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Dustin M. Dow

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THE UNAMBIGUOUS SUPREMACY CLAUSE

Abstract: The U.S. Supreme Court’s Supremacy Clause jurisprudence has reached a confusing junction. The Court recently declined to say whether the Supremacy Clause confers a cause of action for federal court litigants. As a result, lower courts and litigants are caught between conflicting doctrines: one that suggests and one that denies that the Supremacy Clause confers causes of action. Neither line of cases definitively answers the question. A cause of action is necessary for a federal court plaintiff to bring suit. This Note explores whether potential plaintiffs should be able to rely on the Supremacy Clause when applicable federal law does not otherwise confer a cause of action. Navigating the history of the Supremacy Clause, the contours of dueling lines of precedent, and policy ramifications, the Note concludes that, in the midst of the confusion, state defendants have a strong argument that the Supremacy Clause does not confer plaintiffs a cause of action.

INTRODUCTION

The premise of federal supremacy (or preemption) is elementary.¹ When a state law conflicts with a federal law, the Supremacy Clause provides a resolution: federal law trumps state law.² For nearly three decades, however, the alluring simplicity of Supremacy Clause conflicts masks what is actually a confused doctrine.³ No unequivocal answer exists to the question of whether the Supremacy Clause provides an independent cause of action.⁴ Rather than offering clarity, the U.S. Supreme Court recently injected even more uncertainty into the arena when it passed on an opportunity to answer the question that has long simmered in the background of certain preemption cases.⁵

¹ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (noting that state laws contrary to the laws of Congress are invalid because “[i]n every such case, the act of Congress . . . is supreme; and the law of the State though enacted in the exercise of powers not controverted, must yield to it”); Mary Ann K. Bosack, *Cigarette Act Preemption—Refining the Analysis*, 66 N.Y.U. L. REV. 756, 761 (1991) (“When Congress legislates in an area within its constitutional grant of power, the supremacy clause mandates that federal law displace state law.”).

² U.S. CONST. art. VI; Bosack, *supra* note 1, at 761.

³ See *infra* notes 90–189 and accompanying text.

⁴ See *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1207 (2012) (acknowledging that the question of whether the Supremacy Clause provides a cause of action for Medicaid providers and beneficiaries is unanswered).

⁵ See *Indep. Living*, 132 S. Ct. at 1211.

The confusion does not arise in all preemption contexts.⁶ For instance, a defendant asserting preemption as a defense need not rely on a cause of action, whether located in the Supremacy Clause or elsewhere.⁷ A plaintiff who relies on a federal statute that creates a cause of action or a constitutional provision that creates a federal right (such as the Commerce Clause) likewise is not affected by the abstract question of whether the Supremacy Clause confers a cause of action.⁸ Instead, the question that remains unanswered comes up in a narrow but important class of cases in which a federal law alleged to preempt a state law does not contain a private cause of action.⁹ In those cases, plaintiffs swing preemption as a sword to seek prospective relief in the form of injunctions against state action and declaratory judgments of unconstitutionality.¹⁰

These preemption plaintiffs arrive at the courthouse in one of two vehicles: they either explicitly allege federal preemption of state law,¹¹ or they imply federal preemption of state law.¹² The different treatment afforded such plaintiffs in preemption cases has not only led to the question of whether the Supremacy Clause confers a cause of action, but also defined the contours of a tentative answer.¹³

⁶ See, e.g., *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 508 (1992) (asserting preemption in defense).

⁷ *Id.*; see also *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (asserting preemption in defense to an alleged violation of a state law regarding pesticide use).

⁸ See *Gibbons*, 22 U.S. at 1, 199–200. The *Gibbons* plaintiff had no need for a statutory cause of action when it could rely on the Commerce Clause to assert that a state law regulating navigation of state waters conflicted with the Commerce Clause and therefore violated the plaintiff's rights under the Commerce Clause. *Id.*

⁹ See *infra* notes 90–189 and accompanying text.

¹⁰ See generally *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983) (involving a suit prospectively seeking injunctive and declaratory relief against a pending state employment law on grounds that contrary federal law preempted it). In this respect, prospective preemption plaintiffs differ from traditional preemption plaintiffs in that traditional preemption plaintiffs seek to remedy an injury an allegedly preempted law or action already caused. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540 (2001) (challenging a state tobacco advertising regulation as preempted by federal law after the state regulation limited the ability of the tobacco company to advertise).

¹¹ See *infra* notes 99–160 and accompanying text.

¹² See *infra* notes 163–174 and accompanying text.

¹³ See *Indep. Living*, 132 S. Ct. at 1211 (directing the U.S. Court of Appeals for the Ninth Circuit Court on remand to consider several specific factors to determine if the Supremacy Clause conferred a cause of action in the narrow circumstance of Medicaid beneficiaries alleging that federal Medicaid law preempted state action). Consider *Crosby v. National Foreign Trade Council*, the 2000 Supreme Court case of a nonprofit business organization suing the State of Massachusetts, explicitly alleging that a federal Burmese trade law preempted a state law restricting business activity with Burma. 530 U.S. 363, 372 (2000). The justices emphatically struck down the state law, remarking on the obvious federal preemption. *Id.* at 373–74.

This Note examines that preemption doctrine and its incongruity: different classes of plaintiffs are burdened with different cause of action requirements in the shadow of the Supremacy Clause.¹⁴ The evolution of constitutional law has produced various doctrines—cause of action,¹⁵ jurisdiction,¹⁶ and standing¹⁷—to ensure that federal courts properly adjudicate valid “cases or controversies” pursuant to Article III of the Constitution.¹⁸ Notwithstanding the command of Article III, federal courts, including the Supreme Court, have permitted some types of preemption plaintiffs to pursue claims without demonstrating a valid cause of action.¹⁹ The implication for these plaintiffs who prospectively assert preemption is that the Supremacy Clause provides not only federal court jurisdiction but also a cause of action where one does not otherwise exist in the federal law alleged to preempt the conflicting state law or action.²⁰

Jurisdiction, or the power of a federal court to hear a case, has long been found to exist in Supremacy Clause cases.²¹ In February 2012, the Supreme Court declined to define the extent to which the Supremacy Clause also provides a cause of action.²² After initially granting certiorari to review the specific question of whether the Supremacy Clause provided a cause of action for certain preemption plaintiffs, a 5–4 Court remanded the case to the lower court for further argument on the same question, leaving the state of the doctrine particularly uncertain.²³

This Note argues that unless and until the Supreme Court holds that the Supremacy Clause confers a cause of action, a distinction among plaintiffs in which some are and others are not found to have a valid cause of action is without merit.²⁴ All preemption plaintiffs should

Curiously, no one—not the justices and not the state defendant—stopped to ask whether the nonprofit corporation had a valid cause of action. *Id.*

¹⁴ See *infra* notes 90–270 and accompanying text.

¹⁵ *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001).

¹⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803).

¹⁷ *Warth v. Sedlin*, 422 U.S. 490, 498 (1975).

¹⁸ U.S. CONST. art. III; *Lujan v. Defenders of Wildlife*, 504, U.S. 555, 560 (1992) (“One of those landmarks, setting apart the ‘Cases’ and ‘Controversies’ that are of the justiciable sort referred to in Article III . . . is the doctrine of standing.”).

¹⁹ See *infra* notes 99–160 and accompanying text.

²⁰ See *infra* notes 99–160 and accompanying text.

²¹ See *infra* notes 64–89 and accompanying text.

²² *Indep. Living*, 132 S. Ct. at 1211.

²³ See *id.*; see also *id.* at 1214 (Roberts, C.J., dissenting) (“If, as I believe, there is no private right of action under the Supremacy Clause . . . that is the end of the matter. If, on the other hand, the Court believes that there is such an action . . . then the Court should just say that.”).

²⁴ See *infra* notes 190–270 and accompanying text.

be required to establish a valid cause of action independent of the Supremacy Clause to satisfy the adjudicatory principles of the federal judiciary.²⁵ The current doctrine that affords varying cause of action requirements for different plaintiffs harms principles of fairness,²⁶ infringes on the Constitution's separation-of-powers structure,²⁷ and undermines federalism goals.²⁸

Part I navigates the historical development of the Supremacy Clause, illustrating its grounding in preemption cases.²⁹ Part II lays out the important roles that jurisdiction and cause of action play in federal court and how those roles affect preemption cases.³⁰ Although cause of action and jurisdiction generally establish a plaintiff's right to be in federal court and the court's power to hear the case, only jurisdiction appears to be necessary for some preemption plaintiffs.³¹ Part II also introduces the reality that varying standards exist for different types of preemption plaintiffs, particularly with respect to the cause of action requirement.³²

In Part III, the Note closely examines the cause of action burdens for those different types of preemption plaintiffs: those who expressly allege preemption and those who imply preemption.³³ In this examination, Part III highlights the considerably different treatment with respect to the Supremacy Clause and cause of action analysis afforded plaintiffs with merely subtle differences.³⁴ In Part IV, the Note analyzes the impact of this varying treatment and argues for a clearer standard for all preemption plaintiffs, thereby staying true to historical intent, the separation-of-powers constitutional framework, and federalism principles.³⁵

I. SUPREMACY CLAUSE EVOLUTION

Modern preemption doctrine derives from Supremacy Clause jurisprudence, which has evolved from the nation's founding to present

²⁵ See *infra* notes 196–270 and accompanying text.

²⁶ See *infra* notes 38–40, 218–242 and accompanying text.

²⁷ See U.S. CONST. arts. I, II, III (separating power among three major branches of government: the legislature, the executive, and the judiciary).

²⁸ See *infra* notes 257–270 and accompanying text.

²⁹ See *infra* notes 36–63 and accompanying text.

³⁰ See *infra* notes 64–89 and accompanying text.

³¹ See *infra* notes 64–89 and accompanying text.

³² See *infra* notes 64–89 and accompanying text.

³³ See *infra* notes 90–189 and accompanying text.

³⁴ See *infra* notes 90–189 and accompanying text.

³⁵ See *infra* notes 190–270 and accompanying text.

day.³⁶ The arc of this evolution helps explain the Court's contemporary approach to federal preemption cases and ultimately helps answer the question of whether the Supremacy Clause confers a cause of action or merely ranks federal over state rights.³⁷

The Supremacy Clause was adopted to resolve an embarrassing power struggle for the young United States.³⁸ When the Constitutional Framers met in Philadelphia in 1787, they convened amidst—indeed, because of—a disturbing reality: the failure of the Articles of Confederation to establish an effective, stable, and cohesive governing structure.³⁹ Handcuffed by substantial state power and independence, Congress struggled to raise money to repay war debts to Revolutionary soldiers, manage the nation's western expansion, and engage with a single national voice in effective and meaningful foreign relations.⁴⁰ Indeed, uncertainty, as much as anything else, defined who was and who was not sovereign in the new America.⁴¹ State governments promoted the public's general distrust of government.⁴² The 1780s saw overregulation, chaotic procedures of passing and repealing laws, and commercially damaging *ex post facto* laws.⁴³

Frustrated with such circumstances, the Framers restructured American government, including notions of separation of powers and a federalism that clarified the allocation of sovereign authority in the constitutional architecture.⁴⁴ To support this structure, the Framers

³⁶ See Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 972–75 (2002) (noting the “long history” of preemption rooted in the Supremacy Clause and the expansion of preemption doctrine following “the unprecedented legislative activity of the post-Depression era”); see also *Verizon Md. Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 642 (2002); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108 (1989); *Shaw*, 463 U.S. at 96 n.14; *Ex parte Young*, 209 U.S. 123, 149–50 (1908); *Gibbons*, 22 U.S. at 1, 211.

³⁷ See *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 334 (5th Cir. 2005) (holding that the Supremacy Clause implies a private cause of action). *But see Andrews v. Maher*, 525 F.2d 113, 118–19 (2d Cir. 1975) (holding that the Supremacy Clause merely ranks federal statutes ahead of state laws in the event of a conflict as opposed to implying a cause of action). For an argument that the Supremacy Clause should imply a cause of action in the prospective preemption context, see David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 364 (2004).

