

A CAUSE OF ACTION, ANYONE?:
FEDERAL EQUITY AND THE PREEMPTION
OF STATE LAW

*Henry Paul Monaghan**

I was not fortunate enough to have known Dan Meltzer well. I met Danny only a few times. We had only the thinnest of correspondence. Of his sterling reputation as a human being, I am of course fully aware. And I do know his work—all of it—thoroughly. On that point, a mountain of encomiums would iterate only a simple thought: Dan was the gold standard in federal courts scholarship.¹ It is, therefore, a special honor to participate in a symposium to honor his memory.

In this very brief Essay, I focus on aspects of a topic on which both Danny and I have written and on which our reasoning differed: federal court authority, “sitting in equity,” to enjoin enforcement of state law on federal preemption grounds. In a coercive action brought by the state to enforce the state law, the federal act could of course be set up as a defense. Suppose, however, that alleging “arising under” subject-matter jurisdiction,² the plaintiff sues the appropriate state officials to restrain enforcement of the state statute. Many such challenges are readily entertained on the merits, often because these challenges have a firm statutory basis such as 42 U.S.C. § 1983.³ But not all do. The Court has, however, asserted a more general, freestanding equitable injunctive authority: “[A]s we have long recognized, if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions pre-

© 2016 Henry Paul Monaghan. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

* Harlan Fiske Stone Professor of Constitutional Law, Columbia Law School. Special thanks to Marie Killmond for research assistance.

1 I put to the side another area of his preeminence. Along with my colleague Peter Strauss, Danny was the leading modern defender of the Legal Process School (my school!) of legal interpretation.

2 U.S. CONST. art. III, § 2; 28 U.S.C. § 1331 (2012).

3 *E.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) (holding that Title IX does not preclude action alleging unconstitutional gender discrimination under § 1983); *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 105 (1989) (“NLRA granted petitioner rights enforceable under § 1983.”).

empted.”⁴ Yet, not all such non–statutorily based challenges succeed. In *Armstrong v. Exceptional Child Center, Inc.*,⁵ for example, the source of the preceding quotation, a divided Court just last term refused to entertain such a challenge by participants in a federal funding program (healthcare providers) seeking more favorable state-set Medicaid rates for their services. That result may or may not be sound, but to my mind what is most interesting is the intriguing nature of the various opinions, particularly given the Court’s unanimous opinion one term earlier in *Lexmark International, Inc. v. Static Control Components, Inc.*⁶ Lexmark’s mode of analysis, if it takes firm root, should significantly reshape long-embedded modes of thinking about standing, at least at the statutory level. These two decisions and their intersection are the focus of this brief Essay.

I. OLD BASICS

For many decades law students have been taught that before a district court may address the merits of a private litigant’s substantive claims, Article III requires that the plaintiff satisfy a three-part, trans-substantive set of “constitutional standing” requirements—*injury-in-fact*, causation, and redressability⁷—as well as three additional “prudential” justiciability barriers.⁸ The source of judicial authority to fashion this discretionary overlay has never been made clear,⁹ but its content generally included a ban on the assertion of both generalized grievances and third-party claims,¹⁰ as well as a demand that the plaintiff’s injury fall “within the zone of interests protected by the law invoked.”¹¹

4 *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015) (citing *Ex parte Young*, 209 U.S. 123, 155–56 (1908)).

5 *Id.*

6 134 S. Ct. 1377 (2014).

7 See, e.g., RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 101 (7th ed. 2015) [hereinafter *HART & WECHSLER*] (identifying these requirements).

8 See *id.* at 156–58 (identifying prudential aspects of standing doctrine and discussing *Lexmark*).

9 The authority to create such an overlay might, however, have been thought to inhere in the discretion long associated with equitable and declaratory remedies. See, e.g., *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282–88 (1995) (reviewing history of federal courts’ discretion in entertaining declaratory judgment actions). But citing the “virtually unflagging obligation” language of *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), the Court now seems eagerly determined to exercise all statutorily conferred jurisdiction. See, e.g., *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015); *Lexmark*, 134 S. Ct. at 1386.

10 The ban on generalized grievances was sometimes located in Article III. See *HART & WECHSLER*, *supra* note 7, at 149 n.3. The ban on *jus tertii* claims has not in fact proved to be very formidable. See *id.* at 161–68.

11 *Lexmark*, 134 S. Ct. at 1386 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004)).

*Allen v. Wright*¹² is the casebook poster child for this body of doctrine. It is a leading case in virtually every casebook that has a section on standing.¹³ But *Association of Data Processing Service Organizations v. Camp*,¹⁴ decided in 1970, not *Allen v. Wright*, arguably is the doctrinal high-water mark. That decision, however, appears much later in the casebook standing sections.¹⁵ And there is a puzzle about what it illustrates: statutory limits on article standing; prudential standing; the invention of the zone-of-interest standing limitations; the APA? Long familiarity with the decision has obscured its intellectual importance.

In *Data Processing*, the Court said that standing is a matter distinct from and anterior to the plaintiff's merits claim:

The "legal interest" test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Thus the Administrative Procedure Act grants standing to a person "aggrieved by agency action within the meaning of a relevant statute."¹⁶

What is perhaps insufficiently remembered now is that the *Data Processing* formulation constituted a sharp break from previous cases, in which the Court frequently (but not always¹⁷) rejected any sharp distinction between standing and the claim on the merits, especially in the statutory context. That is, the earlier formulation, the "legal interest" test, asked whether this plaintiff had stated a cause of action.¹⁸ As a leading administrative law casebook puts it: "Standing is a modern jurisprudential concept. For most of our legal history, litigation occurred principally within a private-rights model, in which *who* could seek relief was not recognized as distinct from whether the complaint *stated a cause of action*."¹⁹

12 468 U.S. 737 (1984).

13 *E.g.*, HART & WECHSLER, *supra* note 7, at 101–03 (including *Allen v. Wright* in first group of cases on standing).

14 397 U.S. 150 (1970).

15 *See, e.g.*, HART & WECHSLER, *supra* note 7, at 157 (where it now no longer even appears as a principal case).

16 *Data Processing*, 397 U.S. at 153 (quoting 5 U.S.C. § 702 (1964)).

17 This was especially true in constitutional cases. *See* for example *Fairchild v. Hughes*, 258 U.S. 126, 129–30 (1922), and *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (*per curiam*), two such challenges where the Court understood plaintiffs to assert nothing more than a generalized grievance that the government was not being administered according to constitutional requirements.

18 A leading example of the merits-based approach to "standing" is *Alexander Sprunt & Son v. United States*, 281 U.S. 249, 259–60 (1930), which discussed how an action by competitors challenging regulatory action failed because competitors had no common-law right to be free from competition and the relevant federal statute gave them no such right.

19 PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 1207 (11th ed. 2011); *see also* Jonathan Remy Nash, *A Functional Theory of Constitutional Standing*, 114 MICH. L. REV. 339, 347 n.44 (2015). For an early description of the

The private-rights model included litigants asserting interests protected by the common law and those secured by statute.²⁰ In theory, therefore, unless the plaintiff's claim was too insubstantial to confer subject-matter jurisdiction,²¹ dismissal should be for failure to state a claim, not for want of subject-matter jurisdiction.

Data Processing has always struck me as a laconic, casually tossed off opinion. But it has stood for decades as a systemic judicial response to the emergence of federal-court litigants who could not be analogized to private parties asserting rights protected by the common law—most significantly, to plaintiffs (like the *Exceptional Child* plaintiffs) who themselves are not the direct subject of governmental regulation but who claimed injury arising from the activities (or inactivities) of the modern regulatory state.²² However, the *Data Processing/Allen v. Wright* constitutional/prudential framework has not

private-rights model, see Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–68 (1973).

