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 612–15 (1979) (holding that there is no federal question jurisdiction under 28 U.S.C. § 1343(a)(3) for a 42 U.S.C. § 1983 claim alleging a violation of the Supremacy Clause); Virgin v. County of San Luis Obispo, 201 F.3d 1141, 1144–45 (9th Cir. 2000) (holding that a plaintiff does not have a cause of action directly under the Supremacy Clause and that the court lacks subject matter jurisdiction under 28 U.S.C. § 1331 as a result).

Chapman v. Houston Welfare Rights Organization, the "Clause is not a source of any federal rights," but rather a choice of law rule for cases of conflict between state and federal law.[159] Again, the plaintiff's lack of substantive rights forms the linchpin to the Court's jurisdictional ruling, not the origin of the cause of action as the Holmes test suggests.

Moreover, contrary to the Holmes test, a federal cause of action is not a necessary condition for § 1331 jurisdiction.[160] The Court takes § 1331 jurisdiction over cases asserting substantive federal rights even when coupled with state law causes of action.[161] The lead case is *Smith v. Kansas City Title & Trust Co.*[162] In *Smith*, a stockholder sued in federal court to enjoin his corporation from purchasing bonds issued pursuant to the Federal Farm Loan Act.[163] The plaintiff argued that such a purchase would constitute a breach of fiduciary duty—a state law cause of action—because the corporation could only purchase bonds "authorized to be issued by a valid law" and that the Federal Farm Loan Act was unconstitutional.[164] Although the plaintiff pursued a state law cause of action, the Court held that "where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution . . . and that such federal claim is not merely colorable, . . . the District Court has jurisdiction under this provision."[165] In so doing, the Court found that a plaintiff could avail himself of a federal forum on a state law theory of recovery under § 1331, because the plaintiff's state law cause of action necessarily required the court to pass upon the constitutionality of a federal act.[166] The Court recently reaffirmed the *Smith*-style jurisdiction in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing.*[167]

As this sampling of the Court's cases demonstrates, contrary to the Holmes test, it is the federal origin of the substantive right asserted, not the origin of the cause of action, that is the key concept in determining whether a case arises under § 1331.[168] The Court's *Russell & Co.* opinion best re-

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[159] 441 U.S. at 613.

[160] *See, e.g.*, T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.) (Holmes test is a rule of inclusion); *see also* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9 (1983) (same and quoting *T.B. Harms*).

[161] *See, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005); Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921); *see also* Mulligan, *supra* note 121, at 1698–1701, 1711–12 (discussing *Grable* and *Smith*).

[162] *Smith*, 255 U.S. 180; *see also* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 319–22 (1936) (taking jurisdiction over a state law fiduciary duty case which presented an embedded constitutional challenge); Wheeldin v. Wheeler, 373 U.S. 647, 659–60 (1963) (Brennan, J., dissenting) (similar).

[163] 255 U.S. at 195.

[164] *Id.* at 198.

[165] *Id.* at 199.

[166] *Id.* at 201–02.

[167] 545 U.S. 308, 308 (2005). *See infra* Part I.B.2 (discussing *Grable* in greater detail).

[168] Mulligan, *supra* note 121, at 1725 ("[T]he primary determinate for the vesting of § 1331 jurisdiction is the status of the federal right asserted.").

flects this view of the § 1331 doctrine: "The federal nature of the right to be established is decisive [in determining federal question jurisdiction]—not the source of the authority to establish it."[169] Although the origin of the cause of action affects the vigor with which a substantive federal right must be pled, the essential jurisdictional determinate under § 1331 is the assertion of a substantive federal right.[170]

This more accurate understanding of how § 1331 jurisdiction operates has much purchase in refuting the argument that inferring a cause of action is extrajurisdictional. Recall that in inferred cause of action cases there is little argument that the statutory provision in question does not create a right. Instead, the issue before the Court in these cases is whether the plaintiff is a member of a class of persons entitled to seek judicial enforcement of the right (i.e., whether the plaintiff has a cause of action).[171] Given that the existence of a substantive federal right is not in question in these cases, and that it is the assertion of the federal substantive right that is the essential jurisdictional trigger for § 1331, the act of inferring a cause of action does not expand the jurisdiction of the federal courts. Thus, it is Congress, absent a clear statement to the contrary,[172] that expands § 1331 when it creates a right, not the judiciary when it infers a cause of action.[173] The courts' latter determination of whether a cause of action lies, while of great importance to the success of the suit, is not a decision of a jurisdictional nature.

2. Hybrid Actions as a Problem.—In a related difficulty for the tribunals position, the federal courts are empowered to take § 1331 jurisdiction over hybrid claims. The inferred cause of action is a regular feature of state tort law, often bearing the moniker of negligence per se.[174] Under standard tort doctrine, the breach of a state law statutory duty that lacks a statutory cause of action may be remedied by using the statutory breach as a

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[169] 288 U.S. 476, 483 (1933).

[170] Mulligan, *supra* note 121, at 1725–26 (summarizing the view that the origin of the cause of action is not outcome determinative of § 1331 jurisdiction, but it does affect the standard to which the plaintiff must plead the federal right invoked).

[171] *See* Davis v. Passman, 442 U.S. 228, 239 n.18 (1979) (defining cause of action along these lines).

[172] *See infra* notes 298–300 and accompanying text (discussing the Court's strong presumption that newly adopted federal statutory rights concomitantly vest the federal courts with § 1331 jurisdiction absent a clear statement to the contrary).

[173] *See* Wasserman, *supra* note 95, at 677–78 ("The significance of statutory general federal question jurisdiction is that when Congress enacts a substantive law, federal district courts immediately and necessarily attain jurisdiction to hear claims under that statute, without Congress having to do anything more."). Of course, this only follows when one discusses statutory, not constitutional, federal question jurisdiction. If there were not a well established series of lower federal courts, such a presumption may well be unsound.

[174] *See* Zeigler, *Integrated Approach, supra* note 4, at 75 ("During the late 1800s and early 1900s, American state courts routinely allowed private remedies for violations of statutes containing other sanctions, although sometimes on a slightly different legal theory. Violation of a statute was said to constitute 'evidence of negligence' or 'negligence per se.'"); *accord* Foy, *supra* note 19, at 542.

means of establishing breach of duty of care in a negligence or other common law cause of action.[175] Moreover, federal statutory[176] and constitutional[177] rights are often coupled with state common law causes of action in just this way.[178] In these so-called hybrid actions, a federal statutory duty is employed as the standard of care within the context of a state law cause of action.[179] Importantly for this discussion, when a plaintiff couples a federal right with a state law cause of action in this manner, the case may arise under § 1331 federal question jurisdiction.

Again, *Smith* is the starting point.[180] Recall that in *Smith* the Court held § 1331 jurisdiction appropriate over a state law cause of action because the claim had an embedded federal constitutional right at issue.[181] Thus, even if the inference of a cause of action from a federal statute were extrajurisdictional, in what amounts to the same practical result, a hybrid suit where

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[175] See RESTATEMENT (SECOND) TORTS § 286 (1965) (providing basic negligence per se rule).

[176] *See, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 311–12 (2005) (applying IRS standard in a quiet title action); Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 805–07 (1986) (seeking to use federal FDA standard in a negligence per se action); Vinnick v. Delta Airlines, Inc., 113 Cal. Rptr. 2d 471, 481 (Cal. Ct. App. 2001) ("[The] negligence per se standard can be applied to a violation of federal standards . . . ."); Coker v. Wal-Mart Stores, Inc., 642 So. 2d 774, 776, 778 (Fla. Dist. Ct. App. 1994) (holding that a violation of the federal Gun Control Act can amount to negligence per se); Lohmann *ex rel.* Lohmann v. Norfolk & W. Ry. Co., 948 S.W.2d 659, 672 (Mo. Ct. App. 1997) (noting that the plaintiff could argue "negligence per se in failing to comply with federal regulations"). *But see* Lugo v. St. Nicholas Assocs., 772 N.Y.S.2d 449, 454–55 (N.Y. Sup. Ct. 2003) ("[T]he ADA does not create a private cause of action for damages for its violation. If mere proof of a violation of the ADA were to establish negligence per se, plaintiff would effectively be afforded a private cause of action that the ADA does not recognize. The court accordingly holds that proof of a violation of the ADA may only constitute evidence of negligence, not negligence per se.").

[177] *See, e.g.*, *Ex parte* Duvall, 782 So. 2d 244, 248 (Ala. 2000) (holding state law torts of assault, unlawful arrest, false imprisonment and conspiracy barred as a matter of law because the police officer met the Fourth Amendment's probable cause standard when detaining the plaintiff); Renk v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994) (a plaintiff alleging false imprisonment must show that a defendant's actions were unlawful, which often amounts to whether a defendant acting under color of law had probable cause); Susag v. City of Lake Forest, 115 Cal. Rptr. 2d 269, 278–79 (Cal. Ct. App. 2002) (holding that the plaintiff's state law claims of battery, intentional infliction of emotional distress, and false imprisonment failed as a matter of law because the plaintiff "did not meet his burden of producing evidence showing [the defendants] used physical force against or exerted authority over him that resulted in a 'seizure' under the Fourth Amendment").

[178] Pauline E. Calande, Note, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 YALE L.J. 1144, 1144 (1985) ("[T]hus even when implied federal rights of action have been denied, states may often be able to provide a right of action to private plaintiffs by creating a parallel state law that incorporates federal law by reference.").

[179] John F. Preis, *Jurisdiction and Discretion in Hybrid Cases*, 75 U. CIN. L. REV. 145, 161–62 (2006) (finding in an empirical review of court of appeals cases over a nearly twenty-year period that almost 39% of hybrid cases "appear as tort actions where the federal law defines a standard of care to be observed").

[180] 255 U.S. 180 (1921). *See also* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 319–22 (1936) (taking jurisdiction over a state law fiduciary duty case which presented an embedded constitutional challenge to a corporate purchase of electricity from the TVA).

[181] 255 U.S. at 199.

state law provides the cause of action to vindicate a federal right permits a federal court to take § 1331 jurisdiction under *Smith*.

Justice Powell recognized as much in his *Cannon* dissent.[182] Citing *Smith*, Justice Powell found it "instructive to compare decisions implying private causes of action to those cases that have found nonfederal causes of action cognizable by a federal court under § 1331."[183] He agreed with the notion that "the net effect [of bringing a hybrid claim under *Smith*] is the same as implication of a private action directly from the constitutional or statutory source of the federal law elements."[184] As a result, Justice Powell concluded that hybrid actions such as *Smith* are extrajurisdictional in just the same manner as the inference of a federal cause of action.[185]

In 1986, the Court flirted with the notion that bringing a hybrid action under § 1331 was jurisdictionally barred unless congressional intent could be found to justify an inference of a cause of action directly from the federal statute in question. In *Merrell Dow Pharmaceuticals Inc. v. Thompson*, the plaintiffs alleged that the defendant's pharmaceutical product caused a birth defect.[186] They brought a state law negligence per se action, using an alleged breach of the Federal Food, Drug, and Cosmetic Act as proof of the breach of duty.[187] The defendant sought to remove the case to federal court under a *Smith* theory of § 1331 jurisdiction. [188] Of importance, all the parties and the circuit court below agreed that there was no federal cause of action, inferred or otherwise.[189] The Court went on to state that the "significance . . . that there is no federal private cause of action . . . cannot be overstated."[190] The Court stated that to infer a cause of action here, which would run contrary to congressional intent, would be impermissible. The Court continued:

> [I]t would similarly flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be a "rebuttable presumption" or a "proximate cause" under state law, rather than a federal action under federal law.[191]

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[182] 441 U.S. 677, 746 n.17 (1979) (Powell, J., dissenting).

[183] *Id.*

[184] *Id.*

[185] *Id*

[186] 478 U.S. 804, 805 (1986).

[187] *Id.* at 805–06.

[188] *Id.* at 806.

[189] *Id.* at 810 ("In this case, both parties agree with the Court of Appeals's conclusion that there is no federal cause of action for FDCA violations.").

[190] *Id.* at 812.