³⁸ G. Edward White, *Revisiting the Ideas of the Founding*, 77 U. CIN. L. REV. 969, 975–76 (2009).

³⁹ *Id.*

⁴⁰ *Id.* at 974–75.

⁴¹ *Id.* at 976.

⁴² See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 405–07 (1998).

⁴³ *Id.*

⁴⁴ White, *supra* note 38, at 978–79.

crafted the Supremacy Clause and created a federal Supreme Court empowered to enforce the clause.⁴⁵ Whereas the nation had previously stumbled in asserting its authoritative voice, the reality of federal supremacy post-ratification was clear.⁴⁶ When faced with conflicting state and federal law, the Supreme Court needed only to turn to the Supremacy Clause to find that federal law controls.⁴⁷

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁴⁸

The combination of a Supremacy Clause and a Supreme Court to enforce it brought federal preemption into the fabric of American jurisprudence.⁴⁹ In 1824, Chief Justice John Marshall recognized in *Gibbons v. Ogden* that a state law contrary to a federal law must yield to its federal counterpart because “the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it” by insertion of the Supremacy Clause in the Constitution.⁵⁰

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ U.S. CONST. art. VI, cl. 2.

⁴⁹ See generally *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (asserting jurisdiction over a state court decision involving a federal question and holding that a federal treaty preempted state action); White, *supra* note 38, at 980 (“[T]hrough the idea of enumerated federal powers, reserved state powers, and the Supremacy Clause, the drafters of the Constitution said, in effect, to state legislatures: we will offer you a model of government designed to function, and, by the way, if it passes laws that conflict with your laws, you will have to obey them.”). Additionally, the Supremacy Clause ensured a federalist model for the new nation because it operated in conjunction with Article I of the Constitution, which conferred power to appoint Senators on state legislatures. See Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1432 (2008). Small states had a guarantee, therefore, that the laws the federal government passed, which were supreme by definition, were made with state participation. See *id.*

⁵⁰ 22 U.S. at 210–11. The Supremacy Clause is enforceable in state as well as federal courts. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 507 (1954) (“The supremacy clause, of course, makes plain that if a state court undertakes to adjudicate a controversy it must do so in accordance with whatever federal law is applicable.”). Indeed, until federal question jurisdiction was established in 1875, state courts handled the bulk of Supremacy Clause issues. See Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1588 (2008).

As the nation lurched toward Civil War and then repaired in the aftermath, federal preemption proved to be a strong but controversial doctrine.⁵¹ Before the Civil War, the Court leveraged the preemptive force of the federal Fugitive Slave Act of 1793 to protect slaveholders who violated contrary state laws when they crossed state lines to recapture escaped slaves.⁵² After the Civil War, southern states enacted laws that maintained the pre-Civil War status quo with regard to civil rights.⁵³ So-called black codes prevented African Americans from voting, relocating, or enjoying public benefits, such as hospitals, parks, and schools.⁵⁴ In response, Congress passed the Civil Rights Act of 1866 that, by way of the Supremacy Clause, outlawed the black codes.⁵⁵ Ratification of the Fourteenth⁵⁶ and Fifteenth Amendments,⁵⁷ which mirrored the Civil Rights Act of 1866 in their goals of racial equality, guaranteed African Americans voting rights and expanded the breadth of federal supremacy, though the scope of such rights remained limited by principles of federalism.⁵⁸

⁵¹ See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 608–10 (1842); ANDREW P. NAPOLITANO, *DRED SCOTT'S REVENGE, A LEGAL HISTORY OF RACE AND FREEDOM IN AMERICA* 111 (2009).

⁵² See *Prigg*, 41 U.S. at 608–10. The plaintiff in *Prigg v. Pennsylvania* argued successfully before the Supreme Court in 1842 that his kidnapping arrest pursuant to Pennsylvania law was unconstitutional. *Id.* Prigg had entered Pennsylvania and taken Margaret Morgan, formerly enslaved in Maryland, back to Maryland where he sold her as a slave. *Id.* Under a Pennsylvania kidnapping statute, Prigg was arrested and indicted. *Id.* He emerged victorious, however, because the Court held that the Fugitive Slave Act of 1793, which permitted his actions, preempted the Pennsylvania statute:

[T]he act of Pennsylvania upon which this indictment is founded, is unconstitutional and void. It purports to punish as a public offence against that state, the very act of seizing and removing a slave, by his master, which the constitution of the United States was designed to justify and uphold.

Id. at 625–26.

⁵³ Cynthia A. Leiferman, *Private Clubs: A Sanctuary for Discrimination?*, 40 BAYLOR L. REV. 71, 90 (1988) (“During the period following the passage of the thirteenth amendment, the increasing frequency of private acts of discrimination against Negroes in situations involving property interests and contractual rights were viewed as a revival of the institution of slavery.”).

⁵⁴ NAPOLITANO, *supra* note 51, at 111.

⁵⁵ Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Leiferman, *supra* note 53, at 89–90 (“Enactment of the 1866 Act was to . . . render void state discriminatory laws, especially the Black Codes.”).

⁵⁶ U.S. CONST. amend. XIV.

⁵⁷ U.S. CONST. amend. XV.

⁵⁸ See *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 593–94 (1871). For instance, in *Blyew v. United States*, the Court refused to recognize federal jurisdiction in a case involving the Civil Rights Act of 1866. *Id.* The Court held that removal of a murder case from state to federal court was improper even though, under Kentucky law, African-American witnesses

The preemption doctrine under the Supremacy Clause gained full-bodied status in the twentieth century when expansion of Congress's power under the Commerce Clause brought greater numbers of state laws into conflict with federal statutes, requiring the Court to establish a nuanced way to handle this sensitive area of federalism.⁵⁹ The Court, broadly interpreting congressional purpose in the early twentieth century, often found federal legislation to "occupy the field," thus preempting state laws.⁶⁰

In the mid-twentieth century, the Court reversed its preemption tack when it emphasized a policy of presuming against preemption to protect state laws from unintentional preemption.⁶¹ In stating in 1947 in *Rice v. Santa Fe Elevator Co.* that "[w]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," the Court recognized a federalism interest in avoiding preemption unless indicated by congressional intent.⁶² Regularly since *Rice*, and as recently as 2009, the Court reaffirmed the presumption against preemption, citing the *Rice* language to underscore the federalism concerns at issue in preemption cases when state sovereignty is vulnerable to federal domination by way of the Supremacy Clause.⁶³

were not allowed to testify against Caucasian defendants in state court. *Id.* Because giving testimony was not a right conferred by the Civil Rights Act of 1866, the Court reasoned that removal to federal court pursuant to the Act was not proper. *Id.* at 595.

⁵⁹ See Davis, *supra* note 36, at 973–75.

⁶⁰ *Id.* at 974.

⁶¹ See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230–31 (1947); Davis, *supra* note 36, at 978 (noting that the Court was becoming more cognizant of traditional state police powers and was requiring clearer congressional intent to find preemption).

⁶² 331 U.S. at 230; Davis, *supra* note 36, at 978; see also THE FEDERALIST NO. 45, at 236–37 (James Madison) (Ian Shapiro ed., 2009) (noting federal power shall be limited in scope while "powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State").

⁶³ *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Bates*, 544 U.S. at 449 ("[W]e would nevertheless have a duty to accept the reading that disfavors preemption. 'Because the states are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state-law causes of action.'" (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996))); Davis, *supra* note 36, at 973–75.

II. A WORKING RELATIONSHIP: CAUSE OF ACTION AND JURISDICTION IN THE PROSPECTIVE PREEMPTION CONTEXT

All preemption cases, whether preemption is asserted prospectively or defensively, turn on the effect of the Supremacy Clause.⁶⁴ But for a preemption plaintiff to persuade a court to reach the merits of the claim under the Supremacy Clause, the plaintiff must demonstrate valid subject matter jurisdiction and a valid cause of action.⁶⁵ This Part shows that the separate concepts of jurisdiction and cause of action work together to establish or deny federal court authority over a case, substantially influencing prospective preemption outcomes.⁶⁶ The Part further shows that the Court's contemporary approach in preemption cases has created ambiguity about the relationship between jurisdiction and cause of action.⁶⁷

When a federal court analyzes jurisdiction, it examines its power—both constitutional and statutory—to hear a case or controversy.⁶⁸ Subject to congressional constraints, federal courts only possess power to hear cases that fall within those bounds of Article III of the Constitution.⁶⁹

In contrast to a jurisdictional analysis, a federal court analyzing the validity of a cause of action focuses not so much on its power to hear a

⁶⁴ See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (noting that in light of the power of the Supremacy Clause “the purpose of Congress is the ultimate touchstone in every pre-emption case”).

⁶⁵ See *Davis v. Passman*, 442 U.S. 228, 239 (1979) (“The concept of a ‘cause of action’ is employed specifically to determine who may judicially enforce the statutory rights or obligations.”); *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 383–84 (1884) (describing jurisdiction as the “judicial power of the United States” to issue a judgment); Sloss, *supra* note 37, at 377 (“[P]laintiff’s right to relief depends on whether he or she has a valid federal cause of action.”); Carl C. Wheaton, *The Code “Cause of Action”: Its Definition*, 22 CORNELL L.Q. 1, 14 (1936) (“By no stretch of the imagination can a cause of action exist without a combination of facts and legal rights and duties.”).

⁶⁶ *Passman*, 442 U.S. at 239 (articulating the difference between jurisdiction and cause of action in detail and noting that cause of action analysis involves questioning whether an appropriate party is invoking the federal court’s power); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 746 n.17 (1979) (Powell, J., dissenting).

⁶⁷ See *infra* notes 82–89 and accompanying text.

⁶⁸ *Passman*, 442 U.S. at 239 n.18; see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803).

⁶⁹ See U.S. CONST. art. III, §§ 1–2; *Marbury*, 5 U.S. at 178. Congress may limit but not expand jurisdiction. *Id.* Since the first Judiciary Act in 1789, Congress has always afforded courts less jurisdictional power than the full scope of Article III permits. RICHARD H. FALLON ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 276 (6th ed. 2009). For example, Congress has limited federal question, diversity, removal, and supplemental jurisdiction by statute pursuant to its Article III power. *Id.*

case as on the plaintiff's power to assert a complaint.⁷⁰ The Court articulated the subtle but important difference between jurisdiction and cause of action analyses in *Davis v. Passman* in 1979 when it said that "jurisdiction is a question of whether a federal court has the power . . . to hear a case" while "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."⁷¹

So although a federal court may have proper jurisdiction to hear a case, if a plaintiff sues pursuant to a federal statute or constitutional provision that does not contain a cause of action, a motion to dismiss for failure to state a claim should be granted.⁷² The Constitution explicitly provides causes of action in two situations: the guarantee of the writ of habeas corpus⁷³ and just compensation in the event of a property taking.⁷⁴ Supreme Court precedent has further established that the Equal Protection and Due Process Clauses of the Fourteenth Amendment imply causes of action to plaintiffs asserting denials of such protections.⁷⁵ Where individual rights are found in the Constitution, the *Passman* Court held, the Constitution implies a cause of action.⁷⁶

⁷⁰ FALLON ET AL., *supra* note 69, at 690–91 (noting that, when Congress does not expressly confer a private cause of action, the courts must engage in an analysis to determine if the private person seeking redress actually has a cause of action (or right) implied by statute).

⁷¹ 442 U.S. at 239 n.18. In 1938, the Federal Rules of Civil Procedure replaced the term "cause of action" with "claim"; courts, however, have continued to require plaintiffs to establish valid causes of action. *Id.* at 237; Rochelle Bobroff, *Section 1983 and Preemption: Alternative Means of Court Access for Safety Net Statutes*, 10 LOY. J. PUB. INT. L. 27, 32 (2008).

