We Should Use 'Cause of Action' More Carefully: A Review of John F. Preis, *How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction*

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If you are a litigator or a scholar of American civil litigation, I bet you used the phrase "cause of action" in the past week. Despite its ubiquity, few of us know, precisely, what cause of action means. And equally important, few of us know how causes of action interact with the concepts of rights, jurisdiction, and remedies. Professor John Preis takes up these important questions in his latest article.[1]

Preis begins by defining the contemporary notion of cause of action. His take on that definition draws deeply from *Davis v. Passman*.[2] In line with *Passman*, Preis finds that a cause of action is the power to enforce a right in court. Moreover, cause of action is typically meant as the "offensive" enforcement of a right in court, to be contrasted with the reliance upon a right in court as a defense. Thus, to have a cause of action means one is empowered to initiate a court proceeding to enforce a right.

With this crisper understanding of cause of action at hand, Preis turns to current doctrine. Here he concludes that the Supreme Court unhelpfully intertwines the notion of cause of action with the concepts of rights and jurisdiction, while at the same time erroneously insisting that remedies are analytically distinct from causes of action.

Having outlined this analytical mess, Preis traces how we got into this predicament. He turns first to old English common law where the concepts of right and cause of action were thought to be immutably linked within the parameters of the old writ system. American lawyers imported this older understanding into our legal system. *Marbury v. Madison*, for instance, held that "'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'"[3] Similarly, jurisdiction largely depended upon the identity of the writ (the forerunner of the modern cause of action) deployed. And finally, access to the writ, or cause of action, opened the door to recovery of a remedy.

By the end of the twentieth century, however, the federal courts, largely reacting to statutory innovations and the administrative state, began to differentiate between causes of action, rights, remedies and jurisdiction. Yet at other times the Court conflated cause-of-action concepts within

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1. John F. Preis, *How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction*, 67 FLA. L. REV. 849 (2015).

2. 442 U.S. 228, 238–39 (1979).

3. 5 U.S. (1 Cranch) 137, 163 (1803) (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES *23).

rights, remedies and jurisdictional discussions, leading to the confusions Preis illustrates in the beginning of his work.

Armed with his more refined understanding, Preis argues that the Court errs, by applying mismatched concepts, when it applies cause-of-action jurisprudence to resolve "rights" issues. In short, Justice Scalia's inferred cause-of-action jurisprudence is wrong. Similarly, the Court errs, at least most of the time, when it applies cause-of-action jurisprudence to resolve questions of federal question subject matter jurisdiction. Hence, Justice Holmes' jurisdictional position is wrong. The Court also errs, in Preis' view, when it insists, as it did in *Bell v. Hood*, that the "federal courts may use any available remedy to make good the wrong done."[4] In essence, Justice Brennan is wrong to insist that a cause of action is analytically prior to remedy. As one can see, our confused understanding of a cause of action as a concept has wide-ranging implications.

I have my disagreements with Preis, of course. For example, Preis treats sovereign immunity as a matter of cause-of-action jurisprudence, believing that because sovereign immunity is an immunity from suit, not just liability, it must implicate the notion of cause of action.[5] I conclude that immunity is a defense with jurisdictional implications.[6] Indeed, the courts normally provide just such a treatment.[7] Moreover, the Supreme Court does not conclude that sovereign immunity is wrapped up with causes of actions, otherwise it would allow the existence of a sovereign-immunity defense to establish 28 U.S.C. § 1331 jurisdiction under the well-pleaded complaint rule—which it does not do.[8] Further, qualified-immunity doctrine, which likewise creates immunity from suit not just from liability, illustrates that having a defense from suit does not equate immunity with cause of action.[9]

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4. 327 U.S. 678, 684 (1946).

5. Preis, *supra* note 1, at 891.

6. *See* Lumen N. Mulligan, *You Can't Go Holmes Again*, 107 NW. U. L. REV. 237, 265 (2012).

7. *See, e.g.*, United States v. Interstate Commerce Comm'n, 337 U.S. 426, 462 (1949) ("The *defense* of sovereign immunity, moreover, cannot be avoided by directing that the suit proceed only against the Interstate Commerce Commission." (emphasis added)); United States v. Sherwood, 312 U.S. 584, 586 (1941) (discussing the sovereign immunity defense and jurisdiction). The courts of appeals have aptly labeled these jurisdictional defenses. *See, e.g.*, Hydrogen Tech. Corp. v. United States, 831 F.2d 1155, 1162 n.6 (1st Cir. 1987) ("It is well-established law that . . . jurisdictional defenses cannot be waived by the parties and may be raised for the first time on appeal or even raised by a court sua sponte."); *see also* Roberts v. United States, 887 F.2d 899, 900 (9th Cir. 1989) (similar).

8. *See* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 10–11 (1983) (holding that the presence of a federal immunity defense, even if pleaded on the face of the complaint, is not sufficient to bring a claim within § 1331 jurisdiction).

9. *See* Gomez v. Toledo, 446 U.S. 635, 640 (1980) ("[T]his Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question."); *see also* Crawford-El v. Britton, 523

I also part with Preis when he argues against the notion that remedies are analytically distinct from causes of action as a matter of contemporary law. At times, Preis makes the more modest claim that a cause of action is a necessary, but not sufficient, condition for the finding of a remedy.[10] I am in full agreement with Preis here. But at other times he makes the stronger claim that "a cause of action has been, and remains today, remedy-specific."[11] This is simply false under most state law.[12] Of course, Preis' focus is federal, not state, law. But even here once one ventures beyond the rarified air of constitutional torts (an area where I do concur with Preis that the Court often conflates cause of action with damages), one finds that the Court often applies the maxim of "'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'"[13] Moreover, it seems that one of the points of combining legal and equitable practice at the federal level was to distinguish between causes of actions and remedies. All this is to say, outside of the constitutional torts arena, the Court does tend to treat remedies as distinct from causes of action. I also think Preis undervalues the binary nature of successfully bringing a cause of action (i.e., the plaintiff either possesses or does not possess a cause of action) as opposed to the scalar nature of most damages (i.e., the jury may award varying amounts of money) insofar as this relates to his thesis that the concepts of cause of action and remedy are essentially identical.

Quibbles aside, I think Preis hits the nail on the head. The Court, through sloppy usage of cause of action, has created a host of problems that are readily avoided by more careful deployment of the term. Indeed, he offers up model language to clean up these confusions at the close of his interesting and important piece. We should all agree with Preis, therefore, that the courts should use cause-of-action language with much more precision and care going forward.

U.S. 574, 589 (1998) (quoting Gomez). The Court also held qualified immunity distinct from, although implicated by, plaintiff's cause of action in *Hartman v*. *Moore*, 547 U.S. 250, 257, n.5 (2006).

10. *See* Preis, *supra* note 1, at 875.

11. *Id*. at 886.

12. *See, e.g*., Uniform Commercial Code Art. 2, §§ 700–19 (providing a variety of remedies, both legal and equitable, for the breach of a contract for the sale of goods).

13. *See, e.g*., Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 66 (1992) (quoting and applying Bell v. Hood, 327 U.S. 678, 684 (1946), in a Title IX case); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (same in a Title VII case); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969) (same in a 42 U.S.C. § 1981 case); *see also* Eshelman v. Agere Sys., Inc., 554 F.3d 426, 443 (3d Cir. 2009) (providing a more recent application of the *Bell* principle in an ADA case).