[191] *Id.*

For the next twenty years, many courts of appeals, believing this argument to constitute the holding in *Merrell Dow*, held that the existence of a federal private right of action was the definitive factor for divining congressional intent on the propriety of taking federal question jurisdiction over hybrid claims.[192] Thus, Justice Powell's view was taking root.

The Court, however, recently clarified its *Merrell Dow* opinion. In *Grable & Sons v. Darue Engineering*, the IRS seized real property belonging to Grable & Sons to satisfy a federal tax deficiency and sold the property to Darue Engineering.[193] Five years later, Grable & Sons sued Darue Engineering in state court to quiet title, a state law cause of action.[194] Grable & Sons asserted that Darue Engineering's title was invalid because the IRS had conveyed the seizure notice to Grable & Sons in violation of the Internal Revenue Code governing such actions.[195] The Supreme Court affirmed federal question jurisdiction in the case because the plaintiff's state law cause of action necessarily depended upon a claim of a substantive federal right.[196] In so holding, the Court specifically rejected the notion that a federal court may only take § 1331 jurisdiction over hybrid claims if the court could have inferred a federal cause of action.[197]

Grable & Sons presents a difficult problem for the tribunals position. On the one hand, if "the net effect [of bringing a hybrid claim under *Smith*] is the same as implication of a private action directly from . . . [a federal] constitutional or statutory source,"[198] as Justice Powell contends, then *Grable & Sons*, which upheld taking jurisdiction over a hybrid case, is a strong—perhaps overwhelming—precedent weighing against the tribunals position. On the other hand, if hybrid actions and inferred federal causes of action are not essentially the same jurisdictional animal, a jurisdictional ban upon the inference of a federal cause of action would have little real world effect, as plaintiffs would merely file hybrid actions and seek federal jurisdiction under the *Smith* test.

An advocate of the tribunals position would likely retort that the second horn of this dilemma is stated too strongly. The jurisdictional standard crafted for hybrid claims is significantly more restrictive than the typi-

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[192] *See* Note, *Mr.* Smith *Goes to Federal Court: Federal Question Jurisdiction over State Law Claims Post-*Merrell Dow, 115 HARV. L. REV. 2272, 2280–82 (2002) [hereinafter *Mr.* Smith] (discussing the split in Courts of Appeals over the private cause of action requirement after *Merrell Dow*).

[193] 545 U.S. 308, 310–11 (2005).

[194] *Id.*

[195] *Id.* (Grable & Sons maintained that the IRS failed to comply with the notice procedures of 26 U.S.C. § 6335(a)).

[196] *Id.* at 316.

[197] *Id.* at 318 ("Accordingly, *Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the 'sensitive judgments about congressional intent' that § 1331 requires.").

[198] Cannon v. Univ. of Chi., 441 U.S. 677, 746 n.17 (1979) (Powell, J., dissenting).

cal jurisdictional standard employed under § 1331.[199] In *Grable & Sons*, the Court went to pains to distinguish the "substantial" and "serious" claim to a congressionally created right, which is necessary to establish § 1331 jurisdiction when a state law cause of action is asserted, from mere colorable assertions of a congressionally created right, which typically ground § 1331 jurisdiction.[200] The Court stressed that in a hybrid claim the federal right at issue must be the central and predominant question in the case.[201] Further, the Court emphasized that in a hybrid case the legal content of the statutory right invoked must be actually contested by the parties.[202] Finally, the Court specifically considered whether taking jurisdiction in the case comported with congressional intent regarding the division of labor between the state and federal courts.[203] Given this heightened standard, one should expect hybrid jurisdiction to remain a "special and small category" of § 1331 jurisdiction,[204] which undercuts the force of the assertion that hybrid action cases are jurisdictionally interchangeable with inferred cause of action cases.

This rebuttal is surely correct—as far as it goes. Adopting the view that the inference of a federal cause of action is extrajurisdictional would, in fact, have a real-world effect on those seeking to enforce federal rights that lack explicit causes of action in a federal court. But the effect is not to bar the federal courthouse door outright, only to make it harder to open. If these federal right-holders are relegated to hybrid actions, they may still ob-

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[199] *See* Mulligan, *supra* note 121, at 1699–1701.

[200] *See, e.g.*, *Grable & Sons*, 545 U.S. at 313 ("It has in fact become a constant refrain in such cases that federal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.").

[201] *Id.*

[202] *Id.*

[203] To be clear, the Court treats the substantial right factor as necessary, but not sufficient, for finding § 1331 jurisdiction. *Id.* at 318–19. It also requires a finding that jurisdiction "is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331." *Id.* at 313–14. There are lower court examples of this specific finding of congressional intent. *See* Broder v. Cablevision Sys. Corp., 418 F.3d 187, 194–96 (2d Cir. 2005) (applying *Grable & Sons* and taking jurisdiction over a state law contract claim that required construction of federal cable television law, because taking this jurisdiction would not upset the flow of litigation in state and federal courts); Municipality of San Juan v. Corporación Para El Fomento Económico De La Ciudad Capital, 415 F.3d 145, 148 n.6 (1st Cir. 2005) (applying *Grable & Sons* and taking jurisdiction over a state law contract claim that required construction of HUD regulations); *see also* Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1793 (1992) (arguing that federal question jurisdiction over hybrid claims should lie to "increase the level of state-federal judicial interchange in the shaping and development of the relevant federal statute"); *Mr.* Smith, *supra* note 192, at 2292–93 (arguing that by incorporating federal law "a state might be understood to have waived its claim to exclusive jurisdiction over a violation of the hybrid law").

[204] *See, e.g.*, Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 699 (2006) (declining to take hybrid jurisdiction under *Grable & Sons*).

tain a federal forum,[205] even though it will be more difficult to do so than is typically the case under § 1331.[206]

3. The Greater Power of Federal Common Law.—If the rights-focused theory for taking § 1331 jurisdiction I advocate demonstrates a jurisdictional defect, it lies in the Court's federal common law doctrine—not in the practice of inferring causes of action.[207] It is informative, in this regard, to distinguish federal common law from the practice of inferring causes of action. This distinction is not cheaply made, however.

There are at least three views on the subject, with the broadest notion encompassing the practice of inferring causes of action as an element of federal common law.[208] The narrowest view finds that federal common law is merely a listing of those enclaves where the Court has employed federal common law in the past.[209] On the broad side, federal common law is thought by some to include "any rule of federal law created by a court . . . *when the substance of that rule is not clearly suggested by federal enactments*—constitutional or congressional."[210] This broad view would encompass many actions, such as inferring causes of actions from statutes or the Constitution, often not traditionally considered components of federal common law.[211] I employ the more common definition of federal common

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[205] *See* Lumen N. Mulligan, *Why* Bivens *Won't Die: The Legacy of* Peoples v. CCA Detention Centers, 83 DENV. U. L. REV. 685, 709–15 (2006) (discussing the use of federal law as the standard of duty to gain federal jurisdiction over negligence per se cases).

[206] Mulligan, *supra* note 121, at 1726 (discussing the heightened jurisdictional standard applied to hybrid cases).

[207] *Id.* at 1717–25, 1735–40 (discussing the ultra-restrictive jurisdictional approach the Court employs for taking § 1331 jurisdiction over pure federal common law claims).

[208] *See* Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 590–94 (2006).

[209] *Id.* at 593.

[210] Field, *supra* note 24, at 890.

[211] *See* Tidmarsh & Murray, *supra* note 208, at 594. Indeed, such a view of federal common law would wreak havoc on the reinterpretation of § 1331 doctrine I present here. When taken to its logical conclusion, this broad view finds no meaningful distinction between federal common law and other judicial acts of interstitial lawmaking. *See* Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 807 (1989); Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 332 (1980) ("The difference between 'common law' and 'statutory interpretation' is a difference in emphasis rather than a difference in kind. The more definite and explicit the prevailing legislative policy, the more likely a court will describe its lawmaking as statutory interpretation; the less precise and less explicit the perceived legislative policy, the more likely a court will speak of common law. The distinction, however, is entirely one of degree."). Thus, at least for this jurisdictional project, the expansive view is inappropriate because the Court does appear to differentiate between statutory and constitutional claims (i.e., those involving interpretation) on the one hand, and federal common law cases (i.e., those employing legislative authority) on the other. Further, whether it makes sense or not, the courts continually assert that inferring a cause of action from a statute or the Constitution is a different task than creating federal common law. *See, e.g.*, Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 97 (1981) ("But the authority to construe a statute is fundamentally different from

law in my discussion,[212] which defines federal common law as "federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands."[213] The standard view of federal common law, then, excludes the practice of inferring a cause of action for two reasons. First, the decision of whether to infer a cause of action, as the Court in the *Touche Ross* era makes clear, is primarily a function of legislative intent.[214] The decision to craft a federal common law, by contrast, does not rest primarily upon legislative intent.[215] Thus, these are fundamentally distinct endeavors—one a species of divining congressional intent, the other an independent weighing of competing policies. Second, the judicial inference of a cause of action does not entail the judicial creation of a right, because by definition all such cases are those in which the federal right is already extant. The judicial creation of a right in federal common law cases, moreover, carries with it serious separation of powers[216] and federalism issues[217] not as prominent in the inferred cause of action context.

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the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.").

[212] Tidmarsh & Murray, *supra* note 208, at 590–91.

[213] RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 685 (5th ed. 2003).

[214] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) ("The question of the existence of a statutory cause of action is, of course, one of statutory construction."). The Court has reiterated this sentiment often in the *Touche Ross* era. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 286 (2001); Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1102 (1991); Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 812 n.9 (1986); Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 535–36 (1984); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 13 (1981).

[215] *See, e.g.*, O'Melveny & Myers v. FDIC, 512 U.S. 79, 89 (1994) (holding that the weighing of factors in the proposed creation of federal common law is more appropriately a legislative function); *Nw. Airlines*, 451 U.S. at 98 n.41 (same); Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 457 (1957) (holding that in fashioning federal common law "[t]he range of judicial inventiveness will be determined by the nature of the problem").

[216] *See* Illinois v. City of Milwaukee, 406 U.S. 91, 99–100 (1972) (holding that federal decisional law is properly "law" under § 1331); Mulligan, *supra* note 121, at 1716–17 (outlining in more detail the jurisdictional—and thus separation of powers—implications for the creation of rights as a matter of federal common law); Tidmarsh & Murray, *supra* note 208, at 653 ("[A] federal common law claim creates federal jurisdiction."); *cf.* Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1035 (2006) (arguing, in regard to equal protection claims, that recognizing certain "actionable federal constitutional claims would dramatically expand the jurisdiction of federal courts"). Congress retains broad control of the jurisdiction of the inferior federal courts, and it may grant a narrower scope of subject matter jurisdiction than is found in Article III. *See supra* note 104 and accompanying text.

[217] *See, e.g.*, Atherton v. FDIC, 519 U.S. 213, 218 (1997) (holding that because federal common law displaces state law, such issues properly are matters of congressional concern); *O'Melveny & Myers*, 512 U.S. at 83 (rejecting the federal common law rule for attorney malpractice on grounds, inter alia, that it would "divest[] States of authority over the entire law of imputation"); *see also* Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (Scalia, J.) (arguing that federal common law regarding the contractual rights of the United States preempts state law); United States v. Kimbell Foods, Inc., 440 U.S. 715, 726 (1979) (positing that legal obligations under federal expenditure programs are to be governed by federal law); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426–27 (1964) (asserting that fed-

Because when the Court engages in federal common lawmaking[218] it crafts both a cause of action and a substantive federal right,[219] under my rights-centric view of § 1331 the Court does concomitantly expand its jurisdiction in just the manner that Justice Powell criticized.[220] But this judicial expansion of jurisdiction does not occur when the Court is merely inferring a cause of action from a preexisting right.[221] Thus, the act of federal common lawmaking is far more self-aggrandizing and jurisdictionally troubling, just as Justice Powell outlines, than the act of inferring a cause of action from a preexisting right. Nevertheless, the Court has squarely held that federal common law questions do arise under § 1331.[222] Surely, then, if the federal courts have jurisdiction to exercise the broader power of creating *both* rights and causes of action from whole cloth as a matter of common law, they have jurisdiction to exercise the lesser power of creating only a cause of action.