⁷² See *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009) (holding that, although jurisdiction was proper, dismissal was required because the plaintiff failed to state a claim for relief by merely reciting a formulaic cause of action without factual particularity). For example, in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, the U.S. Court of Appeals for the Eleventh Circuit affirmed a 12(b)(6) dismissal, holding that the relevant provision of Title IX did not contain a private cause of action. 526 U.S. 629, 637–38 (1999). The Supreme Court, finding a cause of action, reversed. *Id.*; Wheaton, *supra* note 65, at 14 (arguing that, without a cause of action, a court should not hear a case because a cause of action is necessary).

⁷³ U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); see Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 n.244 (1991).

⁷⁴ U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). Therefore, plaintiffs may rely on the Fifth Amendment's Just Compensation Clause for a valid cause of action in the event of a taking without just compensation. See *id.*

⁷⁵ See *Alden v. Maine*, 527 U.S. 706, 740 (1999) ("[D]ue process requires the State to provide the remedy it has promised. The obligation arises from the Constitution itself."); *Ward v. Bd. of Cnty. Comm'rs*, 253 U.S. 17, 24 (1919) (relying on a cause of action in the

To demonstrate a statutory (as opposed to Constitutional) cause of action, a plaintiff must prove that Congress intended to create a cause of action by pointing to statutory “rights-creating” language.⁷⁷ In *Alexander v. Sandoval*, a 2001 case where the preemption allegation was implied, the Court, sensitive to separation-of-powers principles,⁷⁸ found no evidence that Congress intended to create a private cause of action to enforce the disparate-impact regulations promulgated under section 602 of Title VI of the Civil Rights Act of 1964.⁷⁹ Without a valid cause of action, the Court held that an individual could not sue the Director of the Alabama Department of Public Safety for administering drivers’ license examinations in a way that allegedly violated the regulations so as to be preempted by Title VI.⁸⁰ Proper jurisdiction notwithstanding, the Court found the suit to be without merit because of lack of a cause of action.⁸¹

Both jurisdiction and cause of action must be found for a case to survive in federal court,⁸² and the extent to which a cause of action exists can help inform a court of its jurisdiction.⁸³ In the contemporary

Fourteenth Amendment to hold that nonrefunded coercive taxes violated plaintiffs’ constitutionally established due process rights).

⁷⁶ See *Passman*, 442 U.S. at 242. The *Passman* Court noted that, beginning with *Marbury*, the Court has long recognized a cause of action in constitutional rights: “[T]hose litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.” *Id.*

⁷⁷ *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001); *Cannon*, 441 U.S. at 690 n.13 (“[T]he right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action.”).

⁷⁸ See 532 U.S. at 287 (noting that it would be improper for the federal judiciary to create a cause of action when Congress has not conferred such a right).

⁷⁹ *Id.* at 293 (“Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602.”).

⁸⁰ *Id.* at 278–79, 293. Alabama amended its constitution in 1990 to declare English the official language. *Id.* at 278–79. The plaintiffs in *Sandoval* sued after a state official enacted a policy to administer drivers’ license tests only in English pursuant to the state constitution. *Id.*

⁸¹ *Id.* at 293.

⁸² See *Cale v. City of Covington, Va.*, 586 F.2d 311, 313 (4th Cir. 1978) (holding that jurisdiction pursuant to § 1331 did not by itself create a proper cause of action).

⁸³ See *Cannon*, 441 U.S. at 746 n.17 (Powell, J., dissenting) (noting that, if an affirmative federal cause of action is found, then federal question jurisdiction pursuant to § 1331 is presumed, thereby enabling a federal court to expand its federal question jurisdiction by finding an implied cause of action in a federal statute). For instance, in *Marbury*, a case more famous for establishing judicial review, the Court in 1803 separately examined whether the plaintiff had a proper cause of action and whether the Court had jurisdiction to hear the case. See 5 U.S. at 168, 173, 177. Finding a cause of action, but not jurisdiction

preemption context, however, the Court has obscured the relationship between cause of action and jurisdiction.⁸⁴ Whereas a valid cause of action and proper jurisdiction generally must exist,⁸⁵ specific categories of preemption cases have prompted a question about whether the Supremacy Clause implies a cause of action.⁸⁶ For some plaintiffs suing a state officer for prospective relief when preemption was expressly alleged or characterized, the Court has focused solely on whether it possessed jurisdiction—foregoing cause of action analysis.⁸⁷ In other preemption cases, when preemption was implied or expressly alleged in combination with a 42 U.S.C. § 1983 claim, the Court has analyzed jurisdiction as well as cause of action, requiring both.⁸⁸ This confusion continues unabated in light of the Court’s February 2012 decision in *Douglas v. Independent Living Center of Southern California, Inc.* when it declined to answer the specific question about whether the Supremacy Clause conferred a cause of action for preemption plaintiffs alleging preemption of state action by a federal law that did not contain an evident private cause of action.⁸⁹

(the power to hear the case) under the Judiciary Act of 1789, the Court refused to grant relief, despite acknowledging the plaintiff’s statutory injury. *Id.* at 173, 180. Indeed, 198 years after *Marbury*, the Court continued to adhere to the principle that jurisdiction and cause of action both must exist for federal court adjudication. *See Sandoval*, 532 U.S. at 293; *Marbury*, 5 U.S. at 168, 173.

⁸⁴ *See* Sloss, *supra* note 37, at 358–60 (noting that jurisdiction is enough to qualify some prospective preemption plaintiffs for federal court adjudication, but that a valid cause of action is necessary for others).

⁸⁵ *See* Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 241 (1991) (“To obtain injunctive relief, the plaintiff must do more than establish a colorable claim: a right of action must actually be established before injunctive relief is appropriate.”).

⁸⁶ *See* *Verizon Md. Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 642–43 (2002); *Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n.14 (1982); *Wilderness Soc’y v. Kane Cnty., Utah*, 581 F.3d 1198, 1216 (10th Cir. 2009), *vacated en banc*, 632 F.3d 1162 (10th Cir. 2010); *Local Union No. 12004, United Steelworkers v. Massachusetts*, 377 F.3d 64, 74–75 (1st Cir. 2004); *see also* Sloss, *supra* note 37, at 401.

⁸⁷ *See* *Verizon*, 535 U.S. at 642–43; *Shaw*, 463 U.S. at 96 n.14.

⁸⁸ *See Sandoval*, 532 U.S. at 286–88; *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108 (1989).

⁸⁹ *See Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1211 (2012).

III. PRESENTATION OF THE PROSPECTIVE PREEMPTION CASE: CHARACTERIZATION AND CATEGORIZATION MATTERS

A plaintiff's preemption claim can either explicitly or implicitly allege preemption.⁹⁰ An explicit allegation specifically asserts in the claim for relief that federal law preempts contrary state law or action.⁹¹ An implicit allegation implies preemption by asserting in the claim for relief that state law or action violates a federal right.⁹² The cause of action burden in a preemption case depends significantly on the explicitness of the preemption claim.⁹³ This Part identifies the differences in asserting preemption implicitly versus explicitly.⁹⁴ It demonstrates that different types of plaintiffs appear to have different cause of action requirements.⁹⁵

Section A explores the types of plaintiffs who have no cause of action requirement, seemingly because they explicitly allege preemption.⁹⁶ Demonstrating the importance of litigation strategy and characterization, Section B describes litigants who are required to demonstrate a cause of action independent of the Supremacy Clause.⁹⁷ Both litigants who imply preemption or who explicitly allege preemption and sue pursuant to 42 U.S.C. § 1983 fall into this category.⁹⁸

⁹⁰ See Sloss, *supra* note 37, at 359 (dividing prospective preemption cases into “*Shaw* preemption cases” in which preemption is alleged explicitly and “*Shaw* violation cases” in which preemption is implied in an allegation that state or local action violates federal law).

⁹¹ See *id.*

⁹² See FALLON ET AL., *supra* note 69, at 712 (noting the disparity between federal court plaintiffs who have to assert valid causes of action—including plaintiffs who implicitly allege prospective preemption—and those explicitly alleging preemption who do not have to establish a cause of action independent of the Supremacy Clause); Sloss, *supra* note 37, at 359.

⁹³ See FALLON ET AL., *supra* note 69, at 712. Compare *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 642–43 (2002) (allowing action to go forward without verifying a cause of action when preemption is explicitly alleged), with *Alexander v. Sandoval*, 532 U.S. 275, 286–88 (2001) (specifying that a cause of action must be present in a preemption case when preemption is implied by an allegation of state action in violation of federal rights).

⁹⁴ See *infra* notes 99–189 and accompanying text.

⁹⁵ See *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108 (1989) (mandating that plaintiffs alleging preemption and suing pursuant to 42 U.S.C. § 1983 assert a valid cause of action).

⁹⁶ See *infra* notes 99–160 and accompanying text.

⁹⁷ See *infra* notes 161–189 and accompanying text.

⁹⁸ See *infra* notes 99–174 and accompanying text.

A. *Plaintiffs Without a Cause of Action Requirement*

From lower-court interpretation of two contemporary Supreme Court cases separated by nineteen years, a standard has emerged that, when a preemption plaintiff explicitly alleges preemption, a valid cause of action independent of the Supremacy Clause is unnecessary.⁹⁹ The majority in the 2012 Supreme Court case of *Douglas v. Independent Living Center of Southern California, Inc.* declined to answer whether this interpretation validly satisfies federal cause of action requirements.¹⁰⁰ Chief Justice John Roberts, Jr. argued in dissent that, because the Supremacy Clause does not supply a cause of action, a plaintiff cannot maintain a preemption suit wherein the federal law in question does not supply a private cause of action.¹⁰¹

Nevertheless, no lower court determination that the Supremacy Clause confers a cause of action has ever been overturned by the Supreme Court, in part because the Court's position remains unclear.¹⁰² The contemporary approach derives from an early-twentieth-century case, *Ex parte Young*, in which the Court established in 1908 that jurisdiction properly exists when a plaintiff prospectively seeks relief from a state law or regulation in violation of, or preempted by, the Fourteenth Amendment of the federal Constitution.¹⁰³ In relying so substantially on the jurisdictional approval of *Ex parte Young* in contemporary preemption suits without probing for a cause of action, the Court laid the foundation that leads to the question of whether the Supremacy Clause implies a cause of action in explicit, prospective preemption suits.¹⁰⁴

In 1983 in *Shaw v. Delta Air Lines*, the Court confronted a federalism question illuminated by preemption: when must a state regulation yield to a federal law?¹⁰⁵ The Court found *Ex parte Young*-style jurisdic-

⁹⁹ See *Verizon*, 535 U.S. at 642–43; *Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n.14 (1982).

¹⁰⁰ *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1211 (2012).

¹⁰¹ *Id.* at 1215 (Roberts, C.J., dissenting).

¹⁰² Compare *Indep. Living*, 132 S. Ct. at 1211 (declining to answer whether the Supremacy Clause implicates a cause of action), with *Verizon*, 535 U.S. at 642–43 (allowing a preemption action absent a cause of action without questioning whether the Supremacy Clause confers the cause of action).

¹⁰³ See 209 U.S. 123, 149–50 (1908); Sloss, *supra* note 37, at 378–79 (noting that contemporary prospective preemption doctrine is a logical expansion of the jurisdictional principle articulated in *Ex parte Young*).

¹⁰⁴ See Bobroff, *supra* note 71, at 71 (demonstrating that circuit courts have read an implied cause of action into the Supremacy Clause based on the Court's prospective preemption doctrine); Sloss, *supra* note 37, at 380 n.139 (“Whether plaintiffs have a private cause of action to bring such claims is a separate question.”).