While it is true that standing is a modern concept, the concern for a proper plaintiff is a longstanding one. See, e.g., Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) (“[E]arly American courts . . . were well aware of the need for proper parties . . .”). For a very recent discussion, see generally Anthony J. Bellia, Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609 (2015). These authors insist that from the beginning of our constitutional history, “the local law of a particular sovereign . . . determined the causes of action that its courts could adjudicate.” *Id.* at 638. Considerable variation existed in “[t]he forms and modes of proceeding.” *Id.* at 637. The First Judiciary Act, they claim, made causes of action “matters of local law,” and Section 34 required federal courts to apply state law. See *id.* at 639. The grant of jurisdiction in equity and admiralty was more complicated, but the authors insist that this grant, too, did not extend to the creation of new causes of action. Rather, Congress “directed federal courts to apply traditional causes of action in equity and admiralty.” *Id.* at 675. The authors do not identify a source of these “traditional causes of action.” Marshall Court decisions suggest that the rules of decision came from England, “that country from which we derive our knowledge of those principles.” *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 223 (1818). “[T]he Courts of the Union have a Chancery jurisdiction in every state, and the judiciary act confers the same Chancery powers on all, and gives the same rule of decision.” *United States v. Howland & Allen*, 17 U.S. (4 Wheat.) 108, 115 (1819); see also HART & WECHSLER, *supra* note 7, at 602–03.

20 See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 234–37 (1988) (discussing relationship between private-cause-of-action cases and standing cases and identifying the issue in both as “whether the particular plaintiff had a judicial right to enforcement of a legal duty of the defendant”).

21 See the line of cases stemming from *Bell v. Hood*, 327 U.S. 678, 682–83 (1946) (“Jurisdiction, therefore, is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover”; the court also noted that exceptions exist where the federal claim is “immaterial” or “wholly insubstantial and frivolous.”). See *Shapiro v. McManus*, 136 S. Ct. 450, 455–56 (2015) (collecting cases). On the ironic relationship between *Data Processing* and *Bell v. Hood*, see Fletcher, *supra* note 20, at 235.

22 Non-common-law (non-Hohfeldian) plaintiffs would also include plaintiffs asserting constitutional rights for which there was no common-law analogue, such as the right to vote.

yielded anything like a unified theory.²³ In fact, the Court's standing jurisprudence has long drawn strident criticism as "unprincipled" along a wide variety of perspectives (from that of low-level politics, to concealed merits determinations, to unpredictability).²⁴ I pass those criticisms here. Professor Fallon's recent comprehensive study, *The Fragmentation of Standing*, is for me far more helpful.²⁵ He maintains that "[r]ecent years have witnessed the accelerated fragmentation of standing into a multitude of varied, complexly related subdoctrines."²⁶ If one looks at discrete areas of law, however, he observes that one finds considerably more consistency and predictability.²⁷ This Essay is an effort to look at one such area, albeit a rather large and important one: statutory standing. And I want to emphasize the importance of the existence of a cause or right of action, an idea that until *Lexmark* had been obscured by *Data Processing's* description of the elements of constitutional and prudential standing.²⁸

Before turning to *Lexmark*, however, one final point should be noted. Richard Stewart characterized *Data Processing* as an "unredeemed disaster" and he was by no means alone.²⁹ But how much its conceptual shift actually changed things on the ground I cannot say.³⁰ Issues of "statutory stand-

23 The Court insists that its standing doctrine reinforces separation-of-powers principles and informed judicial decision-making. *E.g.*, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009))); *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) ("At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))).

24 See, e.g., Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 466–67 (2008) (collecting criticisms); see also HART & WECHSLER, *supra* note 7, at 125 n.21 (same). Considerable specific criticism centered on the zone-of-interest test on the grounds that it was erratically applied and was perhaps relevant only to interpreting Section 702 of the Administrative Procedure Act, 5 U.S.C. § 702 (2012), which was at issue in *Data Processing*. See Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 319 (2004).

25 Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061 (2015).

26 *Id.* at 1061.

27 See *id.* at 1063. The Establishment Clause cases, however, do leave Professor Fallon particularly unsatisfied. See *id.* at 1071–75.

28 So distinct indeed were these concepts that to this day every edition of *Hart and Wechsler* places them in different chapters. Compare HART & WECHSLER, *supra* note 7, at 101 (introducing section on problems of standing), with *id.* at 723 (introducing section on rights of action to enforce federal statutes and to enjoin federal constitutional violations).

29 See, e.g., Richard Stewart, *Standing for Solidarity*, 88 YALE L.J. 1550, 1569 (1979); see also Fletcher, *supra* note 20, at 229 n.48 (agreeing and collecting other such criticisms).

30 Jessica Bulman-Pozen insisted on this point. See Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 823 n.48 (2015) (collecting sources on the distinction between the law in action and the law on the books).

ing,³¹ as *Lexmark* reluctantly but accurately denominated them, quickly took hold, typically framed under the heading of prudential standing.³² Laid bare, the end question often ultimately became, does *this* statute authorize *this* plaintiff to sue? *Lexmark* itself provides an excellent illustration. *Lexmark*, it was alleged, had committed trade libel against a component supplier of a *Lexmark* competitor. As it came to the Court, the question was one of “statutory standing” under § 43(a)(1)(B) of the Lanham Act.³³ Specifically, did a supplier to a *Lexmark* competitor have a claim against *Lexmark* for the “false or misleading” advertising proscribed by the Act? The Act imposed liability “in a civil action by *any person who believes that he or she is or is likely to be damaged by such act.*”³⁴ Despite this very capacious language, no one, including the Court’s textualists, supposed that “anyone” injured could sue.³⁵ The courts of appeals had framed the relevant statutory narrowing inquiry in terms of “prudential standing,”³⁶ and a three-way circuit split developed as to the appropriate standard. Acknowledging but describing the prudential standing label as “misleading,”³⁷ the Court granted review: “We granted certiorari to decide ‘the appropriate analytical framework for determining a party’s standing to maintain an action for false advertising under the Lanham Act.’”³⁸ As we shall see, the Court greatly reshaped “the appropriate analytical framework for determining” who could sue in the federal court.³⁹

II. NEW BASICS?

Further analysis of our preemption topic should, I believe, now be filtered through the prism of *Lexmark*’s (I hope) watershed and (I believe) restorative decision. That decision drew wide notice because, writing for a *unanimous* Court, Justice Scalia’s opinion all but categorically held that *no* judicially fashioned prudential standing barriers could exist for refusing to exercise statutorily conferred jurisdiction.⁴⁰ This was quite startling given

31 See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014).

32 See *id.* at 1386.

33 15 U.S.C. § 1125(a) (2012).

34 *Id.* (emphasis added).

35 See *Lexmark*, 134 S. Ct. at 1388.

36 See *id.* at 1386.

37 *Id.*

38 *Id.* at 1385 (quoting Petition for Certiorari at i, *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (No. 12-873)).

39 *Id.*

40 See *id.* at 1388 (citation omitted) (“Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates.”); see also *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (strongly suggesting that any notion of prudential ripeness will also be eliminated); *Leading Cases*, 128 HARV. L. REV. 291, 330 (2014) (“*Lexmark* calls the future viability of prudential standing into question”

recent squarely contrary precedent.⁴¹ Moreover, all the Members of the Court seemingly agreed that the ban on “generalized grievance” claims inhered in Article III itself.⁴² With those striking aspects of the decision I am not here concerned.

What is important for us is that Justice Scalia removed *Data Processing’s* zone-of-interest test from prudential standing and merged it with the issue of proximate causation. “Although we admittedly have placed that test under the ‘prudential’ rubric in the past,” he said, “it does not belong there.”⁴³ To ask “[w]hether a plaintiff comes within ‘the zone of interests’” protected by the law invoked is simply to ask “*whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.*”⁴⁴ And that issue goes to the merits, not to subject-matter jurisdiction.⁴⁵

Several aspects of *Lexmark* strike me as noteworthy. First, in statutory cases, *Lexmark* should significantly reduce fixation on the constitutional dimensions of standing. To be sure, the standard three constitutional requirements are formally retained,⁴⁶ but those barriers are actually quite thin. Increasingly, “statutory standing” will be the central focus: Does *this* statute arguably provide *this* plaintiff with a cause of action? Causation and redressability will be seen as going to the merits of the claim, rarely to subject-matter jurisdiction.⁴⁷ The same may be true of injury-in-fact. *Data*

and “leaves little room for courts to refuse to adjudicate a case for lack of standing based on *prudential* considerations.”)