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eral law controls interstate water apportionment, even in the face of an interstate compact); Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 494–95 (2007) ("[C]onstitutional preemption is a component of almost all the federal common law decisions that displace state law with a judicially created alternative."); Tidmarsh & Murray, *supra* note 208, at 615 ("Federal common law displaces state law, and thus shifts the balance of power from state to federal government.").

[218] I am not proposing that making law itself is necessarily troublesome, but only that in the § 1331 context there is a unique jurisdictional difficulty. Federal courts must surely have some ability to create law. *See, e.g.*, Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 265 (1990) ("[I]t is naïve—as well as undesirable—to think of separation of power rules as capable of creating sealed chambers each of which must contain all there is of the executive, the legislative and the judicial powers. Overlap is inevitable."); Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587, 590 (1990) ("[A] strict separation of powers . . . was deliberately rejected at the outset. Whatever separation of powers may be provided for, it does not compel a bright line separation between the departments . . . ."). But Justice Scalia rejects this position, and his rejection may well support his overall tribunals position. *Compare* Mistretta v. United States, 488 U.S. 361, 381 (1989) (stating that the Court is heir to a "pragmatic, flexible view of differentiated governmental power"), *with id.* at 417 (Scalia, J., dissenting) ("[T]he power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power."). Justice Scalia is not entirely consistent in this strict separation of powers view, however. *See Boyle*, 487 U.S. 500 (Scalia, J.) (creating a federal common law defense to a state law tort action against a federal contractor).

[219] The creation of federal common law procedural rules and defenses, however, does not raise § 1331 problems under my view as there is no possibility of satisfying the well-pleaded complaint rule in the first instance. *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 499 (2001) (creating a federal common law rule to regulate the preclusive effect of federal dismissals of state law claims); *Boyle*, 487 U.S. at 504 (creating a federal common law defense).

[220] *See* Mulligan, *supra* note 121, at 1736–37.

[221] *See supra* Part I.B.1.b.

[222] Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972) ("[Section] 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin."). Because of this jurisdiction-enlarging quality, courts employ a more stringent jurisdictional standard for pure-federal common law cases than they do for other § 1331 cases. *See* Mulligan, *supra* note 121, at 1737–40.

In sum, I find the statutory version of the tribunals position unsound. First, the argument is grounded upon a poor understanding of § 1331 doctrine because it assumes that the successful establishment of a federal cause of action is the key determination for vesting statutory jurisdiction. Rather, it is the concept of a federal right that does the heavy lifting here. Thus the judicial creation of a cause of action does not constitute a concomitant creation of the § 1331 jurisdictional hook. Second, the Court's recent approval of hearing hybrid claims under § 1331 undermines the force of the statutory argument. Third, assuming, as the Court does, that taking jurisdiction over federal common law claims is not problematic, *a fortiori*, there should be no jurisdictional concerns over merely implying a cause of action as a function of legislative intent. Thus, I do not find a § 1331 barrier to the inference of causes of actions from federal statutes.[223]

II. THE ARTICLE III ARGUMENT

The lack of a statutory jurisdictional barrier to the inference of a cause of action does not end the discussion; there may well be a constitutionally based jurisdictional defect for such inferences. The traditional scholarly view has not found such a constitutional difficulty. This view looks first to ancient English practice,[224] noting that the *raison d'être* for the courts of equity is fulfillment of the maxim "equity will not suffer a wrong to be without a remedy."[225] Pursuant to this end, the Chancellor would fashion new causes of action to correct wrongs suffered.[226] Moreover, implication of causes of action to remedy preexisting legal rights was not limited to the old English courts of equity. King's Bench as well as early state court deci-

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[223] To be clear, I am not advocating that the mere existence of the jurisdictional statute affirmatively empowers the practice, but only that it is not a hindrance. Despite suggestions in implied cause of action cases decided before the 1970s that a specific jurisdictional grant might support a private cause of action, *see* J.I. Case Co. v. Borak, 377 U.S. 426, 430–31 (1964), the idea that a congressional grant of jurisdiction does more than give federal courts the ability to hear a case has generally been repudiated. Such a grant does not provide a lawmaking power for implied cause of action cases. *See* Brown, *supra* note 17, at 646; Creswell, *supra* note 16, at 979; Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1221 (1982).

[224] Scholars in this traditional camp trace the ability to infer actions from statutes to the English Statute of Westminster II. *See* Statute of Westminster II, 13 Edw. I, c. 50 (1285) (Eng.) ("Moreover, concerning the Statutes provided where the Law faileth, and for Remedies, lest Suitors coming to the King's Court should depart from thence without Remedy, they shall have Writs provided in their Cases . . . ."); Theodore F. T. Plucknett, *Case and the Statute of Westminster II*, 31 COLUM. L. REV. 778 (1931) (discussing the attribution of the practice of inferring actions from statutes to the Statute of Westminster II); Zeigler, *Integrated Approach*, *supra* note 4, at 71 n.12 (tracing the practice to the Statute of Westminster II).

[225] Zeigler, *Rights Require*, *supra* note 19, at 667–69.

[226] *Id.*

sions regularly inferred legal remedies for statutory violations.[227] Many scholars have pointed to this ancient lineage to conclude that the federal courts, as inheritors of this tradition, are empowered to infer causes of action.[228]

Recent scholarship, however, challenges this predominant view, concluding that Article III places jurisdictional limits upon the ability of the federal courts to infer causes of action. In this Part, I review this variation of the tribunals position. I then present two challenges to the position. I argue that even if this historical analysis is correct, it fails to explain how this interpretation is to be applied in a contemporary context. I further contend that the jurisdictional limits proposed are redundant of modern standing doctrine.

A. Article III Constrained by Writ Pleading

Although scholars have been the primary proponents of an Article III restraint upon inferring causes of action, members of the Court have offered Article III-based arguments as well. Justice Black offered such a view in

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[227] The Supreme Court has recognized this historical power. *See, e.g.*, Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 66 (1992) ("From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court, although it did not always distinguish clearly between a right to bring suit and a remedy available under such a right."); California v. Sierra Club, 451 U.S. 287, 299–300 (1981) (Stevens, J., concurring) (noting that "implication of private causes of action was a well-known practice at common law and in American courts" and citing early English authorities). There are several King's and Queen's Bench cases emblematic of this authority. *See, e.g.*, Couch v. Steel, (1854) 118 Eng. Rep. 1193, 1196–98 (K.B.) (inferring a cause of action from a statute requiring merchant vessels to carry appropriate medicines while at sea); Ashby v. White, (1703) 92 Eng. Rep. 126, 136–39 (K.B.) (inferring a cause of action for the failure to tally votes in a parliamentary election); Anonymous, (1703) 87 Eng. Rep. 791, 791 (Q.B.) ("[W]herever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity."). *But see* Atkinson v. Newcastle & Gateshead Waterworks Co., (1877) 2 Exch. Div. 441, 444 (questioning *Couch*); Stevens v. Jeacocke, (1848) 116 Eng. Rep. 647, 652 (Q.B.) (holding that imposition of penalty precluded private remedy). Early state court decisions drew upon these authorities. *See, e.g.*, Stearns v. Atl. & St. Lawrence R.R. Co., 46 Me. 95, 115 (1858) (citing *Ashby* for the proposition that every right has a remedy); Stout v. Keyes, 2 Doug. 184, 187 (Mich. 1845) ("It is a general principle of the common law, that whenever the law gives a right, or prohibits an injury, it also gives a remedy by action; and, where no specific remedy is given for an injury complained of, a remedy may be had by special action on the case."); Calking v. Baldwin, 4 Wend. 668, 671 (N.Y. Sup. Ct. 1830) (presenting as the general rule that "if a statute gives a remedy in the affirmative, without a negative expressed or implied, for a matter which was actionable at common law, the party is not deprived of his common law remedy, but may elect to take it or that offered by the statute").

[228] *See, e.g.*, Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1542 (1972) (recognizing the "common law background in which courts created damage remedies as a matter of course"); Foy, *supra* note 19, at 534 (same); Linda Sheryl Greene, *Judicial Implication of Remedies for Federal Statutory Violations: The Separation of Powers Concerns*, 53 TEMP. L.Q. 469, 472 (1980) (accord); Stabile, *supra* note 19, at 864 (arguing that common law courts had full authority to infer actions from statutes); Zeigler, *Integrated Approach*, *supra* note 4, at 103 (same).

his dissent to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*—a ruling that inferred a cause of action directly from the Fourth Amendment.[229] In his dissent, Justice Black argued that the inference of a cause of action directly from the Constitution constituted a legislative, not judicial, action.[230] Indeed, the very heart of legislative control over the jurisdiction of the lower federal courts, Justice Black argued, resides in making difficult choices as to which types of claims warrant the courts' limited adjudicative resources.[231] As a result, in Justice Black's view, the Court's inferring a cause of action constituted an "exercise of power that the Constitution does not give us."[232] Justices Powell, Blackmun, and Scalia, following Justice Black, have similarly argued that inferring causes of action from the Constitution or statutes reaches beyond the Court's Article III powers into legislative territory reserved for Congress.[233]

More recently, Professor Bellia in a powerful piece offers a more nuanced argument that Article III constrains the ability of federal courts to infer causes of action.[234] He contends that, from an originalist perspective, Article III federal question jurisdiction must be understood within the context of common law writ pleading prevalent at the country's Founding.[235] He argues that the ability of a federal court to infer a cause of action from a statute is thus constrained by the confines of the common law writs.[236]

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[229] 403 U.S. 388 (1971).

[230] *Id.* at 429–30 (Black, J., dissenting) ("Should the time come when Congress desires such lawsuits, it has before it a model of valid legislation, 42 U.S.C. § 1983, to create a damage remedy against federal officers. Cases could be cited to support the legal proposition which I assert, but it seems to me to be a matter of common understanding that the business of the judiciary is to interpret the laws and not to make them.").

[231] *Id.* at 428 ("Of course, there are instances of legitimate grievances [pertaining to violations of the Fourth Amendment], but legislators might well desire to devote judicial resources to other problems of a more serious nature.").

[232] *Id.*

[233] *See* Cannon v. Univ. of Chi., 441 U.S. 677, 732 (1979) (Powell, J., dissenting) ("[T]he . . . implication applied by the Court today . . . represents judicial assumption of the legislative function . . . ."); *see also* Thompson v. Thompson, 484 U.S. 174, 191 (1988) (Scalia, J., concurring) (adopting Justice Powell's view); *Bivens*, 403 U.S. at 430 (Blackmun, J., dissenting) (providing a similar argument).

[234] Bellia, *supra* note 26, *passim* (arguing that Article III is best interpreted in light of writ pleading concepts and that this insight produces important ramifications for understanding Article III federal question jurisdiction under *Osborn*, standing doctrine, and inferred cause of action doctrine). But note that professors Stewart and Sunstein reject the view that "[t]hese objections to judicial creation of private remedies can be summarized in what we term the formalist thesis. That thesis holds that legal rights cannot be derived from conceptions of natural justice, background understandings, or theories of sound government. Unless the right to be vindicated is granted by the Constitution or a statute, courts lack authority to recognize it; the only basis of legal rights is a textual instrument drawn by a sovereign lawmaking authority." Stewart & Sunstein, *supra* note 223, at 1221.

[235] Bellia, *supra* note 26, at 780–81.

[236] *Id.* at 838 ("At common law, courts did not create remedies whenever a defendant deprived a plaintiff of a statutory benefit; they afforded common law remedies that existed under state law or general principles for certain injuries that happened to arise from a statutory violation. Again, to advocate a

It is key to note that our contemporary understanding of rights and causes of action as distinct analytic notions does not map onto the legal world of the late eighteenth century. At common law, the possession of a legal right by a wronged individual was necessarily coterminus with the possession of a cause of action to enforce that right in court.[237] "[C]ontemporary modes of jurisprudential thought . . . link[ed] 'rights' and 'remedies' in a 1:1 correlation."[238] Similarly, the federal courts found that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[239] Under this system of procedure, then, litigants had to identify a particular writ or form of action (e.g., assumpsit, replevin, debt, trespass) in order to present a judiciable claim.[240]

While in very early times the courts of England had some ability to craft new writs, by the time of the Founding, the number of writs was static.[241] A plaintiff could only bring suit if he could identify a form of action at law or equity that would support the relief sought.[242] Legal rights, then, could only be enforced by way of an enumerated writ. The writ in turn supplied the plaintiff's cause of action, which also delineated the type of remedy the plaintiff could hope to achieve.[243] Under the writ pleading system, therefore, the form of action (i.e., the writ) supplied the right, the cause of action, and the remedy.