¹⁰⁵ See 463 U.S. at 95 (analyzing whether a preemption question required an in-depth examination of congressional intent in enacting the federal legislation).

tion proper when plaintiffs alleged that state legislation violated—or was preempted by—a federal statute as opposed to a Constitutional provision; in so doing, the Court expanded the *Ex parte Young* approach beyond the Fourteenth Amendment.¹⁰⁶ Citing *Ex parte Young* in a footnote, the Court determined that it had jurisdiction and left the issue of whether plaintiffs presented a valid cause of action unaddressed.¹⁰⁷

In *Shaw*, the New York State Human Rights Law, interpreted by the New York Court of Appeals, required employers to pay certain benefits to workers prevented from working because of non-occupational injuries or illness.¹⁰⁸ Pregnant women fell within the qualified category, and employers were required to provide eight weeks of benefits to pregnant women for pregnancy-related disabilities.¹⁰⁹ Several large employers independently sued the New York Commissioner of the Division of Human Rights in United States District Court, seeking injunctive relief by alleging that the federal Employee Retirement Income Security Act of 1974 (ERISA) preempted the New York Human Rights Law.¹¹⁰ ERISA covered the medical plans that the employers provided employees, and one section explicitly preempted “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA.¹¹¹ The U.S. district courts in each case found the pregnancy benefits provision of the Human Rights Law to be preempted.¹¹² The U.S. Court of Appeals for the Second Circuit Court affirmed.¹¹³ When the consolidated cases came before the U.S. Supreme Court, the Court referenced *Ex parte Young* in a powerful footnote asserting that federal question jurisdiction was unquestionably appropriate in a case where federal rights were concerned:

It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question

¹⁰⁶ *Id.* at 96 n.14.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 88–89.

¹⁰⁹ *Id.* at 89.

¹¹⁰ *Id.* at 92–93.

¹¹¹ 29 U.S.C. § 1144 (2006); *Shaw*, 463 U.S. at 91–92.

¹¹² *Shaw*, 463 U.S. at 92–93.

¹¹³ *Id.* at 93–94.

which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.¹¹⁴

By leaning so heavily on *Ex parte Young* for jurisdictional support, the *Shaw* Court took the jurisdictional holding of *Ex parte Young* and expanded it to cover not only suits against state officers under the Fourteenth Amendment but also suits based on a federal statute.¹¹⁵ Significantly, the language of the *Shaw* Court was clear: it was relying on *Ex parte Young* for jurisdictional support.¹¹⁶ The Court left unanswered, indeed unaddressed, the question of whether plaintiffs had a proper cause of action.¹¹⁷ Although the allegation of preemption under the Supremacy Clause provided support for jurisdiction, the plaintiffs were not required to show that Congress, through ERISA, had created a cause of action.¹¹⁸

Without directly holding, the Court implied that establishing a valid cause of action was not necessary in the preemption setting where the plaintiff seeking prospective relief explicitly alleged that a federal law such as ERISA preempted a state law or regulation such as the New York Human Rights Law.¹¹⁹ After *Shaw* this view became so entrenched that, by the time the Court decided *Crosby v. National Foreign Trade Council* in 2000, neither the Court nor the defendant State even raised the cause of action issue.¹²⁰ The jurisdictional thrust of *Shaw* in pro-

¹¹⁴ *Id.* at 96 n.14.

¹¹⁵ *See id.*

¹¹⁶ *Id.*

¹¹⁷ *See id.*

¹¹⁸ *See Shaw*, 463 U.S. at 96 n.14. The source of the *Shaw* plaintiffs' cause of action is unclear. *See id.*; Sloss, *supra* note 37, at 378, 390 (noting that the Court did not find an explicit cause of action in ERISA or hold that the Supremacy Clause conferred a cause of action). In *Sandoval*, ERISA was found to include a private cause of action. 532 U.S. at 286–88; *see also* 29 U.S.C. § 1132 (2006). But that precedent was inapplicable to the *Shaw* plaintiffs who were not participants, beneficiaries, or fiduciaries of benefit plans. *See Shaw*, 463 U.S. at 92; *see also* 29 U.S.C. § 1132 (authorizing suit by participants, beneficiaries, and fiduciaries of benefit plans to enjoin conduct that violates ERISA).

¹¹⁹ *See FALLON ET AL.*, *supra* note 69, at 807 (“[T]he rule [after *Shaw* and *Verizon*] that there is an implied right of action to enjoin state or local regulation that is preempted by a federal statutory or constitutional provision—and that such an action falls within the federal question jurisdiction—is well established.”). Compare *Verizon*, 535 U.S. at 642–43 (foregoing a cause of action analysis in a prospective preemption case in which preemption was alleged explicitly), with *Sandoval*, 532 U.S. at 286–88 (requiring a valid cause of action in a prospective preemption case in which preemption was implied in an alleged constitutional violation).

¹²⁰ *See generally* 530 U.S. 363 (2000) (neglecting to address whether a cause of action existed); Brief for Petitioners, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (No. 99-474) (neglecting to argue that plaintiffs' suit lacked a valid cause of action in federal law).

spective preemption cases was so overwhelming that the state neglected to argue that the federal law on which the plaintiff trade organization relied did not contain a valid cause of action.¹²¹

After *Shaw*, it became common for lower courts in preemption cases involving state agency action to question whether the Supremacy Clause conferred a cause of action because of the *Shaw* footnote's positive implication.¹²² The answers of the lower courts varied by circuit.¹²³ The U.S. Court of Appeals for the Eleventh Circuit turned to *Shaw* for jurisdictional support in *Legal Environmental Assistance Foundation, Inc. v. Pegues* in 1990 in which the plaintiff environmental foundation sought to enjoin a state action on grounds that the federal Clean Water Act preempted it.¹²⁴ The court, however, affirmed dismissal of the case, holding that the Supremacy Clause does not confer a cause of action and that *Shaw's* footnote did not suggest otherwise.¹²⁵ Three days prior to the *Legal Environmental Assistance* decision, the U.S. Court of Appeals for the Eighth Circuit held in *First National Bank of Eastern Arkansas v. Taylor* that, after *Shaw*, "a party may apply directly to federal court based on an affirmative claim of preemption," thereby implying a cause of action within the Supremacy Clause.¹²⁶

¹²¹ Brief for Petitioners, *supra* note 120; Monaghan, *supra* note 85, at 238 (noting that after *Shaw*, the appearance of a "district court's jurisdiction to award equitable and declaratory relief to any preemption plaintiff" seemed clear); *Crosby v. National Foreign Trade Council*, U.S. SUPREME COURT MEDIA: OYEZ (Mar. 22, 2000), http://www.oyez.org/cases/1990-1999/1999/1999_99_474.

¹²² See *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 331–32 (5th Cir. 2005) (analyzing *Shaw* and its progeny and concluding that the Supremacy Clause provides a cause of action for a preemption claim); *Local Union No. 12004, United Steelworkers v. Massachusetts*, 377 F.3d 64, 74–75 (1st Cir. 2004) (questioning whether the Supremacy Clause confers a cause of action by comparing *Shaw* to previous cause of action precedent); *Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640, 643–44 (11th Cir. 1990) (examining whether the Supremacy Clause confers a cause of action); Bobroff, *supra* note 71, at 30 ("Other courts . . . read into Supreme Court jurisprudence an implied cause of action derived from the Supremacy Clause.")

¹²³ See *Planned Parenthood*, 403 F.3d at 331–32; *Local Union*, 377 F.3d at 74–75; *Legal Envtl. Assistance*, 904 F.2d at 643–44.

¹²⁴ 904 F.2d at 643–44.

¹²⁵ *Id.* (holding that *Shaw's* Supremacy Clause analysis was limited to jurisdiction and did not eliminate a cause of action analysis).

¹²⁶ *First Nat'l Bank of E. Ark. v. Taylor*, 907 F.2d 775, 776 n.3, 777 (8th Cir. 1990). The *Taylor* decision dovetailed with the U.S. Court of Appeals for the Ninth Circuit's decision in *Guaranty National Insurance Co. v. Gates* when it used *Shaw* as a foundation to explicitly hold that "the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws." See *Guaranty Nat'l Ins. Co. v. Gates*, 916 F.2d 508, 511–12 (9th Cir. 1990).

The Supreme Court never directly endorsed either circuit court's interpretation of the Supremacy Clause's ability to imply a cause of action.¹²⁷ Eventually, the Court took a strong step toward implying that, if a plaintiff clearly established jurisdiction to hear an explicitly alleged preemption case against a state official, then any related cause of action concerns would be resolved in the jurisdictional holding.¹²⁸ In 2002, in *Verizon Maryland Inc. v. Public Service Commission*, the Court borrowed heavily from *Shaw* to imply a cause of action under the Supremacy Clause in explicit allegation preemption cases.¹²⁹ The Court declared that federal courts had federal question jurisdiction in the case in which Verizon sought declaratory and injunctive relief from a state agency order, alleging preemption by federal telecommunication law.¹³⁰ The Court cast as irrelevant the state agency's argument that the federal law did not provide a cause of action by noting that the absence of a cause of action does not reduce the judiciary's jurisdictional power to adjudicate.¹³¹ Because the federal court had federal question jurisdiction to adjudicate the preemption claim, under *Shaw*, it need not worry about a missing cause of action.¹³²

Although the Supreme Court did not directly hold that the Supremacy Clause implies a cause of action in preemptive challenges to state legislative action, lower federal courts have not been shy to take

¹²⁷ See *Verizon*, 535 U.S. at 642–43. Although asserting that an absent cause of action did not preclude federal question jurisdiction in a prospective preemption case, the Court stopped well-short of endorsing a theory that the Supremacy Clause confers a cause of action for such cases. See *id.*

¹²⁸ See *id.* Upon establishing that it had federal question jurisdiction pursuant to § 1331, the Court addressed cause of action, stating 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.” *Id.*

¹²⁹ See *id.* *Verizon* is included in the explicit allegation of preemption category because the Court explicitly characterized the dispute as one of “preemption.” See *id.* Arguably, the case could fall into the implicit allegation of preemption category because Verizon’s allegation was that the state agency order violated federal law. See *id.* at 640, 642.

¹³⁰ *Id.* at 642 (“We have no doubt that federal courts have jurisdiction under § 1331 to entertain such a suit.”). After Verizon’s claim alleged that the state agency order violated federal law, the Court characterized the state order as explicitly preempted by federal law. *Id.* In 2000, the Court held a Massachusetts foreign trade law preempted by federal foreign trade law. *Crosby*, 530 U.S. at 372. In so doing, the Court progressed quickly to the merits, neither pausing to consider whether jurisdiction existed nor whether the federal law created a cause of action. *Id.* *Shaw* and its jurisdictional holding played no express role in the Court’s decision to enjoin the state law. See *id.*

¹³¹ *Verizon*, 535 U.S. at 642–43.

¹³² *Id.*

that step in the shadow of *Shaw* and *Verizon*.¹³³ By 2005, lower federal courts confidently relied on the *Shaw-Verizon* doctrine to maintain jurisdiction without concern that a cause of action may be absent.¹³⁴ That year, in *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, the U.S. Court of Appeals for the Fifth Circuit asserted that no explicit cause of action was necessary under the *Shaw-Verizon* doctrine as long as a plaintiff sought to prospectively enjoin a state law by claiming that a federal statute or constitutional provision preempted it.¹³⁵ The Fifth Circuit plainly declared that it need not be concerned that the federal law created no individual rights—a preemption allegation under the Supremacy Clause implied a cause of action.¹³⁶

The Supremacy Clause’s implied cause of action in explicit allegations of preemption has reverberated through other circuits, though not entirely without debate.¹³⁷ In January 2011 in *Wilderness Society v. Kane County, Utah*, the en banc U.S. Court of Appeals for the Tenth Circuit vacated a panel decision in a preemption case in which the panel had found that the Supremacy Clause conferred a cause of action.¹³⁸ Although the Tenth Circuit anchored its reasoning on standing grounds, it acknowledged the confusion over whether the Supremacy Clause conferred a cause of action, noting that the Supreme Court had not yet provided a clear answer.¹³⁹ Holding that prudential standing doctrine required dismissal, the Tenth Circuit “assume[d] without deciding that the Supremacy Clause provides a cause of action whether one exists or not.”¹⁴⁰

The Supreme Court appeared poised to resolve the debate when it granted certiorari in *Independent Living* in October 2011, specifically to answer the question of whether plaintiff beneficiaries could maintain a cause of action under the Supremacy Clause to enforce a Medicaid

¹³³ See *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1058–59 (9th Cir. 2008), *vacated sub nom. Indep. Living*, 132 S. Ct. 1204; *Qwest Corp. v. City of Santa Fe, N.M.*, 380 F.3d 1258, 1264–65 (10th Cir. 2004); *Local Union*, 377 F.3d at 74–75.