For additional discussion, see S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 127 (2014) (arguing “debates over the classification of specific principles” about standing “mask underlying differences in judicial philosophy”), and *Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014), commented upon in *Recent Cases*, 128 HARV. L. REV. 1850 (2014), which discussed the D.C. Circuit’s articulation of the zone-of-interests test following *Lexmark* not as a prudential standing issue but “as a statutory inquiry into whether the plaintiffs have a cause of action,” *id.* at 1854. *Lexmark’s* lengthy footnote left open the status of the formal barrier against third-party standing. *Lexmark*, 134 S. Ct. at 1387 n.4.

For me, many third-party cases in fact involve first party standing, Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984), or the application of the valid rule and severability doctrines, HART & WECHSLER, *supra* note 7, at 182 (citing Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1).

41 Most notably, *Elk Grove United School District v. Newdow*, 542 U.S. 1, 11 (2004), and *United States v. Windsor*, 133 S. Ct. 2675, 2685–86 (2013). *Lexmark* cited *Elk Grove* with evident disapproval. *Lexmark*, 134 S. Ct. at 1386.

42 See *Lexmark*, 134 S. Ct. at 1387 n.3.

43 *Id.* at 1387.

44 *Id.* (emphasis added).

45 See *id.* at 1391 n.6 (noting that for subject-matter jurisdiction, only an “arguable” cause of action is necessary).

46 See *id.* at 1386 (“[P]laintiff must have suffered or be imminently threatened with a concrete and particularized ‘injury in fact’ that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision.” (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992))).

47 See *supra* note 40 (discussing future of prudential standing doctrine following *Lexmark*).

Processing sought to fashion that issue as a non-normative “factual” one.⁴⁸ Few will subscribe to that view as a general proposition. While some free-standing, common law–based concept of injury will continue to exist⁴⁹ (i.e., the “right” to be free from direct regulation), many cases will turn on a different statutory question: Does a plaintiff not the direct subject of a regulation nonetheless assert an injury within the protective ambit of the relevant federal statute? That is, of course, *Lexmark*.⁵⁰

Second, the Court’s discussion of the APA is significant. Section 702 creates only a remedial right of action. For Justice Scalia, however, it was also a directive with respect to understanding the scope of judicial inquiry into the underlying statute: in APA-governed matters, courts should be generous in identifying plaintiffs who can assert injury from agency breach of a regulatory duty.⁵¹ With such a sentiment, I am in full accord. The idea of a “right” in the regulatory context is complicated. For common-law and some statutory plaintiffs (such as in *Lexmark*, which is essentially a trade libel suit), the fundamental claim is one of a strong “right”: “I am entitled to win on these facts.”⁵² In interest analysis terms, the plaintiff asserts that her interest is sufficiently strong to overcome an ordinary utilitarian calculus.⁵³ In the regulatory context of the modern administrative state, however, the claim of right frequently takes a more limited form. It is simply a claim that the regulators must take into account plaintiffs’ substantive interests and not treat them in an arbitrary and unreasonable manner.⁵⁴ Typical of such cases is *Michigan v. EPA*,⁵⁵ decided at the end of the last term. All nine Justices agreed that the EPA had to take into account the costs imposed on the regulated parties. The Court divided over whether that had been done at the

48 Fletcher, *supra* note 20, at 230–31 (describing and criticizing that attempt).

49 See *Kerry v. Din*, 135 S. Ct. 2128, 2132–33 (2015) (plurality opinion) (Justice Scalia summarizing Blackstone).

50 *Lexmark*, 134 S. Ct. at 1377.

51 See *id.* at 1388–89 (quoting Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2210 (2012)) (noting that the test is not “especially demanding,” is “lenient,” and is generous, barring only “marginally related” interests). My colleague Gillian Metzger pointed out to me that even prior to Justice Scalia’s statement, the zone-of-interest standard, when applied, excluded very few would-be-litigants.

52 This is the structure of a claim made by a common-law plaintiff, and in *Lexmark*, which the Court treats as a federal common-law trade libel tort action. See *Lexmark*, 134 S. Ct. at 1392, 1393–94 (discussing understanding of common-law tort of unfair competition at time of adoption of Lanham Act and establishing proximate causation).

53 The “right” can be conceived of as a “trump,” or as simply excluding certain justifications for its infringement. See Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3101–02, 3124–25, 3146 n.243, 3157 n.292, 3168 n.345 (2015) (describing and collecting sources). That is not, of course, to say that the claim of right can never be defeated.

54 See 5 U.S.C. § 706 (2012); see also Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1963 (2015) (quoting Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1756 (1975)).

55 135 S. Ct. 2699 (2015).

appropriate stage in the regulatory proceedings.⁵⁶ Recognition of such limited “rights” is inevitable given the regulatory complexities and imperatives of regulation necessary in the modern administrative state.⁵⁷ Whether assertions of these kinds of interests merit the characterization of “right” in other contexts is not important here. They do here.

Third and finally, care should be taken with respect to the cause-of-action terminology. As (then-) Professor Fletcher pointed out, the term is “awkward . . . because it includes within its scope the two distinct questions of defendant’s duty and plaintiff’s right to enforce that duty.”⁵⁸ Indeed, because of that confusion the Federal Rules of Civil Procedure substituted “a

56 Compare *id.* at 2709 (emphasis in original) (“Cost may become relevant again at a later stage of the regulatory process, but that possibility does not establish its irrelevance at *this* stage.”), with *id.* at 2715 (Kagan, J., dissenting) (“EPA reasonably found that it was ‘appropriate’ to decline to analyze costs at a single stage of a regulatory proceeding otherwise imbued with cost concerns . . .”).

57 I put to one side any discussion of the seductive concept of the “private Attorney Generals,” which Judge Frank made fashionable in the early 1940s. See *Associated Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), *vacated as moot*, *Ickes v. Associated Indus. of N.Y. State, Inc.*, 320 U.S. 707 (1943) (referring to “non-official persons, authori[zed] to bring a suit to prevent action by an officer in violation of his statutory powers” as “private Attorney Generals”). That was a fashionable legal concept in Supreme Court jurisprudence during the middle of the last century. See HART & WECHSLER, *supra* note 7, at 145–46 (collecting cases). For an argument that the case law was understood to hold that Congress could create litigants who (unlike a competitor, for example) had no concrete, personal interest in the litigation, see Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1147 (2009). For some, such a doctrine would pose problems under the Take Care Clause. See HART & WECHSLER, *supra* note 7, at 154; Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1351–54 (2015) (questioning, but ultimately rejecting, arguments against the proposition that the “Constitution permits Congress to decide to authorize an individual to bring suit in federal court for violation of federal law”). This Court seems completely inhospitable to any freestanding notion of the private attorney general. On the whole, the concept now seems to do limited work. That is certainly true with respect to litigants who can insist, as in *Michigan v. EPA*, that the regulatory framework requires that their tangible, economic interests be taken into account. It may have some explanatory power in the case of otherwise qualified Article III litigants. These litigants could advance “public interest” claims in addition to claims related to their own injury. For example, in litigation governed by the APA, a litigant with an arguable cause of action for economic injury could assert the full range of reasons that the agency’s action was invalid (e.g., environmental damage) even if the litigant’s own interest was not compromised, at least if the agency action was not severable. Were it otherwise, the litigant would not be regulated under a valid rule. See *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (holding that petitioners had standing to challenge EPA’s denial of their rulemaking petition because “[t]he risk of catastrophic harm, though remote, is nevertheless real,” and “[t]hat risk would be reduced to some extent if petitioners received the relief they seek”); *Bennett v. Spear*, 520 U.S. 154, 164–65 (1997) (holding that the Endangered Species Act’s citizen-suit provision expanded standing to negate or expand the zone-of-interests test and allow for suit by plaintiffs alleging over-enforcement).

58 Fletcher, *supra* note 20, at 236.

claim for relief.”⁵⁹ But the ancient terminology has the tenacity of original sin.⁶⁰

Given the Janus-faced character of cause-of-action terminology, care must be taken with respect to making some relevant subsidiary distinctions. Here, I would insist on the general soundness of the traditional Legal Process mode of analysis, asking whether the defendant violated any duty owed to plaintiff as a primary right holder,⁶¹ and, if so, whether plaintiff had identified a remedial right of action from some source.⁶² (Hart and Sacks caution against “the ease . . . which . . . allows a primary right to be confused with a remedial right of action, which is a very different legal animal.”⁶³) The substantive federal statute itself or § 702 of the APA⁶⁴ might provide the requisite remedial right. The capacious § 1983 may be available if defendants are state officials.⁶⁵ Finally, a plaintiff may have an implied right of action,

59 FED. R. CIV. P. 8(a).

60 See, e.g., *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998)); *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014).