Against this backdrop, Professor Bellia reexamines the Founding-era English and American cases that inferred what moderns would style a cause of action for a statutory violation when the statute failed to explicitly provide for one. In each instance, he contends, the court was able to infer a cause of action only because the plaintiff had successfully invoked a common law writ within which to nestle the statutory violation.[244] Take the celebrated English case of *Ashby v. White*,[245] for example. Here Parliament eventually upheld the plaintiff's suit to enforce—by what a modern would style as an inferred cause of action—a statutory right to have his vote in a

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return to the common law approach, but to substitute a benefit- or rights-based conception of the cause of action, is to claim a broader judicial power than courts historically exercised.").

[237] *See* Mulligan, *supra* note 121, at 1678–79.

[238] *Bivens*, 403 U.S. at 400 n.3 (Harlan, J., concurring).

[239] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

[240] *See, e.g.*, F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES 5–10 (1936).

[241] *Id.*

[242] *Id.*

[243] *Id.*; *see also* Zeigler, *Integrated Approach*, *supra* note 4, at 105–15 (discussing the traditional congruity of these concepts and the ramifications for contemporary practice).

[244] *See* Bellia, *supra* note 26, at 840; *see also* Bullard v. Bell, 4 F. Cas. 624, 639 (C.C.D.N.H. 1817) (No. 2,121) (Story, Circuit Justice) (noting that "[a]n action adapted to the nature of the case" must be "moulded according to the forms and distinctions of the common law").

[245] (1703) 92 Eng. Rep. 126 (K.B.).

parliamentary election tallied.[246] Lord Holt opined that "[w]here a new Act of Parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him."[247] Many look to this case, and this passage in particular, as strong precedent justifying the power of the federal courts to infer causes of action from statutes.[248] A careful reading of the case, however, shows that the plaintiff in *Ashby* asserted a form of action, namely trespass on the case, and that without that assertion of a writ the court would have been powerless to provide a remedy.[249] Expounding upon *Ashby*, Professor Bellia concludes that, at the time of the Founding, "[i]f a statute did not expressly confer a remedy on the plaintiff, a cause of action [at common law] for its violation would lie only if one of the forms of action—e.g., debt, case, assumpsit—provided a remedy for the kind of injury that the statutory violation caused."[250]

Importantly, specific pleading requirements accompanied each form of action. For example, under the form of trespass on the case, which provided the form of action for the bulk of implied statutory actions in the eighteenth and nineteenth centuries, a plaintiff needed to show an injury to person or property in order to succeed.[251] Indeed, the question of whether the plaintiff suffered an injury to property was the key issue in the *Ashby* case.[252] Lord Holt concluded that the right of election, under the then-existing scheme in which only property owners could vote, was "inseparable from the freehold."[253] Thus, common law courts had the power to remedy statutory violations that lacked statutory causes of action, but this power was constrained by the fact that the plaintiff had to plead and prove his case by way of one of the preexisting writs. These forms of action, in turn, constrained the types of remedies the court could award as well as limited those awards to certain types of injuries.

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[246] *Id.* at 127.

[247] *Id.* at 136.

[248] *See supra* note 227 (citing case law and academic reliance on *Ashby*).

[249] Bellia, *supra* note 26, at 840–41.

[250] *Id.* at 839.

[251] *Id.* at 849 ("Courts did not afford remedies to any individual deprived of a statutory benefit; they afforded remedies, primarily through the action of case, to individuals deprived of statutory benefits and suffering a certain kind of injury or wrong thereby. The legal determinant of whether the plaintiff had suffered a certain kind of injury or wrong belonged to the finite set of determinants that courts appear to have believed constrained them in recognizing causes of action for statutory violations.").

[252] 92 Eng. Rep. at 129 (Gould, J.) (arguing that "[t]o raise an action upon the case, both damage and injury must concur" and that "the plaintiff's privilege of voting is not a matter of property or profit, so that the hindrance of it is merely damnum sine injuria"); *id.* at 133 (Powell, J.) ("[H]ere is not a damage upon which this action is maintainable; for to maintain an action upon the case, there must be either a real damage, or a possibility of a real damage, and not merely a damage in opinion or consequence of law.").

[253] *Id.* at 134.

Because this fettered power to infer a cause of action was the prevailing view at the time of the Founding, Professor Bellia contends that an originalist reading of Article III cannot support the notion that the federal courts have unbounded constitutional power to infer causes of action now.[254] Following this approach, then, a federal court (as purely an Article III matter) may infer a cause of action from a federal statute only when: (1) the plaintiff has been injured in a manner that would have been recognizable at common law, and (2) the injury would have given rise to a common law form of action to remedy it.[255]

B. Two Challenges

With the Article III version of the tribunals position at hand, I turn to two intra-originalist objections. First, I argue that even assuming Article III should be interpreted from an originalist perspective and that every historical point upon which the position relies is accurate, the proposed dual constraints upon the federal courts' power to infer causes of action (viz., an injury cognizable at common law and existence of an applicable common law writ) do not necessarily follow. Even if the original public meaning of Article III imposes a writ pleading understanding of a court's ability to infer a cause of action, it remains an open question of construction as to how contemporary federal courts should apply that understanding into a system that has done away with writ pleading. Second, even if the tribunals position's construction of Article III carries the day, in practice it would impose no further restrictions upon the power of the federal courts to infer a cause of action than is already found in contemporary standing doctrine.

1. Interpretation Versus Construction.—I turn first to the problem of constitutional construction as it relates to the Article III variant of the tribunals position. The tribunals position relies upon an originalist interpretation of the Constitution.[256] But originalism is a term with many different meanings.[257] Some define it as an approach to constitutional interpretation that finds the Framers' and ratifiers' actual, subjective understandings of the

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[254] Bellia, *supra* note 26, at 851.

[255] *Id.* at 849–50 ("If historical practice is to be our guide, however, we should not selectively focus on one necessary but insufficient determinant of whether a plaintiff had a cause of action (e.g., deprivation of statutory benefit) to the exclusion of other necessary determinants (e.g., resulting in a certain kind of injury)."). To be clear, this Article III argument should not be confused with Justices Powell and Scalia's argument. Their view finds every (or almost every) implication of a statutory cause of action to be extrajurisdictional. But their view "does not squarely reflect the historical practice of English and state courts." *Id.* at 851.

[256] *Id.* at 849–50.

[257] *See, e.g.*, Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004) (describing the rise of original public meaning originalism); Lawrence B. Solum, *Semantic Originalism* 16–27 (Ill. Pub. Law Research Paper No. 07-24, 2008) [hereinafter Solum, *Semantic*], *available at* http://ssrn.com/abstract=1120244 (reviewing the evolution of originalism as an interpretive tool).

constitutional text the lodestar for constitutional adjudication.[258] On the whole, however, this search for subjective intent has been abandoned.[259] Most originalists now confine the approach to a quest for original public meaning of the text.[260] Instead of searching for subjective meanings that the Framers personally adopted, original meaning originalists seek "the meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc. at the time the particular provision was adopted."[261]

Within the now predominant original public meaning school of originalism, an important new development has come to the fore: constructivist originalism. Following three leading scholars,[262] most public meaning ori-

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[258] *See, e.g.*, Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1317 (2006) (defining originalism as "the theory that the original understanding of those who wrote and ratified various constitutional provisions determines their current meaning"); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976) (though not using the term "originalism," adopting a similar view of the interpretive methods that contrast with living constitutionalism, although focusing more upon the intent of the Framers); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 13 (1971) (same).

[259] *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 231–34 (1980) (critiquing the subjective intent of the Framers' approach to originalism).

[260] *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1122–34 (2003); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[261] Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001) ("It is originalist because it disregards any change to that meaning that may have occurred in the intervening years. It is objective insofar as it looks to the public meaning conveyed by the words used in the Constitution, rather than to the subjective intentions of its framers or ratifiers."); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION; FEDERAL COURTS AND THE LAW 38 (1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."); Kesavan & Paulsen, *supra* note 260, at 1132 ("Thus, when we use the term 'originalism,' it is not in reference to a theory of 'original intent' or 'original understanding.' Rather, it is in reference to the original, non-idiosyncratic meaning of words and phrases in the Constitution: how the words and phrases, and structure (and sometimes even the punctuation marks!) would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted." (footnote omitted)).

[262] *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 7 (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL INTERPRETATION] ("Regardless of the extent of judicial interpretation of certain aspects of the Constitution, there will remain an impenetrable sphere of meaning that cannot be simply discovered. The judiciary may be able to delimit textual meaning, hedging in the possibilities, but after all judgments have been rendered specifying discoverable meaning, major indeterminacies may remain. The specification of a single governing meaning from these possibilities requires an act of creativity beyond interpretation. . . . This additional step is the construction of meaning."); *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 118–30 (2004) (discussing how constitutional construction differs from constitutional interpretation); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1–19 (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL CONSTRUCTION] (same); Robert N. Clinton, *Original Under-*

ginalists now "explicitly embrace the idea that the original public meaning of the text 'runs out'" in some cases.[263] The constructivist originalist, thus, engages in two distinct enterprises when applying the Constitution.[264] First and foremost, the public meaning originalist "interprets" the Constitution, using original public meaning to delimit as much textual meaning as possible.[265] But this original public meaning will at times be "underdeterminate"[266] in yielding a rule of law to be applied in particular cases.[267] This underdeterminancy may occur because the text is vague, ambiguous, silent on the issue, contradictory, or reaches the issue at hand only by implication.[268] In such instances, the originalist must engage in an act of "construction" to create a legal rule.[269] This act of construction necessarily "must be guided by something other than the semantic content of the constitutional text," because such circumstances arise uniquely in those cases where the original meaning of the text does not answer the question presented.[270]

Following this approach, constitutional interpretation is an act of historical investigation, seeking to find the original public meaning of the text. This methodology is the primary tool for reaching answers to constitutional questions for originalists.[271] Constitutional construction, on the other hand,

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standing, Legal Realism, and the Interpretation of "This Constitution," 72 IOWA L. REV. 1177, 1264–76 (1987) (distinguishing "extraconstitutional" from "contraconstitutional" interpretations).

[263] Solum, *Semantic*, *supra* note 257, at 19. *See also* Lee J. Strang, *Originalism and the "Challenge of Change": Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 961–62 (2009) (noting that the predominate view endorses the interpretation versus construction divide but devising a theory of "abduced-principles originalism" as a means of addressing the lack of original public meaning without relying as heavily on construction).

[264] *See, e.g.*, BARNETT, *supra* note 262, at 118–30 (discussing how constitutional construction differs from constitutional interpretation); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 51 (2004) (arguing that there is a distinction between constitutional meaning and constitutional decision rules, which direct the application of that meaning).

[265] *See* Solum, *Semantic*, *supra* note 257, at 7.

[266] *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (providing a discussion of the nature and extent of underdeterminacy); Solum, *Semantic*, *supra* note 257, at 75 (arguing that construction is appropriate in cases of constitutional underdeterminancy).

[267] *See* Barnett, *Commerce Clause*, *supra* note 261, at 108–10 (discussing the need for constitutional construction).

[268] *See* Solum, *Semantic*, *supra* note 257, at 69.

[269] *See* discussion of constitutional construction *supra* note 262.

[270] *See* Solum, *Semantic*, *supra* note 257, at 68–69 ("When constitutional practice requires that rules of constitutional law go beyond semantic content, then the activity of supplying that content is 'constitutional construction.' Thus, the distinction can be summarized in the following slogan: *Constitutional construction begins when the meaning discovered by constitutional interpretation runs out.*" (footnote omitted)).