¹³⁴ *Planned Parenthood*, 403 F.3d at 331–32; *Local Union*, 377 F.3d at 74–75.

¹³⁵ 403 F.3d at 334–35 (“We have little difficulty in holding that Appellees have an implied right of action to assert a preemption claim seeking injunctive and declaratory relief.”).

¹³⁶ *Id.* at 335.

¹³⁷ See *Wilderness Soc’y v. Kane Cnty., Utah*, 581 F.3d 1198, 1233–34 (10th Cir. 2009) (McConnell, J., dissenting), *vacated en banc*, 632 F.3d 1162 (10th Cir. 2011).

¹³⁸ *Wilderness Soc’y v. Kane Cnty., Utah*, 632 F.3d 1162, 1165 (10th Cir. 2011).

¹³⁹ See *id.* at 1169 (“The Court has yet to weigh in, however, on whether the Supremacy Clause provides a cause of action.”).

¹⁴⁰ See *id.*

provision by alleging that it preempted a state law.¹⁴¹ The U.S. Court of Appeals for the Ninth Circuit relied on *Shaw* and *Verizon* to hold that a party may bring a claim under the Supremacy Clause that a state law is preempted by federal law despite an absent cause of action in the federal law.¹⁴²

The Court's February 2012 decision, however, left the question unanswered and the debate unresolved.¹⁴³ Rather than directly answer the Supremacy Clause cause of action question, the Court noted that, since the filing of suit, the federal agency in charge of Medicaid enforcement declared that the state law did not conflict with the federal statute and therefore the state law was not preempted.¹⁴⁴ Although the Court acknowledged that a "case or controversy" remained because plaintiffs still challenged preemption, the Court vacated the Ninth Circuit's allowance of the suit under the Supremacy Clause and remanded for further argument on whether, in light of the new posture, the Supremacy Clause could confer a cause of action.¹⁴⁵

In sum, the Court did not reject the conclusion of circuits that held that the Supremacy Clause confers a cause of action; it merely held that the changing nature of the case required re-argument at the circuit court level.¹⁴⁶ In dissent, Chief Justice Roberts wondered why remand was necessary when the basic question remained the same: does or does not the Supremacy Clause enable plaintiffs to sue under the Medicaid Act without a private cause of action?¹⁴⁷ The dissent responded in the negative.¹⁴⁸ In doing so, it distinguished *Independent Living* from *Ex parte Young*.¹⁴⁹ Chief Justice Roberts noted that—unlike the *Ex parte Young* plaintiffs who could have relied on the Fourteenth Amendment to defend against threatened state action—the *Independent Living* plaintiffs had no other enforceable federal right.¹⁵⁰

¹⁴¹ *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 652–53 (9th Cir. 2009), *vacated sub nom. Indep. Living*, 132 S. Ct. 1204.

¹⁴² *Sheary*, 543 F.3d at 1058–59. The Supreme Court granted certiorari after the case came before the Ninth Circuit a second time; the defendant director had appealed the district court's decision following remand of the initial Ninth Court decision. *Maxwell-Jolly v. Indep. Living Ctr. of S. Cal., Inc.*, 131 S. Ct. 992, 992 (2011).

¹⁴³ *Indep. Living*, 132 S. Ct. at 1211.

¹⁴⁴ *Id.* at 1209.

¹⁴⁵ *Id.* at 1209, 1211.

¹⁴⁶ *Id.* at 1211 (vacating and remanding to the Ninth Circuit for reconsideration of whether the Supremacy Clause confers a cause of action).

¹⁴⁷ *Id.* at 1212 (Roberts, C.J., dissenting).

¹⁴⁸ *Id.*

¹⁴⁹ *Indep. Living*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting).

¹⁵⁰ *Id.*

Nevertheless, the dissenting opinion remains just that—a non-binding dissenting opinion.¹⁵¹ So it holds true that, since 1983 and more frequently in the past several years, the surest route into federal court on a prospective preemption claim has been to make the allegation explicit.¹⁵² Jurisdiction is likely assured.¹⁵³ Whether a cause of action exists and its origin is considerably less relevant until a majority of the Supreme Court holds otherwise.¹⁵⁴ Therefore, lack of a cause of action is less of a potential barrier to plaintiffs explicitly alleging preemption.¹⁵⁵ Accordingly, arguments have diminished vigor when defendant states or localities attempt to assert that such plaintiffs have no valid cause of action.¹⁵⁶

Nevertheless, *Independent Living* provided state agency defendants a potential opening.¹⁵⁷ At least four justices directly indicated that they do not believe that the Supremacy Clause confers an independent cause of action.¹⁵⁸ The five majority justices simply decided not to decide whether it does or does not.¹⁵⁹ The potential to make the argument and convince at least one of those justices remains in play.¹⁶⁰

B. *Litigants Who Must Show a Cause of Action*

The Court has been more inclined to require a plaintiff to assert a valid cause of action, independent of the Supremacy Clause, to main-

¹⁵¹ Laura Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMP. L. REV. 307, 309–10 (1988) (noting that dissenting opinions by definition do not command a controlling majority of the Court but can nevertheless persuade future legal change).

¹⁵² See *Verizon*, 535 U.S. at 642–43; *Crosby*, 530 U.S. at 371–72 (discussing the procedural posture and the certiorari grant in *Crosby* that focused entirely on the preemption issue without any reference to cause of action analysis); *Shaw*, 463 U.S. at 96 n.14; Sloss, *supra* note 37, at 391 (arguing that the Supreme Court has “tacitly assumed” the existence of a cause of action under the Supremacy Clause when prospective preemption is alleged explicitly).

¹⁵³ FALLON ET AL., *supra* note 69, at 712, 806.

¹⁵⁴ See *id.* at 712, 806; Monaghan, *supra* note 85, at 238.

¹⁵⁵ See FALLON ET AL., *supra* note 69, at 712, 806; Bobroff, *supra* note 71, at 45; Sloss, *supra* note 37, at 391, 440; Rosemary B. Guiltinan, Note, *Enforcing a Critical Entitlement: Preemption Claims as an Alternative Way to Protect Medicaid Recipients Access to Healthcare*, 51 B.C. L. REV. 1583, 1602 (2010) (“[The Court] has repeatedly assumed that the Supremacy Clause creates an implied cause of action for plaintiffs alleging that a state law is preempted by a conflicting federal law.”).

¹⁵⁶ See *Verizon*, 535 U.S. at 642–43; FALLON ET AL., *supra* note 69, at 712, 806; Bobroff, *supra* note 71, at 45; Sloss, *supra* note 37, at 391, 440.

¹⁵⁷ See 132 S. Ct. at 1215 (Roberts, C.J., dissenting).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1211 (majority opinion).

¹⁶⁰ See *id.*

tain a suit in which preemption is implied in the allegation that state action violates federal rights, whether statutory or constitutional.¹⁶¹ The cause of action requirement also applies to plaintiffs who sue pursuant to § 1983, even if the preemption allegation is explicit.¹⁶²

I. Implied Allegations

The reasoning behind the distinct treatment of plaintiffs making explicit versus implicit preemption allegations is murky.¹⁶³ What is clear, though, is that, when the preemption allegation is implicit, the Court does not follow its express allegation path of heavily emphasizing jurisdictional power while foregoing cause of action analysis.¹⁶⁴ In adjudicating implicit cases, rather, the Court has tended to follow the *Sandoval v. Alexander* proof-of-Congressional-intent approach in searching for a cause of action in addition to establishing jurisdiction.¹⁶⁵

Even before *Sandoval*, the Court acknowledged discomfort in permitting preemption suits against state executive action when plaintiffs were unable to establish any cause of action independent of the Supremacy Clause.¹⁶⁶ In 1981, two years before it decided *Shaw*, the Court declared that two federal laws did not provide a proper cause of action for a plaintiff fisherman who alleged that actions by state and local officials violated federal environmental protection laws.¹⁶⁷ The fisherman in *Middlesex County Sewerage Authority et al. v. National Sea Clammers' Ass'n* implied preemption by alleging that the state action violated federal law.¹⁶⁸ With the Constitution's separation-of-powers construct in mind, the Court held that Congress did not intend to create a private cause of action and therefore, despite the underlying pre-

¹⁶¹ See *Sandoval*, 532 U.S. at 288; *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers' Ass'n*, 453 U.S. 1, 13 (1981); Sloss, *supra* note 37, at 371 (referring to such cases as "*Shaw* violation" cases).

¹⁶² See *Golden State*, 493 U.S. at 108.

¹⁶³ See Sloss, *supra* note 37, at 371–72.

¹⁶⁴ Compare *Verizon*, 535 U.S. at 642–43 (no cause of action requirement when explicit preemption characterization), with *Sandoval*, 532 U.S. at 286–88 (cause of action required when implicit preemption characterization), and Sloss, *supra* note 37, at 371–72 (“[A] judicial doctrine in which the availability of an implied private right of action turns on empty linguistic distinctions is indefensible.”).

¹⁶⁵ See *Sandoval*, 532 U.S. at 286–88; *Sea Clammers*, 453 U.S. at 17–18; *California v. Sierra Club*, 451 U.S. 287, 293–94 (1981).

¹⁶⁶ See *Sea Clammers*, 453 U.S. at 17–18; *Sierra Club*, 451 U.S. at 293–94.

¹⁶⁷ See *Sea Clammers*, 453 U.S. at 17–18.

¹⁶⁸ *Id.*

emption the Supremacy Clause implied, the plaintiff's case could not survive.¹⁶⁹

The federal court practice of searching for a cause of action in Congress's intent remains good law.¹⁷⁰ In 2001, the Court in *Sandoval*, a suit to enjoin state action that allegedly violates federal law, held that a plaintiff must prove that Congress intended to create a cause of action in the federal law.¹⁷¹ The holding in *Sandoval* did not address the Supremacy Clause's capacity to confer a cause of action, and the Court did not explicitly characterize the case as a preemption challenge.¹⁷² But when the Court held that the plaintiff in *Sandoval* could not enjoin the state regulation because there was no proof of Congress's intent to create a cause of action, the Court necessarily implied that the Supremacy Clause could not have conferred a valid cause of action to support such a preemption challenge against the state executive agency's actions.¹⁷³ The holding reflected the Court's cause of action analysis when confronted with a third type of preemption plaintiffs: those suing pursuant to 42 U.S.C. § 1983.¹⁷⁴

2. Explicit Allegations in § 1983 Suits

Federal law permits plaintiffs to sue state officials to protect or vindicate constitutionally or statutorily protected rights.¹⁷⁵ The provi-

¹⁶⁹ *Id.* at 18 ("Where, as here, Congress has made clear that implied private actions are not contemplated, the courts are not authorized to ignore this legislative judgment."). That same year, the Court decided *California v. Sierra Club*, holding that the relevant federal law did not create a private cause of action for plaintiff environmentalists to enjoin state water agencies from allegedly violating federal water law. 451 U.S. at 293–94. Notwithstanding the preemption implication in the allegation that state action violated federal law, the Court probed for a valid cause of action. *Id.* When it failed to find one, it dismissed the case, again mindful of the separation-of-powers boundaries that prevent a federal court from creating a cause of action when Congress has not. *Id.*

¹⁷⁰ See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002); *Sandoval*, 532 U.S. at 288–89.

¹⁷¹ See *Sandoval*, 532 U.S. at 286–88.

