Constitutional Remedies for Statutory Violations

David Sloss
Santa Clara University School of Law, dlsloss@scu.edu

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Constitutional Remedies for Statutory Violations

David Sloss*

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* Assistant Professor of Law, Saint Louis University School of Law. B.A., Hampshire College; M.P.P. Harvard University; J.D., Stanford University. The author thanks Lonny Hoffman, Catherine Struve, Carlos Vazquez, Douglas Williams, Larry Yackle, and Gordon Young for their invaluable comments on prior drafts of this Article. The author also thanks Kristin Zurek and Caroline Lavelle for their research assistance. Research for this Article was supported by a grant from the Saint Louis University School of Law.
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CONSTITUTIONAL REMEDIES FOR STATUTORY VIOLATIONS

I. INTRODUCTION

The Rehnquist Court's sovereign immunity jurisprudence has limited Congress's power to create a damages remedy for private plaintiffs to sue state governments for violations of federal statutes. The Court has also raised the bar for private plaintiffs who want to utilize 42 U.S.C. § 1983 to obtain a damages remedy against state officers who violate federal statutes. In contrast, the Court's recent decision in Verizon Maryland, Inc. v. Public Service Commission of Maryland unanimously affirmed the continued vitality of Ex parte Young, which authorizes suits for prospective injunctive relief against state officers who violate federal statutes. Thus, Verizon might foreshadow the development of a significant nationalist reaction to the Rehnquist Court's federalism revolution.

The Court's decision in Verizon also exposes a crucial fault line between nationalist and federalist strands of Supreme Court jurisprudence. On the nationalist side of the fault line is a set of cases that I will call "Shaw preemption cases." These are cases in which private plaintiffs sue state officers to enjoin enforcement of state laws that are allegedly preempted by federal statutes. Crosby v. National Foreign Trade Council is one example. The plaintiffs in Crosby sued to enjoin enforcement of a Massachusetts law barring state procurement from companies that did business with Burma.

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5. Other recent decisions also suggest that the pendulum may be swinging back in a nationalist direction. See, e.g., Nev. Dept. of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003) (holding that the Family and Medical Leave Act of 1993, which creates a private right of action for damages against state governments, was a valid exercise of Congress's Fourteenth Amendment power to abrogate state sovereign immunity).

6. The label is derived from the Supreme Court's decision in Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983). Shaw established an important jurisdictional principle that gives the federal courts subject matter jurisdiction over a large class of federal preemption claims. See id. at 96 n.14; see also infra notes 125-45 and accompanying text.

The plaintiffs alleged that a federal statute governing international trade with Burma preempted the state law. The federal Burma statute did not create a private right of action and was probably not enforceable under § 1983. Even so, the Court in Crosby granted plaintiffs injunctive relief without questioning whether the plaintiffs had a valid federal cause of action. Crosby is typical of Shaw preemption cases. In Shaw preemption cases, the Court tacitly assumes that the Supremacy Clause creates an implied private right of action for plaintiffs who sue state officers to enjoin enforcement of state laws that are allegedly preempted by federal statutes.

On the federalist side of the fault line is a set of cases that I will call "Shaw violation cases." These are cases in which private plaintiffs sue state officers to enjoin state executive action that allegedly violates a federal statute. Alexander v. Sandoval is a recent example of a Shaw violation case. The plaintiffs in Sandoval sued to enjoin enforcement of the Alabama Department of Public Safety's official policy of administering drivers' license tests only in English. They alleged that the policy violated the disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964. The Court declined to reach the merits of the plaintiffs' claim, holding that neither Title VI nor its implementing regulations provided the plaintiffs a private right of action. Sandoval is typical of Shaw violation cases. In Shaw violation cases, the Court does not address the merits of plaintiff's claim unless the plaintiff can establish an express statutory private right of action, either under the federal statute that creates the substantive right, or under § 1983.

The juxtaposition of Crosby and Sandoval shows that the Supreme Court applies two very different private right of action doctrines in cases where plaintiffs sue to enjoin state action that allegedly conflicts with a federal statute. In cases where plaintiffs sue to enjoin enforcement of a state law that

8. See id. at 366–71.

9. See infra notes 230–46 and accompanying text for a detailed defense of these propositions.

10. Crosby, 530 U.S. at 388. The term "cause of action" has different meanings in different contexts. See, e.g., LARRY W. YACKLE, FEDERAL COURTS 219 n.120 (2d ed. 2003) (stating that the phrases "private right of action" and "private cause of action" are used interchangeably). This Article uses the terms "private right of action" and "private cause of action" interchangeably. As used in this Article, both terms refer to a remedial right, not a primary right.

11. Several lower federal courts have held explicitly that the Supremacy Clause creates an implied private right of action for injunctive relief against state officers to prevent enforcement of state laws that are preempted by federal statutes. See infra note 192. The Supreme Court has never explicitly held that such a right of action exists. However, the thesis that there is an implied right of action under the Supremacy Clause provides the best explanation for the Court's decisions in Shaw preemption cases. See infra Part IV.


13. Id. at 278.

14. Id. at 292–93.

15. See infra notes 58–76 and accompanying text.
is allegedly preempted by a federal statute ("Shaw preemption cases"), the Court tacitly assumes that the plaintiffs have an implied right of action under the Supremacy Clause. But in cases where plaintiffs sue to enjoin state executive action that allegedly violates a federal statute ("Shaw violation cases"), the Court will not address the merits of the claim unless plaintiffs can establish an express statutory cause of action. Under this approach, if Alabama codified its drivers' license policy as a law, the Sandoval plaintiffs would have had an implied right of action under the Supremacy Clause. Conversely, the Massachusetts governor could adopt a policy that would be functionally equivalent to the law invalidated in Crosby, but that policy would be immune from federal judicial review because the federal Burma statute does not create a private right of action. Thus, the current doctrinal categories create perverse incentives for states to de-codify laws.

Verizon is situated on the fault line between Shaw preemption claims and Shaw violation claims. In Verizon, the plaintiff sued to enjoin enforcement of an adjudicative order issued by a state administrative agency that allegedly violated the Telecommunications Act of 1996. Verizon is a "Shaw case" because the plaintiff sued state officers to enjoin state action that allegedly conflicted with a federal statute. But Verizon does not fit neatly into either the "violation" or "preemption" category because the administrative order at issue was neither legislative nor executive in character.

The Verizon defendants argued that the district court lacked jurisdiction, in part because the plaintiff did not have a private cause of action under the Telecommunications Act. The district court granted defendant's motion to dismiss and declined to reach the merits of plaintiff's claim. The Fourth Circuit affirmed, implicitly placing the case on the "violation" side of the fault line by refusing to reach the merits of the claim. However, the Supreme Court reversed, citing Shaw (the progenitor of the Shaw preemption line) in support of the proposition that the district court did have subject matter jurisdiction and should have reached the merits of plaintiff's claim. Thus, unlike the lower courts, the Supreme Court behaved as if Verizon fell on the preemption side of the fault line.

16. An alternative explanation is that the Court tacitly assumes that the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (2000), creates a private right of action for Shaw preemption claims. Either way, the Court behaves as if there is a generally available private right of action for Shaw preemption claims that does not depend upon either 42 U.S.C. § 1983 or the preemptive federal statute. See infra Part IV. For discussion of the Declaratory Judgment Act, and its relation to Shaw preemption claims, see infra notes 310-36 and accompanying text.


18. The defendants in Verizon included the Maryland Public Service Commission and "its individual members in their official capacities." Id. at 640.

19. Id. at 641-44.


21. Id. at 309.

Shaw held that federal courts have jurisdiction over suits to enjoin enforcement of state laws that are preempted by federal statutes. 23 Verizon extended Shaw's jurisdictional principle to claims in which plaintiffs sue to enjoin enforcement of state administrative orders that allegedly violate federal statutes. However, the Court in Verizon did not decide whether the plaintiffs had an implied right of action under the Supremacy Clause. Even so, Verizon lends some support to the theory that the Supremacy Clause creates a private right of action for Shaw claims because the Court indicated that the district court should have addressed the merits of plaintiff's claim, regardless of whether the plaintiff had a valid cause of action under the Telecommunications Act. 24

The Supreme Court has never explicitly decided whether plaintiffs in Shaw preemption cases have an implied right of action under the Supremacy Clause. But the Court cannot continue to duck this issue. Broadly speaking, the Court has three options. First, the Court could hold explicitly that plaintiffs in Shaw preemption cases have an implied right of action under the Supremacy Clause, but limit that right of action to claims challenging state legislative action. As Verizon illustrates, this option is problematic because there is a broad range of state administrative action that does not fit neatly into either the legislative or executive category. Moreover, as noted above, this option creates perverse incentives for states to de-codify laws.

Second, the Court could decide that the Supremacy Clause does not create an implied private right of action for Shaw preemption claims. As a formal matter, this would not overrule Shaw because Shaw and its progeny have held only that federal courts have subject matter jurisdiction over Shaw preemption claims. As a practical matter, though, the repudiation of a Supremacy Clause right of action would vitiate Shaw's jurisdictional holding because—absent a Supremacy Clause right of action—most Shaw preemption plaintiffs would not have any valid federal cause of action, and would therefore be forced to litigate their claims in state court. 25 Thus, under this option, a large class of federal preemption claims that are currently litigated in federal court would be relegated to state court. 26

Third, the Court could hold that the Supremacy Clause creates an implied private right of action not only for Shaw preemption claims, but also for Shaw violation claims. The Court took a large step in this direction in

25. See infra Part IV. This statement assumes that a Supreme Court decision to reject a Supremacy Clause right of action would also entail rejection of a right of action under the Declaratory Judgment Act. For discussion of the Declaratory Judgment Act and its relation to Shaw preemption claims, see infra notes 310–36 and accompanying text.
26. The Supreme Court has decided more than twenty Shaw preemption cases over the past twenty years. See infra note 141. It is fair to assume that the lower federal courts have adjudicated many times that number of Shaw preemption cases during the same time period.
Verizon by extending Shaw's jurisdictional principle to a claim challenging an adjudicative order issued by a state administrative agency. If Shaw's jurisdictional principle encompasses suits to enjoin state administrative orders that violate federal statutes, that same jurisdictional principle should arguably encompass suits to enjoin state executive policies that violate federal statutes (i.e., Shaw violation claims). Moreover, if the Supremacy Clause creates an implied right of action for claims within the scope of Shaw's jurisdictional principle (as the Court has tacitly assumed in its Shaw preemption cases), and that jurisdictional principle encompasses Shaw violation claims, then it follows that the Supremacy Clause right of action also extends to Shaw violation claims.

Extension of the Shaw right of action to Shaw violation claims, such as Sandoval, would provide a significant nationalist counterweight to the recent federalist thrust of Supreme Court jurisprudence. In particular, it would empower civil rights plaintiffs to bring claims for injunctive relief against state officers who violate federal statutes, without having to rely on § 1983 or other civil rights statutes to establish a private right of action. This possibility assumes added significance in light of the Court's recent decision in Gonzaga University v. Doe, which limits the availability of § 1983 as a mechanism for private plaintiffs to obtain judicial remedies against state officers for federal statutory violations.

This Article has three main objectives. First, the Article documents the fact that the Supreme Court actually employs two very different private right of action doctrines in Shaw cases. For Shaw violation claims, the Court insists upon a statutory cause of action that establishes the plaintiffs' right to bring suit in federal court. But for Shaw preemption claims, the Court tacitly assumes the availability of an implied right of action under the Supremacy Clause. Federal courts scholars have generally overlooked the significance of the Shaw preemption line of cases. Shaw is cited frequently in articles on ERISA preemption, and occasionally in articles on general preemption doctrine, but those articles do not discuss the source of the private right of

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28. But see Meltzer, supra note 3, at 373–74. Meltzer writes:
   [A]t the same time that the Court has declared its unwillingness to recognize implied rights of action (typically in actions by one private party against another), it has consistently recognized a particular kind of implied right of action—that asserted by plaintiffs (often businesses) seeking a federal court injunction against officials charged with enforcing state or local laws to which the plaintiff is subject and which the plaintiff alleges to be preempted.

Id.
29. The following electronic search of law review articles yielded 292 hits: (Shaw /3 "Delta Airlines") & ERISA & preemption. [Westlaw search in JLR file. Date unknown.]
action for Shaw preemption claims. Most federal courts casebooks and treatises either omit Shaw entirely or give it abbreviated treatment. Apart from a previous article by this author, currently there are only six law review articles that cite Shaw in the context of a discussion of private rights of action. This is the first article to present a detailed analysis of the Shaw line of cases.

Second, the Article evaluates the policy arguments for and against recognition of an implied right of action under the Supremacy Clause for Shaw preemption claims. There are weighty arguments on both sides, but I conclude that the Court should explicitly hold that there is an implied right of action under the Supremacy Clause for Shaw preemption claims. By focusing on a constitutional right of action to enforce statutory law, this Article fills a gap in the current literature. Legal scholars have written extensively about constitutionally based private rights of action to enforce federal

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35. That right of action is constitutionally presumed, not constitutionally compelled, because Congress should be able to bar the remedy for a particular statute by expressing its intent to do so. On the distinction between constitutionally compelled remedies and constitutionally presumed remedies, see Daniel J. Meltzer, Congress, Courts, and Constitutional Remedies, 86 Geo. L.J. 2537, 2559-65 (1998).
constitutional rights, and about statutorily based implied rights of action to enforce federal statutory rights. However, scholars have written very little about constitutionally based implied rights of action to support private enforcement of federal statutory rights.

Third, the Article criticizes the differential treatment of Shaw preemption claims and Shaw violation claims. The current doctrinal framework is inconsistent with the principle of legislative primacy because it has the perverse effect of insulating state executive policies from federal judicial review, even in cases where the policy at issue is functionally equivalent to a law that would be subject to federal judicial review. There is simply no rational basis for presuming a constitutional right of action under the Supremacy Clause for Shaw preemption claims, while insisting on a statutory right of action for Shaw violation claims. Therefore, the implied right of action for Shaw preemption claims, like Crosby, should be extended to encompass Shaw violation claims, like Sandovil.

The remainder of this Article is divided into five parts. Part II documents the fact that the Supreme Court applies one private right of action doctrine in Shaw preemption cases and a different private right of action doctrine in Shaw violation cases. Part III discusses the doctrinal basis for federal jurisdiction over Shaw claims. Part IV demonstrates that judicial precedent supports an implied right of action under the Supremacy Clause.
for *Shaw* preemption claims. Part V presents a policy justification for that implied right of action. Part VI contends that the Court should also recognize an implied right of action under the Supremacy Clause for *Shaw* violation claims.

II. TWO PRIVATE RIGHT OF ACTION DOCTRINES

Between October 1996 and June 2003, the Supreme Court decided twenty cases in which: (1) private plaintiffs filed civil actions in federal court, (2) against state officers or local governments or officers, (3) seeking prospective declaratory and/or injunctive relief, (4) to remedy an alleged violation of a federal statute, or to block enforcement of a state or local law allegedly preempted by a federal statute. This Article refers to

39. Since the Supreme Court has never commented on the source of the private right of action for *Shaw* preemption claims, and the lower courts rarely discuss it, documentation of this point requires extensive reliance on unpublished materials, including pleadings and other documents filed in the lower courts in *Shaw* preemption cases. See infra Part IV.


41. This Article focuses primarily on the availability of an implied private right of action to enforce federal statutes. Accordingly, the category of *Shaw* claims excludes suits brought by Indian tribes, see, e.g., Chickasaw Nation v. United States, 534 U.S. 84 (2001), and suits brought by or on behalf of the federal government, see, e.g., Idaho v. U.S., 533 U.S. 262 (2001), because such cases do not implicate private right of action doctrines. Federal habeas cases are also excluded from the category of *Shaw* cases, see, e.g., Stewart v. Smith, 536 U.S. 856 (2002), because habeas petitions are not technically "civil actions," and the federal habeas statute provides an express right of action, so the question of an implied right of action does not arise in habeas cases. The category of "*Shaw* cases" also excludes cases filed in state court, see, e.g., Gonzaga Univ. v. Doe, 536 U.S. 273 (2002), because they do not implicate federal jurisdictional rules, and there is a close link between those jurisdictional rules and implied right of action doctrines. See infra notes 109–24 and accompanying text (discussing the relationship between federal question jurisdiction and implied rights of action).

42. In cases involving suits against state officers in their official capacities, sovereign immunity bars claims for money damages, but not claims for prospective injunctive relief. See infra note 303. Hence, cases in which plaintiffs seek money damages are excluded from the *Shaw* category, as are cases in which plaintiffs seek both injunctive relief and money damages.

43. The category of "*Shaw* cases" excludes cases in which plaintiffs raise only constitutional claims, see, e.g., Booth v. Churner, 532 U.S. 781 (2001), because this Article focuses on the availability of an implied right of action to enforce federal statutes. There are many cases in which plaintiffs sue state or local governments or officers for violation of federal law.
cases that satisfy these criteria as "Shaw cases" because they fit within the parameters identified and implied by the Supreme Court in Shaw v. Delta Air Lines, Inc."\(^44\)

A. PREEMPTION CASES AND VIOLATION CASES

As has been mentioned, Shaw cases can be divided into "preemption" cases and "violation" cases. "Shaw violation cases" are cases in which plaintiffs challenge state or local executive action. "Shaw preemption cases" are cases in which plaintiffs challenge state or local legislative action. Cases in which plaintiffs challenge state administrative regulations are also included in the category of "Shaw preemption cases" because regulations are similar to laws in that they prescribe general rules to regulate private conduct.

Between October 1996 and June 2003, the Supreme Court decided nine Shaw preemption cases—i.e., cases in which private plaintiffs filed civil actions in federal court against state or local governments or officers, seeking prospective declaratory and/or injunctive relief to block enforcement of a state or local law or regulation allegedly preempted by a federal statute. These nine cases are: Pharmaceutical Research and Manufacturers of America v. Walsh,\(^45\) Kentucky Ass'n of Health Plans, Inc. v. Miller,\(^46\) City of Columbus v. Ours Garage and Wrecker Service, Inc.,\(^47\) Lorillard Tobacco Co. v. Reilly,\(^48\) Crosby v. National Foreign Trade Council,\(^49\) United States v. that satisfy some, but not all, of the elements that define Shaw claims. Part II focuses on cases that satisfy all four elements that define Shaw claims.

44. See 463 U.S. 85, 96 n.14 (1983). In Shaw, the court stated:

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

Id. (citations omitted). Strictly speaking, Shaw addresses only preemption cases, not violation cases. However, this Article contends that Shaw violation cases are, and should be seen to be, jurisdictionally and procedurally indistinguishable from Shaw preemption cases.


46. 123 S. Ct. 1471 (2003) (HMOs sued Commissioner of Kentucky's Department of Insurance to enjoin enforcement of state statute allegedly preempted by the Employment Retirement Income Security Act (ERISA)).

47. 536 U.S. 424 (2002) (Ohio corporation and trade association sued city and city officials to enjoin enforcement of city ordinance allegedly preempted by the Interstate Commerce Act).

In most of the Shaw preemption cases, the allegedly preemptive federal statute does not create a private cause of action. Moreover, although 42 U.S.C. § 1983 provides a private cause of action to enforce some federal statutory rights against state and local government officers, it is questionable whether the plaintiffs in these Shaw preemption cases could have brought suit under § 1983. No matter. The Court consistently reaches the merits in these cases without reference to § 1983, and without

49. 530 U.S. 363 (2000) (nonprofit corporation representing companies engaged in foreign commerce sued state officials to enjoin enforcement of state statute allegedly preempted by federal statute that imposed sanctions on Burma).
52. 520 U.S. 806 (1997) (trustees of fund established to administer employee welfare benefit plan sued state officials to enjoin enforcement of state statute allegedly preempted by ERISA).
53. 519 U.S. 316 (1997) (contractor on public works project sued California state agencies and officers for declaratory judgment that state statute was preempted by ERISA).
55. See infra Part IV.
57. See infra Part IV. The Supreme Court's recent decision in Gonzaga University v. Doe, 536 U.S. 273 (2002), further restricts the use of § 1983 to enforce federal statutes against state officers, thereby making it even more difficult for private plaintiffs to utilize section 1983 to pursue Shaw preemption claims.
considering whether the allegedly preemptive federal statute accords plaintiffs a private right of action. In short, the Court behaves as if there is some other generally available right of action that enables plaintiffs to bring Shaw preemption claims.

Between October 1996 and June 2003, the Supreme Court decided ten Shaw violation cases—i.e., cases in which private plaintiffs filed civil actions in federal court against state or local governments or officers, seeking prospective declaratory and/or injunctive relief to enjoin state executive action that allegedly violated a federal statute. These ten cases are: Branch v. Smith, Department of Housing and Urban Development v. Rucker, Alexander v. Sandoval, Christensen v. Harris County, Olmstead v. L.C., Lopez v. Monterey County, Calderon v. Ashmus, Foreman v. Dallas County, Blessing v. Freestone, and Young v. Fordice.

Four of these ten Shaw violation cases were brought under section 5 of the Voting Rights Act. Branch v. Smith, Lopez v. Monterey County, Foreman v. Dallas County, and Young v. Fordice. Section 5 provides an express private

58. 123 S. Ct. 1429 (2003) (Mississippi voters sued state officers to enjoin conduct of congressional elections pursuant to state redistricting plan that had not been precleared under Voting Rights Act).
59. 535 U.S. 125 (2002) (public housing tenants sued Oakland Housing Authority to enjoin enforcement of lease provision that allegedly violated federal housing statute).
60. 532 U.S. 275 (2001) (driver’s license applicant brought class action against Alabama state official and agency to enjoin enforcement of state policy that allegedly violated regulations promulgated pursuant to Title VI of the Civil Rights Act of 1964).
63. 525 U.S. 266 (1999) and 519 U.S. 9 (1996) (Hispanic voters sued county for declaratory and injunctive relief, alleging that county’s failure to obtain preclearance of local ordinances violated section 5 of the Voting Rights Act).
64. 523 U.S. 740 (1998) (in response to announcements that state officials planned to seek expedited review of federal habeas petitions under the Antiterrorism and Effective Death Penalty Act, death row prisoner filed class action against state officials, seeking declaratory judgment that California did not qualify for expedited review under the Act).
65. 521 U.S. 979 (1997) (minority voters sued county for injunctive relief, alleging that county’s failure to obtain preclearance for new election procedures violated section 5 of the Voting Rights Act).
66. 520 U.S. 329 (1997) (mothers of children eligible to receive state child support services sued director of Arizona’s child support agency, alleging that state program did not comply with Title IV-D of the Social Security Act, and seeking mandatory injunction to enforce state compliance with federal statute).
67. 520 U.S. 273 (1997) (private plaintiffs sued Mississippi state officials to enjoin implementation of new voter registration system on grounds that state had failed to obtain preclearance, in violation of section 5 of the Voting Rights Act).
right of action to enjoin enforcement of any change in any “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting”\textsuperscript{69} that has the purpose or effect “of denying or abridging the right to vote on account of race or color.”\textsuperscript{70} Relying on this express statutory right of action, the Court reached the merits in all four voting rights cases.\textsuperscript{71}

The Court also reached the merits of plaintiffs’ claims in three other Shaw violation cases: \textit{Department of Housing and Urban Development v. Rucker, Christensen v. Harris County,} and \textit{Olmstead v. L.C.}\textsuperscript{72} In \textit{Rucker}, the lower court held explicitly that plaintiffs had a private right of action against the Director of the Oakland Housing Authority under 42 U.S.C. § 1983.\textsuperscript{73} In \textit{Christensen}, the plaintiffs had an express statutory right of action under the Fair Labor Standards Act.\textsuperscript{74} And in \textit{Olmstead}, the plaintiffs had an express statutory right of action under the Americans with Disabilities Act.\textsuperscript{75} Thus, all

\textsuperscript{69} Id.

\textsuperscript{70} Id. The statute requires “covered jurisdictions” to obtain preclearance from the U.S. Attorney General before implementing any change in voting procedures. It also says: “Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General’s failure to object . . . shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.” \textit{Id.} The statutory reference to “subsequent action to enjoin enforcement” clearly envisions private suits to enjoin implementation of any change in a voting practice or procedure that allegedly has the purpose or effect of denying or abridging the right to vote on account of race or color.

\textsuperscript{71} Branch v. Smith, 123 S. Ct. 1429 (2003) (affirming district court order that enjoined enforcement of state redistricting plan that had not been precleared by Attorney General); Lopez v. Monterey County, 525 U.S. 266 (1999) (holding that Monterey County was required to obtain federal preclearance before implementing changes in its judicial election procedures); Foreman v. Dallas County, 521 U.S. 979 (1997) (vacating lower court decision, which held that Dallas County was not required to obtain preclearance for new election procedures, and remanding case to district court); Young v. Fordice, 520 U.S. 273 (1997) (holding that Mississippi violated Voting Rights Act by making changes in voter registration procedures without obtaining federal preclearance).