[271] *See* DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM 11 (2005) (stating that originalists claim that "the original understanding of the constitutional text always trumps any contrary understanding of that text"); Strang, *supra* note 263, at 981 ("In

is the analytically distinct, creative endeavor[272] of crafting a constitutional rule in the face of textual underdeterminancy.[273] As a corollary, then, once this "something other than the semantic content" begins to lead a court's constitutional rulemaking, the presumptions of legitimacy that accompany originalist interpretation are no longer present.[274] As a result, any act of constitutional construction requires a normative defense that is independent of those normative principles that support originalist interpretation.[275]

This distinction between interpretation and construction sheds a great deal of light upon the Article III variation on the tribunals position. I will assume that the proponents of the tribunals position have correctly *interpreted* Article III's original public meaning as embedded within the concepts of writ pleading. Nevertheless, the proponents of the Article III tribunals position fail to recognize that they face a question of *construction*, unless they are willing to take the hard stance that Article III prohibits the use of any scheme of civil procedure other than writ pleading (which they generally are not)[276] or reject the distinction between constitutional con-

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situations where the Constitution's original meaning is determinate, there is no flexibility: the interpreter—the courts, the President, or Congress—has no choice and must follow its mandate.").

[272] *See id.*, at 961 n.203 (noting that construction's "usage by Whittington and Barnett . . . designate[s] creative activity," not an interpretive endeavor).

[273] *See* Solum, *Semantic*, *supra* note 257, at 67 (distinguishing "between constitutional interpretation (the activity directed at discerning the semantic content of the constitutional text) and constitutional construction (the activity directed at resolving vagueness, ambiguity, gaps, and contradictions and at constitutional implicature)").

[274] *Id.* at 19.

[275] *See id.* at 127. The normative principle supporting original interpretation is often presented as deriving from the fact that we have a written constitution. *See id.* at 100–17 (arguing that the Constitution's "writtenness" is central to originalism); WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 262, at 50 (arguing that "a written constitution requires an originalist interpretation"). Other justifications are often given as well. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 802–04 (2002) (arguing that originalism is justified because it protects the good consequences that arise from the Constitution's supermajority requirements); Lee J. Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition*, 28 HARV. J.L. & PUB. POL'Y 909, 983–97 (2005) (using the Aristotelian tradition's concept of the common good and the related concept of authority to justify originalism).

[276] Indeed, the very earliest Court rulings assumed flexibility in crafting rules of procedure. *See* Rule, 2 U.S. (2 Dall.) 411, 413–14 (1792) (Jay, C.J.) (stating that while the "Court considers the practice of the courts of *King's Bench* and *Chancery* in *England*, as affording outlines for the practice of this court," it retained the power to "from time to time, make such alterations therein, as circumstances may render necessary"); *see also* Rules of Practice for the Courts of Equity of the United States, 20 U.S. (7 Wheat.) xvii (1822) (adopting formal rules of equity practice). Professor Suja Thomas, however, argues primarily on Seventh Amendment grounds that the Constitution requires much more fidelity to eighteenth-century procedural practice. *See, e.g.*, Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008); Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007). Showing sympathy for this view, the Court has at times decried procedural innovation. *See, e.g.*, McFaul v. Ramsey, 61 U.S. (20 How.) 523, 525 (1857). Interpreting the new Iowa code system, the *McFaul* Court complained that many states had "ruthlessly abolished" writ pleading, a system "matured by the wisdom of ages" and "founded on principles of truth

struction and interpretation altogether[277] (which, again, most are not).[278] The semantic meaning of the text of the Constitution simply does not answer the question of how to apply writ pleading concepts into a system that has abandoned writ pleading; as such, the endeavor is one of construction, not interpretation.[279] Moreover, because this endeavor is one of construction, the grounds of legitimacy available to originalist interpretation are not present. A proponent of the Article III version of the tribunals position, then, must provide an independent normative basis for the view that modern courts are constrained by Article III from inferring causes of action unless the plaintiff suffered an injury that would have been remediable by way of a common law writ.

The Court's analogous Seventh Amendment jurisprudence illustrates how the merger of law and equity forces interpretation to yield to construction. By all accounts, this Amendment by its very text demands an originalist interpretation.[280] The Court, however, has dealt with a series of puzzles

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and sound reason." *Id.* The Court continued that "[t]he distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common-law courts." *Id.*

[277] *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 773 (2009) (arguing that the Framers did not employ "construction" and that proper interpretation avoids the need). It is beyond the scope of this article to fully engage with Professors McGinnis and Rappaport's insightful argument here. But I will offer two thoughts on why their view does not offer much help in this particular context. First, they argue that rules of interpretation can adequately address problems of textual vagueness or ambiguity without resort to construction. *Id.* at 774. But construction problems arise more properly within the broader context of underdeterminancy. *See supra* notes 263–270 and accompanying text. The question this Article addresses—how to reconcile a writ pleading understanding of Article III with a non-writ pleading litigation scheme—is neither ambiguous nor vague. *See* McGinnis & Rappaport, *supra*, at 773–74 (defining the terms). Rather, the semantic meaning of the Constitution is underdeterminate here because the text is silent on the issue—a concept distinct from vagueness or ambiguity. *See* Solum, *Semantic*, *supra* note 257, at 69. Thus, McGinnis and Rappaport do not squarely address the issue presented in this Article. Second, McGinnis and Rappaport actually endorse construction in all but name. *See* McGinnis & Rappaport, *supra*, at 775. They contend that in cases where rules of interpretation are in equipoise, the courts should defer to legislative judgment as to the constitutionality of the act. *Id.* Thus, they offer a rule of decision for cases where interpretation fails to provide such a rule. Now McGinnis and Rappaport insist this is not construction, *id.*, but their rule appears as an archetypal example of construction. *See supra* notes 266–270 and accompanying text. Moreover, even if McGinnis and Rappaport's view applied to the questions this Article raises, I think that they would adopt some rule of deference to congressional intent, which is similar to the conclusion that I offer. *See infra* notes 296–301 and accompanying text.

[278] *See* Strang, *supra* note 263, at 961–62 (noting that the predominant view endorses the interpretation versus construction divide).

[279] *See* Solum, *Semantic*, *supra* note 257, at 68.

[280] The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII. It is widely accepted that this text requires an originalist interpretation. *See, e.g.*, David L. Shapiro & Daniel R. Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442, 449 (1971) ("Even the most ardent critic of any historical test would concede that matters that would have fallen entirely within the jurisdiction of a court of equity or admiralty in 1791 do not come

of construction since the merger of law and equity—all relating to the application of eighteenth-century procedural practice into a contemporary procedural context.[281] In *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, for example, the Court grappled with the question of whether, in the face of legislative silence, an employee who sought relief in the form of backpay for a union's alleged breach of its duty of fair representation under Section 301 of the Labor Management Relations Act had a right to trial by jury.[282] All of the Justices and the parties agreed on the appropriate constitutional interpretation: The plaintiff should have a jury trial right only if the claim presented was "legal" as opposed to "equitable," as these terms were understood at the Founding.[283] The Court held that the plaintiffs did have a right to a jury trial, but it failed to reach a majority on the constructive methodology employed in reaching this result.[284]

This disagreement among the Justices illustrates, I contend, that when dealing with procedural issues such as jury rights or the power to infer a cause of action, settling upon the correct original public meaning of the relevant text does not lead to an obvious rule of construction for applying that rule outside of a writ pleading regime. Given this translation problem, it is not obvious that Professor Bellia's constraints are the best construction of eighteenth-century inferred cause of action practice for a contemporary setting. He contends that Article III limits a federal court's power to infer a cause of action from a federal statute or the Constitution when: (1) the plaintiff has been deprived of a statutory or constitutional right in a manner that would have been recognized as an injury at common law, and (2) the plaintiff's injury would have given rise to a common law form of action.[285] Professor Bellia's normative defense of the view appears to be that this bipartite constraint is best because it follows historical understandings of the powers of the courts.[286] But once we recognize that we are dealing with a

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within the definition of a suit at 'common law' under the seventh amendment."); Suja A. Thomas, *The Unconstitutionality of Summary Judgment: A Status Report*, 93 IOWA L. REV. 1613, 1616 (2008) ("The Seventh Amendment, however, is the only part of the Constitution that explicitly, through the text, requires this application of originalism.").

[281] *See, e.g.*, Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (1990) ("Since the merger of the systems of law and equity, see Fed. Rule Civ. Proc. 2, this Court has carefully preserved the right to trial by jury where legal rights are at stake."); *see also* Tull v. United States, 481 U.S. 412, 417 (1987) (requiring a jury trial on the merits in actions analogous to suits at common law); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959) (noting that the jury is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care").

[282] 494 U.S. at 561.

[283] *Id.* at 564–65 (majority opinion); *id.* at 574 (Brennan, J., concurring); *id.* at 581 (Stevens, J., concurring); *id.* at 584 (Kennedy, J., dissenting).

[284] *See infra* notes 288–291.

[285] Bellia, *supra* note 26, at 849–50.

[286] *Id.* ("If historical practice is to be our guide, however, we should not selectively focus on one necessary but insufficient determinant of whether a plaintiff had a cause of action (e.g., deprivation of

question of construction, not interpretation, this normative defense—that a certain rule is best because it comports with original understanding—no longer carries implicit legitimacy.[287] The historical understandings normative defense attaches to rules of interpretation, not rules of construction.

This is not to say that the tribunals position proposed rule of construction is necessarily a poor one. But as the *Terry* Court illustrates, a constitutional construction that attempts to apply the common law understanding of a cause of action into a contemporary context could well focus on issues besides type of injury and presence of a common law writ. Indeed, because any theory of constitutional construction requires some normative defense that is independent of those normative principles that support originalist interpretations,[288] the door is open to many possibilities. One could, following Justice Marshall's plurality opinion in *Terry*, focus upon the normative importance of the courts' remedial power. This view concludes that to determine whether a statutory action will resolve legal rights, and thus trigger a right to a jury trial, courts should "examine both the nature of the issues involved and the remedy sought," with the second inquiry being weightier than the first.[289] Or one could look to these same two factors but emphasize the first inquiry, as Justice Kennedy did in his dissent in *Terry*.[290] Or one might focus on the sole factor of whether the remedy sought would have been legal or equitable at the time of the Founding, as Justice Brennan suggests.[291] Another approach would be to adopt Justice Stevens's three prong rule.[292] Further still, one could adopt Professor Barnett's general rule of constitutional construction that favors a libertarian set of negative rights,[293] or Professor Strang's general rule of constitutional construction that favors deference to Congress,[294] or any other of a number of constructive approaches one might apply.[295]

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statutory benefit) to the exclusion of other necessary determinants (e.g., resulting in a certain kind of injury).").

[287] *See* BARNETT, *supra* note 262, at 151–52.

[288] *See id.* at 127.

[289] Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (1990) (Marshall, J., plurality).

[290] *Id.* at 584 (Kennedy, J., dissenting).

[291] *Id.* at 574 (Brennan, J., concurring in part and concurring in the judgment).

[292] *Id.* at 582–83 (Stevens, J., concurring in part and concurring in the judgment) (considering historical analogues, the "nature of the substantive right," and the "relief sought").

[293] *See* BARNETT, *supra* note 262, at 5 (advocating a "presumption of liberty" as the rule of construction according to which "any restriction on the rightful exercise of liberty is unconstitutional unless and until the government convinces a hierarchy of judges that such restrictions are both necessary and proper").

[294] *See* Strang, *supra* note 263, at 981 ("[W]here the Constitution's original meaning is under- or indeterminate, Congress has the authority to make constitutional determinations, also labeled constitutional constructions.").

[295] *See* Solum, *Semantic*, *supra* note 257, at 76–79 (reviewing possible theories of construction).