61 Interestingly, in the area of private rights, Hart and Sacks treated the important concept as primary duty, not primary right. See, e.g., H. HART & A. SACKS, *THE LEGAL PROCESS* 136–37 (William N. Eskridge & Philip P. Frickey eds., 1994) [hereinafter HART & SACKS]. But they insisted in a footnote that the idea of a primary right “has an important and highly distinctive role in the analysis of relations between private persons and officials.” *Id.* at 137 n.8. This claim was not developed. But the authors proved to be prescient. See HART & WECHSLER, *supra* note 7, at 843–49, 1012–15 (discussing actions for declaratory or injunctive relief on grounds of preemption, application of § 1983 to preemption claims, and supremacy clause as alternative basis for preemption claim). As I said earlier, however, in the regulatory context the claim of right may be only that plaintiff’s interests be taken into account. See *id.* at 11–12. Claims under 42 U.S.C. § 1983 could, I believe, transcend this framework, or more accurately it can be used to enforce immunities as well as rights. But, as yet, that claim has not found a home in the Court’s implied-right-of-action jurisprudence. See *infra* note 106 and accompanying text.

62 See HART & SACKS, *supra* note 61, at 137 (“A right of action is a species of power—of remedial power. It is a capacity to invoke the judgment of a tribunal of authoritative application upon a disputed question about the application of preexisting arrangements and to secure, if the claim proves to be well-founded, an appropriate official remedy.”).

63 They add:

[A] system of analysis which permits confusion between a primary claim to a performance and a remedial capacity to invoke a sanction for nonperformance is dangerous at best. But Hohfeld and Corbin went further and encouraged this confusion by seeming to suggest that the right and the right of action necessarily went together so that if there was no right of action there was no primary right in a genuine sense to begin with, and vice versa. Lots of people have tried to think backwards in this way. It is the essence of clear analysis to see that it is backwards, and instead to think frontwards.

Id. at 136.

64 5 U.S.C. § 702 (2012).

65 42 U.S.C. § 1983; see also *supra* notes 3, 61; *infra* note 106 and accompanying text.

although (as we all know) the heyday of implying such rights has long since passed.⁶⁶

* * *

Once again, of course, how much the *Lexmark* reformulation will actually change results on the ground remains to be seen. Familiar and deeply ingrained modes of thinking are not readily displaced. Moreover, one appellate court has indicated that the *Lexmark* change is only verbal, and there is surely force to this point.⁶⁷ But *Lexmark's* mode of analysis should foster clarity, and as my colleague Judge Lynch pointed out to me, it should reduce the number of issues the courts will view as “jurisdictional.” Moreover, if the Court’s mode of analysis takes hold, it should go a long way in restoring the pre-*Data Processing* framework. But the migration of ideas and concepts may take some time.⁶⁸ Even on the Court itself! For example, does *Lexmark's* mode of analysis apply in constitutional cases? *Data Processing* explicitly referred to the Constitution as well as to statutes applying the zone-of-interest standard; *Lexmark* did not.⁶⁹ In the Arizona Redistricting Commission case,⁷⁰ the Court’s major standing case last term, the Court, over the dissents of Justices Scalia and Thomas,⁷¹ held that the Arizona Legislature had standing under the Elections Clause⁷² to assert that an Arizona constitutional amendment creating an independent redistricting commission unconstitutionally excluded it from the process of redistricting seats for the House of Representatives.⁷³ The Court then went on to hold, 5-4, against the legisla-

66 *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1387–88 (2015), provides the most recent example of a case in which the Court did not recognize an implied right of action. See *infra* Part III. But did the Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), necessarily assume that the Electoral Clause impliedly created a right of action? See *infra* Part III.

67 *Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014) (commented upon in *Recent Cases*, 128 HARV. L. REV. 1850 (2014)). While *Lexmark* seems to favor a generous approach to the question of whether a statutory cause of action has been created, *Perez* recognized that the zone-of-interest test “is not a demanding one.” *Id.* at 1016–17.

68 See for example the fine recent student note, *Causation in Environmental Law: Lessons from Toxic Torts*, 128 HARV. L. REV. 2256 (2015). The author decries treating causation as an Article III matter in environmental cases, but as a merits issue in common-law toxic tort cases. See *id.* at 2271–72. The writer, however, seems entirely unaware of *Lexmark* and its potential application here.

69 *Compare* *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (referring to the “statute or constitutional guarantee”), *with* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. at 1386 (referring to “the law invoked” (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004))).

70 See *Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652.

71 Justice Scalia dissented, invoking the private-rights model of constitutional adjudication. For him, this case involved only a contest for political power between two political bodies. *Id.* at 2694–97 (Scalia, J., dissenting).

72 See *id.* at 2665 (majority opinion); see also U.S. CONST. art. I, § IV, cl. 1.

73 See *Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. at 2665 (holding that the Arizona Legislature had standing because the initiative “together with the Arizona Constitution’s

ture on the merits. Issues of standing and the merits were distinct, Justice Ginsburg said. Standing in “no way depends on the merits’ of the claim.”⁷⁴ *Lexmark* was not mentioned.⁷⁵ Nor was there any separate discussion of the source of the Arizona legislature’s right of action.

Finally, a major constitutional question, which can be noted only in passing, has surfaced. Everyone understands that the term injury “in fact” has a strongly normative component.⁷⁶ To what extent does Article III limit congressional power to create a judicially cognizable injury? The recent grant in *Spokeo, Inc. v. Robins*⁷⁷ could shed considerable light on that issue. Plaintiff Robins complained of a Federal Credit Reporting Act (FCRA)⁷⁸ violation by defendant data broker.⁷⁹ Defendant published inaccurate but not necessarily negative information on its website.⁸⁰ Arguably, plaintiff suffered no tangible injury—thus a “no injury” case. But this federal statute (like many other federal statutes) carried a statutory penalty for its violation, and the Ninth Circuit held that “the violation of a statutory right is usually a sufficient injury-in-fact to confer standing.”⁸¹ This reasoning is in tension with the Court’s statement that “[u]nlike redressability[,] . . . the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.”⁸² Certiorari was granted on the following question: “May Con-

ban on efforts to undermine the purposes of an initiative . . . would ‘completely nullif[y]’ any vote by the Legislature, now or ‘in the future,’ purporting to adopt a redistricting plan” (quoting *Raines v. Byrd*, 521 U.S. 811, 823–24 (1997))). The legislature could submit a non-binding plan to the redistricting commission. See *id.* at 2661.

74 *Id.* at 2663 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

75 Neither, I might add, were the Fourth Amendment cases where the *Lexmark* merits mode of analysis has long found a home. That is to say, in Fourth Amendment cases, the Court almost invariably concludes that the litigant either states a cause of action under the Fourth Amendment or he does not. See, e.g., *City of L.A. v. Patel*, 135 S. Ct. 2443, 2447 (2015) (in a challenge brought by hotel operators, holding that a municipal code provision requiring them to turn over registries to police on request violated the Fourth Amendment); *Rakas v. Illinois*, 439 U.S. 128, 148 (1978) (holding that petitioners who “asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized” lacked “legitimate expectation of privacy”). In the First Amendment context standing has played a more important role. See, e.g., *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1143 (2013) (finding that the respondents lacked standing to challenge a provision of the Foreign Intelligence Surveillance Act on First and Fourth Amendment grounds, among others, because their “theory of *future* injury [was] too speculative”). But *Clapper* would probably not read any differently if viewed as a failure to state a claim on the merits. The same is true of *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436, 1440 (2011), which held that Arizona taxpayers lacked standing to assert Establishment Clause challenge to state tuition tax credit.

76 See *Fletcher*, *supra* note 20, at 229–33 (“[T]he nature and degree of a person’s injury . . . cannot be seen as a merely ‘factual’ question.”).

77 135 S. Ct. 1892 (2015).