\textsuperscript{74} In \textit{Christensen}, plaintiffs alleged a violation of 29 U.S.C. § 207(o)(5). \textit{See Christensen,} 529 U.S. at 581. 29 U.S.C. § 216(b) provides an express private cause of action for violations of § 207. Moreover, 29 U.S.C. § 215(a)(2) makes it unlawful to violate any of the provisions of § 207, and 29 U.S.C. § 217 grants the district courts “jurisdiction, for cause shown, to restrain violations of section 215.”

\textsuperscript{75} The Americans with Disabilities Act (ADA) states: “The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.” 42 U.S.C. § 12133 (2000). Section 794a of title 29, in turn, refers to the “remedies, procedures, and rights” set forth in section 706 of the Civil Rights Act of 1964.
three cases are consistent with the thesis that the Court does not reach the merits of Shaw violation cases unless plaintiffs can establish an explicit statutory right of action.

In the remaining three Shaw violation cases—Alexander v. Sandoval, Calderon v. Ashmus, and Blessing v. Freestone—plaintiffs sued to enforce federal statutes that do not create an express private cause of action. In each of these three cases, the Court declined to reach the merits of plaintiffs' claims. The pattern is clear. In Shaw violation cases, the Court does not reach the merits of plaintiffs' claims unless plaintiffs can establish an express statutory right of action, either under the federal statute that creates the substantive right at issue, or under 42 U.S.C. § 1983. This contrasts sharply with Shaw preemption cases, where the Court decides the merits of cases without considering whether plaintiffs have a private right of action under the preemptive federal statute or § 1983.

B. OTHER POSSIBLE EXPLANATIONS

The previous section suggests that the Court's willingness to reach the merits of Shaw claims depends upon the nature of the state action that plaintiffs are challenging. If a plaintiff alleges that state executive action violates a federal statute, courts do not reach the merits of the claim unless the plaintiff can establish an express statutory right of action. In contrast, if a plaintiff alleges that state legislative action is preempted by a federal statute, courts reach the merits of the claim, regardless of whether the federal statute creates a private right of action. I will refer to this as the "state action" theory.

One difficulty with the state action theory is that the conceptual line distinguishing executive action from legislative action is blurry at the margins. One of the Shaw cases that the Supreme Court decided between October 1996 and June 2003—Verizon Maryland, Inc. v. Public Service Commission of Maryland—does not fit neatly into either the "preemption" category or the "violation" category because the state action at issue was

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neither legislative nor executive in nature.78 Thus, the state action theory does not adequately account for the Supreme Court's decision in Verizon. Except for Verizon, though, the state action theory provides an accurate description of the Supreme Court's treatment of Shaw cases in the period between October 1996 and June 2003.79 In every case where plaintiffs sued to enjoin enforcement of state legislation or regulations, the Court reached the merits of plaintiffs' claims without reference to § 1983, and without considering whether the allegedly preemptive federal statute accorded plaintiffs a private right of action.80 In cases where plaintiffs sued to enjoin state executive action, though, the Court did not reach the merits unless the plaintiff could establish an express statutory right of action.81

Apart from the state action theory, there are at least three alternative explanations of the distinction between Shaw preemption claims and Shaw violation claims that merit consideration. The "linguistic theory" holds that the Supreme Court's willingness to reach the merits of Shaw claims turns on whether the Court uses the term "preemption" or "violation" to describe the alleged conflict between the federal statute and the challenged state action. If the Court uses the term "preemption," then the Court will reach the merits of the claim, regardless of whether the federal statute creates a private right of action. But if the Court uses the term "violation," it will not reach the merits of the claim unless the plaintiff can establish an express statutory right of action. In short, the linguistic theory suggests that the Court relies heavily on labels as a substitute for analysis in Shaw cases.82

78. The state action at issue was an order issued by the Maryland Public Service Commission that directed Verizon to pay reciprocal compensation to MCI WorldCom for telephone calls made by Verizon's customers to the local access numbers of internet service providers. See id. at 638–41. Justice Scalia, writing for the Court, hinted in a footnote that the Commission's order was properly characterized as "executive action." Id. at 644 n.3. In fact, though, the order was more akin to judicial action because the Commission has statutory authority to adjudicate disputes between private parties related to the Telecommunications Act, see id. at 642 n.2, and the Commission issued its order in the context of exercising that adjudicative authority.

79. Prior to 1996, there was one Shaw case that the Court treated as a "preemption" case, even though the challenged state action was executive in nature. See Bldg. & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218 (1993) (organization representing nonunion employers sued Massachusetts state agency to enjoin enforcement of contract between agency and private contractor that excluded nonunion entities from participating in six billion dollar construction project). See infra note 160.

80. See supra notes 45–57 and accompanying text (discussing those cases).

81. See supra notes 58–76 and accompanying text (discussing those cases).

82. Numerous scholars have commented on the Court's tendency to use labels as a substitute for analysis in other contexts. See, e.g., Robert Force, Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause, 75 Tul. L. Rev. 1421, 1438 (2001) (criticizing the Supreme Court's approach to choice of law issues in admiralty cases, and contending that "[t]here are labels that courts attach to the conclusions they have reached as though they are a substitute for analysis or policy choices").
All twenty Shaw cases that the Supreme Court decided between October 1996 and June 2003 are consistent with the linguistic theory. All of the Shaw preemption cases cited in Part II.A above use the term “preemption,” rather than “violation,” to describe the alleged conflict between the federal statute and the challenged state action. In all nine Shaw preemption cases, the Court reached the merits of plaintiffs’ claims. Conversely, all of the Shaw violation cases cited in Part II.A above use the term “violation,” rather than “preemption,” to describe the alleged conflict between the federal statute and the challenged state action. In the Shaw violation cases, the Court did not reach the merits of plaintiffs’ claims unless plaintiffs could establish an express statutory cause of action. Thus, the linguistic explanation is entirely consistent with the Supreme Court’s cases. In contrast, none of the other theories discussed in this section is entirely consistent with the Supreme Court’s decisions.

The Fourth Circuit decision in Verizon is consistent with the linguistic theory because the Fourth Circuit used the term “violation” to describe the alleged conflict between the state action and the federal statute, and it held that the district court lacked jurisdiction over plaintiff’s claim. Moreover, the Supreme Court decision in Verizon is also consistent with the linguistic theory because the Supreme Court used the term “preemption” to describe the relationship between the state administrative order and the Telecommunications Act, and it held that the district court had jurisdiction over plaintiff’s claim. Thus, the linguistic theory provides a more complete description of Supreme Court decisions than the state action theory. However, the linguistic theory does not provide a justification for those decisions. Indeed, a judicial doctrine in which the availability of an

83. See supra notes 45–57 and accompanying text (discussing these cases).
84. See supra notes 58–76 and accompanying text (discussing these cases).
85. See supra notes 77–81 and accompanying text; see infra notes 89–106 and accompanying text (discussing the Supreme Court’s decisions).
86. See Bell Atl. Md. v. MCI Worldcom, Inc., 240 F.3d 279, 286 (4th Cir. 2001) (“Bell Atlantic’s complaint sought a declaratory judgment that the Maryland Public Service Commission had violated the Telecommunications Act of 1996.”); id. at 287 (“Bell Atlantic is seeking only declaratory and injunctive relief against State officials to prevent an ongoing violation of federal law.”). The word “preemption” does appear several times in the Fourth Circuit opinion. Id. at 290, 293, 300. However, nowhere in its opinion does the Fourth Circuit use the term “preemption” to describe the alleged conflict between the Commission’s order and the Telecommunications Act.
87. See Verizon Md., Inc. v. Pub. Serv. Comm’n of Md., 535 U.S. 635, 642 (2002) (“Verizon seeks relief from the Commission’s order 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 . . . .”) (internal quotations omitted).
88. The Supreme Court did not attempt to justify its use of the term “preemption,” rather than “violation,” to characterize Verizon’s claim. Indeed, the Court provided almost no rationale for its jurisdictional holding in Verizon, apart from quoting Shaw. See id. at 642.
implied private right of action turns on empty linguistic distinctions is indefensible.

The “realist theory” holds that the Court’s willingness to reach the merits in Shaw cases depends upon the identity of the plaintiff. Under the realist view, the Court consistently reaches the merits of claims brought by corporate plaintiffs, regardless of whether the federal statute creates a private right of action. However, the Court refuses to reach the merits of claims brought by individual plaintiffs, unless they can establish an express statutory right of action.89

The realist theory is largely, but not entirely, accurate as a descriptive matter. All ten Shaw violation cases that the Court decided between October 1996 and June 2003 involved non-corporate plaintiffs; the Court declined to reach the merits in those cases unless the plaintiffs had an express statutory right of action.90 In contrast, eight of the nine Shaw preemption cases that the Court decided during the same period, as well as Verizon, involved corporate plaintiffs; the Court reached the merits in all those cases regardless of whether the plaintiffs had a statutory right of action.91 The only case that is inconsistent with the realist theory is Foster v. Love.92 In that case, the Court reached the merits of a preemption claim brought by non-corporate plaintiffs (Louisiana voters), despite the fact that the plaintiffs lacked a statutory right of action.93 In light of Foster, it is clear that the linguistic and state action theories both provide a more accurate description of the Court’s decisions in Shaw cases than does the realist theory.94 Moreover, the realist theory fails to provide a rational justification for current doctrine because the Court would not wish to defend a policy of granting corporate plaintiffs more favorable procedural treatment than individual plaintiffs.

89. Professor Meltzer has invoked a version of the realist theory as a partial explanation for the contrast between the Court’s “active” approach to preemption cases and its “passive” approach to other cases. See Meltzer, supra note 3, at 371–75.
90. See supra notes 58–76 and accompanying text (discussing these cases).
91. See supra notes 45–57 and accompanying text (discussing these cases).
93. In contrast to the Shaw violation cases that involved claims under the Voting Rights Act, see supra notes 68–71 and accompanying text, the Foster plaintiffs did not have a statutory right of action under the Voting Rights Act. For analysis of the source of the private right of action in Foster, see Sloss, supra note 33, at 1179–80.
94. Proponents of the realist theory might argue that it is just as accurate as the state action theory, because both theories account for nineteen of the twenty Shaw cases that the Supreme Court decided between October 1996 and June 2003. However, the Court’s decision in Foster actually conflicts with the realist theory because the Court reached the merits even though the realist theory claims that the Court should not have reached the merits. In contrast, the Court’s decision in Verizon does not conflict with the state action theory. Rather, the state action theory fails to account for Verizon because the state action in Verizon does not fit within the categories that the theory uses to explain the Court’s decisions.
The "Spending Clause theory" holds that the Court's willingness to reach the merits in Shaw cases depends upon the nature of the federal statute invoked by the plaintiff. If the federal statute was enacted pursuant to Congress's Spending Power, then the Court will not reach the merits of the claim unless the plaintiff can establish an express statutory right of action. But if the federal statute was enacted pursuant to some other congressional power, then the Court will reach the merits of the claim, regardless of whether the federal statute creates a private right of action.

In contrast to the linguistic and realist theories—both of which describe the case law without attempting to justify the case law—individual Justices have invoked variants of the Spending Clause theory as a justification for denying plaintiffs a right of action to enforce Spending Clause statutes. The policy implications of the Spending Clause theory are considered below. Here, it is important to emphasize that the Spending Clause theory does not provide an accurate description of Supreme Court decisions in Shaw cases. For example, in Calderon v. Ashmus, the plaintiff sued to enjoin state action that allegedly violated the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal statute that was not enacted pursuant to the Spending Clause. According to the Spending Clause theory, the Court should have reached the merits of the plaintiff's claim because AEDPA is not a Spending Clause statute. In fact, though, the Court declined to reach the merits of plaintiff's claim.

Conversely, in Pharmaceutical Research and Manufacturers of America v. Walsh, the plaintiff sued to enjoin enforcement of a state law that was allegedly preempted by the Medicaid statute, a federal statute enacted

95. See infra notes 362-72 and accompanying text.
96. See infra notes 352-75 and accompanying text.
98. The substance of plaintiff's claim in Calderon was based upon section 107 of AEDPA, which added a new chapter, 154, to Title 28 of the U.S. Code. See Calderon, 523 U.S. at 742-43; see also Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 107, 110 Stat. 1214, 1221-26. AEDPA is a complex statute, different portions of which were enacted pursuant to different congressional powers. Section 107 of AEDPA, in particular, modified the procedures in federal court for habeas petitions "brought by prisoners in State custody who are subject to a capital sentence." 28 U.S.C. § 2261(a) (2000). Congress enacted section 107 of AEDPA on the basis of its power to regulate the procedures governing suits in federal district courts, which is inherent in the express power "[t]o constitute Tribunals inferior to the supreme Court." U.S. Const. art. I, § 8, cl. 9. Thus, section 107 of AEDPA, which was at issue in Calderon, is not a Spending Clause statute.
99. See Calderon, 523 U.S. 740 (holding that district court lacked jurisdiction because plaintiff's declaratory judgment action was not a justiciable case within the meaning of Article III).
100. 123 S. Ct. 1855 (2003).
pursuant to the Spending Clause. According to the Spending Clause theory, the Medicaid statute is a Spending Clause statute and the plaintiff did not have an express statutory right of action under the statute. In fact, though, the Court did reach the merits of the plaintiff's preemption claim. The Court's decision in Pharmaceutical Research is significant because the defendants contested the plaintiff's right to bring suit and the First Circuit relied explicitly on the Supremacy Clause as the basis for the plaintiff's right of action. Moreover, Justices Scalia and Thomas, in separate concurrences, both advanced the Spending Clause theory in support of their view that the plaintiff lacked a private right of action. Nevertheless, the other seven Justices addressed the merits of the plaintiff's claim, assuming sub silentio that the plaintiff had a right of action for its claim that the Medicaid statute preempted state law.


102. The Medicaid statute is codified in Subchapter XIX of Chapter 7 of Title 42 of the U.S. Code, 42 U.S.C. §§ 1396–1396v (2000). Medicaid is an exceptionally complex statute with a wide variety of remedial provisions. For example, if the Secretary of Health and Human Services determines that a "Medicaid managed care organization," as defined in § 1396b(m)(1), has engaged in any of the "bad acts" enumerated in § 1396b(m)(5)(A), then the Secretary is authorized to impose civil penalties, or to deny payment of certain medical assistance to the State. 42 U.S.C. § 1396b(m)(5)(B) (2000). Similarly, if the Secretary finds that a "nursing facility," as defined in § 1396r(a), fails to satisfy any of the requirements mandated by subsections (b) through (e) of § 1396r, and the Secretary determines that the facility's deficiencies "immediately jeopardize the health or safety of its residents," then the Secretary may deny payments to the State, impose civil penalties, or "appoint temporary management to oversee the operation of the facility." See 42 U.S.C. § 1396r(h)(3)(B) and § 1396r(h)(3)(C) (2000). Although the Medicaid statute occupies more than 200 pages in the unannotated U.S. Code, the statute does not create any express private cause of action. See 42 U.S.C. §§ 1396–1396v (2000).

103. See Pharm. Research, 123 S. Ct. at 1867–70 (holding that federal Medicaid statute does not preempt Maine statute).

104. See Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 72–74 (1st Cir. 2001).

105. See Pharm. Research, 123 S. Ct. at 1874 (Scalia, J., concurring); id. at 1878 (Thomas, J., concurring).

106. The Court produced five separate opinions in Pharmaceutical Research. Justice Stevens—writing for himself, Justice Souter, and Justice Ginsburg—concluded that the federal Medicaid statute did not preempt the Maine statute. Id. at 1867–70. Justice Breyer agreed with that conclusion, but for different reasons. See id. at 1871–73 (Breyer, J., concurring). Justice O'Connor—writing for herself, Justice Kennedy, and the Chief Justice—concluded that the federal Medicaid statute did preempt the Maine statute. See id. at 1878–82 (O'Connor, J., concurring in part and dissenting in part). Justices Stevens, Breyer, and O'Connor did not explicitly address the private right of action issue.

Justice Thomas argued that the plaintiff's preemption claim should be rejected on the merits. See id. at 1874–78 (Thomas, J., concurring). Additionally, he argued, the preemption claim should be rejected because third-party beneficiaries may not sue to enforce Spending Clause legislation. See id. at 1878 (Thomas, J., concurring). Justice Scalia did not address the
In sum, the linguistic theory provides an accurate description of Supreme Court decisions in Shaw cases, but does not provide a justification for those decisions. Likewise, the realist theory does not provide a justification for Supreme Court decisions, and it is less descriptively accurate than the linguistic theory. The Spending Clause theory lacks descriptive accuracy, but does have some normative force. Therefore, the state action theory is the only theory that is both normatively defensible and descriptively accurate. The normative arguments for and against the state action theory, which uses the legislative-executive distinction as a basis for determining whether to recognize an implied right of action in Shaw cases will be discussed below. First, though, it is important to explain the doctrinal basis for federal jurisdiction over Shaw claims.

III. FEDERAL JURISDICTION OVER SHAW CLAIMS

A. THE RELATION BETWEEN FEDERAL JURISDICTION AND A PRIVATE CAUSE OF ACTION

Under the general federal question statute, federal courts have jurisdiction over claims "arising under" federal law. The phrase "arising under" plays an important role in limiting the jurisdiction, and hence the power, of federal courts. Yet despite the importance of this phrase, Supreme Court decisions reflect two sharply contrasting views concerning the relationship between arising under jurisdiction and the requirement of a private cause of action.

One view is associated with Justice Holmes's famous dictum that a "suit arises under the law that creates the cause of action." Under this view, if the plaintiff lacks a federal cause of action, then federal jurisdiction is also lacking. The Court has adhered strictly to this view in cases such as Merrell Dow Pharmaceuticals, Inc. v. Thompson, where it held that federal jurisdiction was lacking because the plaintiff asserted a cause of action created by state law, not federal law.

merits of plaintiff's preemption claim at all; he would have rejected the claim on the ground that plaintiff lacked a right of action to enforce Maine's compliance with its obligations under the Medicaid statute. See id. at 1874 (Scalia, J., concurring).

107. For analysis of the normative argument in favor of the Spending Clause theory, see infra notes 352-75 and accompanying text.

108. See infra Part VI.


113. See id. at 817.
In contrast to Merrell Dow, there are two separate lines of cases in which the Court has insisted that a federal cause of action is not a prerequisite for the exercise of federal jurisdiction. In Smith—a case, like Merrell Dow, where state law created the plaintiff’s cause of action—the Court upheld federal jurisdiction on the grounds that the plaintiff’s “right to relief depends upon the construction or application of the Constitution or laws of the United States.”Six years ago, the Court reaffirmed the continuing vitality of Smith. The Smith line of cases flatly contradicts the Holmes dictum and is difficult to reconcile with Merrell Dow.

In contrast to both Smith and Merrell Dow, there is a line of cases in which the plaintiff’s claim is based on federal law, not state law, but it is uncertain whether federal law creates a private cause of action. In Bell v. Hood, the Court held that federal courts have jurisdiction over such cases—despite the uncertainty as to whether federal law creates a private cause of action—unless the claim “clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.” The Supreme Court recently reaffirmed Bell:

'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 court’s statutory or constitutional power to adjudicate the case.' As we have said, ‘the district court has jurisdiction if “the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another”....'

Whereas the Smith line of cases flatly contradicts Holmes’s dictum, the Bell line of cases is arguably consistent with that dictum. Under the Bell approach, a federal court can exercise jurisdiction for the purpose of determining whether the plaintiff has a valid (federal) cause of action.

115. Id. at 199.
118. 327 U.S. 678 (1946).
119. Id. at 682–83.
121. See Bell, 327 U.S. at 682. The Court stated:
the court determines that the plaintiff lacks a valid cause of action, then the claim will be dismissed for failure to state a claim upon which relief can be granted. Granted, under the Holmes approach, the claim would be dismissed for lack of subject matter jurisdiction, but that is a mere difference in terminology, not substance. Regardless of whether one follows Holmes or Bell in cases where the plaintiff lacks a state law cause of action, plaintiff’s right to relief depends on whether he or she has a valid federal cause of action.

The Smith line of cases has been criticized as jurisdictional overreaching by the federal judiciary. But that criticism does not apply to Bell. In cases such as Bell, where the claim is based on federal law but plaintiff’s right of action is contested, the central threshold question is whether federal law creates either an express or implied private right of action. Federal jurisdiction is appropriate because federal courts are generally better positioned than state courts to answer that type of question, given their greater expertise on matters of federal law. If federal courts lacked jurisdiction in such cases, then cases in which it is uncertain whether plaintiff has a valid federal cause of action would have to be adjudicated in state court, and state courts would assume primary responsibility for determining whether a federal statute creates a federal cause of action. That result makes no sense. Therefore, the remainder of this Article proceeds from the premise that the Bell approach to jurisdiction is justified. Specifically, in cases where a plaintiff asserts a right to relief based on federal law, but it is uncertain whether the plaintiff has a valid federal cause of action, federal courts have jurisdiction under § 1331, at least for the limited purpose of determining whether the plaintiff has a valid federal cause of action.

B. JURISDICTION OVER SHAW PREEMPTION CLAIMS

In Shaw, a group of employers filed suit in federal court, seeking declaratory and injunctive relief against various New York state officials on
the grounds that a New York statute that obligated them to provide pregnancy-related disability benefits was preempted by the Employee Retirement Income Security Act (ERISA). Although the Supreme Court did not explicitly decide whether the plaintiffs had a private cause of action under ERISA, the Court did explicitly hold that federal courts have subject matter jurisdiction over such claims:

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

To appreciate fully the significance of the Court's jurisdictional holding in Shaw, it must be viewed against the background of two early twentieth century Supreme Court decisions: Louisville and Nashville Railroad v. Mottley, and Ex parte Young. In Mottley, the plaintiffs sued a railroad company for breach of contract. Anticipating that the railroad would raise an affirmative defense based upon a federal statute, the complaint alleged that the statute did not affect the railroad's contractual obligation to the Mottleys. The Court held that the plaintiffs' claim did not "arise under" federal law because the federal issues in the case arose only by way of a defense and were not an essential ingredient of the plaintiffs' claim. Thus, Mottley affirmed the "well-pleaded complaint" rule, which states that the existence of federal question jurisdiction turns, in part, on whether the federal question is "offensive" (i.e., an element of plaintiff's claim) or "defensive" (i.e., an affirmative defense).