Other equally plausible constructions of eighteenth-century cause of action practice that are consistent with originalism as an interpretive tool are similarly available. A construction that errs on the side of taking jurisdiction over inferred actions, for example, is normatively attractive on congressional meta-intent grounds. If the federal courts refuse to infer a cause of action for the violation of a federal right, the state courts would become the sole adjudicative bodies to hear these federal claims.[296] Prior to the passage of § 1331 in 1875, such a result may well have comported with the congressional default preference that federal rights are to be litigated in state courts, but this is no longer the case.[297] Since the passage of § 1331, the congressional creation of rights, absent a clear statement to the contrary,[298] constitutes strong evidence of legislative intent that these rights should be vindicated in a federal forum. The Court engages in this strong presumption in favor of federal jurisdiction because Congress legislates against a historical backdrop in which the enforcement of statutory federal rights by federal courts was essential and the Court assumes Congress intends its new statutes be enforced with equal vigor.[299] Indeed, the Court

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[296] *See* Sloss, *supra* note 24, at 377 (arguing that the effect of such a practice would be to empower the state courts as the final interpreters of federal statutes on this score).

[297] 28 U.S.C. § 1331 (2006). Excepting statutory amounts in controversy, the Act has been essentially unchanged since 1875. *See, e.g.*, Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369 (1980) (striking out the minimum amount in controversy requirement of $10,000); Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415 (1958) (raising the minimum amount in controversy requirement from $3,000 to $10,000). Finally, following most scholars, I exclude the short-lived general grant of federal question jurisdiction passed at the end of President John Adams's term and treat the 1875 Act as the first general federal question grant.

[298] Congress can create rights without vesting the federal courts with jurisdiction. For instance, several courts have noted that the Telephone Consumer Protection Act, 47 U.S.C. § 227 (2006), vests jurisdiction exclusively in the state courts, pursuant to clear congressional command. *See* Murphey v. Lanier, 204 F.3d 911, 913–14 (9th Cir. 2000) (listing cases). But such acts are exceptional. *See* 15 U.S.C. § 2310(d) (2006) (limiting most Magnuson–Moss Act claims to state court).

[299] *See, e.g.*, *Letters from the Federal Farmer XV* (Jan. 18, 1788), *reprinted in* THE COMPLETE ANTI-FEDERALIST 315 (Herbert J. Storing ed., 1981) ("It is true, the laws are made by the legislature; but the judges and juries, in their interpretations, and in directing the execution of them, have a very extensive influence for preserving or destroying liberty, and for changing the nature of the government."); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1397 (1953) ("Remember the *Federalist* papers. Were the framers wholly mistaken in thinking that, as a matter of the hard facts of power, a government needs courts to vindicate its decisions?"); *id.* at 1372–73 (discussing the courts' role in enforcement proceedings and the constitutional constraints that come into play when Congress confers jurisdiction to enforce federal law); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 712 n.163 (1997) ("[A]ny effort to pare back federal jurisdiction would deny Congress an important and historically effective forum for the implementation of its laws."); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1611 (2000) ("Congress generally cannot ensure enforcement of its legislative mandates without providing a federal judicial forum where violators of those mandates can be prosecuted."). Of course this raises the issue of the so-called parity debate between the federal and state courts. The crux of this debate has been to determine which system, state or federal, better protects federal rights. I need not dip into this debate, as it is likely incapable of non-normative resolution. *See* Brett C. Gerry, *Parity Revisited: An Empirical Comparison of*

regularly engages in a similar presumption that Congress intends for the federal courts to hear actions to enforce constitutional rights.[300] Moreover, such an approach would have the added (although ironic) benefit, as Justice Scalia noted, of presenting a clear rule of construction against which Congress could legislate.[301]

My argument here is modest. I do not believe I have necessarily established that my proposed rule of construction is normatively superior to the rule presented by proponents of the tribunals position. Rather, I hope only to make the claims that: (1) the Article III argument weighing against jurisdiction to infer causes of action is an argument from construction, not interpretation; (2) any rule of construction requires a normative defense independent from the claims of historical accuracy that ground originalist interpretation; and (3) there are normatively attractive rules of construction that compete with the tribunals position's restrictive view.

2. Standing Redux.—In addition to these construction-based concerns, Professor Bellia's view that Article III creates dual constraints upon the federal courts' power to infer causes of action offers no more of a restriction upon the Article III jurisdiction of the federal courts than one finds in contemporary standing doctrine. Prior to the merger of law and equity in 1938, there was no standing doctrine per se.[302] The successful pleading of a

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State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission, 23 HARV. J.L. & PUB. POL'Y 233, 237 (1999) (noting that the question "whether state courts are doing a good job of interpreting the Federal Constitution . . . inevitably lead[s] to a conclusion influenced by the normative preconceptions of the person who poses the query"). I need only assert that it makes sense to assume Congress generally prefers a federal forum for the protection of federal rights. Congress's preference may have no factual foundation, but the lack of a foundation for Congress's intent is immaterial when one is focusing upon congressional intent itself, as it is the constitutionally empowered actor here. *See* Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction,* 97 CAL. L. REV. 95, 98–99 (2009), (arguing there is reason to doubt the empirical basis for the widely asserted notion that the state courts are less likely to enforce federal rights than are the federal courts).

[300] *See, e.g.*, INS v. St. Cyr., 533 U.S. 289, 308–09 (2001) (requiring a clear statement of legislative intent to bar habeas corpus review of constitutional violations); Webster v. Doe, 486 U.S. 592, 603 (1988) (holding that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear"); Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986) (requiring a heightened showing of legislative intent in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 112 (1982) ("We cannot impute to Congress an intent now or in the future to transfer jurisdiction from constitutional to legislative courts for the purpose of emasculating the former."); Johnson v. Robison, 415 U.S. 361, 373–74 (1974) (holding that a federal statute will not be construed to preclude judicial review of constitutional challenges absent clear and convincing evidence of congressional intent).

[301] Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring in the judgment) (arguing that a clear and absolute rule against inferring causes of action would be welcomed by legislators).

[302] *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168–70 (1992) (arguing against the view "that Article III [standing] requires injury in fact, causation, and redressability," because these "requirements [were] unknown to our law until the 1970s").

common law or equitable form of action served as the functional equivalent due to the congruity of the notions of right, cause of action, and remedy under the writ pleading scheme.[303] After the merger of law and equity, which did away with forms of action in the federal system,[304] the question arose as to who could enforce federal rights. Thus, contemporary standing doctrine evolved to fill this gap. Contemporary standing doctrine, then, is little more than a rule regarding injury synthesized from old writ pleading practice.[305] Thus, the tribunals position—even if it is sound as a matter of constitutional construction—is redundant in practice. A more detailed review of standing doctrine will make the point.

Doctrinally speaking, "standing is a question of whether a plaintiff is sufficiently advers[e] to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal court jurisdiction."[306] Pursuant to this purpose, standing doctrine, which is itself a jurisdictional issue, must be decided prior to—and can therefore avoid—on-the-merits adjudication of claims, on the ground that the party bringing the claim is not properly entitled to its judicial determination.[307] The focus is on

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[303] *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224 (1988) ("It is at least clear that current standing law is a relatively recent creation. In the late nineteenth and early twentieth centuries, a plaintiff's right to bring suit was determined by reference to a particular common law, statutory, or constitutional right, or sometimes to a mixture of statutory or constitutional prohibitions and common law remedial principles."); Sunstein, *supra* note 302, at 177 ("The discussion thus far has shown that early English and American practices give no support to the view that the Constitution limits Congress' power to create standing. The relevant practices suggest not that everyone has standing, nor that Article III allows standing for all injuries, but instead something far simpler and less exotic: people have standing if the law has granted them a right to bring suit."); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1395 (1987) (describing the "syllogism of the forms"—the standing doctrine's predecessor—where "[j]udicial power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law" such that the claim only "then becomes a case" (quoting Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 819 (1824) (Marshall, C.J.) (internal quotation marks omitted)); *id.* at 1419 (explaining that even where the word "standing" appeared in cases in the nineteenth century, "the Court's explicit consideration of 'standing' was an inquiry into the merits"); *id.* at 1451 (concluding that "[f]or over a hundred years, the metaphor of 'standing' was shorthand for the question of whether a plaintiff had asserted claims that a court of equity would enforce").

[304] FED. R. CIV. P. 2.

[305] *See* Bellia, *supra* note 26, at 831–32 ("We thus see how, in the years following the merger of law and equity in the federal system, the Court dealt with the abolition of the forms of proceeding that previously determined whether an individual could bring a cause of action in federal court. Where a federal regulatory scheme authorized no specific remedy for its violation, the Court generalized from prior practice that only individuals who had suffered an injury in fact could sue in federal court. Where a federal regulatory scheme did authorize a specific remedy for its violation, the Court allowed the lawsuit to proceed, though whether it recognized that non-injured-in-fact individuals could sue to vindicate the public interest in such circumstances is unclear.").

[306] Davis v. Passman, 442 U.S. 228, 239–40 n.18 (1979).

[307] *See* 13 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3531 (2007) (collecting cases).

the characteristics of the plaintiff (e.g., was the plaintiff injured in fact, is the plaintiff representing third parties, etc.)—not the claim itself.[308]

The Court now divides standing doctrine into two categories: those rules divined from Article III and other rules that are merely prudential (i.e., nonconstitutional).[309] For the purposes of this discussion, I focus solely upon Article III standing. The Court now applies a threefold test for determining when a plaintiff has Article III standing. The plaintiff must plead that she suffered a distinct and palpable injury (the injury-in-fact requirement), that this injury was caused by the challenged activity of the defendant (the causation requirement), and that this injury is apt to be redressed by a remedy that the court is empowered to award (the remediation requirement).[310]

Of prime importance here is the injury-in-fact requirement. The Supreme Court has employed several locutions attempting to capture the notion of "injury in fact"—"concrete," "distinct and palpable," and "actual or imminent."[311] All of these locutions, however, merely restate the common law requirement, present in most old writs, of an injury to person or property.[312] Furthermore, contemporary usage of injury-in-fact more often than not turns on whether the plaintiff has a legally protected interest.[313] This in turn amounts to the requirement that the plaintiff's injury is "traditionally

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[308] *Id.*

[309] *See, e.g.*, Kowalski v. Tesmer, 543 U.S. 125, 128 (2004) ("The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." (internal quotation marks omitted)).

[310] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). The Court said:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not conjectural or hypothetical." Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. (alterations in original) (internal citations and quotation marks omitted).

[311] McConnell v. FEC, 540 U.S. 93, 225 (2003); *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982) ("distinct and palpable injury") (internal quotation marks omitted); Larson v. Valente, 456 U.S. 228, 239 (1982) ("concrete adverseness" and "distinct and palpable injury" (internal quotation marks omitted)); Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982) ("distinct and palpable injury" (international quotation marks omitted)); *id.* at 379 ("concrete and demonstrable").

[312] *See* Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 426 (1974) ("A more illuminating way of looking at standing is to recognize that its determination is an adjudication of familiar components of a cause of action, resolved by asking whether a plaintiff has stated a claim for relief. Thus substantive issues—injury, legal protection, duty, and legal cause—rather than procedural or process ones are presented."); Bellia, *supra* note 26, at 831–32 (providing a similar analysis in terms of the meaning of a cause of action under writ pleading).

[313] *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 (2000).

thought to be capable of resolution through the judicial process."[314] That is to say, the Court requires that the plaintiff could have proceeded under a form of action at common law.[315]

Contemporary standing doctrine, in large part then, assures that plaintiffs in federal court must seek a remedy for an injury that would have given rise to a common law form of action. But this standing rule is exactly the same limitation that the Article III variant of the tribunals position imposes upon the courts' ability to infer causes of action.[316] The Article III argument that the inference of a cause of action is extrajurisdictional, then, amounts to no more than the following: Article III prohibits the inference of a cause of action when the plaintiff lacks standing. This should come as no surprise. The tribunals position's Article III limitation on the ability to infer a cause of action is merely redundant of current standing doctrine.

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In sum, one need not even reject originalism as an interpretive enterprise to be unmoved by the Article III argument that inferring a cause of action is extrajurisdictional. First, the proposed dual constraints upon the courts' ability to infer causes of action are rules of construction, not strictly interpretation. From this perspective, it is far from obvious that the rule of construction posited by proponents of the tribunals position is the best normative option. Second, even if this rule of construction is the best one available, it is, in practice, redundant of contemporary standing doctrine.