78 15 U.S.C. § 1681 (2012).

79 *Robins v. Spokeo, Inc.*, 742 F.3d 409, 410 (9th Cir. 2014).

80 *Id.*

81 *Id.* at 412.

82 *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

gress confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute?”⁸³

In his justly admired essay, Professor Fletcher argued that “[s]o long as the substantive rule is constitutionally permissible, Congress should have plenary power to create statutory duties and to provide enforcement mechanisms for them, including the creation of causes of action in plaintiffs who act as ‘private attorneys general.’”⁸⁴ Hart and Wechsler suggest a somewhat different framework:

If standing reflects an irreducible constitutional minimum that authorizes judges to measure the existence of injury in fact, causation, and redressability against a constitutional ideal of what constitutes a “case” or “controversy,” then the availability of standing may not depend upon the way Congress defines new rights of action. If, however, standing turns on the articulation of a *legal* injury, then Congress has greater leeway to define injuries and chains of causation that will create standing where none would otherwise exist.⁸⁵

Putting aside Professor Fletcher’s now dubious reliance upon a private attorney general theory,⁸⁶ both authors advance attractive frameworks. But they ignore the importance of a modern litigation elephant: the Rule 23(b)(3)⁸⁷ monetary class action. Quite obviously, what drove the grant of review was the class action dimensions of the *Spokeo* statute and of its numerous federal counterparts. Companies face enormous penalties for arguably only technical, “no injury” violations of these statutes.⁸⁸ This is a scenario that will not sit well on a Court with a solid majority deeply hostile to aggregate litigation (particularly lawyer-driven small-claims litigation) that none-

83 *Spokeo*, 135 S. Ct. 1892, No. 13-1339 (2015).

84 Fletcher, *supra* note 20, at 251; cf. John Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 78–81 (2014) (arguing that the Necessary and Proper Clause vests Congress with power to resolve matters of governmental structure).

85 HART & WECHSLER, *supra* note 7, at 132–33.

86 For a discussion of the history and current status of the private attorney general theory, see *supra* note 57.

87 FED. R. CIV. P. 23(b)(3).

88 Seventeen amicus briefs seeking reversal on the merits have been filed, most by business organizations. See *Spokeo, Inc. v. Robins*, SCOTUSBLOG (last updated Nov. 2, 2015), <http://www.scotusblog.com/case-files/cases/spokeo-inc-v-robins/>; cf. *Remijas v. Neiman Marcus Grp. LLC*, 794 F.3d 688 (7th Cir. 2015) (reversing and remanding an order of dismissal of a class action involving identity theft). The Seventh Circuit (Wood, J.) held that the plaintiffs satisfied Article III standing requirements based on alleged future injuries, including loss of time and money spent to protect themselves against future identity theft and fraudulent charges. *Id.* at 693–94. In January 2014, Neiman Marcus had announced that the payment card data of 1.1 million customers may have been hacked. See Elizabeth A. Harris et al., *Neiman Marcus Data Breach Worse than First Said*, N.Y. TIMES (Jan. 23, 2014), <http://www.nytimes.com/2014/01/24/business/neiman-marcus-breach-affected-1-1-million-cards.html>. The *Remijas* class consisted of approximately 350,000 members. 794 F.3d at 690.

theless involves aggregate claims that would result in substantial money damages. At oral argument, Justice Ginsburg noted the class action problem. Both she and Justice Sotomayor, otherwise sympathetic to plaintiff's claim, suggested that class certification might be inappropriate.⁸⁹

Lexmark is instructive here. It, after all, continues a focus that was dear to Justice Scalia, namely, whether the plaintiff has alleged a *concrete* injury to itself. For him, abstract interests in securing good government or government according to the rule of law were not enough.⁹⁰ We know, however, that Congress can create interests that the Court would on its own not find cognizable, such as an interest in information.⁹¹ But do Article III and/or the Due Process Clauses impose limits on the extent to which Congress (or the states) can make actionable claims by private parties against other private parties (not the government) for “no injury” statutory violations?⁹² While *Spokeo* could be most interesting in that respect, arguments now presented to the Court emphasize that the plaintiff had adequately alleged more conventional conceptions of injury-in-fact.⁹³ Moreover, it is far from apparent that unwanted dissemination of erroneous information in violation of FCRA constitutes a less substantial injury than unconsented receipt of a single text message in violation of the Telephone Consumer Protection Act,⁹⁴ which also carries a statutory penalty. Yet in *Campbell-Ewald v. Gomez*, decided after the oral argument in *Spokeo*, every Member of the Court assumed that the latter

89 Transcript of Oral Argument at 27, *Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2015) (No. 13-1339) (Justice Ginsburg inquired of respondent's attorney whether there would be “grounds to oppose certification of a class” if the Court held “Congress can give consumers a right to redress for false credit reporting.”); see also *id.* at 62 (Justice Sotomayor framed the question as whether “the class defined by Congress [was] sufficiently congruent with tangible harm . . . to satisfy Article III.”). Harold Edgar called my attention to an opinion by Judge Frankel in a case involving a technical violation of a federal statute that carried a statutory penalty and counsel fees. Given the gross disparity between actual injury and damages, Judge Frankel denied certification under Federal Rule of Civil Procedure 23(b)(3) on the ground that a class action was not shown to be superior to individual lawsuits. *Ratner v. Chem. Bank of N.Y. Tr. Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972) (concluding superiority requirement not met because “allowance of this as a class action is essentially inconsistent with the specific remedy supplied by Congress”).

90 Nor are they enough for the Court. See HART & WECHSLER, *supra* note 7, at 126 (collecting cases).

91 See *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) (“The ‘injury in fact’ that respondents have suffered consists of their inability to obtain information . . .”). Justice Scalia dissented. *Id.* at 29–37 (Scalia, J., dissenting).

92 The state courts are not bound by the case-or-controversy limitations of Article III, but they are bound by the Due Process Clause.

93 See Transcript of Oral Argument at 28, *Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2015) (No. 13-1339) (arguing on behalf of respondent Robins that “his entitlement to monetary relief as a consequence of that violation [of the Fair Credit Reporting Act] shows he has the personal stake that Article III requires,” even if the Court does not find that the “violation of the statutory rights under the Fair Credit Reporting Act” itself “constitutes injury in fact”).

94 47 U.S.C. § 227(d)(1)(A) (2012).

was a constitutionally cognizable injury.⁹⁵ It will be interesting to see the interplay between the class action dimensions of *Spokeo*-like statutes and the content of Article III injury.⁹⁶ *Lexmark* preserves a constitutional requirement of injury-in-fact, and “no injury” violations are problematic, as is the existence of an unlimited power in Congress to create injuries.⁹⁷

III. FREESTANDING EQUITABLE CAUSES OF ACTION

And yet, despite the current Court’s hostility to implied rights of action, we have a longstanding tradition of suits against officers seeking equitable or declaratory relief for alleged wrongful conduct. Many such suits have a firm statutory basis. But others do not, and *Exceptional Child* is the latest in that line of decisions.⁹⁸ As Justice Breyer put it,⁹⁹ this was a rate-setting case. Healthcare providers in Idaho covered by Medicaid sued to require state officials to set more favorable rates for their services. Federal courts cannot be invested with direct rate-setting authority.¹⁰⁰ But, as Justice Breyer observed, “[F]ederal courts have long become accustomed to reviewing for reasonableness or constitutionality the rate-setting determinations made by agencies.”¹⁰¹

The healthcare providers alleged a violation of § 30(A) of the Medicaid Act, which requires that a state Medicaid plan

provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.¹⁰²

Plaintiffs sought an order “to enjoin petitioners to increase [their] rates.”¹⁰³ The Ninth Circuit held that the Supremacy Clause¹⁰⁴ afforded the healthcare providers a right of action to enforce the statute. The Supreme Court unanimously reversed. In several separate opinions, the Court concluded that the Supremacy Clause provides only a rule of decision with

95 136 S. Ct. 663, 679 (2016).

96 Now, as it turned out. 136 S. Ct. 1540 (2016). For a collection of materials on Congress and standing, see HART & WECHSLER, *supra* note 7, at 132–60.

97 I do not here pursue the question of “no injury” violations in the state courts.

98 *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1388 (2015).