In Young, the Minnesota attorney general had threatened to institute civil or criminal enforcement proceedings against various railroad companies in state court if they failed to comply with state statutes that set a ceiling on the rates they could charge. Prior to commencement of any state enforcement action, company stockholders filed suit against the attorney general in federal court to enjoin enforcement of the state statutes

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126. In fact, the plaintiffs in Shaw did not have a private cause of action under ERISA. See Sloss, supra note 33, at 1177-78.
127. Shaw, 463 U.S. at 96 n.14 (citations omitted).
128. 211 U.S. 149 (1908).
129. 209 U.S. 123 (1908).
130. 211 U.S. at 150-51.
131. Id.
132. Id. at 152-54.
133. 209 U.S. at 129-31.
on the grounds that they conflicted with the Fourteenth Amendment.\textsuperscript{134} The Court held that the plaintiffs' complaint gave rise to federal question jurisdiction.\textsuperscript{135} Thus, \textit{Young} established that a claim for injunctive relief against a state officer to block enforcement of a state statute that allegedly conflicts with the Fourteenth Amendment is "offensive" for purposes of the well-pleaded complaint rule.\textsuperscript{136}

The \textit{Shaw} jurisdictional principle is essentially an extension of \textit{Ex parte Young} from constitutional to statutory preemption claims.\textsuperscript{137} \textit{Young}, in a sense, was a preemption case. The logic of \textit{Young} is that state officers cannot enforce state statutes that conflict with the Fourteenth Amendment because the Supremacy Clause mandates that the Constitution preempts conflicting state laws, thereby rendering them unenforceable. Thus, from a jurisdictional standpoint, \textit{Young} and \textit{Shaw} are identical, except that \textit{Shaw} involved a conflict between a federal statute and state law, whereas \textit{Young} involved a conflict between the federal constitution and state law. Since the Supremacy Clause resolves all such conflicts in favor of federal law, it is no surprise that the \textit{Shaw} Court cited both \textit{Young} and the Supremacy Clause in support of its jurisdictional holding.\textsuperscript{138} Moreover, since \textit{Young} held that a suit against a state officer to enjoin enforcement of an unconstitutional state law is "offensive" for purposes of the well-pleaded complaint rule, it should be no surprise, as the Court held in \textit{Shaw}, that a suit against a state officer to

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\item \textsuperscript{134} Id.
\item \textsuperscript{135} Id. at 143-45.
\item \textsuperscript{136} It bears emphasis that \textit{Young} could have been decided the other way. The Court might well have said that the plaintiffs' claim in \textit{Young} did not give rise to federal jurisdiction because it merely raised a federal defense to an anticipated state enforcement action. Thus, although \textit{Young} is generally viewed as an Eleventh Amendment case, it also provides an important corollary to the well-pleaded complaint rule associated with \textit{Mottley}. For further discussion of the relationship between \textit{Young} and \textit{Mottley}, see Collins, \textit{supra} note 36, at 1512-14; Hart, \textit{supra} note 36, at 523-24; Hill, \textit{supra} note 36, at 1124-27.
\item \textsuperscript{137} The author developed this point at greater length in a previous article. Sloss, \textit{supra} note 33, at 1156-58 and 1164-71.
\item \textsuperscript{138} Shaw v. Delta Air Lines, Inc., 463 U.S. 185, 96 n.14 (1983). One might object that \textit{Shaw} does not actually involve a conflict between state and federal law because \textit{Shaw} is a "field preemption" case, not a "conflict preemption" case. Moreover, some commentators have argued that Congress's power of field preemption derives from Article I, not from the Supremacy Clause. See Stephen A. Gardbaum, \textit{The Nature of Preemption}, 79 CORNELL L. REV. 767, 773-83 (1994).
\end{itemize}

Although there is merit to this argument, the Supreme Court in \textit{Shaw} referred specifically to the Supremacy Clause as a basis for federal jurisdiction over \textit{Shaw} preemption claims. \textit{Shaw}, 463 U.S. at 96 n.14. Just last term, the Court reiterated its view that the Supremacy Clause provides a basis for federal jurisdiction over \textit{Shaw} preemption claims. Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 641-43 (2002). Thus, in terms of Supreme Court precedent, there is a well-established link between preemption claims, the Supremacy Clause, and federal jurisdiction.
enjoin enforcement of a state law that is preempted by a federal statute is also "offensive" for purposes of the well-pleaded complaint rule.\textsuperscript{139}

In sum, \textit{Shaw} establishes that federal courts have jurisdiction over civil suits by private plaintiffs who sue state officers for declaratory and/or injunctive relief\textsuperscript{146} to block enforcement of a state statute that is allegedly preempted by a federal statute. Since \textit{Shaw}, the Supreme Court has decided more than twenty preemption cases that fit within \textit{Shaw}'s jurisdictional principle.\textsuperscript{141} Subsequent cases have expanded that principle to encompass: (1) suits alleging preemption of state law by federal regulations;\textsuperscript{142} (2) suits alleging preemption of state regulations by federal law;\textsuperscript{143} and (3) suits against local governments and officers alleging preemption of local ordinances.\textsuperscript{144} Thus, the \textit{Shaw} principle applies broadly to claims alleging

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  \item \textsuperscript{139} \textit{Shaw}, 463 U.S. at 96 n.14. The \textit{Shaw} Court says "that federal courts have jurisdiction" over such claims. \textit{Id}. This necessarily means that such claims are "offensive" for purposes of the well-pleaded complaint rule. Whether plaintiffs have a private cause of action to bring such claims is a separate question.
  \item \textsuperscript{140} With respect to the jurisdictional significance of the distinction between declaratory and injunctive relief, see infra notes 171–81 and accompanying text.
  \item \textsuperscript{142} See, e.g., Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (cable television operators sued Director of Oklahoma Alcoholic Beverage Control Board to enjoin enforcement of state ban on broadcast advertising of alcoholic beverages that was allegedly preempted by Federal Communications Commission regulations).
  \item \textsuperscript{143} See, e.g., United States v. Locke, 529 U.S. 89 (2000) (suit against Governor of Washington to enjoin enforcement of oil tanker design, reporting, and operating regulations promulgated by the state's Office of Marine Safety that were allegedly preempted by federal statutes); Anderson v. Edwards, 514 U.S. 143 (1995) (recipients of federal funds sued Director of California Department of Social Services to enjoin enforcement of state regulation that was allegedly preempted by federal statute governing benefits under Aid to Families with Dependent Children Program); Morales v. Trans World Airlines, 504 U.S. 374 (1992) (airlines sued state attorneys general to enjoin enforcement of state regulations that were allegedly preempted by Airline Deregulation Act).
  \item \textsuperscript{144} See, e.g., City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424 (2002); Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707 (1985) (operator of blood plasma centers sued county to enjoin enforcement of local plasma collection ordinance that

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preemption of state or local statutes, regulations, or ordinances by federal statutes or regulations.\textsuperscript{145}

\textbf{C. Jurisdiction over Shaw Violation Claims}

Ten years after \textit{Young}, in \textit{Greene v. Louisville \& Interurban Railroad Co.},\textsuperscript{146} the Supreme Court extended \textit{Young}'s jurisdictional holding to apply not only to claims alleging that a state law conflicts with the Constitution, but also to claims alleging that state executive action violates the constitution. In \textit{Greene}, the constitutionality of the state law was uncontested, but the plaintiffs alleged that state officers were administering the law in an unconstitutional manner.\textsuperscript{147} Even so, the Court relied on \textit{Young} to uphold federal jurisdiction, stating that \textit{Young}'s jurisdictional "principle is not confined to the maintenance of suits for restraining the enforcement of statutes which, as enacted by the state legislature, are in themselves unconstitutional."\textsuperscript{148} In short, \textit{Greene} extended \textit{Young} from constitutional preemption claims to constitutional violation claims, establishing that suits to enjoin state executive action that allegedly violates the Constitution are also "offensive" for purposes of the well-pleaded complaint rule.

Thus, \textit{Young}, \textit{Greene}, and \textit{Shaw} together establish that a suit against a state officer to enjoin state action is "offensive" for purposes of the well-pleaded complaint rule if the complaint alleges: (1) that a state law is preempted by the Constitution (\textit{Young}); (2) that a state law is preempted by a federal statute (\textit{Shaw}); or (3) that state executive action violates the Constitution (\textit{Greene}). Logically, it follows that a suit against a state officer to enjoin state executive action that allegedly violates a federal statute is also "offensive" for purposes of the well-pleaded complaint rule because the characterization of a federal issue as "offensive" or "defensive" for purposes of the well-pleaded complaint rule should not turn on whether the state action being challenged is legislative or executive, or on whether the federal law at issue is constitutional or statutory. Moreover, one could argue, per \textit{Bell v. Hood}, it follows that district courts have jurisdiction over such claims, even in cases where it is uncertain whether the plaintiff has a valid cause of action was allegedly preempted by federal regulations promulgated by Food and Drug Administration).

\textsuperscript{145} Many of the relevant cases assume jurisdiction \textit{sub silentio}, without deciding on jurisdiction. It is well settled that the exercise of jurisdiction in a case where the issue was not contested does not, without more, establish that the court actually had jurisdiction. Even so, the defendant in \textit{Verizon} did contest jurisdiction and the Court, when squarely presented with the issue, unanimously reaffirmed \textit{Shaw}'s jurisdictional holding. \textit{Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.}, 535 U.S. 635, 641-43 (2002). Therefore, the Court's decision in \textit{Verizon} should remove any lingering doubts about the continued vitality of \textit{Shaw}.

\textsuperscript{146} 244 U.S. 499 (1917).

\textsuperscript{147} \textit{Id.} at 504-05.

\textsuperscript{148} \textit{Id.} at 507.
under the federal statute, provided that the plaintiff's claim is not "wholly insubstantial and frivolous."149

The Supreme Court has never explicitly endorsed this conclusion,150 but the Court came close to doing so in Verizon.151 The plaintiff in Verizon sued individual members of the Public Service Commission of Maryland (a state administrative agency), seeking declaratory and injunctive relief to block enforcement of an adjudicative order issued by the Commission that allegedly violated the Telecommunications Act of 1996.152 The main issue presented to the Supreme Court was "whether federal district courts have jurisdiction over a telecommunication carrier's claim that the order of a state utility commission . . . violates federal law."153 The Court quoted Shaw in support of its holding that the district court had subject matter jurisdiction:

We have no doubt that federal courts have jurisdiction under § 1331 to entertain such a suit. 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."154

The Commission objected "that since the [Telecommunications] Act does not create a private cause of action to challenge the Commission's order, there is no jurisdiction to entertain such a suit."155 The Court replied that it need not decide whether the Act creates a private cause of action because "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."156 The Court cited Steel Co. v. Citizens for a Better Environment157 in support of this proposition, which in turn cites Bell v. Hood.158 Thus, Verizon extends Shaw's jurisdictional principle to cases in which plaintiffs

150. At least one lower federal court has applied Shaw to state executive action. See Legal Envtl. Assistance Found., Inc. v. Pegues, 904 F.2d 640, 643 (11th Cir. 1990) (holding, in a case where plaintiffs sought to enjoin issuance of a permit by a state executive agency, that Young and Shaw provided a basis for federal jurisdiction over plaintiff's claim that the state action was preempted by a federal statute).
152. Id. at 638-41.
153. Id. at 638.
154. Id. at 642 (quoting Shaw).
155. Id.
158. See id. at 89 (citing Bell v. Hood, 327 U.S. 678, 682 (1946)).
challenge adjudicative orders issued by state administrative agencies. And Verizon (indirectly) invokes Bell to support the conclusion that federal courts have jurisdiction to adjudicate such claims, even in cases where it is uncertain whether the plaintiff has a valid private cause of action.

Even post-Verizon, though, there is still no Supreme Court decision that explicitly applies Shaw to a case in which a plaintiff sues to enjoin state executive (as opposed to administrative) action that allegedly violates a federal statute. Therefore, in terms of Supreme Court precedent, one could make a plausible argument that the Shaw jurisdictional principle applies to cases in which plaintiffs challenge state legislative action, and to many cases in which plaintiffs challenge state administrative action, but not to cases in which plaintiffs challenge state executive action.

From a policy standpoint, this position might be justified as follows. First, however desirable it might be to articulate neutral principles for ascertaining when a claim “arises under” federal law, the reality is that “section 1331 ‘has resisted all attempts to frame a single, precise definition for determining which cases fall within’ the jurisdiction it grants.” Recognizing the futility of attempting to do so, courts must make policy judgments about what types of claims should be deemed to “arise under” federal law for purposes of federal question jurisdiction. In making those policy judgments, it is reasonable to distinguish between federal

159. This extension of Shaw was arguably foreshadowed earlier in New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989) (reversing Fifth Circuit decision to abstain from exercising jurisdiction over suit against city by public utility to enjoin enforcement of local regulatory order that was allegedly preempted by an order issued by the Federal Energy Regulatory Commission). However, Verizon is the first case in which the Court relied explicitly on Shaw to support jurisdiction over a challenge to an adjudicative order issued by a state administrative agency.

160. In Bldg. & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218 (1993), an organization representing nonunion construction industry employers sued a Massachusetts state agency to enjoin enforcement of a contract between the agency and a private contractor that effectively excluded nonunion entities from participating in a six billion dollar construction project. See id. at 221–23. The plaintiff alleged that a particular contract provision was preempted by the National Labor Relations Act (NLRA). Id. at 223. The district court denied the plaintiff’s request for a preliminary injunction, but the First Circuit reversed, holding that the NLRA preempted the contested contract provision. See id. at 223. The Supreme Court reversed the First Circuit, holding that the contested provision was not preempted. Id. at 232.

The basis for the initial exercise of jurisdiction by the district court remains unclear, but the lower court may have relied implicitly on Shaw as a basis for federal jurisdiction. Both the First Circuit and the Supreme Court assumed, sub silentio, that the district court had jurisdiction to adjudicate the plaintiff’s claim. Since the state action at issue (a contract between a state agency and a private contractor) is clearly executive in nature, Bldg. & Constr. Trades Council is a case in which the Supreme Court may have relied implicitly on Shaw as the basis for federal jurisdiction over a claim seeking to enjoin state executive action. Regardless, the Court has never explicitly held that Shaw provides a jurisdictional basis for such claims.

161. Oakley, supra note 110, at 1894 (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 8 (1983)).
constitutional and federal statutory claims because federal constitutional claims typically involve fundamental rights, whereas statutory claims do not. Moreover, it is reasonable to distinguish between claims challenging state legislative action and claims challenging state executive action because state legislative action that conflicts with federal statutes can lead to systematic deprivation of federal rights, whereas state executive action that violates federal statutes typically results, at worst, in isolated or ad hoc denials of federal rights. Finally, although state administrative action may be either "legislative" or "executive" in character, there is at least some range of state administrative action that is sufficiently "legislative" that it should be treated like legislative action for purposes of federal jurisdiction. On the basis of these considerations, one might conclude that federal jurisdiction is justified for all constitutional claims (regardless of whether the state action being challenged is legislative, executive, or administrative), and for statutory claims challenging state legislative (and some administrative) action, but not for statutory claims challenging state executive action.

The preceding argument provides a facially plausible justification for the current state of judicial doctrine. However, the argument has three major flaws. First, it assumes that the policy considerations noted above, which are admittedly very important, should guide the jurisdictional inquiry, rather than the implied cause of action inquiry. One of the key advantages of the 

Bell v. Hood approach is that it separates these two inquiries, thereby enabling courts to make jurisdictional findings primarily on the basis of analytically neutral principles (i.e., whether the federal issue is being raised offensively or defensively) and to address policy considerations separately when determining whether to recognize an implied private right of action.

162. The premise that constitutional rights are more "fundamental" than statutory rights provides a partial explanation for the contrast between the Court's willingness to recognize an implied right of action for money damages for constitutional violations, and its reluctance to recognize an implied right of action for money damages for statutory violations. Compare Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing implied right of action for constitutional violation), with Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (denying implied right of action for statutory violation).

163. See Ann Woolhandler & Michael G. Collins, Judicial Federalism and the Administrative States, 87 CAL. L. REV. 613, 682-87 (1999) (suggesting that the availability of federal question jurisdiction over challenges to state administrative action may turn, in part, on whether the "agency has engaged in a systematic [rather than merely ad hoc] denial of federal" rights).

164. Professor Cohen has argued that it is not possible to develop "a single, all-purpose, neutral analytical concept which marks out federal question jurisdiction." William Cohen, The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law, 115 U. PA. L. REV. 890, 907 (1967). Instead, he advocates a pragmatic, case-by-case approach to determining the boundaries of federal jurisdiction. His preferred approach, though, is incompatible with the twin principles that federal courts are courts of limited jurisdiction, and that Congress controls the jurisdiction of the lower federal courts. See generally WRIGHT & KANE, supra note 32, at 27-32. If federal district courts are given broad discretion to determine the presence or absence of federal question jurisdiction on a case-by-case basis, then congressional control is illusory, and the only limits on federal

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Second, the preceding argument assumes that legislative action is "systemic," whereas executive action is more "ad hoc."\textsuperscript{165} While this may be true as a general rule, there are many examples of "systemic" executive action, and of "ad hoc" legislative action. The English-only policy at issue in \textit{Sandoval} had widespread systemic effects, even though it was clearly executive in nature.\textsuperscript{166} Conversely, to take an extreme example, Congress recently amended a federal statute for the sole and express purpose of reviving the claims of the plaintiffs in a single lawsuit.\textsuperscript{167} Thus, although the distinction between systemic and ad hoc violations of federal rights is an important distinction with significant policy implications, the legislative–executive distinction that underlies current judicial doctrine is a poor proxy for addressing those policy issues.

Finally, in \textit{Shaw} cases—all of which, by definition, involve claims for prospective declaratory and/or injunctive relief—courts do not need a proxy to address the distinction between systemic and ad hoc violations. The Court has held that "the 'irreducible constitutional minimum of standing' contains three requirements."\textsuperscript{168} They are "injury in fact," causation, and redressability.\textsuperscript{169} Redressability is defined as "a likelihood that the requested relief will redress the alleged injury."\textsuperscript{170} If the term "systemic violation" is understood to include cases where there is a significant threat of future violations, and the term "ad hoc" is understood to exclude such cases, then plaintiffs who are victims of ad hoc violations do not have standing to sue for prospective injunctive relief because there is no likelihood that the requested relief will redress the ad hoc injury that has already occurred. Thus, in \textit{Shaw} cases, the nature of the relief sought precludes suits for ad

\textsuperscript{165} The distinction between "systemic" and "ad hoc" violations is drawn from Professors Woolhandler and Collins. \textit{See} Woolhandler & Collins, \textit{supra} note 163, at 682–87.


\textsuperscript{167} \textit{See} Pub. L. No. 107-77, § 626(c), 115 Stat. 748, 803 (2001) ("Amend 28 U.S.C. § 1605(a)(7)(A) by inserting at the end, before the semicolon, the following: 'or the act is related to Case Number 1:00CV03110 in the United States District Court for the District of Columbia.'"). The subject lawsuit was a suit against Iran by U.S. nationals who were held hostage by Iran from November 1979 to January 1981. The U.S. Government intervened in the suit, claiming that the plaintiffs' claims had been extinguished by an international agreement between the U.S. and Iran. The statutory amendment was designed to override that international agreement. \textit{See} Sean D. Murphy, \textit{Contemporary Practice of the United States Relating to International Law}, 96 Am. J. INT'L L. 461, 463–68 (2002).


\textsuperscript{169} \textit{Steel Co.}, 523 U.S. at 103.

\textsuperscript{170} \textit{Id}.
hoc violations, both as a constitutional matter (due to the lack of redressability) and as a practical matter (because plaintiffs do not request prospective relief to remedy ad hoc violations that have already occurred). Therefore, Shaw’s jurisdictional principle should be construed to encompass claims against state officials in which plaintiffs seek prospective relief to enjoin state executive action that allegedly violates a federal statute.

**D. JURISDICTION OVER DECLARATORY JUDGMENT ACTIONS**

The preceding argument demonstrates that federal courts have jurisdiction over claims for injunctive relief against state and local government officers in which plaintiffs seek to enjoin enforcement of state legislative or executive action that allegedly conflicts with a federal statute. There is conflicting authority, though, as to whether that jurisdiction extends to cases in which plaintiffs seek only declaratory, but not injunctive, relief.

In *Public Service Commission v. Wycoff Co.*,\(^{171}\) the Court stated that a declaratory judgment action against state government officers to forestall a state enforcement action did not give rise to federal question jurisdiction:

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim.\(^{172}\)

Taken literally, this language would preclude federal jurisdiction over a case in which a private plaintiff sued a state officer for a declaratory judgment that an impending state enforcement action is preempted by federal law. Thus, *Wycoff* appears to bar Shaw preemption claims in which plaintiffs seek only declaratory relief.\(^{173}\)

To understand *Wycoff* properly, though, it is necessary to distinguish between two types of cases: those in which the traditional requirements for injunctive relief are satisfied, and those where injunctive relief is not possible. *Wycoff* was a case in which the plaintiff could not have obtained injunctive relief “because there is no proof of any threatened or probable act of the defendants which might cause the irreparable injury essential to

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172. *Id.* at 248.
173. Other commentators have noted the tension between Shaw and Wycoff. See *Fallon et al.*, *supra* note 32, at 902–03; Monaghan, *Federal Statutory Review, supra* note 34, at 237–41.
equitable relief by injunction."\textsuperscript{174} The plaintiff's failure to establish irreparable injury not only undermined the plaintiff's case for injunctive relief—it also meant that the case was not ripe for judicial review. In the court's words: "[T]his dispute has not matured to a point where we can see what, if any, concrete controversy will develop."\textsuperscript{175}

Thus, \textit{Wycoff} suggests that federal courts may not exercise jurisdiction over \textit{Shaw} preemption claims where plaintiffs seek a declaratory judgment that a state law is preempted by a federal law, and where plaintiffs fail to allege any threatened or ongoing action by the defendant that would cause irreparable harm to the plaintiff. That result should not be surprising. Ordinarily, if a state or local officer has not actually done anything that causes or threatens harm to the plaintiff, a claim against that officer will not satisfy Article III case or controversy requirements.\textsuperscript{176}

A very different situation is presented if a \textit{Shaw} preemption claim alleges threatened or ongoing action by the defendant that would cause irreparable harm to the plaintiff. In such a case, the plaintiff could bring a claim for injunctive relief but might choose to seek only declaratory relief. There is no principled basis for a doctrine that would deny federal jurisdiction over claims for declaratory relief in such cases. Such a doctrine would merely encourage plaintiffs to assert claims for injunctive relief in order to obtain federal jurisdiction, even if a declaratory judgment would suffice. That creates a perverse incentive structure.\textsuperscript{177} One of the central objectives of the Declaratory Judgment Act was to promote the use of declaratory judgments as a milder alternative to an injunction.\textsuperscript{178} In suits against state officers, in particular, declaratory judgments can often achieve

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\item \textsuperscript{174} \textit{Wycoff}, 344 U.S. at 240–41. The plaintiff in \textit{Wycoff} initially sought injunctive relief, and the complaint alleged action by the defendant that caused or threatened harm to the plaintiff. \textit{See id.} at 239. However, by the time the case was presented to the Supreme Court, the plaintiff had "offered no evidence whatever of any past, pending or threatened action by the" defendant, and plaintiff had "abandoned the suit as one for injunction . . . ." \textit{Id.} at 240–41.
\item \textsuperscript{175} \textit{Id.} at 245.
\item \textsuperscript{176} \textit{See}, \textit{e.g.}, \textit{Lujan v. Defenders of Wildlife}, 504 U.S. 555, 560 (1992) (holding that "the irreducible constitutional minimum" of Article III standing requires that the plaintiff must have suffered an "invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical . . . ." (citations omitted)). Both the Article III "injury in fact" requirement and the traditional equitable requirement for "irreparable harm" are flexible standards that courts apply differently in different situations. Accordingly, it is theoretically possible that there might be a case in which a plaintiff who seeks prospective, declaratory relief satisfies the Article III standing requirement even though he cannot demonstrate irreparable harm. However, it is difficult to conceive of a concrete example that satisfies these criteria.
\item \textsuperscript{177} \textit{See} WRIGHT ET AL., supra note 32, § 3566, at 99 ("But to hold that a federal court would have jurisdiction of a suit to enjoin enforcement of a state statute, but not of a suit for a declaration that the statute cannot be enforced, would be to turn somersaults with both history and logic.").
\item \textsuperscript{178} \textit{Steffel v. Thompson}, 415 U.S. 452, 466 (1974) ("Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction . . . .").
\end{enumerate}
the same objectives as an injunction, but pose less of an affront to state sovereignty. Although the Supreme Court has never held explicitly that Shaw's jurisdictional principal extends to cases in which plaintiffs seek only declaratory relief, there is some Supreme Court authority supporting that conclusion.

Thus, the "tension between Wycoff and Shaw" is more apparent than real. In Shaw preemption cases where the allegations in the complaint would support a claim for injunctive relief, but the plaintiff chooses to seek only declaratory relief, federal courts can exercise jurisdiction under Shaw. However, in Shaw preemption cases where the complaint does not allege any action by the defendant that causes or threatens irreparable harm to the plaintiff, Wycoff suggests that jurisdiction is probably lacking, because in most such cases plaintiffs will lack Article III standing.

E. LIMIT ON SHAW'S JURISDICTIONAL PRINCIPLE

The conclusion that Shaw's jurisdictional principle extends both to declaratory judgment actions and to claims challenging state executive action does not mean that Shaw creates federal jurisdiction for all claims alleging federal statutory violations. There are four important limitations on Shaw, three of which relate to the fact that Shaw is a direct descendant of Ex parte Young.

179. See Mann, supra note 30, at 904.

180. In Lawrence County v. Lead-Deadwood School District, 469 U.S. 256 (1985), the plaintiff filed suit in federal court, seeking a declaratory judgment that a state statute was preempted by the Payment in Lieu of Taxes Act. See id. at 259 n.6. The Eighth Circuit held that the claim did not give rise to federal jurisdiction. Lawrence County v. South Dakota, 668 F.2d 27, 31 (8th Cir. 1982). The Supreme Court disagreed, quoting Shaw in support of the proposition that the district court did have jurisdiction. Lawrence County, 469 U.S. at 259 n.6. Since the plaintiff in Lawrence County sought only declaratory relief, not injunctive relief, the case arguably extended Shaw to claims for declaratory relief. On the other hand, the Supreme Court's comment on jurisdiction was clearly dictum because the plaintiff re-filed in state court after the Eighth Circuit dismissed the claim, and the Supreme Court was reviewing a decision by the South Dakota Supreme Court. See id. at 259-60.

In California Division of Labor Standards Enforcement v. Dillingham Construction, Inc., 519 U.S. 316 (1997), the plaintiffs sued for declaratory relief only, claiming that a provision of the California Labor Code was preempted by federal statutes. See Complaint, Dillingham Constr. Inc. v. County of Sonoma (N.D. Cal. 1991) (No. 90-1272-FMS) (seeking a declaratory judgment, but not an injunction) (on file with author). The district court relied explicitly on Shaw as a basis for federal question jurisdiction. Dillingham Constr., Inc. v. County of Sonoma, 778 F. Supp. 1522, 1526 (N.D. Cal. 1991). The Ninth Circuit agreed that "[t]he district court had jurisdiction pursuant to 28 U.S.C. § 1331," but did not explain its reasoning. Dillingham Constr., Inc. v. County of Sonoma, 57 F.3d 712, 716 (9th Cir. 1995). The Supreme Court addressed the merits without commenting on the jurisdictional issue. See Dillingham, 519 U.S. 316. Thus, the Court in Dillingham apparently assumed, but did not hold, that Shaw's jurisdictional principle extends to claims for declaratory relief.