III. THE PROBLEM OF PRUDENCE AS JURISDICTION

In the preceding sections my argument has been limited to the jurisdictional nature of inferring a cause of action. I have argued that the issue is not properly a jurisdictional one. Whether the courts ought to employ a power within their jurisdiction is a matter of prudence, which I do not wish to address in this Article. Rather, in this Part, I consider broadly the courts' practice of treating matters of judicial prudence as matters of jurisdiction. I begin with some doctrinal consequences of considering prudential matters under the guise of jurisdiction. I turn next to the Court's other unsuccessful

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[314] Raines v. Byrd, 521 U.S. 811, 819 (1997) (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)) (internal quotation marks omitted); *id.* ("We have also stressed that the alleged injury must be legally and judicially cognizable. This requires, among other things, that the plaintiff have suffered an invasion of a legally protected interest which is . . . concrete and particularized . . . ." (internal citation and quotation marks omitted)); *id.* at 820 ("[W]e must carefully inquire as to whether appellees have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable.").

[315] *See supra* note 303.

[316] *See* Bellia, *supra* note 26, at 851.

forays into transforming prudential matters into jurisdictional ones. I end by drawing some general conclusions.

A. Doctrinal Havoc

Turning first to doctrinal issues, I contend that pushing traditional matters of prudence into a jurisdictional framework leads to poor consequences. "As frequently happens where jurisdiction depends on subject matter, the question [of] whether jurisdiction exists . . . has been confused with the question [of] whether the complaint states a cause of action."[317] But even in cases of federal question jurisdiction, proper subject matter jurisdiction vests a federal court with the power to decide both successful and unsuccessful suits.[318] Although the Supreme Court's admonishments never to conflate these two concepts are well intended, many lower federal courts are quick to note that "while distinguishing between a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) and a dismissal for failure to state a claim under Rule 12(b)(6) appears straightforward in theory, it is often much more difficult in practice."[319] Treating as jurisdictional the issue of an inference of a cause of action, which is best viewed as a matter of statutory construction or judicial policy more generally, does little to alleviate this difficulty. Rather, on both formal and pragmatic grounds, it merely muddles issues by pushing courts to decide cases on the merits under the guise of a Rule 12(b)(1) jurisdictional motion.

As to the formal distinction, subject matter jurisdiction speaks to a court's ability to resolve claims and defenses—in either the affirmative or negative.[320] A failure to state a claim, by contrast, presupposes that a court

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[317] Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 249 (1951); *see also* Fogel v. Chestnutt, 668 F.2d 100, 105–07 (2d Cir. 1981) (Friendly, J.) (providing an insightful discussion of the standard view).

[318] Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913).

[319] Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir. 1996); *accord* Primax Recoveries, Inc. v. Gunter, 433 F.3d 515, 517 (6th Cir. 2006); Estate of Harshman v. Jackson Hole Mountain Resort Corp., 379 F.3d 1161, 1166 (10th Cir. 2004); Carlson v. Principal Fin. Group, 320 F.3d 301, 305–06 (2d Cir. 2003); Schwenker v. Molalla River Sch. Dist. No. 35, 2006 WL 3019828, at *3 (D. Or. Oct 19, 2006); RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. e (1982) (explaining that "question[s often] can plausibly be characterized either as going to subject matter jurisdiction or as being one of merits"); Joshua Schwartz, Note, *Limiting* Steel Co.*: Recapturing a Broader "Arising Under" Jurisdictional Question*, 104 COLUM. L. REV. 2255, 2261 (2004) (noting that "[c]ourts are often hard pressed to define the difference between jurisdiction and the merits and have been forced to concede that . . . [the distinction] is often much more difficult [to make] in practice" (footnote and internal quotation marks omitted)).

[320] *See* Lee, *supra* note 95, at 1620 (arguing that jurisdiction is a matter of "something like legitimate authority"); Lees, *supra* note 95, at 1470–77 (listing the three major theories which seek to explain the concept of jurisdiction as power, legitimacy and legislative control); *see also Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."); Wasserman, *supra* note 95, at 670–78 (rejecting the practical import of Professor Lee's view).

has power to resolve a case, but that the plaintiff's complaint contains some sort of legal infirmity or pleading defect on its face.[321] Under the standard view, in a federal question jurisdiction case the issue of subject matter jurisdiction is both analytically distinct,[322] and prior to,[323] the issue of the plaintiff's ability to state a claim. As such, a 12(b)(1) motion serves a distinctly different purpose from that of a 12(b)(6) motion. The former is, largely,[324] a modern equivalent of a plea in abatement.[325] As such, a 12(b)(1) motion does not attack the merits of the plaintiff's claim or the sufficiency of the pleadings, but merely the propriety of the federal forum.[326] By challenging the propriety of the federal forum, the movant necessarily argues that the federal court lacks the power under either the Constitution or laws of the United States to hear the case.[327] A 12(b)(6) motion, by con-

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[321] *See, e.g.*, Bell v. Hood, 327 U.S. 678, 682 (1946) ("[J]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover."); 5B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 1356 (3d ed. 2004) [hereinafter WRIGHT, FEDERAL PRACTICE] (discussing purpose of Rule 12(b)(6) motions).

[322] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 198–200 (1962) (discussing the fundamental difference between a dismissal on the merits and a jurisdictional dismissal); Ehm v. Nat'l. R.R. Passenger Corp., 732 F.2d 1250, 1257 (5th Cir. 1984) ("A dismissal under both rule 12(b)(1) and 12(b)(6) has a fatal inconsistency and cannot stand. Federal jurisdiction is not so ambidextrous as to permit a district court to dismiss a suit for want of jurisdiction with one hand and to decide the merits with the other." (citation and internal quotation marks omitted)); Johnsrud v. Carter, 620 F.2d 29, 32–33 (3d Cir. 1980) (holding that dismissal on jurisdictional grounds and for failure to state a claim are analytically distinct, implicating different legal principles and different burdens of proof); *cf.* Winslow v. Walters, 815 F.2d 1114, 1116 (7th Cir. 1987) ("[S]eeking summary judgment on a jurisdictional issue, therefore, is the equivalent of asking a court to hold that because it has no jurisdiction the plaintiff has lost on the merits. This is a nonsequitur.").

[323] *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998) (holding that the notion of hypothetical jurisdiction is contrary to law); Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 250 (1867) (holding that "[i]f there were no jurisdiction, there was no power to do anything but to strike the case from the docket"); Deniz v. Municipality of Guaynabo, 285 F.3d 142, 149 (1st Cir. 2002) ("When a court is confronted with motions to dismiss under both Rules 12(b)(1) and 12(b)(6), it ordinarily ought to decide the former before broaching the latter."); Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001) (accord).

[324] A motion to dismiss for lack of subject matter jurisdiction can merely attack the sufficiency of the jurisdictional statement required by Rule 8(a)(1). *See* 5C WRIGHT, FEDERAL PRACTICE, *supra* note 321, § 1363. But such dismissals are not the focus of the present discussion.

[325] *See* 5B WRIGHT, FEDERAL PRACTICE, *supra* note 321, ("Rules 12(b)(1) through 12(b)(5) and 12(b)(7) essentially are defenses to the district court's ability to proceed with the action. They are modern counterparts to the common law pleas in abatement and do not go to the merits of a claim."); Wasserman, *supra* note 95, at 649–53 (discussing the "first phase" of litigation, during which jurisdictional questions are properly addressed); BLACK'S LAW DICTIONARY 1172 (7th ed. 1999) (Bryan A. Garner, ed.) (defining "plea in abatement").

[326] 5B WRIGHT, FEDERAL PRACTICE § 1349.

[327] *See, e.g.*, Davis v. Passman, 442 U.S. 228, 239 n.18 (1979) (describing subject matter jurisdiction as the power of the court to hear a case).

trast, is the modern equivalent of a demurrer.[328] Again in contrast to a jurisdictional challenge, the 12(b)(6) motion speaks to the merits of the claim or the plaintiff's conformity to Rule 8(a)(2).[329] Prudential issues that could bar recovery—such as whether the court should infer a cause of action—do not challenge the propriety of the federal forum. Rather, they are challenges to the merits of plaintiff's claim.[330] An argument challenging the propriety of the inference of a cause of action, then, is not in reality a claim of "wrong court." It is actually a claim of "wrong statutory interpretation." The latter is squarely a merits issue.[331]

This doctrinal havoc produces practical consequences as well.[332] First, treating a question as jurisdictional has the consequence of raising the issue at the outset of the litigation process.[333] Despite this early treatment, jurisdictional issues, unlike a 12(b)(6) motion,[334] are unwaivable and must be raised sua sponte by the court.[335] Factual findings related to jurisdiction, unlike the presumption of truthfulness employed in a 12(b)(6) motion,[336] are often made by the court and are subject to deferential review on appeal.[337] Furthermore, the party alleging jurisdiction, not the movant, bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence.[338] Finally, a dismissal for want of jurisdiction also divests a fed-

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[328] 5B WRIGHT, FEDERAL PRACTICE § 1349 ("Rule 12(b)(6) is the successor of the common law demurrer and the code motion to dismiss and is a method of testing the sufficiency of the statement of the claim for relief.").

[329] *Id.*

[330] *See, e.g.*, JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS, AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY IN ENGLAND AND AMERICA 403 (2d ed., Boston, Charles C. Little & James Brown 1840) ("The want of form, which is most usually insisted on, is the want of due certainty in the *allegations*, or the loose and inartificial structure of the Bill, or the omission of some prescribed formularies." (emphasis added)).

[331] *See* Wasserman, *supra* note 95, at 671–72 ("Merits ask whether the defendant's conduct was legally constrained (by the Constitution or by act of Congress); jurisdiction asks whether a federal court has the power to enforce that legal constraint on the defendant's conduct.").

[332] *See generally id.* at 662–69 (describing consequences).

[333] *See, e.g., id.* at 662; Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 47 (1994).

[334] FED. R. CIV. P. 12(h)(2).

[335] FED. R. CIV. P. 12(h)(3); Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006); United States v. Cotton, 535 U.S. 625, 630 (2002) (finding that "subject matter jurisdiction, because it involves the court's power to hear a case, can never be forfeited or waived"); Dane, *supra* note 333, at 36–37 (noting that courts must raise jurisdictional questions sua sponte if the parties have not raised them).

[336] *See, e.g.*, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171 (2005); Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 325 (1991).

[337] *Arbaugh*, 546 U.S. at 514 ("[I]f subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own."); Wasserman, *supra* note 95, at 662.

[338] *See, e.g.*, FED. R. CIV. P. 8(a)(1); Thomson v. Gaskill, 315 U.S. 442, 446 (1942); Chayoon v. Chao, 355 F.3d 141, 143 (2d Cir. 2004); Hedgepeth v. Tennessee, 215 F.3d 608, 611 (6th Cir. 2000); Marcus v. Kan. Dep't of Revenue, 170 F.3d 1305, 1309 (10th Cir. 1999).

eral court of pendent jurisdiction over the plaintiff's related state law claims.[339] Thus, the jurisdictional treatment of prudential matters has the improper effect of pushing on the merits review to the onset of trials with standards of review that are much harsher for plaintiffs than they would be under a Rule 12(b)(6) motion. The treatment of prudential matters under the guise of jurisdiction, then, creates both doctrinal havoc and practical headaches.

B. Ripeness Redux

Unfortunately, this is not the Court's first attempt at giving a jurisdictional gloss to a traditionally prudential rule. Of note here is the ripeness doctrine, where the Court's current approach has been much decried. Moreover, the results of this move are strikingly similar to the dysfunctions presented by the movement to treat the inference of a cause of action as a jurisdictional question.