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ Compare *Sandoval*, 532 U.S. at 288 (finding that a cause of action is required when the preemption allegation is implicit), with *Golden State*, 493 U.S. at 108 (finding that a cause of action is required in a prospective preemption suit brought to vindicate federal rights under § 1983).

¹⁷⁵ 42 U.S.C. § 1983 (2006). The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immu-

sion, 42 U.S.C. § 1983, is applicable in the preemption setting when a plaintiff alleges that local action infringes on the plaintiff's federal rights.¹⁷⁶ The Court's adjudication of preemption in a § 1983 context varies significantly with regard to cause of action analysis from non-§ 1983 claims that explicitly allege prospective preemption.¹⁷⁷

Since 1989, the Court has unambiguously permitted plaintiffs to rely on § 1983 to sue for prospective relief against local officials whose conduct is allegedly preempted by federal law.¹⁷⁸ The Court requires, however, that, when a plaintiff in a preemption suit relies on § 1983 to prospectively vindicate federal rights, the plaintiff must identify a valid cause of action within the federal statute or constitutional provision that gives rise to the federal right.¹⁷⁹ The requirement to point to a valid cause of action places such suits squarely in the *Sandoval* line of cases implicitly alleging preemption as opposed to the *Shaw-Verizon* line of cases wherein the Court did not require a valid cause of action when the preemption allegation or characterization was explicit.¹⁸⁰

In practice, § 1983 preemption cases follow standard cause of action analysis.¹⁸¹ The Court most emphatically endorsed this approach

ities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

¹⁷⁶ See, e.g., *Golden State*, 493 U.S. at 108. State agencies may be sued prospectively, but not retrospectively, under § 1983. See *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989).

¹⁷⁷ Compare *Golden State*, 493 U.S. at 108 (requiring a plaintiff to assert a valid cause of action independent of § 1983 and the Supremacy Clause in an explicit prospective preemption case), with *Shaw*, 463 U.S. at 96 n.14 (foregoing a cause of action analysis in an explicit prospective preemption case not pursuant to § 1983).

¹⁷⁸ See *Golden State*, 493 U.S. at 108; FALLON ET AL., *supra* note 69, at 807–08 (noting that, in *Golden State*, the Court held that § 1983 “ordinarily embraces actions by a federal rightholder contending that state or local regulation is preempted by federal law”).

¹⁷⁹ *Golden State*, 493 U.S. at 108; see Monaghan, *supra* note 85, at 242 (“The Court recognizes that while section 1983 ‘must be broadly construed,’ the preemption plaintiff nonetheless ‘must assert the violation of a federal right.’” (quoting *Golden State*, 493 U.S. at 105–06)).

¹⁸⁰ See *Golden State*, 493 U.S. at 108. The *Golden State* Court thoroughly considered whether the federal statute at issue, the National Labor Relations Act, contained a private right pursuant to which the plaintiff taxi company management could sue. *Id.* at 108–13; see Sloss, *supra* note 37, at 411 (“[E]ven assuming that a plaintiff has a meritorious argument for preemption of state law by federal law, that plaintiff might still lose a *Shaw* preemption claim brought under § 1983 on the grounds that the preemptive federal statute does not create a federal right.”).

¹⁸¹ See *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997) (“[A] plaintiff must assert the violation of a federal right, not merely a violation of federal law.”); *Golden State*, 493 U.S. at 108–13.

in *Golden State Transit v. City of Los Angeles* in 1989.¹⁸² Relying on a § 1983 deprivation of rights argument, a plaintiff taxicab franchise sought injunctive and compensatory relief against the City of Los Angeles, alleging that the National Labor Relations Act (NLRA)¹⁸³ preempted the city's interference with the plaintiff's labor dispute.¹⁸⁴ Although the Court held that the § 1983 action vindicated employer rights under the NLRA, Justice John Paul Stevens's decision clarified that the Court was looking to the NLRA and not the Supremacy Clause for the source of the rights or cause of action: "Respondent argues that the Supremacy Clause, of its own force, does not create rights enforceable under § 1983. We agree. 'That clause is not a source of any federal rights'; it 'secures federal rights by according them priority whenever they come in conflict with state law.'"¹⁸⁵ The *Golden State* court did not address *Shaw* at all, either in a cause of action or jurisdictional analysis.¹⁸⁶

What was left after *Shaw*, *Verizon*, *Sandoval*, and *Golden State* was a definite categorization of preemption plaintiffs, however arbitrary the contours of the boundaries of that categorization.¹⁸⁷ Preemption claims implicitly alleged or which relied on § 1983 required a valid cause of action separate from the Supremacy Clause;¹⁸⁸ general preemption claims excepting § 1983 claims did not require a plaintiff to assert a cause of action because the Supremacy Clause implied one.¹⁸⁹

¹⁸² See 493 U.S. at 108.

¹⁸³ 29 U.S.C. § 151 (2006).

¹⁸⁴ *Golden State*, 493 U.S. at 104–05.

¹⁸⁵ *Id.* at 107 (quoting *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 613 (1979)).

¹⁸⁶ See *id.* at 107–13.

¹⁸⁷ See *Verizon*, 535 U.S. at 642–43; *Sandoval*, 532 U.S. at 288; *Golden State*, 493 U.S. at 104–05; *Shaw*, 463 U.S. at 96 n.14.

¹⁸⁸ *Golden State*, 493 U.S. at 107–13.

¹⁸⁹ The Court's *Shaw-Verizon* and *Golden State* preemption doctrines collided in bizarre fashion in a Tenth Circuit decision in 2004, which demonstrated the two doctrines' substantial incongruity. *Qwest Corp.*, 380 F.3d at 1264–65. In *Qwest Corp. v. City of Santa Fe, New Mexico* the Tenth Circuit applied *Shaw-Verizon* to a general preemption claim, but applied *Golden State* to the part of the preemption claim for attorneys' fees that relied on § 1983. *Id.* The court rejected the plaintiffs' attempt to use § 1983 claim to win attorneys' fees. *Id.* at 1265. In the § 1983 analysis, the court examined whether the federal law at issue contained rights-creating language; the court found that it did not, which led to the conclusion that the Supremacy Clause alone could not support a § 1983 claim. *Id.* Relying on *Shaw* and *Verizon*, the court asserted jurisdiction over the action, which sought to enjoin a local regulation on the grounds that federal telecommunication law preempted it. *Id.* The court did so even though the federal law contained no cause of action; instead, a cause of action under the Supremacy Clause was implied. *Id.*

IV. A HISTORICALLY, POLITICALLY CORRECT SOLUTION:
THE SUPREMACY CLAUSE SHOULD NOT CONFER
A CAUSE OF ACTION

The Court's prospective preemption jurisprudence creates undesirable uncertainty and inconsistent results by failing to provide explicit guidance as to whether the Supremacy Clause implies a cause of action.¹⁹⁰

This Part argues that the Supremacy Clause does not imply a cause of action and that preemption plaintiffs should be required to identify a valid cause of action outside of the Supremacy Clause even when making explicit allegations of preemption.¹⁹¹ Section A demonstrates why the different types of preemption plaintiffs—§ 1983 plaintiffs, plaintiffs implicitly alleging preemption of state action, and plaintiffs explicitly alleging preemption—should be treated the same with regard to cause of action analysis.¹⁹² Section B illustrates why finding an implicit valid cause of action in the Supremacy Clause in preemption cases misreads the history of the Supremacy Clause and the cause of action requirement.¹⁹³ Section C underscores how finding an implied cause of action in the Supremacy Clause violates the constitutional separation-of-powers principle.¹⁹⁴ In closing, Section D argues that federalism concerns should encourage the Court to require the *Sandoval* cause of action test in preemption cases.¹⁹⁵

A. *Similarly Situated Plaintiffs Should Be Treated Alike*

The content of a pleading or a court's characterization of an action should not increase or decrease the cause of action burden for a preemption plaintiff.¹⁹⁶ Likewise, defendant states' or localities' de-

¹⁹⁰ See *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1211 (2012); *Wilderness Soc'y v. Kane Cnty.*, Utah, 632 F.3d 1162, 1165 (10th Cir. 2011) (noting that the Supreme Court has not clarified whether the Supremacy Clause confers a cause of action in the prospective preemption context); *Local Union No. 12004, United Steelworkers v. Massachusetts*, 377 F.3d 64, 74 (1st Cir. 2004) (noting that an implied cause of action in the Supremacy Clause does not conform to Supreme Court precedent that predates *Shaw* and *Verizon*).

¹⁹¹ See *infra* notes 196–270 and accompanying text.

¹⁹² See *infra* notes 196–217 and accompanying text.

¹⁹³ See *infra* notes 218–242 and accompanying text.

¹⁹⁴ See *infra* notes 243–256 and accompanying text.

¹⁹⁵ See *infra* notes 257–270 and accompanying text.

¹⁹⁶ See Sloss, *supra* note 37, at 371–72 (“[A] judicial doctrine in which the availability of an implied right of action turns on empty linguistic distinctions is indefensible.”).

fenses should not depend on the type of preemption plaintiff.¹⁹⁷ Preemption plaintiffs can generally be described as plaintiffs who: (1) explicitly allege preemption (“*Shaw* plaintiffs”),¹⁹⁸ (2) implicitly allege preemption (“*Sandoval* plaintiffs”),¹⁹⁹ or (3) rely on § 1983 to assert that federal law preempts local action that infringes on their federal rights (“§ 1983 plaintiffs”).²⁰⁰ In many cases, the art of pleading or the court’s characterization of an action could move a plaintiff from one category to another category.²⁰¹ The distribution of justice is inequitable when such similarly situated parties—those whose basic case rests on the alleged federal preemption of state or local action—receive such varied treatment.²⁰²

When *Shaw* plaintiffs use the word preemption, they send a signal to the court that the case not only arises under federal law but that the Supremacy Clause controls its resolution.²⁰³ The signal is powerful because, in one step, it establishes jurisdiction and introduces the merits question of whether the relevant federal law preempts the state law.²⁰⁴ Cast in that frame, federal courts seem to reach the merits of such cases appropriately; after all, the federal judiciary exists in part to protect the vitality of the Supremacy Clause.²⁰⁵

That frame, however, is not viable because it enables plaintiffs seeking prospective relief from state action to successfully allege preemption by relying on a federal law that was never meant to protect such plaintiffs.²⁰⁶ Indeed, if that were the law, then every federal law

¹⁹⁷ See FALLON ET AL., *supra* note 69, at 712; Sloss, *supra* note 37, at 371–72.

¹⁹⁸ See *supra* notes 99–160 and accompanying text.

¹⁹⁹ See *supra* notes 161–174 and accompanying text.

²⁰⁰ See *supra* notes 175–189 and accompanying text.

²⁰¹ See *Verizon Md. Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 642 (2002). By complaining that the state commission’s decision violated federal law, *Verizon* plaintiffs could have been characterized as *Sandoval* plaintiffs. See *id.* at 640; *Alexander v. Sandoval*, 532 U.S. 275, 288–89 (2001). The *Verizon* Court, however, explicitly cast the suit in preemption terms. See *Verizon*, 535 U.S. at 642.

²⁰² See Monaghan, *supra* note 85, at 239; Sloss, *supra* note 37, at 371–72.

²⁰³ See *Verizon*, 535 U.S. at 642–43 (“*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.”); *Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n.14 (1983).

²⁰⁴ See *Verizon*, 535 U.S. at 642–43; *Shaw*, 463 U.S. at 96 n.14.

²⁰⁵ See *Verizon*, 535 U.S. at 642–43; White, *supra* note 38, at 979.