182. 209 U.S. 123 (1908). On the relationship between Shaw and Young, see supra notes 125-45 and accompanying text.
First, with respect to potential defendants, *Shaw* applies only to suits against state officers or local governments or officers. 183 *Shaw* does not provide a jurisdictional basis for suits against private defendants, nor does it permit suits against state governments, as such. Granted, injunctive relief against a state officer is functionally equivalent to injunctive relief against the state. Even so, the Court has consistently indulged the legal fiction that a suit for injunctive relief against a state officer in his or her official capacity is not a suit against the state. 184

Second, with respect to the relief sought, *Shaw* applies only to claims for prospective declaratory and/or injunctive relief. *Shaw* does not apply to claims for money damages. 185 Since plaintiffs cannot obtain prospective relief for past violations, this means that the *Shaw* jurisdictional principle applies only to cases in which plaintiffs allege a threatened or ongoing violation of a federal statute. 186 Moreover, plaintiffs who seek injunctive relief must satisfy the traditional equitable requirements for injunctive relief. In particular, plaintiffs must show that they have no adequate remedy at law, and that they will suffer irreparable harm if they do not obtain equitable relief. 187

Third, the availability of federal jurisdiction under *Shaw* is ultimately subject to congressional control. The Court held in *Seminole Tribe v. Florida*: "[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." 188 Since *Shaw* is a doctrinal descendant of *Young*, the *Seminole Tribe* limitation on *Young* applies equally to *Shaw*. In effect, this means that *Shaw* establishes a presumption in favor of federal jurisdiction over *Shaw* claims, but a defendant in a specific case can

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183. With respect to suits against local governments and officers, see supra note 144 and accompanying text.


185. Claims for money damages against the state, *per se*, are barred by sovereign immunity. See generally *Chemerinsky*, supra note 31, at 402–10. Claims for money damages against state officers, or against local governments or officers, can be brought under § 1983. See id. at 474–523.


rebut that presumption by showing that Congress intended to bar federal jurisdiction over claims derived from a particular federal statute.\footnote{189. The Court has imposed a similar constraint on suits against state officers under § 1983. See, e.g., Gonzaga Univ. v. Doe, 536 U.S. 273, 284–85, 284 n.4 (2002) (stating that federal statutes that create individual rights are "presumptively enforceable by § 1983," but that a defendant may rebut the presumption "by showing that Congress 'specifically foreclosed a remedy under § 1983'" (quoting Smith v. Robinson, 468 U.S. 992, 1004–05 n.9 (1984))).}

Finally, in accordance with \textit{Bell v. Hood},\footnote{190. 327 U.S. 678 (1946).} the fact that federal courts have jurisdiction over \textit{Shaw} claims does not necessarily mean that plaintiffs have a private cause of action that enables them to bring such claims. Parts IV through VI below discuss private rights of action for \textit{Shaw} preemption claims and \textit{Shaw} violation claims.

\textbf{IV. DOCTRINAL SUPPORT FOR AN IMPLIED RIGHT OF ACTION FOR SHAW PREEMPTION CLAIMS}

The leading treatise on federal practice and procedure contends that the Supremacy Clause creates an implied cause of action that is broad enough to encompass \textit{Shaw} preemption claims.\footnote{191. \textit{See} 13B \textsc{Wright} \textsc{et al.}, supra note 32, § 3566, at 102 ("The best explanation of Ex parte Young and its progeny 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 and laws.") (emphasis added).} In addition, several lower federal courts have explicitly held that the Supremacy Clause creates an implied cause of action for \textit{Shaw} preemption claims.\footnote{192. \textit{See}, e.g., Pharm. Research \& Mfrs. of Am. v. Concannon, 249 F.3d 66, 73 (1st Cir. 2001); St. Thomas-St. John Hotel \& Tourism Ass’n v. Virgin Islands, 218 F.3d 232, 241 (3d Cir. 2000) (holding that a plaintiff has a right of action for a preemption claim "even when the [allegedly preemptive] federal law secures no individual substantive rights for the party arguing preemption"); Burgio \& Campofelice, Inc. v. NYS Dep’t of Labor, 107 F.3d 1000, 1006 (2d Cir. 1997) ("[T]he Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws.") (quoting \textsc{Wright} \textsc{et al.}, supra note 32, § 3566); Indian Oasis–Baboquivari Unified Sch. Dist. v. Kirk, 91 F.3d 1240, 1256 (9th Cir. 1996) (Reinhardt, J., dissenting on other grounds) (stating, in a case where plaintiffs sought injunctive relief against enforcement of state law that was allegedly preempted by federal statute, that "it is the Supremacy Clause itself that provides plaintiffs with the right to sue" and "[m]oreover, a plaintiff may sue directly under the Supremacy Clause even if the assertedly preemptive federal statute does not provide a cause of action or give rise to enforceable rights that could serve as the basis for a § 1983 suit on preemption grounds."); Guar. Nat’l Ins. Co. v. Gates, 916 F.2d 508, 512 (9th Cir. 1990) ("[T]he Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws.") (quoting \textsc{Wright} \textsc{et al.}, supra note 32, § 3566); Sprint Corp. v. Evans, 818 F. Supp. 1447, 1453 (M.D. Ala. 1993) (discussing preemption claims and the Supremacy Clause, and concluding that "the U.S. Supreme Court has not questioned the propriety of allowing a cause of action for preemption claims even when the federal statute whose preemptive power is at issue cannot be the source of the plaintiff’s cause of action"); Storer Cable Communications v. City of Montgomery, 806 F. Supp. 1518, 1529–30 (M.D. Ala. 1992) (same). \textit{But see} Legal Envtl. Assistance Found. Inc. v. Pegues, 904 F.2d 640, 643–44 (11th Cir. 1990) (holding, in a suit against state official to enjoin state action that was allegedly preempted by federal statute, that "Congress did not prescribe the procedures by which federal courts may determine whether a statutory provision is preempted"). But see Legal Envtl. Assistance Found. Inc. v. Pegues, 904 F.2d 640, 643–44 (11th Cir. 1990) (holding, in a suit against state official to enjoin state action that was allegedly preempted by federal statute, that "Congress did not prescribe the procedures by which federal courts may determine whether a statutory provision is preempted") (emphasis added).) The Supreme Court
has never explicitly recognized such an implied cause of action. However, Part IV demonstrates that the Supreme Court has tacitly assumed that there is an implied right of action under the Supremacy Clause for Shaw preemption claims.\textsuperscript{193}

The Supreme Court has decided at least ten cases since Shaw in which the Court granted declaratory and/or injunctive relief to plaintiffs who raised Shaw preemption claims.\textsuperscript{194} Exhaustive analysis of all ten cases would be tedious. The following analysis of two of the cases—Lorillard Tobacco Co. v. Reilly,\textsuperscript{195} and Crosby v. National Foreign Trade Council,\textsuperscript{196}—demonstrates that the Court is willing to grant relief in Shaw preemption cases even if the plaintiff lacks a private right of action under the preemptive federal statute, and without regard to whether the statute creates individual rights that are enforceable pursuant to § 1983.

A. Lorillard

In Lorillard Tobacco Co. v. Reilly, a group of tobacco manufacturers and retailers filed suit to enjoin enforcement of Massachusetts regulations governing the advertisement and sale of cigarettes and other tobacco products.\textsuperscript{197} The complaint in the Lorillard case raised claims under the Commerce Clause, the First Amendment, and the Fourteenth Amendment, as well as a § 1983 claim and a preemption claim.\textsuperscript{198} The substance of the preemption claim was that the Massachusetts regulations were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA).\textsuperscript{199} The complaint did not explicitly identify the source of the private right of action for the plaintiff's preemption claim.\textsuperscript{200} Although the defendant vigorously

\textsuperscript{193} An alternative explanation for the Court's decisions in Shaw preemption cases is that the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, creates a private right of action for Shaw preemption claims. See infra notes 310-36 and accompanying text for discussion of the Declaratory Judgment Act.

\textsuperscript{194} See infra notes 195-96, 248.

\textsuperscript{195} 535 U.S. 525 (2001).

\textsuperscript{196} 550 U.S. 365 (2000).

\textsuperscript{197} 535 U.S. 525 (2001).

\textsuperscript{198} The Lorillard case, as it was presented to the Supreme Court, involved a consolidated appeal of three separate lawsuits. See Consol. Cigar Corp. v. Reilly, 218 F.3d 30, 37 (1st Cir. 2000). The complaint referenced herein is the complaint in Lorillard Tobacco Co. v. Reilly, 84 F. Supp. 2d 180 (D. Mass. 2000) (No. 99-11118-WGY) [hereinafter, Lorillard Complaint] (on file with author).

\textsuperscript{199} See Consol. Cigar, 218 F.3d at 37.

\textsuperscript{200} Paragraph 3 of the complaint alleges that the challenged regulations "violate the Supremacy Clause." Lorillard Complaint, ¶ 3. Paragraph 37 alleges that the "[r]egulations are null and void by reason of Article VI, Section 2 of the United States Constitution ('Supremacy Clause') in that they are preempted by FCLAA." Lorillard Complaint ¶ 37. Thus, one might
contested the merits of the preemption claim, the defendant never challenged the existence of a private cause of action that enabled the plaintiffs to bring the preemption claim. In short, the parties in *Lorillard* all tacitly assumed the existence of a generally available private cause of action for *Shaw* preemption claims that did not depend upon either the preemptive federal statute or 42 U.S.C. § 1983.

The district court in *Lorillard* held that the FCLAA preempted one section of the challenged regulations and that the remainder of the regulations were severable. The First Circuit reversed in part, holding that the FCLAA does not preempt the Massachusetts regulations. The Supreme Court reversed the First Circuit in part, holding that "the Attorney General's outdoor and point-of-sale advertising regulations targeting cigarettes are pre-empted by the FCLAA." None of the published opinions explicitly discusses the source of the private cause of action for plaintiffs' preemption claim. As is typical in *Shaw* preemption cases, the courts simply assumed the availability of a private cause of action, without questioning the source of that right of action.

The FCLAA authorizes civil suits by United States attorneys to enforce its provisions and makes it a criminal misdemeanor to violate the statute. However, the FCLAA does not create an express private cause of action. Moreover, the only lower federal court that has explicitly addressed the issue held that there is no implied private right of action under the FCLAA. That conclusion is clearly correct. The Supreme Court has consistently emphasized that courts should not imply a private right of action under a statute unless there is affirmative evidence of congressional

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201. See, e.g., Answer of Defendant Thomas F. Reilly, Attorney General of the Commonwealth of Massachusetts, *Lorillard* (No. 99-CV-11119-WGY) (on file with author) (denying most of the specific allegations in the complaint, but not contesting the availability of a private right of action for plaintiff's preemption claim); Defendant's Memorandum in Opposition to Motion for Summary Judgment on Preemption Grounds, *Lorillard* (No. 99-CV-11118-WGY) (on file with author) (contending that the FCLAA does not preemp the challenged regulations, but not contesting the availability of a private right of action for plaintiff's preemption claim); Brief of Defendant-Appellee, *Consol. Cigar Corp.* (No. 00-1117) (on file with author) (same); Brief for Respondent, *Lorillard* (Nos. 00-596, 00-59) (arguing that regulations that restrict the location of tobacco advertising are not preempted but not challenging the assumption that the plaintiffs have a private cause of action for their preemption claim).


intent to create a private cause of action. Neither the text nor the legislative history of the FCLAA manifests a congressional intent to create a private cause of action. Therefore, the Lorillard plaintiffs did not have a private right of action under the FCLAA.

Whether 42 U.S.C. § 1983 might have supplied a private right of action for the plaintiffs' preemption claim is a closer question. The Supreme Court has held that § 1983 provides a private cause of action against state officers for violations of some federal statutes. To bring a federal statutory claim under § 1983, the plaintiff must show that "Congress intended to create a federal right" when it enacted the statute. To make the requisite showing, a plaintiff must ordinarily show that the statute contains "rights-creating language.

The FCLAA states: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." The Lorillard plaintiffs could have argued that the FCLAA is enforceable pursuant to 42 U.S.C. § 1983 because the quoted language manifests Congress's intent to grant private rights.

208. See, e.g., Karahalios v. Nat'l Fed'n of Fed. Employees, 489 U.S. 527, 532-33 (1989); Univs. Research Ass'n v. Coutu, 450 U.S. 754, 770 (1981); see also FALLON ET AL., supra note 32, at 781–82. Some commentators have questioned the wisdom of a doctrine that relies on congressional intent as the sole criterion for determining whether to imply a private right of action from a federal statute. See, e.g., Stabile, supra note 37. However, in recent years the Supreme Court has not expressed any willingness to incorporate factors other than congressional intent into its implied right of action analysis.


213. Id. at 277. The Court's opinion in Gonzaga appears to impose a heightened requirement for plaintiffs who seek to establish that a federal statute creates a federal right within the meaning of § 1983. Prior cases indicate that plaintiffs could demonstrate the existence of a federal right under § 1983 by showing that Congress "intended that the provision in question benefit the plaintiff." Blessing v. Freestone, 520 U.S. 329, 340 (1997).

companies a federal right to advertise cigarettes, without interference from state regulation, provided that the companies comply with federal labeling requirements. The Lorillard defendants, on the other hand, could have argued that the FCLAA is not enforceable pursuant to 42 U.S.C. § 1983 because the FCLAA "lack[s] the sort of 'rights-creating' language critical to showing the requisite congressional intent.”

Regardless of how this issue might have been decided, two points are clear. First, the Lorillard plaintiffs never alleged that § 1983 provided a private right of action for their FCLAA preemption claim. Second, the Supreme Court granted relief without even considering whether the plaintiffs had a private cause of action under § 1983. Since the plaintiffs clearly did not have a private cause of action under the FCLAA itself, the best explanation is that the Supreme Court tacitly assumed that there is a generally available right of action for Shaw preemption claims that is not derived either from the preemptive federal statute or from § 1983.

B. CROSBY

In Crosby v. National Foreign Trade Council, a nonprofit corporation representing companies engaged in foreign commerce filed suit to enjoin enforcement of a Massachusetts law that barred government procurement of goods and services from companies doing business with Burma. The

215. Gonzaga Univ., 536 U.S. at 287. If one applies the previous “intended beneficiary” test, see Blessing, 520 U.S. at 340, which was the doctrinal test in place at the time Lorillard was decided, it strengthens the plaintiffs’ case for an enforceable right under § 1983. Regardless, the plaintiffs in Lorillard did not assert a right of action under § 1983 for their FCLAA preemption claim.

216. The complaint in Lorillard does include one count for relief under 42 U.S.C. § 1983. See Lorillard Complaint, supra note 198, ¶ 45–48 (on file with author). However, nothing in the complaint, or in any of the other documents filed with the court, indicates that the plaintiffs relied on § 1983 to provide a private right of action for their preemption claim. Moreover, none of the opinions published by the district court, the First Circuit, or the Supreme Court suggests that the plaintiffs’ private right of action depends upon § 1983.

217. See Lorillard Tobacco Co. v. Reilly, 555 U.S. 525, 540–50 (analyzing a FCLAA preemption claim without any reference to § 1983). The Supreme Court opinion does not explicitly discuss the question of an appropriate remedy. The plaintiffs sought both declaratory and injunctive relief, see Lorillard Complaint, supra note 198, but the initial district court opinion granted only declaratory relief. See Lorillard Tobacco Co. v. Reilly, 76 F. Supp. 2d 124, 135 (D. Mass. 1999). Neither the First Circuit opinion nor the Supreme Court opinion discusses the possibility of injunctive relief. Accordingly, the Supreme Court’s decision to remand the case “for further proceedings consistent with this opinion,” Lorillard, 555 U.S. at 571, appears to require only a declaratory judgment.

complaint alleged that the Massachusetts Burma law "intrudes upon the federal government's exclusive foreign-relations powers" and "violates the Foreign Commerce Clause." Additionally, the complaint alleged that a federal statute imposing sanctions on Burma preempted the Massachusetts Burma law. The complaint does not explicitly identify the source of the private right of action for plaintiff's preemption claim. The defendant vigorously contested the merits of the preemption claim but never challenged the existence of a private cause of action that enabled the plaintiffs to bring the preemption claim. In short, the parties in Crosby all tacitly assumed the existence of a generally available private cause of action for Shaw preemption claims that does not depend upon either the preemptive federal statute or 42 U.S.C. § 1983.

The district court did not rule on the plaintiff's preemption claim; it enjoined enforcement of the Massachusetts Burma Law on the grounds that it "impermissibly infringes on the federal government's power to regulate foreign affairs." The First Circuit affirmed the grant of injunctive relief, holding that the state law "is an impermissible intrusion into the foreign affairs power of the national government," that it "violates the Foreign Commerce Clause," and that the federal Burma statute preempted the state law. The Supreme Court affirmed on preemption grounds, without addressing the other two issues. None of the published opinions explicitly

(2001). However, none of the commentators have discussed the source of the private cause of action for the preemption claim in Crosby.


220. Id. ¶ 57.


222. See Crosby Complaint, supra note 219, ¶¶ 58-63.

223. The complaint refers both to the Declaratory Judgment Act and the Supremacy Clause but does not specifically allege that either provision provides a private right of action. See id. ¶ 6 ("This Court has authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201."); id. ¶ 59 (citing Supremacy Clause in support of preemption claim); prayer for relief (requesting a declaratory judgment pursuant to 28 U.S.C. § 2201).

224. See, e.g., Defendants' Answer, Baker (No. 98-CV-10757-JLT) (on file with author) (not contesting the availability of a private cause of action for plaintiff's preemption claim); Defendants' Memorandum in Support of Their Motion for Summary Judgment, Baker (No. 98-CV-10757-JLT) ¶¶ 31-63 (on file with author) (contending that federal law does not preempt the Massachusetts Burma law, but not challenging the availability of a private cause of action for plaintiff's preemption claim); Brief For Defendants-Appellants, Natsios (No. 98-2504) (on file with author) (same); Petitioner's Brief, Crosby (No. 99-474) (on file with author) (same).


227. Id. at 67.

228. Id. at 71-77.

discuss the source of the private cause of action for the plaintiff's preemption claim. As is typical in Shaw preemption cases, the courts simply assumed the availability of a private cause of action, without questioning the source of that right of action.

The federal Burma statute that provided the basis for the plaintiff's preemption claim does not contain an express private cause of action. As neither the text nor the legislative history of the statute manifests a congressional intent to create a private cause of action. The subsequent executive order, which imposed additional sanctions in accordance with section 570(b) of the Act, states explicitly: "Nothing contained in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States... or any other person." The regulations enacted pursuant to the Burma statute do not contain an express private cause of action. In short, neither the federal Burma statute, the executive order, nor the implementing regulations provided the Crosby plaintiff a private right of action.

Nor did 42 U.S.C. § 1983 provide the Crosby plaintiff a private right of action. As noted above, a plaintiff who brings suit under § 1983 to enforce a federal statute must show that "Congress intended to create a federal right" when it enacted the statute. The language of the federal Burma statute does not manifest a congressional intent to create a federal right. The statute has six parts. The first part restricts bilateral and multilateral assistance to Burma and directs the President not to grant entry visas to Burmese government officials. The second part authorizes the President to prohibit U.S. persons from making new investments in Burma. The

231. See id. The legislative history of the Burma sanctions provision is sparse because the provision was adopted as part of an omnibus appropriations bill. The conference report on the relevant portion of that bill does not provide any indication of a congressional intention to create a private right of action. See CONF. REP. on H.R. 3610, Department of Defense Appropriations Act, 1997, 104 CONG. REC. H11644, 11914 (Sept. 28, 1996).
234. The initial complaint in Crosby does not mention § 1983. See Crosby Complaint, supra note 219. The plaintiff added a reference to 42 U.S.C. § 1983 in a subsequent amendment to the complaint. See First Amended Complaint for Declaratory, Injunctive, and Other Relief, Baker (No. 98-CV-10757 (JLT)) (on file with author). However, the purpose of the amendment was to support a claim for attorneys' fees under 42 U.S.C. § 1988, not to provide a private right of action for the preemption claim. See Motion for Leave to Amend Complaint, Baker (No. 98-CV-10757 (JLT)) (on file with author).
237. Id. § 570(a).
238. Id. § 570(b).
third part directs the President to develop a comprehensive, multilateral strategy to improve human rights practices in Burma.\textsuperscript{239} The fourth and fifth parts, respectively, impose a reporting requirement and grant the President authority to waive sanctions.\textsuperscript{240} The final part contains definitions of key terms.\textsuperscript{241} There is simply nothing in the language of the statute that suggests that Congress intended to create a federal right when it enacted the statute.\textsuperscript{242}

One rationale supporting the Supreme Court's preemption holding in \textit{Crosby} was that the Massachusetts law sought to restrict commerce with Burma that the federal law permitted.\textsuperscript{243} In light of this rationale, one might argue that the federal Burma statute is enforceable pursuant to § 1983 because Congress intended, when it enacted the statute, to preserve the right of U.S. companies to engage in any trade with Burma that was not explicitly prohibited by the federal statute. This argument is unpersuasive. The federal Burma statute expressly limits the right of U.S. persons to engage in foreign commerce with Burma.\textsuperscript{244} Of course, any statute that expressly limits a pre-existing right preserves that pre-existing right to the extent that it is not expressly limited. But it is illogical to contend that a statute that restricts a pre-existing right was "intended to create a federal right"\textsuperscript{245} within the meaning of 42 U.S.C. § 1983 simply because the statute does not eliminate the right altogether. That contention is plainly inconsistent with

\begin{itemize}
    \item 239. \textit{Id.} § 570(c).
    \item 240. \textit{Id.} § 570(d)–(e).
    \item 241. \textit{Id.} § 570(f).
    \item 242. At the time \textit{Crosby} was decided, the doctrinal test for determining whether a federal statute created a federal right enforceable under § 1983 was whether Congress "intended that the provision in question benefit the plaintiff." \textit{Blessing v. Freestone}, 520 U.S. 329, 340 (1997). Application of the old standard would not alter the analysis significantly because the federal Burma statute was not intended to benefit the National Foreign Trade Council (NFTC) (the named plaintiff in \textit{Crosby}). The NFTC is a nonprofit corporation that acts as "a leading spokesman on behalf of the private sector for an open international trade and investment regime." \textit{Crosby Complaint}, supra note 219, ¶ 18. The primary purpose of the federal Burma statute is to promote "progress toward democratization in Burma" and to improve "the quality of life of the Burmese people." \textit{Pub. L. No. 104-208}, § 570(d), 110 Stat. 3009-167 (1996). Although the NFTC's members might benefit indirectly from democratization in Burma, insofar as democratization might lead to expanded opportunities for international trade, that hardly qualifies the NFTC as an intended beneficiary of the statute.
\end{itemize}
Supreme Court jurisprudence, which has deliberately limited the availability of § 1983 as a mechanism for enforcing federal statutes. In addition to Crosby and Lorillard, the Supreme Court has decided several pre-Shaw cases, and at least eight post-Shaw cases, in which the Court granted declaratory and/or injunctive relief to plaintiffs who raised Shaw preemption claims. In all those cases, the grant of relief necessarily implies that the plaintiffs had a valid cause of action. In all eight post-Shaw cases, though, it is clear that the preemptive federal statute does not create an express private cause of action. It is true that 42 U.S.C. § 1983 might

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247. See, e.g., Ray v. Atl. Richfield Co., 435 U.S. 151 (1978) (affirming an injunction against the Governor of Washington to prevent enforcement of a state statute that was preempted by a federal statute); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (affirming order enjoining Illinois Attorney General from instituting enforcement proceedings against respondents, on grounds that the state law to be enforced was preempted by federal statute); Hines v. Davidowitz, 312 U.S. 52 (1941) (affirming order enjoining Pennsylvania Secretary of Labor from enforcing Pennsylvania statute on grounds that it was preempted by federal statute).