Ripeness doctrine developed as a reaction to the rise of the administrative state.[340] Given the great potential for costly agency enforcement action, many potential defendants to such actions desired a judicial determination of their legal status pre-enforcement.[341] In response, ripeness doctrine aims "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" with other organs of government.[342] Pursuant to this end, the Court has stated that the question of ripeness turns on "the fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration."[343] That is, the ripeness inquiry boils down to a determination of whether refusing to hear a case until an agency acts would impose sufficient hardship on the parties.[344]

This seems a wise use of judicial resources as a general rule.[345] And prior to the 1970s, ripeness was generally considered a matter of prudential

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[339] *See, e.g.*, 28 U.S.C. § 1367(c)(3); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 285 (1993); Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 817 n.15 (1986); Hagans v. Lavine, 415 U.S. 528, 545–50 (1974).

[340] *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (describing extensive changes in judicial function under "public law" litigation from the private model of two-party disputes); Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 158 (1987) ("But the expansion of 'public law' litigation eventually forced the courts to stop interpreting the case or controversy standard by analogy to common law adjudication, and thus to abandon the legal interest test." (footnote omitted)).

[341] *See* Nichol, *supra* note 340, at 161, 165.

[342] Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967).

[343] *Id.* at 149.

[344] *Id.*

[345] *See, e.g.*, KENNETH CULP DAVIS, 4 ADMINISTRATIVE LAW TREATISE § 25:2 at 351–56 (2d ed. 1983) (discussing the development of ripeness law); *see also* 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3532 (3d ed. 2008) ("As compared to standing, ripeness decisions have developed a generally satisfactory method for resolving the problems of prematurity."); RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL,

concern, which could be shaped and applied flexibly as individual cases warranted.[346] In reaction to the Warren Court's relaxing of these prudential rules, however, the Burger Court issued a series of rulings that both tightened the ripeness inquiry and treated it as a jurisdictional issue mandated by Article III.[347]

As Professor Nichol argues, this jurisdictional treatment of what had been considered a sound prudential policy wrought bad consequences.[348] It transformed a flexible, factually intensive inquiry—one that took place after the parties had gathered evidence and presented it to the court—into a formal legal question that now must be adjudicated within the early (and nearly evidence-free) confines of a Rule 12(b)(1) motion.[349] This posture has reduced the ripeness inquiry to little more than an allegation in the complaint of an imminent threat of harm.

This categorization as a jurisdictional inquiry results in ripeness decisions that now fall into three unattractive categories. First, many ripeness decisions are simply redundant of the injury-in-fact inquiry posed by standing doctrine.[350] I present the same critique of the Article III argument that

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ADMINISTRATIVE LAW AND PROCESS 199–202 (1985) (discussing the Supreme Court's holding that a pharmaceutical company would suffer hardship if the Court did not review an FDA regulation before it was enforced).

[346] *See, e.g.*, Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 162–64 (1967); Poe v. Ullman, 367 U.S. 497, 502–04 (1961) (stating that for its own prudential "governance" the Court has developed "a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision," including the ripeness doctrine (citations and internal quotation marks omitted)); Columbia Broad. Sys. v. United States, 316 U.S. 407, 425 (1942); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); Pierce v. Soc'y of Sisters, 268 U.S. 510, 536 (1925).

[347] *See* Nichol, *supra* note 340, at 162–63 ("[T]he Supreme Court has been clear that, although the ripeness demand may have begun as an exercise in judicial discretion, it is now firmly planted in the Constitution. In a series of cases dating from the mid-1970s, the Court has conflated the ripeness inquiry and the case or controversy requirement of article III, repeatedly describing the ripeness inquiry as a 'threshold' determination designed to measure whether the 'actual controversy' . . . requirement imposed by Art[icle] III of the Constitution is met." (alterations in original) (footnotes omitted)).

[348] *Id.* at 180 ("The benefits of disassociating ripeness from the case or controversy requirement of article III are numerous.").

[349] *Id.* at 182 ("More fundamentally, constitutionalizing ripeness is at odds with the flexible nature of the doctrine. The announcement that the premature adjudication of claims violates the Constitution suggests a rigidity and uniformity of analysis, as well as an adherence to principle, that have little in common with ripeness review.").

[350] *See, e.g.*, MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 n.8 (2007) ("As respondents acknowledge, standing and ripeness boil down to the same question in this case."); Nichol, *supra* note 340, at 172 ("The problem with this line of ripeness cases, therefore, is not the enterprise undertaken. Rather, it is doubtful that they are truly ripeness determinations at all. In measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing analysis. The standing requirement, the cornerstone of the Burger Court's article III jurisprudence, demands that a litigant show that he personally 'has suffered some threatened or actual injury' as the result of the conduct of the defendant. This requirement of particularized actual injury repeatedly has been treated by the Court not only as constitutionally mandated, but as the very core of the standing determination." (footnotes omitted)).

inferring a cause of action is extrajurisdictional.[351] Second, many ripeness cases can be seen as little more than Rule 12(b)(6) motion decisions on the merits.[352] But when ripeness inquiries are treated as a jurisdictional matter, all the burdens are shifted to the plaintiff at an early stage, contrary to the thrust of the Federal Rules of Civil Procedure's preference for on-the-merits decisions. This same infirmity applies to the argument that inferring a cause of action is extrajurisdictional.[353] Finally, many ripeness decisions are not challenges to the propriety of the federal forum, but rather to the wisdom of its use.[354] That is, they are not pleas in abatement, but demurrers. Again, this same defect plagues the jurisdictional argument against the inference of causes of action.[355] Others have made nearly identical points in regard to the move to treat standing as a function of Article III jurisdiction as opposed to a flexible rule of prudence.[356]

What these results illustrate, I contend, is that prudential matters simply do not translate well into the procedural and formalistic confines of subject matter jurisdiction. First, the attempts appear to lead inevitably to redundant standing analyses or inappropriately timed on-the-merits reviews. Second, the prudential decision to find that a case is ripe requires a case-by-case review of the actual circumstances of particular cases, not a formal rule about the availability of a federal forum.[357] Similarly, the decision to infer a cause of action requires a statute-by-statute analysis. In addition to the in-

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[351] *See supra* Part II.B.2.

[352] Nichol, *supra* note 340, at 169 ("[A] necessary implication of the Court's moves to constitutionalize the ripeness doctrine, therefore, is an assertion that the judiciary has no power to address the 'premature' issues considered in the ripeness cases. When the Court uses the ripeness standard in decisions such as those discussed above, however, it does make a judgment on the merits.").

[353] *See supra* Part III.A.

[354] Nichol, *supra* note 340, at 176 ("The balancing contemplated by *Abbott Laboratories*, however, includes a range of concerns broader than the dictates of the claim on the merits. Other considerations can caution against review. Ripeness analysis has been used, for example, as a tool by the Court to help ensure precision in judicial decision making and to prevent judicial intrusions on proper and efficient allocation of governmental powers.").

[355] *See supra* Part III.A.

[356] Professor Fletcher, for example, has noted:

> As currently constructed, standing is a preliminary jurisdictional requirement, formulated at a high level of generality and applied across the entire domain of law. In individual cases, the generality of the doctrine often forces us to leave unarticulated important considerations that bear on the question of whether standing should be granted or denied. This consequence is obvious in the apparent lawlessness of many standing cases when the wildly vacillating results in those cases are explained in the analytic terms made available by current doctrine. But we mistake the nature of the problem if we condemn the results in standing cases. The problem lies, rather, in the structure of the doctrine.

Fletcher, *supra* note 303, at 223.

[357] Nichol, *supra* note 340, at 183 ("Ripeness, as *Young* demonstrates, often calls for a uniquely case-oriented evaluation of the practical probabilities presented by the litigation. As Professor Jaffe argued, the doctrine demands 'reasoned balancing of certain typical and relevant factors for and against the assumption of jurisdiction.' If the ripeness calculus is rooted in the Constitution, however, the *Abbott Laboratories* balancing process certainly will be skewed." (footnotes omitted)).

terpretation of the text, such an analysis, even if focused solely upon congressional intent, may require sensitive, statute-by-statute, temporal determinations[358] about the legislative expectations of a Congress enacting legislation in 1890,[359] 1964,[360] or 1991[361]—in which Congress legislated against differing background judicial norms concerning the courts' willingness to infer causes of action. A formalistic rule seems inapplicable to the task presented. Finally, even if one were to believe that a rule of prudence should be mandatory, there is no reason to jump to the conclusion that such a rule must be a jurisdictional one. Professor Dodson in a recent piece persuasively argues this point.[362] He notes that while jurisdictional rules are necessarily mandatory, the converse—that mandatory rules are necessarily jurisdictional—does not hold.[363] Following Dodson's lead, one might well

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[358] *Compare* Alexander v. Sandoval, 532 U.S. 275, 287–88 (2001) ("Nor do we agree with the Government that our cases interpreting statutes enacted prior to *Cort v. Ash* have given dispositive weight to the expectations that the enacting Congress had formed in light of the contemporary legal context." (internal citation and quotation marks omitted)), *with id.* at 315 n.25 (advancing the opposite position) *and* Mank, *Legal Context*, *supra* note 16 (discussing the role of contextual evidence in interpreting statutes).

[359] *See, e.g.*, Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (2006)). During that period, the courts regularly assumed a remedy was available for statutory rights. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 374–75 (1982) ("Under this approach, federal courts, following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule."); California v. Sierra Club, 451 U.S. 287, 299-300 (1981) ("[In 1890,] Members of Congress merely assumed that the federal courts would follow the ancient maxim, *ubi jus, ibi remedium*." (quotation marks omitted)); Creswell, *supra* note 16, at 975 ("Justice Pitney [in *Rigsby*] emphasized that he was applying a well-recognized common-law doctrine."); Foy, *supra* note 19, at 554 ("Justice Pitney wrote for the Court in *Rigsby* . . . . [Yet] Justices Story or Marshall could have written the opinion. Indeed, Coke or Chief Justice Holt could have written it. *Rigsby* looked to the past, not to the future.").

[360] *See, e.g.*, Civil Rights Act of 1964, 78 Stat. 241. Again, during this *Borak* era, Congress reasonably expected the courts to supply remedies for statutory violations. *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 688–89 (1979) (holding that the 1964 Congress expected the courts to provide a remedy for rights created by the Act); *id.* at 718 (Rehnquist, J., concurring) ("We do not write on an entirely clean slate, however, and the Court's opinion demonstrates that Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act, tended to rely to a large extent on the courts to *decide* whether there should be a private cause of action, rather than determining this question for itself. Cases such as *J.I. Case Co. v. Borak*, . . . and numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary would undertake this task.").

[361] *See, e.g.*, Americans with Disabilities Act, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12113 (2006)). Given the radically different judicial environment, this Act, perhaps, requires a different interpretative approach. *See, e.g.*, *Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring) ("It seems to me that the factors to which I have here briefly adverted apprise the lawmaking branch of the Federal Government that the ball, so to speak, may well now be in its court. Not only is it 'far better' for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.").

[362] *See* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1 (2008) (arguing that nonjurisdictional rules may still retain some of the features of a jurisdictional rule, such as being mandatory, without absorbing every other feature of a jurisdictional rule).

[363] *Id.* at 5–6.

consider the bar upon inferring a cause of action as mandatory, yet still consider the question as a merits issue.

CONCLUSION

The argument in favor of a jurisdictional bar upon the inference of a cause of action by the federal courts is a poor one. This movement to view the third branch of government, as Justice Scalia styles it, as a system of tribunals is predicated upon a faulty view of § 1331 jurisdiction. Further, the Article III version of the tribunals position fails to provide a convincing rule of constitutional construction. Finally, this jurisdictional move, like others in the past, leads to doctrinal and practical headaches that are not worth their costs. In short, the federal judiciary is a system of full-fledged courts with all the powers attendant thereto. Whether any particular power, such as the ability to infer a cause of action, should be used is properly a matter of judicial prudence.[364] As such, advocates of the tribunals position cannot hide behind the mantle of jurisdiction as an excuse for not providing a palatable normative defense for what amounts to a restrictive policy preference.

[364] *See* Strauss, *supra* note 21, at 924 (commenting on *Sandoval* and concluding that "[t]he reasoning here is not that federal courts *cannot* adopt suggested legal principles in common law fashion, but that it may be unwise for them to do so when those principles turn on assessments better suited for legislative than adjudicative fact-finding").