99 *Id.* at 1388–90 (Breyer, J., concurring).

100 *Keller v. Potomac Elec. Co.*, 261 U.S. 428, 442 (1923) (finding that power conferred on the District Supreme Court by the Public Utilities Law was legislative because “[i]t brings the court much more intimately into the legislative machinery for fixing rates”).

101 *Armstrong*, 135 S. Ct. at 1389 (Breyer, J., concurring).

102 42 U.S.C. § 1396a(30)(A) (2012).

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

104 U.S. CONST. art. VI, cl. 2.

respect to the priority of state and federal law. It is not a repository for rights of action.¹⁰⁵

The Court then went on to consider whether there was any other basis for private enforcement of § 30(A). It found none. Section 30(A), of course, conferred no express right of action. In a less-than-pellucid footnote, the Court said that (had it been raised) § 1983 would have been inapplicable apparently because § 30(A) did not confer a primary right.¹⁰⁶ Finally, and to no one's surprise, the Court found that the Act did not confer an implied right of action (no right was "unambiguously conferred").¹⁰⁷ The concurring and dissenting opinions made no real challenge to the parts of the Court's analysis—so far, so good.

This left only the freestanding "federal equity," the real nub of the case. And here *every* Member of the Court apparently assumed that a federal court "sitting in equity" possessed a freestanding authority to enjoin enforcement of the state conduct on preemption grounds. The portion of the opinion addressing this issue consisted of a single sentence: "And, as we have long recognized, if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory

105 *Armstrong*, 135 S. Ct. at 1383–84 ("The Supremacy Clause . . . certainly does not create a cause of action."). All the Members of the Court seem agreed on this point. *See id.* at 1388 (Breyer, J., concurring in part and concurring in the judgment) ("Like all other Members of the Court, I would not characterize the question before us in terms of a Supremacy Clause 'cause of action.'"); *id.* at 1391 (Sotomayor, J., dissenting) (stating that *Ex parte Young*, 209 U.S. 123 (1908), "giv[es] 'life'" to the Supremacy Clause (quoting *Green v. Mansour*, 474 U.S. 64, 68, 106 (1985))).

106 *Id.* at 1386 n.*; *see also supra* note 3. The Court's current jurisprudence asks whether a federal statute creates a primary right for which 42 U.S.C. § 1983 would provide the right of action. *See, e.g., Gonzaga v. Doe*, 536 U.S. 273, 287 (2002) (finding that FERPA's nondisclosure provision "fail[ed] to confer enforceable rights" under § 1983). But the language of § 1983 is broader; it provides a remedy for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 105 (1989) (quoting § 1983). In fact, both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment can be viewed simply in terms of creating immunities from certain kinds of state regulation. Linguistically, this would seem to create the right of action so long as any of those conditions were present. *See Dennis v. Higgins*, 498 U.S. 439, 445 (1991) (quoting *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 700–01 (1978)) (holding that suits for Commerce Clause violations could be brought under § 1983 and "recognizing that § 1983 'provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights'"); *Golden State*, 493 U.S. at 106 (stating that "deciding whether a federal right has been violated" is necessary to determine availability of § 1983). But for me, § 30(A) is a federal funding statute, far too open-ended to create "rights, privileges, or immunities" within the meaning of § 1983. The most that § 30(A) could contemplate is APA-like review, and § 1983 does not contemplate such limited review.

107 *Armstrong*, 135 S. Ct. at 1387–88 (quoting *Gonzaga*, 536 U.S. at 283).

actions preempted.”¹⁰⁸ Justice Sotomayor’s dissent fully agreed, albeit in far more elaborate detail.¹⁰⁹

At this point the Court effectively divided 6-3.¹¹⁰ Justice Scalia asked whether “this suit can proceed against [the state officials] in equity.”¹¹¹ No, he concluded:

The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations. . . . In our view the Medicaid Act implicitly precludes private enforcement of § 30(A), and respondents cannot, by invoking our equitable powers, circumvent Congress’s exclusion of private enforcement.¹¹²

The “intent to foreclose” analysis, in turn, rested on two prongs.¹¹³ Justice Scalia first referred to the acts’ remedy of withholding of federal funds. But (in light of the precedents) that alone was not determinative:

The provision for the Secretary’s enforcement by withholding funds might not, by itself, preclude the availability of equitable relief. But it does so when combined with the judicially unadministrable nature of § 30(A)’s text. It is difficult to imagine a requirement broader and less specific than § 30(A)’s mandate that state plans provide for payments that are “consistent with efficiency, economy, and quality of care,” all the while “safeguard[ing] against unnecessary utilization of . . . care and services.”¹¹⁴

Speaking for four Justices, Justice Sotomayor concluded that there was no implied preclusion. For her, accepting the Court’s premise the statutory scheme nonetheless clearly lacked the necessary “detailed remedial scheme” that would preempt other remedies.¹¹⁵

108 *Id.* at 1384 (citing *Ex Parte Young*, 209 U.S. 123, 155–56 (1908)).

109 Justice Sotomayor emphasizes the long history of such officer suits dating back to *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824). *Armstrong*, 135 S. Ct. at 1390 (Sotomayor, J., dissenting). The tradition, as she says, is a strong one. But examined closely, the older history provides infirm support for the tradition. Some of the history rested on the jurisprudential order of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Some of the litigation was focused on sovereign immunity, and some was based on diversity jurisdiction. Anne Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 *YALE L.J.* 77, 99–111 (1997) (discussing nineteenth-century diversity cases involving constitutional issues). Justice Sotomayor seemed unaware of the transitional importance of *Young* in impliedly creating “arising under” subject-matter jurisdiction for this freestanding injunctive authority. Moreover, she places far too much emphasis on *Ex parte Young*. See *infra* note 122. But, of course, the more modern case law solidly supports her. See HART & WECHSLER, *supra* note 7, at 745, 844–45.

110 Justice Breyer’s solitary concurrence tracks the essentials of Justice Scalia’s analysis. *Armstrong*, 135 S. Ct. at 1388–90 (Breyer, J., concurring in part and concurring in the judgment).

111 *Id.* at 1385 (majority opinion).

112 *Id.*

113 *Id.*

114 *Id.* (alteration in original) (citations omitted) (quoting 42 U.S.C. § 1396a(a)(30)(a) (2012)).

115 *Id.* at 1390 (Sotomayor, J., dissenting).

Exploration of the differences between the majority and the minority is beyond the scope of this Essay. On the surface, they might seem narrow and context-specific. But in the regulatory context, these differences may have a considerable significance, representing as they do different judicial “moods.” The majority seems increasingly unwilling to grant additional relief in the context of a regulatory funding scheme that has its own significant remedial provisions. That unwillingness is consistent with other decisions of the Court.¹¹⁶

* * *

The entire Court’s search for some source for a right of action to enforce § 30(A) seems to overlook a fundamental preliminary issue: Does § 30(A) confer any private primary rights, and if so of what kind? As noted, Justice Scalia states, “It is difficult to imagine a requirement broader and less specific.”¹¹⁷ I agree. For me, § 30(A) is far too open-ended, far too polycentric to talk about direct *judicial* enforcement of a primary right in the traditional common-law sense.¹¹⁸ The healthcare providers’ “right” seems to be typical of the modern regulatory state: a right that regulatory authorities not treat their interests in an arbitrary or unreasonable manner.¹¹⁹ At the end of the day, Justice Sotomayor’s dissent seems to contemplate no more than APA-style review, which of course makes her dissent all the more formidable.¹²⁰ But perhaps not ultimately persuasive, given the open-ended nature of the statutory criteria.

Even assuming, however, that § 30(A) imposes an enforceable (APA-style) primary duty, the next question is, what is the source of the federal

116 See HART & WECHSLER, *supra* note 7, at 1014–15 (reviewing cases similar in this regard).

117 *Armstrong*, 135 S. Ct. at 1385.

118 Compare this to *Lexmark*, which the Court treated as a federally authorized common-law trade libel suit. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389–90 (2014) (holding that an allegation of injury to “commercial interest in reputation or sales” is necessary to come within zone of interests in the Lanham Act, given the background of the unfair-competition tort at common law).