249. In United States v. Locke, 529 U.S. 89 (2000), the Supreme Court held that Title II of the Ports and Waterways Safety Act of 1972, as amended by the Port and Tanker Safety Act of 1978, created a field preemption rule so that "only the Federal Government may regulate the 'design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning' of tanker vessels." Locke, 529 U.S. at 111. The Court held specifically that 46 U.S.C. § 3703(a) preempted Washington statutes governing the operation and manning of tanker vessels, as well as personnel qualifications and training requirements for tanker crews. Locke, 529 U.S. at 112-14. 46 U.S.C. § 3703(a) is part of Chapter 37 of Title 46 of the U.S. Code. Chapter 37 imposes civil and criminal penalties for violations. See 46 U.S.C. § 3718 (2000). However, Chapter 37 does not contain any express private cause of action. See 46 U.S.C. §§ 3701-3719 (2000). Similarly, the Ports and Waterways Safety Act of 1972, as amended by the Port and Tanker Safety Act of 1978, imposes civil and criminal penalties for violations. See Pub. L. No. 95-474, 92 Stat. 1471, 1478 (1978). The Act also provides that U.S. "district courts shall have jurisdiction to restrain violations of this Act." Id. at 1478-79. However, neither the Ports and Waterways Safety Act nor the Port and Tanker Safety Act creates an express private cause of

In *Foster v. Love*, 522 U.S. 67, 74 (1997), the Supreme Court held that Louisiana's open primary statute was preempted by federal statutes that regulate the timing of elections. 2 U.S.C. §§ 1, 7. When the Supreme Court decided *Foster*, neither of the specific statutory sections at issue in that case, nor any other provision of Chapter 1 of Title 2 of the U.S. Code, contained any express private cause of action. See 2 U.S.C. §§ 1-9 (1994).


In *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 109 (1992), the Supreme Court held that Illinois licensing statutes were preempted by the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (2000), "to the extent they establish occupational safety and health standards for training those who work with hazardous wastes." When the Supreme Court decided *Gade*, the Occupational Safety and Health Act contained a variety of remedial provisions, including: administrative enforcement procedures, 29 U.S.C. § 659 (1988); authorization for aggrieved persons to obtain judicial review of orders issued by the Occupational Safety and Health Review Commission, 29 U.S.C. § 660(a) (1988); authorization for the Secretary of Labor to enjoin employment conditions deemed to be imminently dangerous, 29 U.S.C. § 662(a) (1988); authorization for injured employees to obtain a writ of mandamus against the Secretary of Labor if he or she arbitrarily or capriciously fails to restrain dangerous employment conditions, 29 U.S.C. § 662(d) (1988); various civil and criminal penalties, 29 U.S.C. § 666 (1988); and authorization for States to obtain judicial review of certain decisions by the Secretary of Labor, 29 U.S.C. § 667(g) (1988). However, the Act did not contain an express private cause of action to enjoin enforcement of state laws preempted by the Act. See 29 U.S.C. §§ 651-678 (1988).

In *Morales v. Trans World Airlines*, 504 U.S. 374, 391 (1992), the Supreme Court held that numerous state deceptive advertising laws, as applied to advertising by airlines, were preempted by the Airline Deregulation Act, 49 U.S.C. app. §§ 1301-1557. When the Supreme Court decided *Morales*, the Airline Deregulation Act contained a variety of remedial provisions, including: authorization for persons to file complaints with the Secretary of Transportation or the Civil Aeronautics Board, 49 U.S.C. app. § 1482(a) (1988); authorization for the Secretary or the Board to compel compliance with the Act, 49 U.S.C. app. § 1482(c) (1988); procedures for judicial review of orders issued by the Board or the Secretary, 49 U.S.C. app. § 1486 (1988); and authorization for the Board or Secretary to bring suit in federal district court to enjoin violations of the Act, 49 U.S.C. app. § 1487 (1988). The Act also contained an express preemption provision. 49 U.S.C. app. § 1305(a) (1988). However, the Act did not contain an express private cause of action to enjoin enforcement of state laws preempted by the Act. See 49 U.S.C. app. §§ 1301-1557 (1988).


In *Lawrence County v. Lead-Deadwood School District*, 460 U.S. 256, 258-68 (1985), the Supreme Court held that a South Dakota statute regulating the distribution of federal funds was preempted by the Payment in Lieu of Taxes Act, 31 U.S.C. § 6902 et seq. When the Supreme

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supply a private right of action for some Shaw preemption claims. However, in all eight post-Shaw cases in which the Supreme Court granted relief, neither the Supreme Court opinion nor any published lower court opinion indicates that the plaintiffs had a private cause of action under § 1983.250

The Court's decision to grant relief in these cases (in addition to Crosby and Lorillard) yields two possible conclusions. Either the decision to grant relief was erroneous because plaintiffs lacked a valid right of action, or there is a generally available private cause of action for Shaw preemption claims that does not depend upon the preemptive federal statute or 42 U.S.C. § 1983.251 Such a generally available right of action might be derived either

Court decided Lawrence County, the Payment in Lieu of Taxes Act did not contain any express private right of action. See 31 U.S.C. §§ 6901–6906 (1982).

In Capital Cities Cable v. Crisp, 467 U.S. 691, 705–06 (1984), the Supreme Court held that an Oklahoma law prohibiting advertisements for alcoholic beverages on cable television was preempted by regulations promulgated by the Federal Communications Commission (FCC) under the authority of Chapter 5 of Title 47 of the U.S. Code, 47 U.S.C. §§ 151–610. When the Supreme Court decided Capital Cities, Chapter 5 of Title 47 contained extensive remedial provisions. For example, if a person failed to obey an FCC order, the statute authorized "any party injured thereby" to bring suit for an injunction in federal district court. 47 U.S.C. § 401(b) (1982). The statute also authorized private actions for writs of mandamus against "carriers" (defined in § 153(h)) who committed specified statutory violations. 47 U.S.C. § 406 (1982). Additionally, the statute authorized the FCC to conduct adjudicative hearings. 47 U.S.C. § 409 (1982). However, the statute did not create an express private cause of action for individuals to enjoin enforcement of state laws that are preempted by federal communications laws or by FCC regulations. See 47 U.S.C. §§ 151–610 (1982).


251. One might object that the Supreme Court's silence on the private right of action issue merely indicates that the parties did not present the issue to the Court. However, the decision
from the Supremacy Clause or from the Declaratory Judgment Act. Part V provides a policy justification for a Supremacy Clause right of action for Shaw preemption claims.

V. AN IMPLIED RIGHT OF ACTION UNDER THE SUPREMACY CLAUSE

Part V presents a policy justification for an implied right of action under the Supremacy Clause for Shaw preemption claims. The argument is divided into three sections. The first section articulates the broad policy goals that are served by permitting private plaintiffs to bring Shaw preemption claims. The second section analyzes the marginal benefit to be gained by recognizing an implied right of action under the Supremacy Clause for Shaw preemption claims, in light of the broad range of other remedial mechanisms that are potentially available for obtaining judicial decisions on preemption issues. The final section considers whether a Supremacy Clause right of action should extend to Shaw claims in which a plaintiff alleges that a federal Spending Clause statute preempts a state law or regulation.

A. BROAD POLICY GOALS

Explicit recognition of an implied right of action under the Supremacy Clause would serve two broad policy goals: promoting the rule of law and ensuring the supremacy of federal law. Under the Articles of Confederation, laws enacted by the Continental Congress were theoretically binding on the states. However, if a particular state chose to disregard a particular federal law, the Articles of Confederation did not provide any mechanism for securing state compliance with federal law. As Alexander Hamilton observed with respect to laws enacted by the Continental Congress: "though in theory their resolutions . . . are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option."252 The Framers adopted the Supremacy Clause to remedy this "great and radical vice"253 in the Articles of Confederation. By its terms, the Supremacy Clause embeds a fundamental conflict of laws rule in the text of the Constitution: courts are instructed to apply federal law in the event of a conflict between state and federal law.254

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253. Id. at 31.
254. The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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." U.S. CONST. art. VI, cl. 2.
Thus, the Supremacy Clause was designed to remedy one of the chief defects in the Articles of Confederation by instructing courts to resolve state-federal conflicts in favor of federal law, thereby helping to ensure that federal law would be supreme over state law, not just in theory, but also in practice.

Private rights of action that enable plaintiffs to bring Shaw preemption claims help promote the federal interest in the supremacy of federal law. Granted, there are many other remedial mechanisms that also help promote this policy objective. But claims alleging preemption of state law by federal law are closely linked to federal supremacy interests because the Supremacy Clause creates a constitutional rule that federal statutes preempt conflicting state laws.\(^{255}\) The close link between Shaw preemption claims and federal supremacy interests is evidenced by the fact that courts and commentators have identified the Supremacy Clause as the source of the Shaw right of action.\(^{256}\)

Shaw preemption claims also help to promote the rule of law. Although the precise meaning of the phrase "rule of law" is disputed, most courts and commentators would agree that the rule of law ideal requires that individuals have some access to courts in order to challenge conduct by government officials that allegedly violates the law.\(^{257}\) It is not possible, and not even desirable, for courts to provide judicial remedies for every infraction committed by government officers.\(^{258}\) But if the rule of law is to be a practical reality, the overall system of judicial remedies "must be adequate to keep government generally within the bounds of law."\(^{259}\) Shaw preemption claims—that is, private suits against state and local government officers to enjoin enforcement of state and local laws that are preempted by federal statutes—promote the rule of law by helping to ensure that state and local governments remain within the bounds of federal law.

In addition to keeping government within the bounds of law, the rule of law ideal also aims to "allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various

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255. See, e.g., Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992) ("But under the Supremacy Clause, from which our pre-emption doctrine is derived, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."" (citing Felder v. Casey, 487 U.S. 131, 138 (1988) (citation omitted))).

256. See supra notes 191–92 and accompanying text.

257. See, e.g., Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 8–9 (1997) (identifying five elements that constitute the rule of law, including the notion that "[t]he law should rule officials... as well as ordinary citizens," and the idea that "[c]ourts should be available to enforce the law.

258. In recognition of the fact that it is not desirable to provide judicial remedies for every infraction by government officers, the Supreme Court has crafted the doctrine of official immunity to limit the individual liability of government officers. See CHEMERINSKY, supra note 31, at 493–523.

actions.\textsuperscript{260} Shaw preemption cases also implicate this aspect of the rule of law ideal. In the United States, companies and individuals are subject to both state and federal regulation. If federal law permits what state law prohibits, or state law permits what federal law prohibits, it may be difficult for companies and individuals subject to both state and federal regulation to determine the legal consequences of their actions. Shaw preemption claims promote the rule of law by enabling companies and individuals to obtain authoritative judicial decisions about the relationship between state and federal law so that they can understand the legal consequences of their actions.

I consider below the extent to which Shaw preemption claims are necessary, in light of other available remedial mechanisms, to vindicate federal supremacy interests and protect the rule of law. At present, it is sufficient to note that Shaw preemption claims constitute one available remedial mechanism that helps to promote the practical realization of federal supremacy and rule of law objectives.

\textbf{B. OTHER AVAILABLE REMEDIAL MECHANISMS}

Regardless of whether there is an implied right of action under the Supremacy Clause for Shaw preemption claims, there are five other remedial mechanisms that could be utilized to obtain judicial resolution of preemption controversies between states and private parties:\textsuperscript{261}

\begin{itemize}
\item Suits initiated by the federal government to enjoin enforcement of a state law, or to obtain a declaration that a state law is preempted;
\item Suits initiated by state governments to obtain a judicial declaration that a state law is not preempted;
\item Suits initiated by state governments to enforce state laws, in which the defendant raises a federal preemption defense;
\item Suits filed by private plaintiffs who rely on a federal statutory cause of action, such as 42 U.S.C. § 1983 or the Declaratory Judgment Act;
\item Suits filed by private plaintiffs who rely on a state law cause of action, such as a state declaratory judgment statute.
\end{itemize}

\textsuperscript{260} Fallon, \textit{supra} note 257, at 7–8.

\textsuperscript{261} Preemption issues often arise as a defense in a state tort law case in which the plaintiff and defendant are both private parties. \textit{See}, e.g., Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 893–94 (2000). Cases involving preemption disputes between private parties are outside the scope of this Article. The focus, here, is on cases in which state and/or local government officials are parties.
The policy argument for an implied right of action under the Supremacy Clause must be evaluated in light of these alternative remedial mechanisms. The following section briefly explains why the first three options are inadequate to promote the federal supremacy and rule of law objectives outlined above. The remaining sections address the following potential sources of a private right of action: the preemptive federal statute, 42 U.S.C. § 1983, the Declaratory Judgment Act, and state law rights of action.

1. Suits Initiated by Governments

Suits initiated by the federal government are an inadequate remedial mechanism because the federal government does not have sufficient litigation resources to police all, or even most, of the preemption disputes between states and private parties. Exclusive reliance on this mechanism would result in judicial resolution of only a small fraction of such disputes. Without judicial resolution of such controversies, there would be lingering uncertainty regarding the validity of state laws. Uncertainty about the validity of state laws would undermine the rule of law, because private actors would not know the legal consequences of their actions. Additionally, absent judicial resolution of preemption disputes, states would presumably continue to enforce state laws that might be invalid. On-going enforcement of invalid state laws undermines federal supremacy and is inconsistent with the goal of keeping government within the bounds of law. Therefore, exclusive reliance on suits initiated by the federal government is not an effective mechanism for addressing the rule of law and federal supremacy goals outlined above.

Suits initiated by state governments to obtain a judicial declaration that a state law is not preempted are subject to similar criticisms. State governments, like the federal government, have limited litigation resources. In light of resource constraints, a state attorney general is far more likely to attempt to resolve uncertainties about whether a state law is preempted by initiating a judicial proceeding to enforce the state law, and responding to a potential preemption defense, rather than suing for a declaratory judgment that the state law is not preempted. Thus, declaratory judgment actions initiated by state governments are not an adequate remedial mechanism for accomplishing the broad policy goals at stake in Shaw preemption cases.

262. In the United States legal system, courts are the only institutions capable of providing authoritative resolution of preemption disputes between states and private parties.

263. State executive officials generally have a duty to enforce state laws. Absent a judicial order declaring the state law invalid, or a judicial order enjoining enforcement of the law, state officials will presumably carry out their duty to enforce the law.

264. In Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983), California did both at once. A state agency filed suit in state court to enforce the state law, and to obtain a judicial declaration that the state law was not preempted. See id. at 5–6.
Enforcement actions initiated by state governments are a more effective remedial mechanism for obtaining judicial resolution of preemption disputes between states and private parties. If a state government chooses not to initiate an enforcement action, then the preemption "dispute" may be resolved, as a practical matter, through government inaction. If the government does initiate an enforcement action, then the defendant has the option of raising a federal preemption defense. If the federal preemption defense prevails, the state government will be barred from enforcing the state law. Therefore, in cases where a federal statute does preempt state law, the federal interest in the supremacy of federal law will arguably be vindicated either by a state government's decision not to enforce the state law or by a judicial decision barring enforcement.

However, the preceding argument in favor of state enforcement actions ignores three crucial points. First, even on its own terms, the argument fails to address the broad policy objective of allowing "people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions." Indeed, if the only remedial option available to private parties is to await government enforcement action so that they can raise a federal preemption defense, then they cannot know in advance the legal consequences of their actions.

Second, if a private party must await state enforcement action to obtain judicial resolution of its preemption claim, the private party might reasonably decide to comply with the state law, even though it believes that the state law is invalid, rather than risk the sanctions that would be imposed if its preemption defense fails. Consequently, if the sanctions for noncompliance with a state law are sufficiently severe, and the costs of compliance are relatively small, a state government might be able to enforce compliance with an invalid law because the law would never be challenged in court. On-going state enforcement of an invalid law threatens the

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265. If the state government attempted to enforce the state law in a subsequent action against a different party, the defendant in the subsequent action could raise an issue preclusion defense. This is known as "non-mutual defensive issue preclusion." The validity of such a defense in state court is governed by state law. However, since the Supreme Court's decision in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), the trend has been in favor of recognizing this type of preclusion defense. See DAVID L. SHAPIRO, CIVIL PROCEDURE PRECLUSION IN CIVIL ACTIONS 106-09 (2001).

266. Fallon, supra note 257, at 7-8.

267. See EDWIN BORCHARD, DECLARATORY JUDGMENTS 966-67 (2d ed. 1941).

268. This consideration is central to the rationale underlying Ex parte Young and its progeny. See Ex parte Young, 209 U.S. 123, 144-45 (1908). The Court stated that the plaintiffs' property is liable to be taken without due process of law because [the company] is only allowed a hearing upon the claim of the unconstitutionality of the acts and orders in question, at the risk, if mistaken, of being subjected to such enormous penalties... that rather than take such risks the company would obey the laws....

Id.
supremacy of federal law and fails to keep state government within the bounds of federal law.

Third, there are some cases where a preemption claim cannot be raised defensively in a state enforcement action. Recall *Crosby v. National Foreign Trade Council*.*269* Massachusetts enacted a law that barred government procurement of goods and services from companies doing business with Burma.*270* Under the law, denial of government contracts was the "sanction" imposed on companies that continued to do business with Burma. The government of Massachusetts has the power to impose that sanction without initiating any judicial proceeding. Therefore, in cases like *Crosby*, if private parties do not have some sort of remedial mechanism that allows them to raise their preemption claim offensively, they will be unable to obtain a judicial decision concerning the validity of the state law that is allegedly preempted. Consider the predicament of a hypothetical company that does one million dollars worth of business annually with Burma, and one million dollars annually with the State of Massachusetts. If the company had no opportunity to raise its preemption claim offensively, then Massachusetts could effectively deprive the company of one million dollars worth of business by enforcing a law whose validity would completely escape judicial review.*271*

In light of the above considerations, it is evident that government-initiated lawsuits do not provide an adequate remedial mechanism for resolving preemption disputes between state governments and private parties. To provide sufficient protection for the federal supremacy and rule of law values that are at stake in *Shaw* preemption cases, there must be one or more remedial mechanisms that allow private parties to raise preemption claims offensively against state officers. Those remedial mechanisms are discussed below.

2. Rights of Action Based on the Preemptive Federal Statute

One option for plaintiffs who wish to raise *Shaw* preemption claims against state officers is to allege a right of action under the preemptive federal statute. However, most federal statutes that are at issue in *Shaw* preemption cases do not create an express private cause of action for

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270. *See* 530 U.S. at 366–68.
271. Under the scenario described here, a company that decided to continue doing business with Burma, and that was denied a contract with the State of Massachusetts as a result, could potentially raise a constitutional due process claim challenging the validity of the Massachusetts law. But even assuming that the claim would succeed, which is far from certain, an after-the-fact due process remedy would not provide the company advance notice of the legal consequences of its actions. In light of the risks, the company might reasonably decide to discontinue business with Burma, thereby enabling Massachusetts to continue enforcing its invalid law.
injunctive relief against state officers. Other statutes that do create an express private cause of action for a limited class of plaintiffs are silent with respect to other potential plaintiffs who may wish to bring Shaw preemption claims. Therefore, if an express statutory cause of action in the preemptive federal statute were the only remedial option available for Shaw preemption plaintiffs, many Shaw preemption claims that have heretofore been litigated in federal court would have to be litigated in state court.

Plaintiffs might attempt to overcome the absence of an express private cause of action by asserting an implied cause of action under the preemptive statute, but this approach is unlikely to succeed. In the Cort v. Ash line of cases, the Supreme Court has adopted a strong presumption against implication of private rights of action in suits to enforce federal statutes. Plaintiffs can overcome that presumption by providing affirmative evidence of congressional intent to create a private cause of action. However, the absence of an express private cause of action in a statute is generally viewed as prima facie evidence that Congress did not intend to create a private cause of action. Thus, a plaintiff who seeks to overcome the presumption against implication of private rights of action must provide clear evidence of congressional intent.

One could argue that the Shaw line of cases should be rejected because Shaw's unstated presumption in favor of implied rights of action to enforce federal statutes is inconsistent with Cort's explicit presumption against implied rights of action to enforce federal statutes. I contend, though, that Shaw and Cort are distinguishable, and that both lines of cases generally make sense. Specifically, Cort v. Ash and its progeny support a presumption against a statutory implied right of action for claims against private defendants. Shaw and its progeny support a presumption in favor of a

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272. See supra note 249 and accompanying text.

273. This was true in Shaw, where ERISA creates a private cause of action, but the express right of action in the statute did not apply to the plaintiffs in Shaw. See Sloss, supra note 33, at 1177–78.

274. Cort v. Ash, 422 U.S. 66, 78 (1975), identified four factors for courts to consider when deciding whether to imply a private cause of action for a federal statute. Congressional intent to create a private cause of action was only one of the four factors. See id. However, Cort represented a shift towards a more cautious approach to implied rights of action. See FALLON ET AL., supra note 32, at 781–82. Subsequent cases, following that more cautious approach, have generally refused to recognize implied rights of action for federal statutes, absent clear evidence of congressional intent to create a private cause of action. See, e.g., Karahalios v. Nat'l Fed'n of Fed. Employees, 489 U.S. 527, 532–33 (1989); Univs. Research Ass'n v. Coutu, 450 U.S. 754, 770 (1981); TransAmerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15–16 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979).


Supremacy Clause right of action for claims for injunctive relief against state or local governments or officers.

There are three considerations that justify opposing presumptions in the two types of cases. First, in suits for injunctive relief against state and local government officers, the Shaw presumption in favor of an implied right of action is justified by the federal interest in promoting the supremacy of federal law and keeping state governments within the bounds of law. In contrast, claims against private defendants charged with federal statutory violations do not implicate federal supremacy concerns because there are no state government interests at stake. Similarly, such cases have no relevance to the goal of keeping government within the bounds of law because government conduct is not at issue. Thus, whereas the presumption in favor of an implied right of action for Shaw preemption claims is justified by rule of law and federal supremacy objectives, the presumption against an implied right of action in suits against private defendants is justified, in part, because those cases do not implicate rule of law and federal supremacy goals to nearly as great a degree.

Second, the Cort line of cases is concerned with statutory rights of action. The presumption against an implied statutory right of action is justified by a separation of powers rationale: the task of creating statutory rights of action is primarily a task for Congress, not the courts. In contrast, Shaw cases tacitly assume a constitutional right of action. Granted, the substantive law at issue in Shaw preemption cases is statutory, not constitutional law. But the derivative action); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (suit against accountants); Cort v. Ash, 422 U.S. 66 (1975) (suit by stockholder against corporate directors).

In more than twenty-five years since Cort, there have been only two cases in which the Supreme Court has unambiguously applied the Cort v. Ash approach to claims for injunctive relief against government officers. See Alexander v. Sandoval, 532 U.S. 275 (2001) (suit for injunctive relief against Alabama government officer); California v. Sierra Club, 451 U.S. 287 (1981) (suit for injunctive relief against California government officials). This Article contends that Sandoval was wrongly decided because it should have been treated as a Shaw case, not a Cort case. See infra notes 403-18 and accompanying text. I made a similar argument with respect to Sierra Club in a previous article. See Sloss, supra note 33, at 1187-89.

In addition to Sierra Club and Sandoval, a portion of the Court's opinion in Suter v. Artist M., 503 U.S. 347 (1992), arguably applies the Cort v. Ash test to a claim for prospective relief against a state government officer. Id. at 363-64. However, the Court devoted most of its opinion in Suter to the plaintiffs' § 1983 claims. See id. at 355-63. Thus, although the Court's opinion in Suter is open to differing interpretations, Suter is perhaps best explained as an early precursor of Gonzaga Univ. v. Doe, 536 U.S. 273 (2002), which limited the availability of § 1983 as a remedial mechanism for enforcing federal statutory rights.

277. See supra notes 252-60 and accompanying text.

278. Some claims for money damages between private parties do implicate federal supremacy issues. One example is a case in which the plaintiff files a state tort action and the defendant raises a federal preemption defense. However, cases in which a private party seeks to enforce a federal statute against another private party have no relevance to federal-state relations.

279. See, e.g., TransAmerica Mortgage Advisors, 444 U.S. at 15-16; Touche Ross, 442 U.S. at 578.
remedy in *Shaw* preemption cases is a constitutional remedy, rooted in the Supremacy Clause. That Supremacy Clause remedy applies only to claims against state and local officers because claims against those defendants implicate federal supremacy interests in a way that claims against private defendants do not. Whereas the task of creating statutory rights of action is primarily a legislative function, the task of crafting constitutional remedies is primarily a judicial function. Hence, separation of powers considerations support a different approach in *Shaw* cases than in *Cort* cases.

Application of opposing presumptions in the two categories of cases also accords with likely congressional intent. In federal statutory claims against private defendants, if the statute does not provide an express private right of action against private parties then the presumption that Congress did not intend to provide such a remedy generally accords with legislative reality. This is especially true for statutes enacted within the past twenty-five years. Beginning with *Cort v. Ash*, the Supreme Court has effectively given Congress notice that if Congress wants to create a private cause of action against private defendants, it must say so explicitly.