²⁰⁶ See *Sandoval*, 532 U.S. at 288–89. The *Sandoval* Court explicitly noted that Congress did not envision the particular plaintiffs as the targets of the federal law provision that formed the basis of their suit. *Id.*; Monaghan, *supra* note 85, at 239–40 (“*Shaw* seems wrong, if read to permit any federal immunity holder automatic access to federal courts for declaratory and injunctive relief.”).

could be said to contain a cause of action by way of the Supremacy Clause in a preemption case.²⁰⁷ By not requiring *Shaw* plaintiffs to establish a separate cause of action, the Court enables *Shaw* plaintiffs to manipulate congressional legislation beyond its intended purpose.²⁰⁸ The Court has resisted such manipulation in cases involving § 1983 plaintiffs and *Sandoval* plaintiffs.²⁰⁹ Comparatively, there is nothing extraordinary about *Shaw* plaintiffs or their cases that should obviate the need for cause of action analysis.²¹⁰

Between § 1983 preemption plaintiffs and *Shaw* plaintiffs, the preemptive nature of their claims are virtually identical, clearly stated through the use of “preemption” in the pleadings.²¹¹ The only significant difference is that the invocation of § 1983 signals to a court that it must engage in a cause of action analysis because of the § 1983 doctrine that requires an independent cause of action analysis.²¹² Federal courts are keenly aware that § 1983 itself does not supply a cause of action.²¹³ But if the Supremacy Clause also cannot supply a cause of action for § 1983 plaintiffs who explicitly allege preemption, then it should not supply a cause of action for *Shaw* plaintiffs who also allege preemption, but who simply do not sue under § 1983.²¹⁴ The Court’s adamant refusal to imply a cause of action into the Supremacy Clause for § 1983 plaintiffs²¹⁵ and *Sandoval* plaintiffs²¹⁶ becomes frustrating silence when

²⁰⁷ See *Wilderness Soc’y v. Kane Cnty.*, Utah, 581 F.3d 1198, 1233–34 (10th Cir. 2009) (McConnell, J., dissenting), *vacated en banc*, 632 F.3d 1162 (10th Cir. 2011).

²⁰⁸ Compare *Verizon*, 535 U.S. at 642–43 (finding that plaintiffs were not required to demonstrate that Congress intended for a private cause of action in the Telecommunications Act of 1996), with *Sandoval*, 532 U.S. at 288–89 (finding a cause of action to be absent from the relevant federal regulation).

²⁰⁹ See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002); *Sandoval*, 532 U.S. at 288–89; *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108 (1989).

²¹⁰ See *Shaw*, 463 U.S. at 96 n.14. But see *Golden State*, 493 U.S. at 106 (“The interest the plaintiff asserts must not be ‘too vague and amorphous’ to be ‘beyond the competence of the judiciary to enforce.’ We have also asked whether the provision in question was ‘intended to benefit’ the putative plaintiff.” (citations omitted)) (quoting *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 430–32 (1987)).

²¹¹ Compare *Verizon*, 535 U.S. at 642 (“Verizon seeks relief from the Commission’s order on the ground that such regulation is preempted by a federal statute . . .”), with *Golden State*, 493 U.S. at 105 (alleging that the “city’s conduct was preempted by the National Labor Relations Act”).

²¹² *Golden State*, 493 U.S. at 106 (engaging in a thorough cause of action analysis because of a § 1983 claim); see Monaghan, *supra* note 85, at 248 (“*Golden State*’s search for an underlying ‘federal right’ draws not only on section 1983’s explicit language but on currents deeply embedded in our legal and political culture.”).

²¹³ See *Gonzaga*, 536 U.S. at 283–84.

²¹⁴ See Sloss, *supra* note 37, at 371–72.

²¹⁵ See *Golden State*, 493 U.S. at 108.

Shaw plaintiffs are before the Court and are not even questioned on whether they can demonstrate a valid cause of action.²¹⁷

B. *Correcting a Historical Misreading of the Supremacy Clause*

Several lower courts have interpreted the Supreme Court's handling of *Shaw* preemption cases as affirming that the Supremacy Clause implies a cause of action.²¹⁸ Although doing so increases the likelihood that federal courts will strike down state laws that impermissibly conflict with federal laws, the practice misreads the history and purpose of the Supremacy Clause.²¹⁹

The Framers inserted the Supremacy Clause into the Constitution to give explicit voice to the idea of federalism—that the nation would be comprised of sovereign states free to make their own laws, except that if those laws conflicted with federal law then federal law would control.²²⁰ The Supremacy Clause constitutionalized federal supremacy.²²¹

The Framers did not intend, however, for the Supremacy Clause to be a right unto itself.²²² Unlike, for instance, the constitutional right to habeas corpus, the Supremacy Clause does not give citizens a right to federalism.²²³ It is distinct from some amendments in the Bill of Rights in that it does not create a right like freedom of speech²²⁴ and freedom from illegal search and seizure,²²⁵ or a right to a jury trial in a criminal

²¹⁶ *Sandoval*, 532 U.S. at 288–89.

²¹⁷ *See Verizon*, 535 U.S. at 642–43; *Shaw*, 463 U.S. at 96 n.14.

²¹⁸ *See Wilderness Soc'y*, 581 F.3d at 1216; *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 332 (5th Cir. 2005); *Local Union*, 377 F.3d at 74–75.

²¹⁹ *See Golden State*, 493 U.S. at 108 (holding that the Supremacy Clause is not a source of federal rights but that it merely “secures federal rights by according them priority whenever they come in conflict with state law”); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 609–10 (1842); *Andrews v. Maher*, 525 F.2d 113, 118–19 (2d Cir. 1975) (holding that the Supremacy Clause ranks federal statutes ahead of state laws in the event of a conflict); *White*, *supra* note 38, at 978–79.

²²⁰ *White*, *supra* note 38, at 978–79.

²²¹ *See id.*

²²² *See Golden State*, 493 U.S. at 108; *Andrews*, 525 F.2d at 118–19; *Clark*, *supra* note 49, at 1431 (noting the constitutional convention debates indicate the purpose of the Supremacy Clause was to ensure a federalism structure of government); *White*, *supra* note 38, at 979.

²²³ *Compare* U.S. CONST. art I, § 9, cl. 2 (“The Privilege of Habeas Corpus shall not be suspended.”), *with id.* art. VI, cl. 2 (“This Constitution and the Laws of the United States . . . shall be the Supreme Law of the Land.”).

²²⁴ *See id.* amend. I.

²²⁵ *See id.* amend. IV.

prosecution.²²⁶ Instead, the Supremacy Clause ranks rights that exist elsewhere.²²⁷

Throughout its history, the Supreme Court has explicitly adhered to this interpretation of the Supremacy Clause as containing the limited power to rank conflicting rights.²²⁸ A suggestion that the Supremacy Clause creates a private cause of action in the same manner, for instance, as the Fourteenth Amendment, misreads the purpose and history of the Supremacy Clause.²²⁹

In the nearly two decades since *Shaw*, nevertheless, inferior courts have determined that the Supreme Court has suggested otherwise—that the Supremacy Clause does, in fact, imply a cause of action in the preemption arena.²³⁰ Repeatedly, lower courts have stood in the footprints of *Shaw*—and more recently *Verizon*—to declare that, in a preemption case, no cause of action is needed because the Supremacy Clause implies one.²³¹

Even in the wake of *Douglas v. Independent Living Center of Southern California, Inc.*, the Supreme Court has done little to discourage this practice.²³² *Verizon*, in particular, bolstered this reasoning with language that marched toward (without actually crossing) the line of empowering the Supremacy Clause with cause of action status:

²²⁶ See *id.* amend. VI.

²²⁷ See *id.* art. VI, cl. 2; *Golden State*, 493 U.S. at 108; *Andrews*, 525 F.2d at 118–19.

²²⁸ See *Golden State*, 493 U.S. at 108; *Prigg*, 41 U.S. at 608–10; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 209, 210–11 (1824); Monaghan, *supra* note 85, at 242–43 (“That clause simply states a rule of priority: valid federal law prevails over conflicting state law. By itself the clause provides no algorithm for determining when concededly valid federal law can be asserted only as a defense, or when it can be employed also as a sword.”). The order function shone brightly as the essence of Chief Justice Marshall’s decision in *Gibbons v. Ogden* when he identified the Supremacy Clause as the reason a state law regarding river navigation must yield to a contrary federal law. See 22 U.S. at 210–11. One hundred, sixty-five years later in *Golden State*, the ordering function remains the sole function of the Supremacy Clause; in that case, Justice Stevens wrote that, rather than creating rights, the Supremacy Clause established priority of federal rights in conflict with state rights. 493 U.S. at 107–08.

²²⁹ See *Ex parte Young*, 209 U.S. 123, 149–50 (1908) (holding that the plaintiffs had a Fourteenth Amendment right to due process); Monaghan, *supra* note 85, at 240 n.55 (“But *Ex parte Young* does not dispense with the requirement that the plaintiff assert a federal remedial right, and the Court has long been understood to have assumed such a right from the fourteenth amendment.”); White, *supra* note 38, at 978–79.

²³⁰ See *Planned Parenthood*, 403 F.3d at 331–32; *Local Union*, 377 F.3d at 74–75; *Guaranty Nat’l Ins. Co. v. Gates*, 916 F.2d 508, 512 (9th Cir. 1990) (“[T]he best explanation . . . is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws.”).

²³¹ See *Planned Parenthood*, 403 F.3d at 331–32; *Local Union*, 377 F.3d at 74–75; *Guaranty Nat’l*, 916 F.2d at 512.

²³² See *Verizon*, 535 U.S. at 642–43.

The Commission contends that since the Act does not create a private cause of action to challenge the Commission's order, there is no jurisdiction to entertain such a suit. *We need express no opinion on the premise of this argument.* "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."²³³

Extracting from *Shaw* and *Verizon* that the Supremacy Clause does imply a cause of action in the preemption context, as have lower courts, is certainly reasonable.²³⁴ After all, in both *Shaw* and *Verizon*, the Court reached the merits of preemption suits without requiring plaintiffs to demonstrate a cause of action.²³⁵ For a Court that has reflected sensitivity about engaging a cause of action analysis over the past three-plus decades with development of the *Sandoval* and *Gonzaga* standards,²³⁶ foregoing such an analysis in the preemption context resonates with powerful influence.²³⁷

The value of the Supremacy Clause to a federal court, however, should be irrelevant unless and until a case is properly before a court with respect to cause of action and jurisdiction.²³⁸ Analyzing the preemptive nature of a federal law in contrast to a state law involves examining the merits of a case.²³⁹ Only if a plaintiff sues pursuant to a valid cause of action should a court reach the merits.²⁴⁰ Artificially increasing

²³³ See *id.* (emphasis added) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)). Expressing no opinion on the argument, the *Verizon* Court did not decide whether or not the Supremacy Clause conferred a cause of action. See *id.*

²³⁴ See *Planned Parenthood*, 403 F.3d at 331–32; *Local Union*, 377 F.3d at 74–75.

²³⁵ See *Verizon*, 535 U.S. at 642–43; *Shaw*, 463 U.S. at 96 n.14.

²³⁶ See *Gonzaga*, 536 U.S. at 284; *Sandoval*, 532 U.S. at 288–89; *Davis v. Passman*, 442 U.S. 228, 239 (1979); *Cort v. Ash*, 422 U.S. 66, 78 (1975).

²³⁷ See *Planned Parenthood*, 403 F.3d at 331–32; *Local Union*, 377 F.3d at 74–75. At least one commentator argues that the Court should explicitly hold that the Supremacy Clause confers a cause of action not only for *Shaw* plaintiffs, but also for all types of prospective preemption plaintiffs; doing so would advance the rule of law—federal law controlling over contrary state law. Sloss, *supra* note 37, at 401–02 (arguing that *Shaw* preemption claims promote the rule of law by helping to ensure that state and local governments remain within the bounds of federal law).

²³⁸ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 168, 173 (1803); *Monaghan*, *supra* note 85, at 239–40.

²³⁹ See *Monaghan*, *supra* note 85, at 241 (noting that, in *California v. Sierra Club*, 451 U.S. 287, 293–94 (1981), when the Court did not find a cause of action in a prospective preemption suit, it specifically declared that it could not reach the merits—the preemption issue—of the claim).