119 Were § 30(A) read to contemplate direct, plenary rate-setting judicial enforcement, I find it difficult to believe that a case or controversy would exist. See *supra* note 100 and accompanying text (discussing precedent indicating that courts cannot be invested with direct rate-setting authority). My only slight hesitation stems from the judicial enforcement of the Antitrust Act, which, as we know the Court recently acknowledged, is a broad delegation to courts to fashion primary private law. See *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2412–13 (2015) (stating that because the question in antitrust cases was “whether the challenged activity restrained trade, the Court’s rulings necessarily turned on its understanding of economics” and that it was therefore appropriate for the Court “to overturn the decisions in light of sounder economic reasoning”).

120 See *Armstrong*, 135 S. Ct. at 1394–95 (Sotomayor, J., dissenting) (“[T]he broad scope of § 30(A)’s language . . . counsels in favor of interpreting § 30(A) to provide substantial leeway to States, so that only in rare and extreme circumstances could a State actually be held to violate its mandate.”)

courts' freestanding equitable injunctive power.¹²¹ What federal law source creates an affirmative right to sue? Or in Lexmarkian language, what law creates the cause of action? The general grant of federal-question jurisdiction would now be thought not to be enough.¹²² To get a handle on this puzzle, one must go back to the line of decisions associated with *Shaw v. Delta Air Lines, Inc.*,¹²³ all of which *firmly* assume that a federal court sitting in equity could enjoin enforcement of a state statute on preemption grounds. Justice Scalia himself was strongly wedded to that doctrine. In *Verizon*, for example, he declined to consider the scope of a statutory right of action

121 As Langdell long ago pointed out, equity, like the common law, includes both remedial and substantive doctrines. See C.C. LANGDELL, SUMMARY OF EQUITY PLEADING xiv–xxii (1877). This was extracted in the first six editions of *Hart and Wechsler*. A more truncated version appears in the current edition. See HART & WECHSLER, *supra* note 7, at 592.

122 The “modern” view seems to be that a grant of statutory subject-matter jurisdiction does not by itself empower a federal court to fashion substantive law, including causes of action. See *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981) (“The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law” (citing *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973))); see also John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 121–22 (1998) (describing the “fundamental requirement . . . that a federal court fashioning common law ‘must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule’” (quoting Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 887 (1986))). But see *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957) (concluding that the law to apply in suits under subsection of the Taft-Hartley Act is “federal law, which the courts must fashion from the policy of our national labor laws” (citing Allan I. Mendelson, *Enforceability of Arbitration Agreements Under Taft-Hartley Section 301*, 66 YALE L.J. 167 (1956))). But that was not always the case. When Congress conferred general federal-question jurisdiction in 1875, see 28 U.S.C. § 1331 (2012), the inclusion of general equity authority resulted in a flood of litigation. The classic citation is, of course, *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), a suit against a federal postmaster. Even though no statute created a cause of action, Justice Peckham wrote that “in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.” *Id.* at 108. As my colleague Professor Merrill wrote,

After Congress created federal question jurisdiction in 1875, federal courts began entertaining bills of equity that sought to enjoin allegedly unlawful administrative action. They did so on the theory that federal courts needed only a grant of jurisdiction, not a statutory cause of action, in order to exercise the powers of a court of equity in ruling on a request to enjoin agency action.

Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 949 (2011) (footnotes omitted); see also Duffy, *supra*, at 118–19 (“Equity had been federal judge-made law since the founding of the Republic”). For earlier references to the same effect, see 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 307 (1st ed. 1958) (referring to injunction, before adoption of the Declaratory Judgments Act, as “the mainstay for review of federal administrative action”), and LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 193 (referring to injunction as a “catchall”).

123 463 U.S. 85 (1983).

because the case fell within *Shaw*'s line of authority.¹²⁴ An exhaustive study a decade ago by Professor Sloss showed how entrenched this freestanding equitable doctrine had become.¹²⁵ But no effort has been made to explain how this body of doctrine can be reconciled with the Court's other implied-right-of-action decisions. In *Alexander v. Sandoval*,¹²⁶ also written by Justice Scalia, we are instructed that "[r]aising 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."¹²⁷ Would the result in *Sandoval*, framed as a preemption challenge to state executive misconduct, have been different had it been framed as a suit alleging that a state constitutional provision was preempted to the extent that it authorized certain executive action? Can enforcement of state statutes be enjoined on preemption grounds, but not state executive or administrative conduct?

Justice Scalia described the Court's preemption injunction holdings as "the creation of the courts of equity, and [they] reflect[] a long history of judicial review of illegal executive action."¹²⁸ He cited *Ex parte Young* as the source of the right of action.¹²⁹ The history of officer suit injunctions—which long predated *Ex parte Young*—in constitutional cases does exist, of course.¹³⁰ Hart and Wechsler instruct us in passing and without discussion that *Young* also necessarily held by implication that such a right of action existed (otherwise no federal court subject-matter jurisdiction existed).¹³¹ That, it should be noted, is a matter of constitutional construction (an infer-

124 See *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 642 (2002) ("Verizon seeks relief from the Commission's order 'on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail,' and its claim 'thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.'" (quoting *Shaw*, 463 U.S. at 96 n.14)).

125 See David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 365–66 (2004) (noting that in nine "*Shaw* preemption cases" between 1996 and 2003, the Court "reached the merits of plaintiffs' claims without considering whether the allegedly preemptive federal statute accorded plaintiffs a private right of action"). It remains axiomatic. See *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 590 (2013) ("Neither party has questioned the District Court's jurisdiction to decide whether federal law preempted the [Iowa Utility Board's] decision, and rightly so.").

126 532 U.S. 275 (2001).

127 *Id.* at 287 (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991)).

128 *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015).

129 See *id.*

130 See generally John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1 (2013) (providing a discussion of the history of officer suit injunctions).

131 See HART & WECHSLER, *supra* note 7, at 891–92 (stating that since the Court in *Ex parte Young* "upheld the authority of a federal circuit court to enjoin a state attorney general from instituting suits to impose sanctions for violation of a state statute that allegedly conflicted with the Fourteenth Amendment" it "plainly assumed that the plaintiffs had a judicially cognizable cause of action"). That is to say, *Young* by implication and without a word of discussion established a principle fundamentally important to our constitutional order!

ence from the Due Process Clause itself), not a “creation of the courts of equity.” A parallel development has occurred with respect to implied rights of action. When I started teaching, the Court’s approach to that issue was in the mode of a common-law court. Over the course of time, (misguided?) separation-of-powers concerns eroded that approach. Standard doctrine now views implication as a matter of statutory construction, no longer the “creation of the courts of equity.”¹³²

Moreover, *Ex parte Young* itself involved the implication of a right of action for equitable relief from the Due Process Clause with respect to *constitutional* preemption: the statutorily prescribed rates were confiscatory. It is, of course, entirely possible to extend *Young*’s “implication” to the enforcement of statutory as well as constitutional federal law. Preempted state law is in the end “unconstitutional” state law. Danny Meltzer believed that *Young* applied at the statutory level.¹³³ But for me, (to invoke Holmes) that reasoning elevates logic over experience, that is, the actual history of the development of our ideas about *affirmative* access to the federal courts. Danny’s colleague David Shapiro correctly observes, I believe, that *Ex parte Young* was simply a part—an important marker, to be sure—in the longstanding struggle over the availability of *affirmative* federal remedies (a Lexmarkian cause of action) against state conduct violative of federal law.¹³⁴ The remedial consequences of violations of federal statutes can be seen to present issues different from violations of the Constitution,¹³⁵ and Congress, it could be argued,

132 Cf. *supra* note 121.

133 See Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 36–41 (“*Ex parte Young* concerned not only the Eleventh Amendment but also implied remedies for violations of federal law.”). He endorsed the *Shaw v. Delta Airlines* line of decisions. *Id.* at 39 n.182 (listing cases).

In a truly laconic discussion, Hart and Wechsler also seem to ground the right of action in the relevant federal statute, not the Due Process Clause. See HART & WECHSLER, *supra* note 7, at 844. The authors write, “But insofar as *Young* recognized an implied cause of action under the Due Process Clause, could the Court have refused to recognize a similar cause of action under a federal statute?” *Id.* Well, er, actually yes! Their reasoning would mean that every federal statute has a built-in right of action for equitable relief against state officials, but perhaps not against individual interference.