In contrast, in *Shaw* preemption cases, if the federal statute does not create an express private right of action for injunctive relief against state officers the presumption that Congress did not intend to provide such a remedy does not accord with legislative reality. To the contrary, the Supreme Court’s consistent practice in *Shaw* preemption cases justifies a congressional assumption that an express private cause of action for *Shaw* preemption claims is unnecessary because courts provide injunctive relief in meritorious *Shaw* preemption cases, regardless of whether the preemptive federal statute creates an express private cause of action. Granted, it is fair to assume that Congress would not want a court to provide a remedy in a *Shaw* preemption case if the plaintiff lacked Article III standing, if the requirements for injunctive relief were not satisfied, or if the preemption claim lacked merit. But if the plaintiff does have Article III standing, the requirements for equitable relief are satisfied, and the preemption claim is meritorious, denial of a judicial remedy would undermine federal supremacy and subvert the rule of law by enabling state officers to proceed with enforcement of an invalid state law, to the detriment of private parties. Thus, it defies reality to presume that congressional silence on the question

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281. See supra notes 247–51 and accompanying text.
282. In a federal statutory case, the plaintiff has Article III standing only if the plaintiff has suffered "injury in fact," the defendant's statutory violation caused the injury, and there is a likelihood that the requested relief will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).
283. To obtain injunctive relief a plaintiff must show that he has no adequate remedy at law, and that he will suffer irreparable harm if injunctive relief is denied. See *DOBBS*, supra note 187, at 86–92.
of injunctive relief against state officers manifests a congressional intent to deny such relief.\textsuperscript{284}

In sum, neither express nor implied statutory rights of action based on the preemptive federal statute provide an adequate remedial mechanism for \textit{Shaw} preemption plaintiffs. The \textit{Cort v. Ash} implied right of action doctrine is appropriate for federal statutory claims against private defendants. But \textit{Shaw} preemption plaintiffs should not be constrained by \textit{Cort}'s narrow focus on congressional intent to create a private cause of action. For \textit{Shaw} preemption claims, judicial implication of a constitutional right of action is justified by federal supremacy and rule of law objectives. Indeed, judicial reticence to imply a Supremacy Clause right of action for \textit{Shaw} preemption claims would be contrary to Congress's presumed intent to ensure that state and local government officers do not systematically violate federal statutes.\textsuperscript{285}

3. Section 1983 and \textit{Shaw} Preemption Claims

Thus far, Part V has suggested that there should be one or more remedial mechanisms that allow private parties to raise preemption claims offensively against state officers in order to provide sufficient protection for the federal supremacy and rule of law values that are at stake in \textit{Shaw} preemption cases. The preceding section showed that statutory rights of action based on the preemptive federal statute are inadequate remedial mechanisms due to a presumption against implied rights of action under federal statutes. Hence, the question arises whether 42 U.S.C. § 1983 provides an adequate remedial mechanism for \textit{Shaw} preemption claims.

42 U.S.C. § 1983 authorizes both "action[s] at law" and "suit[s] in equity" against state and local government officers who subject any person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."\textsuperscript{286} Section 1983 provides a cause of action against state officers not only for violations of constitutional rights, but also for

\textsuperscript{284} Justice Souter makes a similar point in his dissent in \textit{Seminole Tribe}.

I do not in theory reject the Court's assumption that Congress may bar enforcement [of a federal statute] by suit [for injunctive relief] against a state official. But because in practice, in the real world of congressional legislation, such an intent would be exceedingly odd, it would be equally odd for this Court to recognize an intent to block the customary application of \textit{Ex parte Young} without . . . a clear statement [of] congressional purpose to [do so].


\textsuperscript{285} Scholarly literature justifies the presumption against implied rights of action, in part, by noting that Congress may be wary of over-enforcement of federal statutes. \textit{See}, e.g., Frankel, \textit{supra} note 37, at 572–78. That argument does not apply to \textit{Shaw} claims, though. The \textit{Shaw} right of action provides a remedy for systematic violations of federal law by state officers. Assuming that Congress is wary of over-enforcement of federal statutes, that concern does not apply to systematic violations of federal law by state officers.

violations of federal statutory rights. Therefore, §1983 provides a private cause of action for some Shaw preemption claims.

However, the Court has emphasized that, to obtain redress under §1983, "a plaintiff must assert the violation of a federal right, not merely a violation of federal law." Hence, even 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. Therefore, analysis of the policy implications of an implied right of action under the Supremacy Clause must assess the marginal benefit of providing a private cause of action for Shaw preemption claims that would not succeed under section 1983 because the preemptive federal statute does not create a "federal right." To address that question, it is helpful to consider a concrete example. In Gonzaga University v. Doe, a former student sued Gonzaga University under §1983 for an alleged violation of the Family Educational Rights and Privacy Act (FERPA). FERPA states, in relevant part: "No funds shall be made available . . . to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students" without the written consent of the student or a parent. Plaintiff had hoped to get a job as a public school teacher in the State of Washington after graduating from Gonzaga. However, without plaintiff's consent, the University released certain damaging information to the state agency

290. Of course, even if the Supreme Court explicitly recognizes an implied cause of action under the Supremacy Clause for Shaw preemption claims, some Shaw plaintiffs with meritorious preemption claims will invariably lose on other grounds, such as lack of standing. But those other grounds also apply to claims brought under §1983. The only factor that distinguishes a §1983 claim from a Supremacy Clause claim is that plaintiffs must establish a "federal right" to bring a Shaw preemption claim under §1983.
291. Even where a statute creates a federal right, a remedy is not available under §1983 if Congress specifically foreclosed the remedy. See supra note 189. A similar limitation applies to claims based on an implied right of action under the Supremacy Clause. See supra notes 188–89 and accompanying text.
293. In light of the fact that §1983 is generally available only for claims against state officers, readers may wonder why the plaintiff in Gonzaga Univ. was able to bring a 1983 claim against Gonzaga, a private university. The Supreme Court provides the answer. "The Washington Court of Appeals and the Washington Supreme Court found [defendants] to have acted 'under color of law' for purposes of §1983 when they disclosed [plaintiff's] personal information to state officials . . . ." Id. at 277 n.1.
responsible for teacher certification. As a result, he was unable to obtain certification. Plaintiff alleged a violation of his right, protected under FERPA, not to have education records released without his consent. The Supreme Court held that plaintiff could not bring a claim under § 1983 because FERPA does not create a "federal right."

Suppose, hypothetically, that the State of Washington enacted a law compelling private universities, such as Gonzaga, to release to state agencies certain education records that FERPA prohibits universities from disclosing. Assume, further, that the state statute imposes a penalty on any university that refuses to disclose the necessary information. A university might seek to bring a Shaw preemption claim to enjoin enforcement of the state law on the grounds that FERPA prohibits the disclosures that state law requires. The university could not bring suit directly under FERPA because FERPA does not create a private cause of action. Similarly, the university could not bring suit under § 1983 because the Supreme Court held that FERPA is not enforceable under § 1983. Thus, the question arises whether the university has an implied right of action under the Supremacy Clause.

If there is no remedial mechanism that permits the university to raise a claim offensively, then the university must either: (1) disclose the information in violation of federal law; or (2) refuse disclosure, refuse to pay the penalty, and plan on raising a federal preemption defense in a subsequent state enforcement proceeding; or (3) refuse disclosure and pay the penalty. The first two options both subject the university to the uncertainty of not knowing the legal consequences of its actions. Disclosure

295. 536 U.S. at 277.
296. Id. at 277.
297. See id. at 286–91.
298. This hypothetical case is similar to United States v. Miami University, 294 F.3d 797 (6th Cir. 2002). In that case, the Ohio Supreme Court issued a writ of mandamus, based on state law, compelling Miami University to release certain student records to a student newspaper. Id. at 803. The university sought U.S. Supreme Court review, but the Court denied certiorari. Id. Subsequently, the U.S. Department of Education determined that the university would be violating FERPA if it complied with the Ohio Supreme Court’s order. Id. at 804. Accordingly, the United States brought suit in federal court against the university to prevent disclosure of the student records that the Ohio Supreme Court had ordered the university to disclose. Id. at 804–05.
299. The Supreme Court’s analysis in Gonzaga University makes clear that the conclusion that FERPA does not create a federal right necessarily means that there is no private cause of action under the statute. See Gonzaga Univ., 536 U.S. at 282–85.
300. Id. at 286–90. One might attempt to distinguish this hypothetical case from Gonzaga Univ. by noting that the plaintiff in Gonzaga University was a student, whereas the plaintiff in this hypothetical is a university. That distinction is unavailing, though, because the purpose of the statutory provision at issue is to protect the privacy rights of students and parents. Hence, given that the statute does not create a “federal right” for students and parents, it is untenable to claim that it creates a “federal right” for universities.
risks a possible federal sanction. Non-disclosure and refusal to pay the penalty risks a possible state sanction (if the university's federal preemption defense fails). The only option that enables the university to determine with confidence the legal consequence of its actions is to refuse disclosure and pay the penalty. But—assuming that FERPA actually preempts the state law—that option undermines federal supremacy and fails to keep state government within the bounds of law because it allows the state, in practice, to disregard supreme federal law and enforce its own (invalid) law. Moreover, the third option is incompatible with rule of law values because a private entity should not be forced to pay a penalty for its refusal to comply with an invalid law.

The preceding example demonstrates that a remedial system that provides no option for plaintiffs to raise Shaw preemption claims offensively is incompatible with important federal supremacy and rule of law ideals. Since there are a range of potential Shaw preemption claims involving statutes, such as FERPA, that are not enforceable under § 1983, there is a clear need for a general right of action for Shaw preemption claims that is not tied to § 1983. Therefore, the Supreme Court should hold explicitly that the Supremacy Clause creates an implied cause of action for Shaw preemption claims.

One possible response to the preceding argument is that it should be recast as a critique of the Supreme Court's current interpretation of § 1983. If the Court construed § 1983 to provide a private cause of action for suits to enforce all federal laws, not just those that create federal rights, then there would be no need for an implied right of action under the Supremacy Clause.

The difficulty with this argument is that § 1983 applies both to claims for money damages and to claims for injunctive relief. There are sound reasons for applying one set of remedial criteria to claims for money damages against state officers, and a different set of remedial criteria to claims for injunctive relief against state officers. As noted above, claims for

301. FERPA bars federal funds for any educational institution that "has a policy or practice of permitting the release of education records . . . ." 20 U.S.C. § 1232g(b)(1) (2000). In this hypothetical case, even a single decision to release information for the purpose of ensuring compliance with state law might constitute a "policy" of permitting release that would trigger termination of federal funds.

302. One potential objection to this argument is that there are state law causes of action that enable plaintiffs to raise Shaw preemption claims offensively. For a response to this objection, see infra notes 337-51 and accompanying text.

303. Indeed, the Court already does this. For example, claims for retrospective money damages against state officers in their official capacities are considered claims against the state and are barred by sovereign immunity. See, e.g., Kentucky v. Graham, 473 U.S. 159 (1985); Edelman v. Jordan, 415 U.S. 651 (1974); Ford Motor Co. v. Dep't of the Treasury, 323 U.S. 459 (1945). However, claims for prospective injunctive relief against state officers in their official capacities are not considered claims against the state and are not barred by sovereign immunity. See, e.g., Edelman v. Jordan, 415 U.S. 651 (1974); Ex parte Young, 209 U.S. 123 (1908).
prospective injunctive relief, which are necessarily forward-looking, provide an important mechanism to "allow people to... know in advance the legal consequences of various actions." In contrast, claims for retrospective money damages, which are necessarily backward-looking, are less useful for promoting this rule of law ideal.

Moreover, claims for prospective injunctive relief typically address systemic violations, as opposed to ad hoc violations. In fact, plaintiffs who are victims of ad hoc violations generally do not have standing to sue for prospective injunctive relief. A remedial system that is expected to "keep government generally within the bounds of law" and to protect the federal interest in the supremacy of federal law can tolerate a certain amount of ad hoc violations by state officers, but it cannot tolerate systemic violations of federal law by state officers. The availability of prospective injunctive relief against state officers is essential to remedy systemic violations of federal law by state officers. In contrast, although claims for money damages can also be used to remedy systemic violations in some cases, the availability of a damages remedy is less crucial for promoting the rule of law and federal supremacy goals discussed above.

One might legitimately ask how, if at all, the distinction between injunctive relief and money damages relates to the preceding distinction between statutes that create "federal rights," which are enforceable under § 1983, and statutes that do not create "federal rights," which are not enforceable under § 1983. The answer to this question begins with the recognition that there are two distinct sources of a private cause of action for federal statutory claims against state officers (apart from the statute, itself). The Supremacy Clause creates a private cause of action for injunctive relief (but not money damages) that is useful for remedying systemic violations (but not ad hoc violations). In light of the limitations on the Supremacy Clause remedy, the crucial function of § 1983 is to provide a damages remedy to address ad hoc (and some systemic) violations.

For the purpose of damages claims under § 1983, the rule of law and federal supremacy principles that govern remedies under the Supremacy Clause play at most a secondary role, and a different remedial principle assumes central importance. That principle is that "there should be individually effective redress for violations of" federal rights, but the need for redress can sometimes "be outweighed by practical imperatives." Insofar as § 1983 provides a damages remedy for violations of federal rights, it helps ensure that there is individually effective redress for such violations.

304. Fallon, supra note 257, at 7–8.
305. See supra notes 168–70 and accompanying text.
308. Meltzer, supra note 35, at 2559.
But the limitation that § 1983 cannot be utilized to enforce federal law generally, in the absence of federal rights, reflects a recognition that the need for individual redress is sometimes outweighed by practical imperatives.\(^{309}\)

In sum, by limiting the § 1983 cause of action to cases where the federal statute creates a "federal right," but recognizing an implied right of action for injunctive relief under the Supremacy Clause, the Court can ensure the availability of remedies for systemic violations (under the Supremacy Clause), while restricting the availability of remedies for ad hoc violations (which can only be pursued under § 1983).

4. The Declaratory Judgment Act and Private Rights of Action

The Declaratory Judgment Act provides: "In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."\(^{310}\) If a plaintiff wins a declaratory judgment, the Act authorizes courts to grant "[f]urther necessary or proper relief," including injunctive relief, if appropriate.\(^{311}\) There are several Shaw preemption cases in which the complaint appears to state a claim under the Declaratory Judgment Act.\(^{312}\) Hence, the question arises whether the Declaratory Judgment Act (DJA) creates a federal cause of action for Shaw preemption claims.

The two leading cases on the DJA are Skelly Oil Co. v. Phillips Petroleum Co.\(^{313}\) and Franchise Tax Board v. Construction Laborers Vacation Trust.\(^{314}\) Skelly Oil involved a contract in which Phillips had agreed to purchase natural gas produced by Skelly for resale to the Michigan-Wisconsin Pipe Line Company. The contract gave Skelly the right to terminate if Michigan-Wisconsin failed to secure a permit from the Federal Power Commission by

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\(^{309}\) Note, too, that the conclusion that a statute creates a federal right suggests that the need for individual redress is particularly strong. In contrast, the conclusion that the statute does not create a federal right suggests that the need for individual redress is comparatively weak.


a specified date, provided that Skelly gave Phillips written notice “before the issuance of such” a permit.\textsuperscript{315} The Federal Power Commission issued the permit on November 30, 1946, “but the actual content of the order was not made public until December 2, 1946.”\textsuperscript{316} Meanwhile, also on December 2, Skelly provided written notice of termination to Phillips. Phillips then sued Skelly in federal court, invoking the DJA and seeking “a declaration that the contracts were still in effect and binding upon the parties thereto.”\textsuperscript{317}

The Supreme Court held that the district court lacked jurisdiction because the plaintiff's claim did not arise under federal law, even though the plaintiff had asserted a right of action under the DJA. Absent the DJA, Phillips would have had a state law breach of contract claim against Skelly. However, that claim would not “arise under” federal law because the only federal issue—whether Skelly provided written notice prior to issuance of the Federal Power Commission permit—would emerge as a reply to Skelly’s right of termination defense.\textsuperscript{318} Therefore, absent the DJA, the well-pleaded complaint rule would bar exercise of federal jurisdiction over plaintiff's claim. Moreover, the Court reasoned, the DJA “enlarged the range of remedies available in the federal courts but did not extend their jurisdiction.”\textsuperscript{319} Therefore, since federal courts could not exercise jurisdiction over plaintiff's claim in the absence of the DJA, plaintiff could not establish federal jurisdiction by invoking the DJA as a basis for a federal cause of action.\textsuperscript{320}

Shaw preemption cases are distinguishable from Skelly Oil because Shaw preemption claims are “offensive” for purposes of the well-pleaded complaint rule.\textsuperscript{321} Therefore, judicial recognition of a private right of action under the DJA for Shaw preemption claims would not be inconsistent with Skelly Oil. Moreover, the legislative history of the DJA supports judicial recognition of a private right of action under the DJA for Shaw preemption claims.\textsuperscript{322}

\begin{itemize}
\item \textsuperscript{315} Skelly Oil, 339 U.S. at 669.
\item \textsuperscript{316} Id. at 670.
\item \textsuperscript{317} Id. at 671 (internal quotation marks omitted).
\item \textsuperscript{318} See id. at 672.
\item \textsuperscript{319} Id. at 671.
\item \textsuperscript{320} See WRIGHT ET AL., supra note 32, § 3566, at 89 (“[T]he present rule is that an action for a declaratory judgment is within federal question jurisdiction only if the coercive action that would have been brought were declaratory judgments not available would have been within that jurisdiction.”).
\item \textsuperscript{321} See supra notes 125–45 and accompanying text.
\item \textsuperscript{322} See Donald L. Doernberg & Michael B. Mushlin, The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn’t Looking, 36 UCLA L. REV. 529, 532–33 (1989) (contending that Supreme Court doctrine is contrary to congressional intent because Congress intended for the Declaratory Judgment Act to expand the scope of federal jurisdiction).
\end{itemize}
In *Franchise Tax Board*, the California agency responsible for enforcing the state income tax law (FTB) was trying to collect overdue tax payments from the Construction Laborers Vacation Trust (CLVT); CLVT was an “‘employee welfare benefit plan’ within the meaning of . . . ERISA.” CLVT claimed that it “lack[ed] the power to honor the levies made upon [it] by the State of California” because ERISA preempted state law. FTB raised a claim under California’s Declaratory Judgment Act, seeking a declaration that ERISA did not preempt state law. When the case reached the Supreme Court, the central issue was whether FTB’s claim arose under federal law. Despite the fact that FTB brought suit under a state declaratory judgment statute, the Supreme Court framed the issue as follows: “The question . . . is whether a federal district court could take jurisdiction of appellant’s declaratory judgment claim had it been brought under” the DJA.

The Supreme Court held that the district court lacked jurisdiction over FTB’s declaratory judgment claim because federal district courts do not have jurisdiction over declaratory judgment actions in which state agencies seek a declaration that federal law does not preempt state law. The Court expressly distinguished cases in which private entities seek a declaration that federal law does preempt state law. If CLVT had brought a declaratory judgment action in federal court, said the Court, then:

CLVT might have been able to obtain federal jurisdiction under the doctrine applied in some cases that a person subject to a scheme of federal regulation may sue in federal court to enjoin application to him of conflicting state regulations, and a declaratory judgment action by the same person does not necessarily run afoul of the *Skelly Oil* doctrine.

Thus, *Franchise Tax Board* is arguably consistent with the thesis that plaintiffs have a right of action under the DJA for *Shaw* preemption claims.

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324. *Id.* at 6–7.
325. *Id.* at 13.
326. *Id.* at 19. FTB brought suit in state court. CLVT removed the case to federal court. The Supreme Court noted that the well-pleaded complaint rule did not preclude the exercise of federal jurisdiction because the ERISA preemption issue was “a necessary element of the declaratory judgment claim.” *Id.* at 14. Hence, the Court acknowledged that its prior decision in *Skelly Oil* was not directly controlling. Even so, the Court decided that “fidelity to [the] spirit” of *Skelly Oil* should bar federal jurisdiction over state declaratory judgment actions if the federal courts could not exercise jurisdiction over a claim brought under the federal DJA. *Id.* at 18–19.
327. *Id.* at 19–22.
328. *See* *id.* at 19–20.
329. *Id.* at 20 n.20.
330. Indeed, it is unlikely that the Supreme Court perceived any inconsistency between *Shaw* and *Franchise Tax Board* because the Court decided both cases on the same day.
If the Supreme Court held explicitly that the DJA creates a private cause of action for Shaw preemption claims, the practical result would be the same as an explicit holding that the Supremacy Clause creates an implied right of action for Shaw preemption claims. Either way, plaintiffs who wished to bring Shaw preemption claims in federal court could proceed with their claims, secure in the knowledge that they did not need to establish a private right of action under the preemptive federal statute or under § 1983. However, there are several reasons why it is preferable to anchor a Shaw right of action in the Supremacy Clause, rather than the Declaratory Judgment Act.

First, as noted above, federal supremacy interests form an essential ingredient of the policy rationale in favor of a federal cause of action for Shaw preemption claims. An explicit Supreme Court holding in favor of a Supremacy Clause right of action for Shaw preemption claims would promote transparency by making clear that a federal cause of action for Shaw preemption claims is necessary to vindicate the federal interest in the supremacy of federal law. In contrast, a Supreme Court decision to link the Shaw right of action to the DJA is more likely to obscure the policy rationale supporting that right of action.

Second, a decision to ground the Shaw right of action in the DJA would foster the mistaken impression that Congress created the right of action when it enacted the DJA in 1934. In fact, the Shaw right of action has deeper historical roots, which can be traced to a “class of cases, which commonly were brought in the courts of equity in which a single individual sues not for individual redress, but to preserve the structural limitations found in our or any other constitutional order.” By holding that the Supremacy Clause creates a private right of action for Shaw preemption claims, the Court could emphasize that Shaw is a descendant of a venerable lineage of equity jurisprudence in which the judiciary, not the legislature, assumed primary responsibility for shaping remedies to address structural problems that cause “a great many individuals [to be] injured by some small but perceptible amount.”

331. See supra notes 252–56 and accompanying text.
332. See, e.g., Green v. Mansour, 474 U.S. 64, 68 (1985) (“[T]he availability of prospective relief of the sort awarded in Ex parte Young gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.”).
333. Richard A. Epstein, Standing and Spending—The Role of Legal and Equitable Principles, 4 CHAP. L. REV. 1, 9 (2001) (emphasis in original). Professor Epstein is not addressing Shaw claims, as such, but his point about the historical role of courts of equity in enforcing structural limitations is directly applicable to Shaw claims.
334. Id. at 10.
Finally, an explicit holding that the Supremacy Clause creates a private right of action for Shaw preemption claims would help counteract the myth of "judicial passivity." As Professor Meltzer has noted:

[T]he Court sounds the theme that its power (or, more generally, that of the federal courts) is sharply limited and that Congress has primary, if not exclusive, responsibility for fleshing out the operation of schemes of federal regulation. ... On the other hand, while the Court frequently articulates the supposed limits of its role quite forcefully, it does not consistently operate within those limits.

A holding that the DJA creates a right of action for Shaw preemption claims would be intellectually dishonest because it would perpetuate the illusion that the Court is acting as a mere agent for Congress, which created the remedy. In contrast, an explicit holding linking the Shaw right of action to the Supremacy Clause might prompt the Court to acknowledge that its remedial power is not nearly as limited as it often pretends. Such an acknowledgment would be welcome because it would encourage lower courts to discuss explicitly the normative judgments that guide their decisions about remedies, rather than shielding those judgments behind a veil of feigned judicial passivity.

5. State Law Rights of Action

If the Supreme Court holds that neither the Supremacy Clause nor the DJA creates a private right of action for Shaw preemption claims, then plaintiffs who lack a private right of action under § 1983 or the preemptive federal statute could still bring Shaw preemption claims in state court on the basis of a state law cause of action. Most states provide a declaratory judgment procedure that would enable plaintiffs to bring Shaw preemption claims offensively in state court.

The adequacy of state law remedial mechanisms implicates the ideological debate over parity. Parity skeptics (who, in Professor Fallon's

335. I borrow the term "judicial passivity" from Professor Meltzer. See Meltzer, supra note 3.
336. Id. at 343-44 (footnote omitted).
337. Additionally, some plaintiffs could bring Shaw preemption claims in federal court on the basis of diversity jurisdiction.
terms, are nationalists) will argue that state courts cannot do as good a job as federal courts in promoting the federal supremacy and rule of law interests at stake in Shaw preemption cases. Those who believe in parity (who, in Professor Fallon’s terms, are federalists) will argue that state courts are equally capable of adjudicating Shaw preemption claims. Indeed, it is tempting to conclude that the Supreme Court’s ultimate decision to grant or deny a Supremacy Clause right of action for Shaw preemption claims will turn entirely on the ideological debate between federalists and nationalists.

However, even if one accepts the federalist premise that state courts can and will provide adequate protection for the federal supremacy and rule of law interests at stake in Shaw preemption cases, there are several arguments that weigh in favor of a Supremacy Clause right of action. First, explicit rejection of a Supremacy Clause right of action for Shaw preemption claims would upset a substantial body of precedent in which the Supreme Court has tacitly assumed that there is a generally available right of action for Shaw preemption claims that is not derived from the preemptive statute or from § 1983. This precedent includes a number of pre-Shaw cases, Shaw itself, and at least ten post-Shaw cases in which the Court has ruled in favor of the preemption plaintiff. It also includes several post-Shaw cases in which the Court held that the state law at issue was not preempted, but did not question the plaintiffs’ right to bring the suit in federal court. Although explicit rejection of a Supremacy Clause right of action for Shaw preemption claims would not technically overrule all of these cases, it would overrule some of them, and it would disturb settled expectations that have developed on the basis of these precedents. Therefore, the Court should not upset this body of precedent without a compelling reason to do so.