²⁴⁰ See *Sandoval*, 532 U.S. at 286–89, 293; *Monaghan*, *supra* note 85, at 240 n.55.

access to federal courts by reading a cause of action into the Supremacy Clause for all preemption plaintiffs does not support the rule of law because the relevance of the Supremacy Clause should become apparent only when both jurisdiction and cause of action hurdles are cleared.²⁴¹ Moreover, implying a cause of action in the Supremacy Clause against the Framers' intentions dangerously injects flexibility into a provision that was conceived and written with rigid outlines.²⁴²

C. Adherence to the Separation-of-Powers Principle

The Court has long been sensitive about its role in the expression of government, reflecting awareness of the separation-of-powers principle embodied in the Constitution.²⁴³ When federal courts inject the Supremacy Clause with cause of action power, they improperly infringe separation-of-power principles.²⁴⁴ If Congress had not made a political choice to create a cause of action for a particular plaintiff, then the judiciary, as the nonpolitical branch of government, should not step into legislative shoes and imply one.²⁴⁵

As if the Court's articulation of its own role were not enough to limit its ability to imply a cause of action, the *Sandoval* Court noted that Congress's essential role in creating causes of action was acutely understood, stating that "[p]rivate rights of action to enforce federal law must be created by Congress. . . . Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter"²⁴⁶

²⁴¹ See *Sandoval*, 532 U.S. at 286–89, 293; *Ex parte Young*, 209 U.S. at 149–50.

²⁴² See *Golden State*, 493 U.S. at 108; White, *supra* note 38, at 978–79.

²⁴³ See *Sandoval*, 532 U.S. at 286.

[P]rivate rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist

Id.; *Sierra Club*, 451 U.S. at 297 (“The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.”); *Marbury*, 5 U.S. at 167. Notably, the *Marbury* Court laid out guidelines for when it could overrule executive and legislative conduct, specifying that when Congress legislated outside the bounds of the Constitution and when the President violated individual rights, the Court could intercede. *Marbury*, 5 U.S. at 165–66.

²⁴⁴ See *supra* notes 68–81 and accompanying text.

²⁴⁵ See *Sandoval*, 532 U.S. at 286; see also *Sierra Club*, 451 U.S. at 297.

²⁴⁶ See *Sandoval*, 532 U.S. at 286–87.

Therefore, when Congress, with its keen understanding of its role in establishing a cause of action, passes a law without a cause of action for a class of plaintiffs, it makes a political choice to withhold such a cause of action.²⁴⁷ When a preemption plaintiff relies on a federal law without a cause of action and the federal court uses *Shaw* and *Verizon* to imply a cause of action through the Supremacy Clause, the federal court crosses a separation-of-powers boundary that otherwise constrains the law-making power of the federal government.²⁴⁸ Such law making opens the so-called nonpolitical branch to charges of improper political activity because it takes political power out of the hands of Congress and assumes it for the judiciary.²⁴⁹

The lower federal courts that have turned to *Shaw* and *Verizon* to imply causes of action through the Supremacy Clause have not questioned their authority to do so in a separation-of-powers context.²⁵⁰ Instead, they have asserted that the Court has implied a cause of action within the Supremacy Clause.²⁵¹

To accept the argument that a plaintiff may bring a preemption claim solely under the Supremacy Clause is to overlook the incongruity between the federal judiciary's constitutional role and the assertion of a cause of action power in the Supremacy Clause.²⁵² The implication that the Supremacy Clause provides a cause of action in preemption cases means that every federal law contains a cause of action for every potential plaintiff.²⁵³ This premise, in the sensitive cause of action environment of federal court, is simply implausible; it turns the principle of separation of powers on its head.²⁵⁴ What would be the point of Congress choosing to withhold a cause of action if one could simply be im-

²⁴⁷ See *id.* at 286–87; *Cannon v. Univ. of Chi.*, 441 U.S. 677, 698–99 (1979) (noting that, when Congress enacts legislation, it understands its role in choosing to create or not create a cause of action); *Cort*, 422 U.S. at 78.

²⁴⁸ See *Sandoval*, 532 U.S. at 286–87; *Cannon*, 441 U.S. at 698–99; *Cort*, 422 U.S. at 78.

²⁴⁹ See *Sandoval*, 532 U.S. at 286–87.

²⁵⁰ See *Planned Parenthood*, 403 F.3d at 331–32; *Local Union*, 377 F.3d at 74–75; *Guaranty Nat'l*, 916 F.2d at 512.

²⁵¹ See *Indep. Living Ctr. of S. Cal. v. Shewry*, 543 F.3d 1050, 1058–59 (2008) (“A party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action.”), *vacated sub nom.* *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012).

²⁵² See *Wilderness Soc'y*, 581 F.3d at 1234 (McConnell, J., dissenting) (“[I]n the absence of congressional intent 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.’” (quoting *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 128 (2008))).

²⁵³ See *id.*

²⁵⁴ See *Sandoval*, 532 U.S. at 286–87; *Cort*, 422 U.S. at 78.

plied through the Supremacy Clause?²⁵⁵ To suggest that the Supremacy Clause implies a cause of action in the preemption context is to completely write cause of action precedent out of the books.²⁵⁶

D. *In the Interest of Federalism*

Implying causes of action through the Supremacy Clause in preemption cases undermines federalism concerns evident in the presumption against preemption doctrine.²⁵⁷

In its articulation of the presumption, the Supreme Court balanced the requirement that federal law supersedes state law with the concern that state sovereignty is an essential ingredient in a federalist government.²⁵⁸ To the extent then that the presumption against preemption indicates the value of state sovereignty, the implication that the Supremacy Clause confers a cause of action in the preemption context undermines that value.²⁵⁹

Whereas on one hand the presumption against preemption operates as a bulwark, protecting state sovereignty, on the other hand, an implied cause of action built into the Supremacy Clause tears down that protection.²⁶⁰ A state defendant who cannot argue that a preemption plaintiff does not have a valid cause of action loses some protection of its sovereignty vis-a-vis the federal government.²⁶¹ In this regard, the Supreme Court undermined its own presumption against preemption principle when it denied Maryland the ability to argue that the *Verizon* plaintiffs did not have a proper cause of action to enforce the Telecommunications Act of 1996.²⁶² Lower courts have followed in line,

²⁵⁵ See *Sandoval*, 532 U.S. at 286–87; *Cort*, 422 U.S. at 78.

²⁵⁶ See *Sandoval*, 532 U.S. at 286–87; *Golden State*, 493 U.S. at 108 (holding that the Supremacy Clause, in fact, does not confer a cause of action for prospective preemption cases involving § 1983 plaintiffs); *Cort*, 422 U.S. at 78.

²⁵⁷ See *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (noting that, if possible, the Court has “a duty to accept the reading that disfavors preemption”); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *supra* notes 58–63 and accompanying text.

²⁵⁸ See *Bates*, 544 U.S. at 449; *Rice*, 331 U.S. at 230 (assuming that “the historic police powers of the state are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”).

²⁵⁹ See *Bates*, 544 U.S. at 449.

²⁶⁰ Compare *Bates*, 544 U.S. at 449 (presuming against preemption in its preemption analysis and therefore decreasing the likelihood of preemption), with *Verizon*, 535 U.S. at 642–43 (allowing a prospective preemption suit without conducting a cause of action analysis and therefore increasing the likelihood of preemption).

²⁶¹ See *Verizon*, 535 U.S. at 642–43.

²⁶² See *id.*

rejecting state and local governments' arguments that preemption plaintiffs assert no valid cause of action to enforce federal law.²⁶³

Lower courts have been more explicit than the Supreme Court, however, relying on the fact that the *Verizon* Court reached the merits of the suit without conducting a thorough cause of action analysis to determine whether the Supremacy Clause implies a cause of action in preemption cases.²⁶⁴ In light of federalism concerns reflected in the presumption against preemption doctrine, the notion that the Supremacy Clause implies a cause of action in preemption cases becomes all the more dubious; this interpretation necessarily deprives state and local governments of an affirmative defense, the very defense that led the *Sandoval* state defendant to victory.²⁶⁵ If causes of action are read into the Supremacy Clause, state defendants will lose the ability to argue that the allegedly preemptive federal statute provides no cause of action; this argument would be moot in face of courts asserting that the Supremacy Clause provides an unspoken cause of action.²⁶⁶

State defendants should take note that the Supreme Court provided an opening in *Independent Living* to defend against preemption suits by arguing that plaintiffs lack a cause of action.²⁶⁷ Chief Justice Roberts's dissenting opinion, joined by Justices Clarence Thomas, Antonin Scalia, and Samuel Alito, stated vigorously that the Supremacy Clause does not provide an independent cause of action.²⁶⁸ The majority opinion did not arrive at a conclusion to such a question.²⁶⁹ Instead, it delayed resolution for another day, meaning that any one of the five justices in the majority could join the dissent when, at long last, the Court has to decide whether the Supremacy Clause contains an implied cause of action.²⁷⁰

²⁶³ See *Sheury*, 543 F.3d at 1059; *Planned Parenthood*, 403 F.3d at 331–32; *Local Union*, 377 F.3d at 74–75; *Guaranty Nat'l*, 916 F.2d at 512.

²⁶⁴ See *Sheury*, 543 F.3d at 1058–59; *Local Union*, 377 F.3d at 74–75.

²⁶⁵ See *Bates*, 544 U.S. at 449; *Verizon*, 535 U.S. at 642–43; *Sandoval*, 532 U.S. at 288; *Golden State*, 493 U.S. at 108; *Rice*, 331 U.S. at 230; *Local Union*, 377 F.3d at 74–75.

²⁶⁶ See *Local Union*, 377 F.3d at 74–75 (rejecting the state agency's argument that the prospective preemption plaintiff lacked a valid cause of action because one could be implied under Court's Supremacy Clause jurisprudence).

²⁶⁷ *Indep. Living*, 132 S. Ct. at 1215 (Roberts, C.J., dissenting).

²⁶⁸ *Id.* at 1212 (“To decide this case, it is enough to conclude that the Supremacy Clause does not provide a cause of action to enforce the requirements of [the federal law] when Congress, in establishing those requirements, elected not to provide such a cause of action in the statute itself.”).

²⁶⁹ *Id.* at 1211 (majority opinion).

²⁷⁰ See *id.*

CONCLUSION

A cause of action is the source of an individual's right to sue in federal court. The Supreme Court has a long history of holding that a cause of action must always be present for that right to be recognized as valid. In a preemption suit, it is improper to both forego a cause of action analysis at the outset and to suggest that a cause of action otherwise absent may be implied by way of the Supremacy Clause. That Clause, the function of which has traditionally been limited to ranking rights already in existence, contains no power to confer new rights in the form of a cause of action.

Nevertheless, state and local defendants have been increasingly powerless to defend on cause of action grounds against certain preemption plaintiffs who explicitly allege that federal law preempts state law or action. This reality has created perverse results and perverse incentives. In contrast to *Shaw* plaintiffs who explicitly allege preemption, plaintiffs who imply preemption through allegations of federal law violations and plaintiffs who assert preemption in connection with a 42 U.S.C. § 1983 claim are required to demonstrate a valid cause of action. The unbalanced treatment of plaintiffs motivates all preemption plaintiffs to characterize themselves as *Shaw* plaintiffs, thereby cutting off a defense for state defendants.

The elimination of a cause of action defense creates problems beyond unequal treatment of preemption plaintiffs. It injects the Supremacy Clause with cause of action powers unforeseen by the Framers, enables the federal judiciary to improperly wade into legislative waters, and undermines a delicate principle of federalist governance—the presumption that federal law does not preempt state law.

Going forward, state defendants must be able to effectively assert that the plaintiff must sue pursuant to a valid cause of action. Federal courts must recognize that the Framers never intended for the Supremacy Clause to serve as a cause of action; allowing it to do so for select plaintiffs disserves the idea of equal justice.

By maintaining a keen awareness of the cause of action requirement, federal court litigants and the judges can restore fairness and legal consistency to preemption doctrine.

DUSTIN M. DOW