134 See David L. Shapiro, *Ex parte Young and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69, 86–87 (2011) (characterizing *Young* as part of “two gradual transitions: (1) from the granting of relief against wrongs to tangible property to the granting of relief against the constitutional wrong of enforcing an invalid law, and (2) from the development of remedies without concern over the source of law to the federalization, and even constitutionalization, of those same forms of relief”); see also *id.* at 94 (“[A]rguments about the case have become a proxy for a more important debate: To what extent, if any, should federal law (especially the Constitution) be available for use not only as a shield against state action but as a sword *Young* is certainly not irrelevant to that debate, but its significance should not be exaggerated.”).

135 See generally Henry Paul Monaghan, *The Sovereign Immunity “Exception”*, 110 HARV. L. REV. 102 (1996) (discussing implications of the Supreme Court’s holding in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), that the Eleventh Amendment prevents Congress from authorizing suit against state officials to enforce legislation enacted under Indian Commerce Clause).

should have a major role in shaping affirmative remedies for federal statutory violations. Not to labor the point here, but to extend *Young* beyond constitutional violations is a stretch for me, and it calls into question the Court's entire implied-right-of-action jurisprudence in the non-constitutional context.¹³⁶

I am therefore left with a puzzle. *Shaw* and its progeny do not seem to cohere well with the Court's general arising-under jurisprudence. But that lack of coherence is not of constitutional dimensions. No issue of congressional power is implicated.¹³⁷ It is enough to say here that a federal right of action is *not* a constitutional prerequisite for arising-under jurisdiction.¹³⁸ We focus here only upon those aspects of "arising under" jurisdiction where the Court has fashioned its own jurisprudence.

Since for me the question has no real Article III dimension, continued adherence to the *Shaw* line of decisions, whatever their correctness, must be decided on some other basis. Having as I do a high regard for precedent, I would adhere to *Shaw*. But the case for adherence is far stronger than that. *Shaw* draws upon the longstanding, venerable, and important tradition of officer suits that helps maintain rule-of-law values.¹³⁹ No visible downside is apparent to me, unless it be that of complexity. But complexity there is. What exactly is the scope of *Shaw*? A suit is never brought "against the statute," as Justice Scalia's opinion fully recognized: it always is a suit to enjoin executive officials from enforcing the statute. But in both *Young* and in *Shaw* itself, the validity of the state statute was quite upfront. Not so in *Exceptional Child*; the state statute was not at issue, only the particular state administrative action taken under the statute.¹⁴⁰ Much of the dicta in the recent cases sup-

136 See HART & WECHSLER, *supra* note 7, at 745 (noting the numerous implied-right-of-action decisions not discussed in the *Shaw* line); see also Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 239–40 (1991) (stating that "*Shaw* seems wrong, if read to permit any federal immunity holder automatic access to federal courts for declaratory and injunctive relief" and noting that no federal law gives persons with an immunity from state regulation a federal right to sue as plaintiff for coercive relief). But see *supra* notes 124–25 (discussing the import of *Shaw* in light of the Court's recent decisions).

137 Thus, we need not explore the outer boundaries of congressional power to confer jurisdiction simply because a matter of federal law might occur in the course of the proceeding. See *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 826–27 (1824) (finding the statute authorizing the Bank of the United States to sue in federal court constitutional, even where the suit "depend[s] in fact altogether on questions unconnected with any law of the United States" because "[e]very act of the Bank grows out of th[e] law [creating the Bank], and is tested by it"). For a collection of materials, see HART & WECHSLER, *supra* note 7, at 784–806.

138 See HART & WECHSLER, *supra* note 7, at 849–60 (noting that Congress, for example, may authorize federal jurisdiction based upon the existence of a federal defense; or because the defendant, not the plaintiff, possesses a federal right of action).

139 See *supra* note 122 (discussing the *McAnnulty* line of officer suit cases).

140 That sentence is also true of *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 642 (2002), as Justice Souter's concurring opinion, see *id.* at 649–53, demonstrates. See HART & WECHSLER, *supra* note 7, at 845 n.3 (noting that Justice

ports application of *Shaw* to these “as applied” challenges to state executive implementation of facially valid state statutes. But what then of *Exceptional Child*? Of *Sandoval*? Chief Justice Roberts takes a different tack: he is clearly hostile to extending *Shaw* to the exercise of state administrative authority pursuant to federal funding statutes. He would limit *Shaw* to cases in which the plaintiff was a prospective defendant in a state coercive action.¹⁴¹ Why? Why such a rigid bias in favor of regulated entities over regulatory beneficiaries insofar as equitable relief is concerned? As it now stands, the Court’s implied-right-of-action jurisprudence could use someone to pull it together.

CONCLUSION

The question remains how best to understand the current body of doctrine, an understanding that respects both history and current practice. I think that understanding would have three components.

First. The development of affirmative remedies against governmental misconduct has had a messy history. Under our contemporary jurisprudence, however, such remedies would ordinarily require a cause of action, and their creation would be seen as largely a matter for Congress.

Second. There is a longstanding and vastly important qualification of the foregoing statement: the tradition of an equitable cause of action in officer suits. That tradition has its roots in the English law brought forward into American law often without any analysis—close or otherwise—of its potentially shifting doctrinal basis in the evolving and changing American jurisprudence. Justice Scalia was right to say that the cause of action (I would prefer “right of action”) is a creation of the federal court of equity.

Third. *Ex parte Young* fits very comfortably within the officer suit tradition, that is, a creation of the court of equity. *Young* itself simply assumes judicial authority to issue such injunctions, and many authorities do not stress its constitutional origins.¹⁴² Hart and Wechsler, however, have always

Souter’s concurrence correctly identified the claim at issue in *Verizon*: “[T]he Maryland Public Service Commission has wrongly decided a question of federal law under a decisional power conferred by a federal statute” (quoting *Verizon*, 535 U.S. at 650 (Souter, J., concurring)).

141 See *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1213 (2012) (Roberts, C.J., dissenting) (arguing respondents should not have standing because they “are not subject to or threatened with any enforcement proceeding” but rather “seek a private cause of action Congress chose not to provide”); cf. *The Supreme Court—Leading Cases: Constitutional Law*, 129 HARV. L. REV. 145, 217–20 (2015) (arguing that the best explanation for the doctrinal confusion regarding implied rights of action is that they “are all federal common law,” and that the outcome in *Armstrong* forecasts that “the bifurcation between affirmative and negative relief is a more permanent fixture in the private-rights-of-action landscape,” where the Court will more readily find affirmative injunctive remedies displaced by statutory text but may be more permissive about implying negative injunctive remedies from federal statutes).

142 See Duffy, *supra* note 122, at 124 (stating that with the *McAnnulty* Court, the “right to relief was thus cut from the fabric of equity” and that the “Court did not require any statutory authorization for the remedy other than the statutory grant of equity jurisdic-

viewed the *Young* cause of action as a matter of constitutional interpretation.¹⁴³ On balance, I would adhere to Hart's and Wechsler's understanding. No advantage appears in rejecting a constitutional foundation for *Young*, and attempting to recast it will only add to doctrinal complexity.

tion"); Merrill, *supra* note 122, at 986–87 (“Article III pointedly specifies that the judicial power extends to all cases ‘in Law and Equity’ and courts sitting in equity characteristically issue prospective orders.” (footnote omitted) (quoting U.S. CONST. art. III, § 2)). *But see* Shapiro, *supra* note 134, at 86, 89–90 (footnote omitted) (recognizing “strong support for understanding the case as a step in the evolution of an action for equitable relief based solely on the notion of remedy rooted in (or at least derived from) the Constitution,” but also acknowledging John Harrison’s argument that “Constitutional rules limiting government . . . have their own remedial apparatus: ‘invalidity and nothing more,’ not damages and not injunctive relief. And *Young* does not contain any implication to the contrary since the anti-suit injunction ‘rested on ordinary principles of equity.’” (quoting John Harrison, *Ex parte Young*, 60 STAN. L. REV. 989, 1020, 1022 (2008))).

143 See HART & WECHSLER, *supra* note 7, at 75, 810, 891–92.