341. See Sloss, supra note 33, at 1159–60.


343. See supra notes 194–96, 248 and accompanying text.


345. The fact that expectations are settled is evidenced by the fact that defendants in Shaw preemption cases do not challenge the plaintiffs’ right of action. See supra notes 201, 224 and accompanying text.
Second, Shaw preemption claims frequently involve complex issues of federal statutory interpretation. Shaw preemption claims frequently involve complex issues of federal statutory interpretation. Federal judges generally have greater expertise than state judges on matters of federal statutory interpretation because federal judges handle such issues routinely. Therefore, explicit recognition of a Supremacy Clause cause of action for Shaw preemption claims is likely to promote more consistent and efficient judicial decision-making by ensuring the availability of a federal forum for adjudication of such claims.

Third, one of the main factors that supports a parity argument in other contexts is not applicable in the context of Shaw preemption claims. In Younger abstention cases, courts have invoked parity considerations to support a general policy against enjoining state criminal prosecutions. In habeas cases, courts and commentators have invoked parity arguments to support a deferential approach to federal habeas review of state criminal convictions. In both contexts, a more interventionist federal approach would arguably impugn the dignity of the state court by interfering with ongoing or completed state criminal proceedings. Shaw preemption cases are different because there is no ongoing or completed state judicial proceeding. A Shaw right of action merely provides plaintiffs the option of choosing whether to bring their federal preemption claims in state or federal court. Hence, Shaw cases pose much less of a threat to the independence of state courts than do Younger or habeas cases.

Finally, even if the Supreme Court holds explicitly that there is an implied right of action under the Supremacy Clause for Shaw preemption claims, that right of action would be constitutionally presumed, not constitutionally compelled. Therefore, a Supremacy Clause cause of action is entirely compatible with federalist views concerning congressional power to control the jurisdiction of the lower federal courts.

346. See, e.g., United States v. Locke, 529 U.S. 89 (2000) (preemption case involving analysis of the Tank Vessel Act of 1936, the Ports and Waterways Safety Act of 1972, the Oil Pollution Act of 1990, and “a significant and intricate complex of international treaties and maritime agreements bearing upon the licensing and operation of vessels”); Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., 519 U.S. 316 (1997) (suit to enjoin enforcement of California law on the grounds that it was allegedly preempted by both the National Labor Relations Act (NLRA) and the Employee Retirement Income Security Act (ERISA)).

347. State courts frequently adjudicate federal preemption defenses to state tort claims. In that context, state courts are required to interpret federal statutes. Even so, it remains true, as a general proposition, that federal courts have greater expertise on federal statutory interpretation issues.


350. See supra note 33 and infra notes 364–65 and accompanying text.

351. For a federalist perspective, see, for example, Paul Bator, Congressional Power Over the Jurisdiction of the Federal Courts, 27 Vill. L. Rev. 1030 (1982).
Whether Shaw preemption claims are brought in state court or federal court matters far less than the availability of some cause of action that allows plaintiffs to bring Shaw preemption claims offensively. Assuming that all states provide some such cause of action, exclusive reliance on state courts to adjudicate Shaw preemption claims would be generally consistent with the rule of law and federal supremacy interests at stake. Even so, for the reasons noted above, the balance of considerations tips in favor of an implied right of action under the Supremacy Clause for Shaw preemption claims.

C. SPENDING CLAUSE STATUTES AND SHAW PREEMPTION CLAIMS

In its most recent Shaw preemption decision, the Supreme Court held that the federal Medicaid statute (a Spending Clause statute) did not preempt the Maine Act to Establish Fairer Pricing for Prescription Drugs. The majority of the Court assumed, sub silentio, that plaintiffs had a right of action for their preemption claim. However, Justices Scalia and Thomas, in separate concurrences, both suggested that private plaintiffs cannot sue to enforce Spending Clause legislation. Their separate concurrences squarely present the following question: Assuming that private plaintiffs have an implied right of action under the Supremacy Clause for Shaw preemption claims, should that right of action extend to preemption claims based upon federal statutes enacted pursuant to the Spending Clause?

Professor Engdahl has argued that Spending Clause statutes never preempt state law because Spending Clause statutes are not “among the ‘Laws’ . . . to which the Supremacy Clause applies.” In his view, federal funding conditions, including those embodied in a statute or regulation, “have no force as ‘law’; their only force is contractual.” If his view is correct, then a Supremacy Clause right of action would not extend to claims based on Spending Clause statutes because Spending Clause statutes would not be the “Law of the Land” under the Supremacy Clause.

However, the Supreme Court has never endorsed Professor Engdahl’s position. The Court has said that “legislation enacted pursuant to the spending power is much in the nature of a contract.” But the fact that

353. See supra notes 100-06 and accompanying text.
354. See Pharm. Research & Mfrs. Of Am., 123 U.S. at 1873–74 (Scalia, J., concurring); id. at 1878 (Thomas, J., concurring). For further discussion of Justice Scalia’s and Justice Thomas’s views, see infra notes 362–75 and accompanying text.
357. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). Such legislation is “in the nature of a contract” because a typical “contract” between the federal government and a state government under a federal funding statute is formed by means of: (1) a state implementation plan submitted to the federal government (the offer); and (2) federal approval of that plan (the acceptance). The exchange involves a state promise to comply with federal law and a federal promise to provide funding.
obligations undertaken by federal funding recipients are "in the nature of a contract" does not mean that those obligations lack the force of law. In other words, the categories of legal obligation and contractual obligation are not mutually exclusive.

A typical contract between the federal government and a federal funding recipient includes three types of provisions. The first type of provision is purely voluntary, in the sense that the contracting parties can choose either to include it or omit it. Such provisions are entirely contractual in nature. The second type of provision is inserted to fulfill a statutory mandate. Spending Clause statutes (or federal regulations promulgated to implement Spending Clause statutes) frequently include provisions stipulating, in effect: "If you accept federal funding, then the contract regulating the use of those funds must include the following provision." A clause that is included in a state plan to fulfill that type of federal mandate is contractual, in the sense that the funding recipient is not legally obligated to accept federal funding. However, such a clause is not merely contractual; it is also legally binding, as a matter of federal law, because a state plan that omitted the required provision would be in violation of federal law.

The third type of "contract provision" is not actually included in any written agreement. For example, suppose Congress enacts a statute that says: "A state that accepts federal funding under this statute shall not penalize anyone for the practice of midwifery." Georgia decides to accept funding under the statute, but the state plan does not include a written midwifery provision. A court might reasonably say that the federal midwifery provision is an implied term of the contract between Georgia and the federal government. But it is fallacious to claim that the implied contract term is merely contractual and lacks the force of law. If, indeed, the midwifery provision is an implied term of the contract, it is only because federal law prohibits Georgia from imposing sanctions on individuals who practice midwifery. The fact that the prohibition applies only to states that choose

358. For example, the Medicaid statute authorizes funding for "making payments to States which have submitted, and had approved by the Secretary, State plans for medical assistance." 42 U.S.C. § 1396 (2000). The state plans must comply with detailed federal statutory requirements. See 42 U.S.C. § 1396a(a). Thus, the federal statutory requirements for the state plans effectively dictate the terms of the contract between a state government and the federal government.

359. This hypothetical statutory provision is a variant of an example that Professor Engdahl uses. See Engdahl, supra note 355, at 77 (discussing a hypothetical federal statute that provides funding for midwives).

360. This assumes that the hypothetical funding condition is a valid condition. In South Dakota v. Dole, 483 U.S. 203 (1987), the Supreme Court articulated four rather loose limits on the Spending Power. First, "the exercise of the spending power must be in pursuit of the 'general welfare.'" Id. at 207 (citations omitted). Second, "if Congress desires 'to condition the States' receipt of federal funds, it 'must do so unambiguously . . . .'" Id. (citations omitted). Third, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal..."
to accept federal funding under the relevant statute does not detract from its status as supreme federal law. Legislative bodies routinely draft prohibitions that apply only to a specified class of persons. If a person can choose to opt in or opt out of the class to which the prohibition applies, that does not transform the statutory prohibition into a contractual obligation.\textsuperscript{361}

In contrast to Professor Engdahl, neither Justice Scalia nor Justice Thomas claims that Spending Clause statutes lack the status of federal law under the Supremacy Clause. However, they both claim that the plaintiff in \textit{Pharmaceutical Research} lacked a private right of action to enforce the Medicaid statute. Justice Scalia contends that termination of federal funding is the exclusive remedy "for the State's failure to comply with the obligations it has agreed to undertake under the Medicaid Act. . . ."\textsuperscript{362} There are two plausible interpretations of Justice Scalia's brief concurrence. He might be

\begin{enumerate}
\item interest in particular national projects or programs." \textit{Id.} (citations omitted).
\item Fourth, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds." \textit{Id.} at 208. If Congress adopted the hypothetical midwifery funding condition in the context of a federal program designed to promote low-cost, high-quality health care for pregnant women, there is little doubt that the condition would survive constitutional scrutiny under the \textit{Dole} test.
\item Third, Engdahl might object that the preceding argument overlooks the crucial distinction between ends that are within an enumerated power and ends that are not within any enumerated power, which he calls "extraneous ends." See \textit{Engdahl, supra} note 355, at 16–18. Engdahl contends that Congress can use its Spending Power to achieve extraneous ends, but Spending Clause legislation that is designed to achieve extraneous ends, and that is unsupported by any other enumerated power, lacks the status of supreme federal law. See \textit{id.} at 20–22. To hold otherwise, he claims, would vitiate the principle of enumerated powers because Congress could use its Spending Power to circumvent the constitutional limits on its enumerated powers.
\item Engdahl does an admirable job of presenting and defending his thesis, but his argument is unpersuasive for two reasons. First, Engdahl's distinction between extraneous ends and ends that are within an enumerated power is ultimately incoherent because it confuses the categories of means and ends. There is no such thing as "an end within an enumerated power" because a power is a means, not an end. Moreover, the phrase "end within an enumerated power," in Engdahl's usage, does not mean "an end that can be accomplished by means of an enumerated power" because he insists that Congress can use its enumerated powers to achieve extraneous ends. Thus, the central distinction that he uses to frame his analysis makes no sense.
\item Second, Engdahl's argument is plagued by an internal contradiction because he cannot decide whether the Spending Power is an enumerated power. His claim that Congress can use the Spending Power to achieve extraneous ends presupposes that the Spending Power is an enumerated power. But his claim that Spending Clause legislation lacks the status of supreme federal law if it is beyond the scope of Congress's enumerated powers presupposes that the Spending Power is \textit{not} an enumerated power.
\item \textit{Pharm. Research \\ & Mfrs. of Am. v. Walsh}, 123 S. Ct. 1855, 1874 (2000) (Scalia, J., concurring). Justice Scalia concedes that a private plaintiff might have a cause of action against the Secretary of Health and Human Services under the Administrative Procedure Act if the Secretary's refusal to terminate funding is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." \textit{Id.} at 1874 (quoting 5 U.S.C. \S 706(2)(A) (2000)). Even so, his position is tantamount to the denial of any judicial remedy for private parties because the Secretary has no legal obligation to terminate funding, even if a recipient fails to comply with funding conditions.
\end{enumerate}
saying that Congress, when it enacted the Medicaid statute, implicitly foreclosed the possibility of private suits against state officers by prescribing “a detailed remedial scheme for the enforcement against a State of a statutorily created right . . . .”363 If that is what Justice Scalia intended, then there is nothing particularly novel in his concurrence; he is simply applying a rule that the Court articulated in Seminole Tribe and in Middlesex County Sewerage Authority v. National Sea Clammers to the particular circumstances of the Medicaid statute.364 The Sea Clammers-Seminole Tribe rule would not bar all private remedies for violations of Spending Clause statutes. Rather, courts would examine the remedial scheme associated with a particular statute to determine whether Congress intended to bar private remedies.365 This approach has considerable merit.

However, Justice Scalia's concurrence does not cite either Sea Clammers or Seminole Tribe. Instead, he cites Pennhurst366 and his concurring opinion in Blessing.367 These citations suggest that Justice Scalia may be advancing a broader thesis: termination of federal funding is the exclusive remedy in every case where a state fails to comply with its obligations under a federal funding statute. If that is Justice Scalia's position, then his concurring opinion in Pharmaceutical Research does not articulate a supporting rationale. Even so, one could construct a supporting rationale by referring to Justice Scalia's concurring opinion in Blessing and to Justice Thomas's concurring

364. In Sea Clammers, 453 U.S. 1 (1981), the Court held that a private plaintiff cannot utilize 42 U.S.C. § 1983 to bring suit against a state officer for an alleged violation of a federal statute if “the remedial devices provided in a particular Act are sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.” Id. at 20. In Seminole Tribe, the Court held that, in cases where a private plaintiff seeks injunctive relief against a state officer for an alleged violation of a federal statute, the plaintiff cannot invoke Ex parte Young to overcome a sovereign immunity defense if the statute prescribes “a detailed remedial scheme for the enforcement against a State of a statutorily created right.” Seminole Tribe, 517 U.S. at 74. Therefore, if a federal statute creates a sufficiently comprehensive remedial scheme, Sea Clammers bars suits against state officers in their individual capacities under § 1983 and Seminole Tribe bars suits against state officers in their official capacities under Ex parte Young.
365. There are two variants of this rule, as applied to Shaw preemption claims. Under one variant, courts would presume that private remedies are available for Shaw preemption claims, unless Congress manifests a contrary intent. That is the Court's current approach to Shaw preemption claims. Under the second variant, courts would presume that private remedies are not available, unless Congress manifests a contrary intent. Justice Scalia might be suggesting that courts should adopt a presumption against private remedies for Shaw preemption claims based on Spending Clause statutes, even though they typically adopt a presumption in favor of private remedies for Shaw preemption claims based on other statutes. However, Justice Scalia's concurrence in Pharmaceutical Research does not present a coherent rationale for distinguishing between Spending Clause statutes and other statutes.
opinion in *Pharmaceutical Research*. The argument can be distilled to four propositions: (1) Spending Clause legislation is "in the nature of a contract," where the federal government and state governments are the contracting parties; (2) private beneficiaries of Spending Clause legislation are like third-party beneficiaries of a contract; (3) the common law limits the right of third party beneficiaries to sue to enforce a contract; (4) therefore, third parties cannot sue to enforce Spending Clause legislation in the absence of a statutory right of action.

This argument is problematic because it begins with a premise that obscures more than it clarifies. Granted, Spending Clause legislation is "in the nature of a contract." Even so, one must still inquire whether Spending Clause statutes are supreme federal law under the Supremacy Clause. Justices Scalia and Thomas both stop short of the bold claim that Spending Clause statutes lack the status of supreme federal law. But if Spending Clause statutes are supreme federal law, then the third-party beneficiary analogy is entirely beside the point. If Spending Clause statutes are the "law of the land" under the Supremacy Clause, and if the Supremacy Clause creates an implied right of action for *Shaw* preemption claims, then there is no apparent reason why that Supremacy Clause right of action should not apply to *Shaw* preemption claims in which the plaintiff alleges that a state law is preempted by a Spending Clause statute.

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369. See *Blessing*, 520 U.S. at 349 (Scalia, J., concurring) (stating that a federal-state funding agreement is "in the nature of a contract" (quoting *Pennhurst*, 451 U.S. at 17)); *Pharm. Research*, 123 S. Ct. at 1878 (Thomas, J., concurring) (stating that Spending Clause legislation is "in the nature of a contract" (quoting *Pennhurst*, 451 U.S. at 17)).

370. See *Blessing*, 520 U.S. at 349 (Scalia, J., concurring) ("In contract law, when... A promises to pay B money, in exchange for which B promises to provide services to C... C is called a third-party beneficiary."); *Pharm. Research*, 123 S. Ct. at 1878 (Thomas, J., concurring).

371. See *Blessing*, 520 U.S. at 349-50 (Scalia, J., concurring) ("Until relatively recent times, the third-party beneficiary... could not sue upon" a contract); *Pharm. Research*, 123 S. Ct. at 1878 (Thomas, J., concurring) ("In contract law, a third party to the contract... may only sue for breach if he is the 'intended beneficiary' of the contract.").

372. See *Blessing*, 520 U.S. at 349-50 (Scalia, J., concurring); *Pharm. Research*, 123 S. Ct. at 1878 (Thomas, J., concurring).


374. See *Blessing*, 520 U.S. at 349 (Scalia, J., concurring); *Pharm. Research*, 123 S. Ct. at 1878 (Thomas, J., concurring).

375. The First Circuit opinion in *Pharmaceutical Research* highlights one significant distinction between Spending Clause statutes and other statutes that bears on preemption analysis. The First Circuit suggests that the doctrine of "field" preemption does not apply to "a cooperative federal and state program," like Medicaid, that is enacted pursuant to the Spending Power. *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 74 n.6 (1st Cir. 2001). In other words, Congress can use its Spending Power to preempt conflicting state law, but Congress cannot use its Spending Power to "occupy a field" and displace non-conflicting state law. This suggestion seems eminently reasonable. Note, though, that this distinction relates to substantive
VI. EXTENDING THE RIGHT OF ACTION TO CLAIMS CHALLENGING STATE EXECUTIVE ACTION

Part VI proceeds from the assumption that the Supremacy Clause creates an implied right of action for injunctive relief against state officers to enjoin enforcement of state laws that are preempted by federal statutes (Shaw preemption claims). Given that premise, Part VI considers whether the right of action should be extended to include claims in which plaintiffs seek to enjoin state executive action that allegedly violates federal statutes (Shaw violation claims). The first section presents a policy justification for extending the Shaw right of action to Shaw violation claims. The second section analyzes two Shaw violation cases to illustrate the practical implications of extending the right of action to Shaw violation claims.

A. POLICY CONSIDERATIONS

1. Legislative Primacy

The principle of legislative primacy suggests that federal courts should be at least as deferential to state legislative bodies as they are to state executive officials. Current judicial doctrine, which recognizes an implied right of action for Shaw preemption claims but not Shaw violation claims, achieves precisely the opposite result. The Supreme Court's tacit assumption that the Supremacy Clause creates an implied right of action for Shaw preemption claims ensures that federal courts address the merits of claims for injunctive relief against state officers that challenge state legislative action. However, the Court's apparent refusal to extend that right of action to Shaw violation claims prevents federal courts from reaching the merits of cases in which plaintiffs seek to enjoin state executive action that allegedly violates a federal statute, even in cases where the executive action at issue is functionally equivalent to a law. By shielding state executive action from federal judicial review, current doctrine provides a perverse incentive for states to codify rules in the form of executive policies, rather than laws.

Crosby provides an excellent example. As previously discussed, in Crosby the Supreme Court held that federal law preempted a Massachusetts preemption analysis; it does not affect the remedial mechanisms plaintiffs utilize to bring preemption claims.


377. See supra notes 45-76 and accompanying text.

378. More specifically, courts will reach the merits in cases where plaintiffs have a right of action under § 1983, or under the statute that was allegedly violated, but not in other cases. See supra notes 58-76 and accompanying text.

law that barred government procurement of goods and services from companies doing business with Burma. Suppose that the Governor of Massachusetts responded to the Supreme Court decision by adopting an executive policy barring government procurement of goods and services from companies that do business with Burma. The executive policy would have precisely the same effect as the Massachusetts law that the Supreme Court held to be invalid. But if the Crosby plaintiff filed suit in federal court to enjoin enforcement of the Governor's policy, and if the Court declined to extend the Supremacy Clause right of action to a claim challenging state executive action, then the plaintiff's claim would have to be dismissed for "failure to state a claim upon which relief can be granted" because the plaintiff would not have a private cause of action under § 1983 or under the federal Burma statute. A judicial doctrine that produces such bizarre results is seriously flawed.

Granted, the plaintiff in this hypothetical case could still bring a claim in state court, or the federal government could sue to enjoin enforcement of the state policy. However, a state law remedy is particularly unsuitable to address a case where a state governor blatantly disregards federal law. An enforcement action by the federal government would be a more suitable remedy. Even so, a remedial system that permits private suits to enjoin state legislative action, but requires private individuals to enlist the aid of the Justice Department to enjoin state executive action, is at odds with the principle of legislative primacy.

380. See id. at 366.
382. FED. R. CIV. P. 12(b)(6).
383. See supra notes 230–46 and accompanying text.
384. Consider, for example, United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969). In that case, after reciting the history of its decision in Brown v. Bd. of Educ., 347 U.S. 483 (1954), the Court noted:

The record shows that neither Montgomery County nor any other area in Alabama voluntarily took any effective steps to integrate the public schools for about 10 years after our Brown I opinion. In fact the record makes clear that that state government and its school officials attempted in every way possible to continue the dual system of racially segregated schools in defiance of our repeated unanimous holdings that such a system violated the United States Constitution. . . . Consequently, if Negro children of school age were to receive their constitutional rights as we had declared them to exist, the coercive assistance of courts was imperatively called for.

Montgomery County Bd., 395 U.S. at 228. For obvious reasons, an effective remedy required the coercive assistance of federal courts, not state courts.
2. Preemption

Current doctrine, which assumes a right of action under the Supremacy Clause for Shaw preemption claims but not Shaw violation claims, may be founded in part upon a misunderstanding of the concept of preemption that is embodied in the text of the Supremacy Clause. The Supremacy Clause, among other things, codifies a hierarchical principle: federal law ranks higher than state law in the constitutional hierarchy of legal rules. Therefore, whenever there is a conflict between state and federal law, federal law preempts state law.

Of course, state law has its own hierarchy of legal rules. A state constitution ranks higher than a state statute; a state statute ranks higher than state common law; and, most importantly, a state statute ranks higher than a legal rule embodied in a state executive policy. Since federal law ranks higher than state statutes (as a matter of federal law), and state statutes rank higher than state policies (as a matter of state law), it follows that federal law ranks higher than state policies. Therefore, in the event of a conflict between a federal law and a state policy, federal law preempts the state policy. In short, the concept of preemption applies not only to conflicts between federal law and state legislative action, but also to conflicts between federal law and state executive action, at least insofar as state executive action codifies a legal rule.

One might object that federal law cannot preempt state policies because preemption doctrine is rooted in the Supremacy Clause, and the text of the Supremacy Clause refers only to state constitutions and laws, not state policies. However, the Supreme Court has applied the Supremacy Clause to federal preemption claims challenging state administrative regulations, state common law, and adjudicative orders issued by state executive action.

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385. Professor Nelson refers to this as a "rule of priority." See Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 250–54 (2000). In his view, the Supremacy Clause also establishes a "rule of applicability" and a "rule of construction." See id. at 245–60.


387. See U.S. Const. art. VI, cl. 2 (providing that judges are bound by federal law, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").


administrative agencies. The Supreme Court has even applied preemption doctrine to a claim alleging a conflict between a federal statute and a specific provision of a contract between a state agency and a private contractor. If the phrase "or Laws" in the Supremacy Clause is broad enough to encompass all these non-statutory legal rules, then it is surely broad enough to include legal rules embodied in state executive policies.

3. Setting Intelligent Limits

Assuming that there is an implied right of action under the Supremacy Clause for claims against state officers, it is important to establish clear limits on the scope of that implied right of action. Indeed, without clear limits, judicial creation of a Supremacy Clause right of action would be inconsistent with the principle of legislative primacy because a key corollary of the principle of legislative primacy is the notion that Congress, not the courts, has primary responsibility for crafting remedies for statutory violations.

Consider three possible options for limiting the scope of the Supremacy Clause right of action. The first option is to limit the scope of the right of action by excluding claims challenging state executive action. This is essentially current doctrine. A possible explanation for this option is that executive action tends to be ad hoc, rather than systemic, whereas the policy objective underlying the Supremacy Clause right of action is to ensure the availability of a remedy for systemic violations. Although this is a plausible explanation for the current state of judicial doctrine, it is not a persuasive justification. As noted above, the distinction between legislative and executive action is a poor proxy for the distinction between ad hoc and systemic violations. Even if a state legislature has not enacted a law that conflicts with a federal statute, the state executive might adopt a policy that conflicts with (and is therefore preempted by) the statute. Consistent implementation of a state policy that is preempted by a federal statute yields systemic violations of federal law by state officers. By limiting the Supremacy Clause right of action to claims challenging state legislative action and excluding claims challenging state executive action, current doctrine fails to address an entire class of cases involving systemic violations of federal law by state officers.


393. See supra notes 165–67 and accompanying text.
A second option recognizes that the Shaw right of action is a doctrinal descendant of Ex parte Young. Since the Young doctrine applies only to claims for prospective relief to address on-going and/or threatened violations, the Shaw right of action (i.e., an implied right of action under the Supremacy Clause) should also apply only to claims for prospective relief to address on-going and/or threatened violations. By distinguishing between completed violations and ongoing or threatened violations, and by limiting a Supremacy Clause right of action to claims alleging ongoing and/or threatened violations, the Court would effectively preclude use of a Supremacy Clause remedy to address ad hoc violations. At the same time, though, the Court would ensure the availability of a constitutional remedy that addresses all systemic violations of federal statutes by state officers.

The main advantage of the second option is that it addresses all systemic violations of federal statutes by state and local government officers. However, precisely because of its broad scope, the second option also raises the specter of excessive interference by the federal judiciary in state executive action. To minimize those concerns, the Court might wish to consider a third option. That option would build on the current distinction between “preemption claims” and “violation claims” but expand the concept of preemption to encompass claims challenging legal rules promulgated by state executive branch officials. Under this approach, if the state executive action at issue does not codify a “legal rule,” then the concept of preemption is inapplicable, and a Supremacy Clause remedy would not be available. However, if the state action being challenged establishes a “legal rule,” then the concept of preemption applies—regardless of whether the state action is characterized as legislative, executive, administrative, or judicial—and a Supremacy Clause remedy for prospective injunctive relief is potentially available. This approach is consistent with the preceding interpretation of

396. The problem of federal judicial interference with state executive action is twofold. First, separation of powers principles suggest that judicial intervention is not appropriate in cases where an executive officer has made a tentative, non-final decision, or where he is acting within the limits of his discretionary authority. Accordingly, federal judicial review of federal administrative action is generally available only for “final agency action.” 5 U.S.C. § 704 (2000). Moreover, judicial review is precluded if agency action is “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2) (2000). There are sound reasons for imposing similar limits on federal judicial review of state executive action. Additionally, federal judicial review of state executive action raises federalism issues, as well as separation of powers issues. States arguably have a sovereignty interest in avoiding excessive federal judicial oversight of state executive programs. See, e.g., Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) (reversing award of injunctive relief in school desegregation case, in part because of the "deeply rooted" tradition of "local control over the operation of schools").
397. To flesh out the details of this approach, one could draw on a large body of federal administrative law in which courts have analyzed the question of when action by a federal
the Supremacy Clause, which emphasized that the Clause establishes a hierarchical relationship between federal law and state "legal rules," including legal rules promulgated by non-legislative bodies.\(^{998}\)

The third option is problematic, though, because state officers sometimes engage in systemic violations of federal law without promulgating "legal rules" in any form—legislative, executive, administrative, or judicial. Indeed, there are many cases in which plaintiffs allege a "pattern or practice" of executive branch activity that systematically violates federal law.\(^{999}\) Systemic violations of federal law by state officers threaten the supremacy of federal law, and undermine the goal of keeping government within the bounds of law, regardless of whether the officer is acting pursuant to a "rule" of state law. Given that the purpose of an implied right of action under the Supremacy Clause is to protect federal supremacy and promote the rule of law, a Supremacy Clause right of action that is limited to claims challenging state "legal rules" would arguably be excessively narrow because it would not reach claims alleging a "pattern or practice" of executive branch activity.

Thus, there is a trade-off between the second and third options. The third option minimizes the risks of federal judicial interference with state executive action by limiting the Supremacy Clause right of action to claims challenging "legal rules" promulgated by state actors.\(^{400}\) The chief disadvantage of this option is that some systemic violations of federal statutes by state officers—violations involving a "pattern or practice" that does not constitute a "legal rule"—would be beyond the scope of the Supremacy Clause remedy. The main advantage of the second option is that it provides a comprehensive remedy for all systemic violations of federal statutes by state officers. However, the second option imposes fewer constraints on federal judicial interference with state executive action.\(^{401}\)

In my judgment, the second option is preferable. The Supreme Court should hold explicitly that the Supremacy Clause creates an implied right of administrative agency creates a "rule" that is subject to judicial review. DAVIS & PIERCE, supra note 386, §§ 6.1, 6.2.

398. See supra notes 385–91 and accompanying text.


400. The second option gives federal district courts fairly broad discretion to determine, on a case-by-case basis, whether equitable relief is appropriate. In contrast, the third option limits that discretion by precluding equitable relief in cases where plaintiffs sue to enjoin state executive action that is not codified in some sort of "legal rule." Thus, the third option minimizes interference with state executive action by limiting the discretion of federal district courts.

401. Another potential criticism of the second option is that the argument in favor of the second option largely ignores the fact that one of the policy objectives at stake in Shaw preemption cases is to provide individuals notice of the legal consequences of their actions. That objective is not implicated by state government action unless the action is manifested in some legal "rule."
action for all claims that fall within the scope of the *Ex parte Young* exception to sovereign immunity: i.e., all claims in which plaintiffs seek prospective relief to remedy an ongoing or threatened violation of federal law by state or local officers. However, the Court should instruct the federal judiciary to make wise use of its equitable discretion, on a case-by-case basis, to fashion equitable remedies for systemic violations of federal law, while avoiding excessive interference with state executive action. The next section analyzes two specific cases to illustrate the application of this general approach.

**B. SPECIFIC APPLICATIONS**

Broadly speaking, systematic violations of federal statutes by state executive officials come in two forms: (1) official policies that establish a legal rule; and (2) a “pattern or practice” of activity that is not based upon any official policy or legal rule. This section analyzes one case of each type to illustrate the application of the principles discussed above.

1. *Alexander v. Sandoval*

   In the early 1990s, the Alabama Department of Public Safety adopted an official policy of administering driver’s license examinations only in English. The policy effectively established a legal rule: any applicant who wishes to obtain a driver’s license in Alabama must take the exam in English. Martha Sandoval filed a class action in federal court on behalf of “all present and future legal residents of Alabama who have been or may be denied the opportunity to obtain a driver’s license in the state because of their inability to speak or read English fluently.” Ms. Sandoval raised both an intentional discrimination claim under the Fourteenth Amendment, and a disparate impact claim under Title VI and its implementing regulations.

402. One might object that a case-by-case approach is undesirable because it would replicate the problems associated with the courts’ inconsistent treatment of *Shaw* violation claims and *Shaw* preemption claims. That objection misses its mark. Under the approach recommended here, the Supreme Court would recognize a Supremacy Clause right of action that applies to all *Shaw* claims, including violation claims as well as preemption claims. The case-by-case approach would not limit that right of action. Rather, it would give district courts flexibility in fashioning appropriate remedies in individual cases.


404. In fact, the complaint in *Sandoval* characterizes the policy as a rule. See Complaint, ¶ 10–12, *Sandoval* (No. 96-D-1875-N) (on file with author).

405. *Id.* ¶ 7 (on file with author).

406. *Id.* ¶¶ 23–25 (on file with author). The Fourteenth Amendment prohibits only intentional discrimination. Similarly, section 601 of Title VI reaches only intentional discrimination. However, regulations promulgated under section 602 of Title VI also prohibit state actions that have a disproportionate adverse impact on protected groups, regardless of whether those actions are motivated by a discriminatory purpose. See *Alexander v. Sandoval*, 532 U.S. 275, 279–82 (2001).
She sought declaratory and injunctive relief, naming as defendants the Alabama Department of Public Safety and its director. The District Court granted the defendants’ motion for judgment as a matter of law on the intentional discrimination claim. However, the court ruled in favor of the plaintiff class on the disparate impact claim, declaring “that the Department’s English-Only Policy violates Title VI of the Civil Rights Act of 1964.” The court permanently enjoined the department and its director from enforcing the policy. On appeal to the Eleventh Circuit, the defendants argued that there was neither an express nor an implied private cause of action for the plaintiffs to enforce the disparate impact regulations promulgated under § 602 of Title VI. The court of appeals disagreed, holding that “an implied private cause of action exists under section 602 of Title VI.” The Eleventh Circuit affirmed the district court’s judgment on the merits and sustained the award of declaratory and injunctive relief.

The Supreme Court granted certiorari to consider whether there is a private cause of action to enforce disparate impact regulations promulgated under Title VI. The Court concluded that the plaintiff class in Sandoval lacked a private right of action to pursue its disparate impact claim. Therefore, notwithstanding the lower courts’ uncontested holding that the Alabama policy violated federal regulations, the Supreme Court reversed the Eleventh Circuit’s judgment, thereby dissolving the injunction, and effectively authorizing Alabama to resume implementation of its (presumably) illegal policy.

The Court invoked separation of powers principles in support of its decision, claiming that “private rights of action to enforce federal law must be created by Congress.” But the Court has never permitted this

408. Id. ¶ 5, 6 (on file with author).
411. Id.
412. See Sandoval v. Hagan, 197 F.3d 484, 502 (11th Cir. 1999). Defendants also argued that the suit was barred by the Eleventh Amendment and that the English-only policy did not violate Title VI. See id. at 492–501, 507–11.
413. Id. at 507.
414. Id. at 511.
416. Id. at 292–93.
417. On appeal to the Eleventh Circuit, the defendants did challenge the trial court’s holding that the Alabama policy violated federal regulations. See Sandoval v. Hagan, 197 F.3d 484, 507–11 (11th Cir. 1999). However, in their Supreme Court brief, the defendants focused exclusively on the private cause of action issue and did not contest the merits. See Petitioner’s Brief, Alexander v. Sandoval, 532 U.S. 275 (2001) (No. 99-1908).
418. Sandoval, 532 U.S. at 286.
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separation of powers principle to impede judicial creation of private rights of action on behalf of plaintiffs who seek to enjoin enforcement of state laws that are allegedly preempted by federal statutes or regulations. And the Court failed to explain why the judicially created private cause of action that it consistently applies in Shaw preemption cases should not also apply to cases where plaintiffs sue to enjoin enforcement of state policies that are preempted by federal statutes or regulations.

Assuming that the Alabama policy does violate federal law, the Supreme Court's decision undermines the supremacy of federal law and subverts the rule of law by tacitly endorsing an ongoing violation of federal law by state officers. Alabama cannot claim a legitimate state sovereignty interest in being able to implement its policy because the policy is (presumably) illegal. Moreover, a federal injunction barring implementation of the policy is not an unwarranted intrusion into the realm of executive discretion — again, because the policy is illegal. In short, assuming that the policy actually does violate federal law, there is no good reason to refrain from granting an injunction to prevent implementation of the policy.

Sandoval also illustrates a broader point. If the Court recognizes an implied right of action under the Supremacy Clause for Shaw preemption claims, there is no persuasive argument against extending that right of action to encompass claims, like Sandoval, alleging that an official executive policy violates, or is preempted by, a federal statute or regulation. Even under the third option discussed above, which would extend the Shaw right of action only to cases in which plaintiffs challenge a "legal rule," the plaintiffs in Sandoval would have a private right of action under the Supremacy Clause because the policy at issue in Sandoval created a legal rule that allegedly conflicted with federal law.

2. Blessing v. Freestone

In Blessing, a group of mothers sued the director of Arizona's child support agency under 42 U.S.C. § 1983. The complaint alleged that Arizona's systemic failure to assist with the collection of child support from "deadbeat dads" violated various provisions of Title IV-D of the Social Security Act and its implementing regulations. The complaint did not allege that Arizona had an official policy of refusing to collect child support. Rather, the complaint alleged a systemic "pattern or practice" of failing to

419. See supra Part IV.

420. The policy is "preempted" because it establishes a "legal rule" that driver's license applicants must take the exam in English, and the lower courts found that that legal rule conflicted with federal regulations prohibiting state actions that have a disproportionate adverse impact on protected groups.


422. See Complaint for Declaratory and Injunctive Relief, Freestone v. Cowan, 68 F.3d 1141 (9th Cir. 1995) (No. 93-16697) [hereinafter Blessing Complaint] (on file with author).
comply with federal requirements. The Ninth Circuit summarized the complaint succinctly as follows: "The stories told by the five named plaintiffs document a range of administrative abuses extending from simple incompetence and bureaucratic bungling to shockingly callous indifference." 425 Plaintiffs sought declaratory and injunctive relief to remedy the alleged violations.

The district court granted summary judgment for the defendant, holding that § 1983 did not provide a cause of action for private enforcement of Title IV-D. 424 The Ninth Circuit reversed, but the Supreme Court agreed with the district court, holding that plaintiffs could not bring their claim under § 1983 because "Title IV-D does not give individuals a federal right to force a state agency to substantially comply with Title IV-D." 425 Unfortunately for potential Shaw plaintiffs, the Supreme Court reached the right result for the wrong reasons. Analysis of the Court's opinion illustrates both the intellectual poverty of the Court's current approach, and the proper application of the framework proposed herein.

Title IV-D authorizes appropriations "[f]or the purpose of enforcing the support obligations owed by absent parents to their children... and assuring that assistance in obtaining support will be available under this part to all children... for whom such assistance is requested." 426 The statute directs the Secretary of Health and Human Services to "establish such standards for State programs for locating absent parents, establishing paternity, and obtaining child support... as he determines to be necessary to assure that such programs will be effective." 427 Pursuant to this statutory authorization, the Secretary promulgated detailed regulations that establish comprehensive federal standards for State child support enforcement programs. 428

The Supreme Court's analysis of whether the plaintiffs had a "federal right" under Title IV-D began by identifying three factors that determine "whether a particular statutory provision gives rise to a federal right." 429 One factor is that "Congress must have intended that the provision in question benefit the plaintiff." 430 The Court relied expressly on this "intended beneficiary" factor to justify its holding. Specifically, the Court said: "[T]he

423. Freestone v. Cowan, 68 F.3d 1141, 1144 (9th Cir. 1995).
424. See Blessing, 520 U.S. at 338.
425. Id. at 333.
430. Id. The other two factors are that the asserted right "is not so vague and amorphous that its enforcement would strain judicial competence," and that "the statute must unambiguously impose a binding obligation on the States." Id. at 340-41.
requirement that a State operate its child support program in 'substantial compliance' with Title IV-D was not intended to benefit individual children and custodial parents, and therefore does not constitute a federal right."431 This statement is astonishing because the statute says explicitly that it is intended to benefit individual children and custodial parents.432

The Court's conclusion can be partially explained by its distinction between specific statutory requirements, which might "give rise to individual rights,"433 and the more generalized requirement for a state to achieve "substantial compliance" with Title IV-D, which the Court says does not create individual rights. Indeed, the Court's rationale is based on the premise that the plaintiffs merely alleged violations of "Title IV-D as an undifferentiated whole" but failed "to identify with particularity the rights they claimed." 434 In fact, though, this premise is demonstrably false. The complaint alleged systemic violations of eleven specific provisions of the Code of Federal Regulations,435 including, inter alia, a regular and consistent failure to:

- "establish a system for and carry out periodic reviews of low priority or inactive cases at least annually or on receipt of new information, as required by 45 C.F.R. §303.10(B)(6)";436
- "immediately repeat attempts to locate absent parents whenever new information becomes available and to repeat location attempts at least quarterly, even if no new information is available, as required by 45 C.F.R. §303.3(B)(5)".437

431. Id. at 343.
432. See 42 U.S.C. § 651 (2000) (stating that the statute is enacted "[f]or the purpose of enforcing the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living").
433. Blessing, 520 U.S. at 345 ("We do not foreclose the possibility that some provisions of Title IV-D give rise to individual rights.").
434. Id. at 342. The court stated:

It was incumbent upon respondents to identify with particularity the rights they claimed, since it is impossible to determine whether Title IV-D, as an undifferentiated whole, gives rise to undefined "rights." Only when the complaint is broken down into manageable analytic bites can a court ascertain whether each separate claim satisfies the various criteria we have set forth for determining whether a federal statute creates rights.

435. Blessing Complaint, supra note 422, ¶ 143.
• "file actions for paternity determinations or complete service of process to establish paternity within ninety days of locating putative fathers, as required by 45 C.F.R. §303.5(a)(1)";\(^{438}\)

• "take appropriate action pursuant to state law to enforce child support obligations that have become delinquent, as required by 45 C.F.R. §§ 305.26 and 303.6";\(^{439}\)

• "maintain sufficient staff, including attorneys, to adequately represent [the State] in court with respect to the establishment and enforcement of support orders, and to provide an effective program of child support services, as required by 45 C.F.R. §303.20(F)."\(^{440}\)

Given that the plaintiffs alleged specific violations of specific regulatory provisions, why did the Court treat plaintiffs' claim as a generalized allegation that Arizona had failed to achieve substantial compliance with Title IV-D? And given that the express purpose of Title IV-D and its implementing regulations is to benefit mothers and children, like the plaintiffs in Blessing, who need governmental assistance in collecting child support from "deadbeat dads," why did the Court conclude that "Title IV-D was not intended to benefit individual children and custodial parents"?\(^{441}\)

One possible explanation is that the Court is hostile towards civil rights plaintiffs. While that may be true as a general matter, there is no reason to believe that the Court's conservative majority has an interest in protecting deadbeat dads from child support enforcement efforts. Rather, the best explanation for Blessing is that the Court was justifiably reluctant to issue a mandatory injunction that would have required the district court to oversee virtually every aspect of Arizona's child support collection program.\(^{442}\) If there was evidence to suggest that the Director of Arizona's Department of Economic Security was purposefully violating federal law, then the Blessing plaintiffs might have had a plausible claim for a mandatory injunction. However, careful reading of the complaint and the Ninth Circuit opinion indicates that the defendants' violations of federal law were primarily attributable to bureaucratic incompetence.\(^{443}\) In light of traditional


\(^{439}\) Blessing Complaint, supra note 422, ¶ 143(j). See 45 C.F.R. §§ 305.26, 303.6(c) (1993).


\(^{441}\) Blessing v. Freestone, 520 U.S. 329, 343 (1997).

\(^{442}\) The Ninth Circuit did not actually award injunctive relief; it remanded the case for the district court to consider the appropriate remedy. See Freestone v. Cowan, 68 F.3d 1141, 1156 (9th Cir. 1995), vacated, 520 U.S. 329 (1997). However, the complaint sought a permanent injunction "requiring affirmative measures sufficient to achieve as well as sustain substantial compliance with federal law, throughout all programmatic operations at issue." Blessing Complaint, supra note 422, Prayer for Relief.

\(^{443}\) See Blessing Complaint, supra note 422; Freestone, 68 F.3d at 1156.
equitable doctrines related to the distinction between mandatory and prohibitory injunctions, the Supreme Court might well have concluded that a mandatory injunction would have been overly intrusive, and ultimately ineffective as a remedy for bureaucratic incompetence. Indeed, the Court's analysis would have been far more persuasive if it had confronted directly the problems associated with issuance of a mandatory injunction, rather than misrepresenting the allegations in the plaintiffs' complaint, and pretending that Title IV-D was not intended to benefit the very people for whose benefit the statute was enacted.

_Blessing_ helps illuminate the difference between the two options discussed above for extending the _Shaw_ right of action to address systemic violations of federal statutes by state executive officers. If the _Shaw_ right of action applied only to claims challenging legal rules, then the _Blessing_ plaintiffs would not have had a private right of action because the defendants were not acting pursuant to any official policy or legal rule. If, on the other hand, the _Shaw_ right of action encompassed all claims for prospective relief to remedy ongoing violations of federal law, the _Blessing_ plaintiffs would have had an implied right of action under the Supremacy Clause. Under the latter approach, though, the decision whether to grant injunctive relief in any given case would necessarily be guided by traditional principles of equitable discretion.

Thus, the Court in _Blessing_ could have held that the plaintiffs had a right of action under the Supremacy Clause, but that they were not entitled to injunctive relief for the reasons noted above.

One key advantage of the broader right of action is that it would yield more transparent judicial decision-making. A ruling in favor of the defendant in _Blessing_ based on the fact that the defendant was not acting pursuant to an "official policy" or "legal rule" would not address the real reasons for reluctance to grant injunctive relief. In contrast, if the Court held that the plaintiffs had a right of action under the Supremacy Clause, but that they were not entitled to injunctive relief for the reasons noted above.

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444. _See_ DOBBS, supra note 187, at 163–64 (noting that "courts may be reluctant to award a mandatory injunction because it may be especially intrusive, or more difficult to supervise and enforce.")

445. Although the _Blessing_ plaintiffs had a weak claim for injunctive relief, they had a stronger claim for declaratory relief. A judicial declaration identifying specific violations of specific federal regulatory provisions would have increased pressure on Arizona's child support agency to improve its performance, without requiring the district court to supervise the details of the program. It might also have sent a useful signal to the Department of Health and Human Services to play a more active role in overseeing implementation of Arizona's child support collection program.

446. _See_ supra notes 394–402 and accompanying text.

prospective relief to remedy ongoing violations of federal law, and directed the lower courts to apply traditional principles of equitable discretion, the lower courts in Blessing would have been forced to confront directly the difficult remedial issues raised by plaintiffs' complaint, rather than relying on empty formalism to dodge the issues.

Moreover, if the facts in Blessing were slightly different—in particular, if there was evidence of willful refusal to comply with federal law—the case for injunctive relief would be more compelling. A broad right of action, limited by principles of equitable discretion, would enable courts to deal effectively with that type of situation. In contrast, a narrower right of action, limited only to claims challenging "legal rules," would preclude courts from granting relief even in meritorious cases.

VII. CONCLUSION

This Article has demonstrated that the Supreme Court applies two very different private right of action doctrines in cases where plaintiffs sue to enjoin state action that allegedly conflicts with federal statutes. In cases where plaintiffs sue to enjoin enforcement of a state law that is allegedly preempted by a federal statute (Shaw preemption cases), the Court tacitly assumes that plaintiffs have an implied right of action under the Supremacy Clause. But in cases where plaintiffs sue to enjoin state executive action that allegedly violates a federal statute (Shaw violation cases), the Court does not address the merits of the claim unless plaintiffs can establish a statutory cause of action. The current doctrinal framework is irrational because it creates a perverse incentive for states to de-codify laws to evade federal judicial review.

The Supreme Court's ultimate resolution of the doctrinal tension between Shaw preemption claims and Shaw violation claims has significant theoretical and practical implications. From a theoretical standpoint, the contrast between the Court's treatment of Shaw preemption claims and Shaw violation claims can be viewed as a manifestation of the Court's tendency to oscillate between what Professor Fallon has called the "federalist" and "nationalist" models of judicial federalism. In essence, the Court applies a nationalist model in Shaw preemption cases and a federalist model in Shaw violation cases. The Court might take a further step in the federalist direction by rejecting a Supremacy Clause right of action for Shaw preemption claims. In that case, a large class of federal preemption disputes that are currently litigated in federal court would be relegated to state court. However, the Court might also endorse a Supremacy Clause right of action and extend it to Shaw violation claims. The latter option would provide an important nationalist counterweight to the recent federalist revival.

448. See Fallon, supra note 340, at 1151–64.
From a practical standpoint, the fault line between Shaw preemption claims and Shaw violation claims introduces litigation opportunities for both plaintiffs and defendants. Although the Supreme Court has resolved any lingering doubts as to whether federal courts have jurisdiction over Shaw preemption claims, defendants can still move to dismiss such claims on the grounds that plaintiffs lack a valid federal cause of action. If defendants litigate this issue, then in cases where plaintiffs do not have a private right of action under the preemptive federal statute or under § 1983, courts will be forced to decide whether to recognize an implied right of action under the Supremacy Clause for Shaw preemption claims.

The doctrinal fault line between Shaw preemption claims and Shaw violation claims also presents litigation opportunities for plaintiffs. In cases where private plaintiffs sue to enjoin state action that conflicts with federal statutes, federal courts are more likely to reach the merits of claims if plaintiffs use the word “preemption,” rather than “violation,” to describe the conflict between the federal statute and the challenged state action. Therefore, plaintiffs who seek to enjoin state executive action that allegedly conflicts with federal statutes would be wise to make greater use of the “preemption” label. If plaintiffs do so, then courts will be forced to decide whether to extend a Supremacy Clause right of action to Shaw violation claims.

The Supreme Court should hold explicitly that the Supremacy Clause creates a private right of action not only for Shaw preemption claims, but also for Shaw violation claims. In abstract terms, such a right of action is necessary to promote important rule of law and federal supremacy values. In more concrete terms, explicit recognition of a Supremacy Clause right of action for Shaw violation claims would enable civil rights plaintiffs to obtain injunctive relief against state officers without having to rely on § 1983 or other civil rights statutes to establish a private right of action. Given that recent cases such as Alexander v. Sandoval and Gonzaga University v. Doe have limited the availability of statutory rights of action for civil rights plaintiffs, a constitutional right of action under the Supremacy Clause is necessary to prevent systemic violations of federal statutes by state officers.

450. See supra notes 82-88 and accompanying text.
451. The “preemption” label may not be applicable to cases like Blessing v. Freestone, 520 U.S. 329 (1997), where plaintiffs challenge a “pattern or practice” of executive branch activity. See supra notes 421-47 and accompanying text. But the “preemption” label is applicable to cases like Alexander v. Sandoval, 532 U.S. 275 (2001), where plaintiffs challenge an executive branch policy that is functionally equivalent to a law. See supra notes 405-20 and accompanying text.