Federal Causes of Action and Everything that Follows

Author : Lumen N. Mulligan

Date : December 11, 2014

John F. Preis, *How Federal Causes of Action Relate to Rights, Remedies and Jurisdiction*, 67 **Fla. L. Rev.** __ (forthcoming 2015, available at SSRN).

"Cause of action" is a ubiquitous phrase in American law. Plaintiffs plead causes of action every day. Justice Scalia admonishes the courts never to infer them from statutory or constitutional rights. Justice Holmes tells us that federal question jurisdiction depends upon them. Justice Brennan scolds us never to conflate them with choice of remedy. But what, precisely, does cause of action mean? And equally important, how does cause of action interact with the concepts of rights, jurisdiction, and remedies? Professor John Preis takes up these questions in his latest article.

If you are a consumer of federal courts or procedure scholarship, Preis' piece is a must read. To be sure, these concepts—cause of action, right, jurisdiction, and remedy—have been the topic of much past scholarship. These past pieces, however, tend to focus on cause of action in just one context, such as how cause of action relates to jurisdiction. Preis puts this myopic focus aside and aims to understand how the federal courts use cause of action across the board, providing both a detailed historical account of the concept and an analytically crisp contemporary treatment. But even if you are not a proceduralist, you need to read Preis' article for its innovative approach to scholarly writing. While Preis begins his piece in the standard manner ("In part I, I argue X and in part II, I contend Y."), he ends the piece not by simply imploring the Court to adopt his views. Instead, Preis concludes with mock Supreme Court slip opinions—he even switches to New Century Schoolbook font—that incorporate his positions. Seldom is a piece of scholarship both substantively important and rhetorically novel.

Preis begins the piece with ancient English common law, where the concepts of right (or what was often referred to as the "primary right" or the "rule of decision") and cause of action (or what was sometimes referred to as "remedial right" or a "right of action") were thought to be immutably linked within the parameters of the old writ system. One did not exist without the other. Examples abound even after the common law crossed the Atlantic to the United States. *Marbury v. Madison*, for instance, held that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." But by the end of the twentieth century, the federal courts, largely reacting to statutory innovations and the administrative state, began to differentiate between causes of action, rights, remedies and jurisdiction. Preis thus defines the contemporary notion of cause of action by reference to *Davis v. Passman*, which held that a cause of action grants the holder the power to enforce a right in court. Preis' meticulous recounting of cause of action's historical and contemporary denotations provides a detailed working understanding of the notion, which he puts to good use in several areas.

The Supreme Court, it turns out, uses cause of action just as sloppily as the rest of us do, which leads to unnecessary confusion on a number of issues. Armed with his more refined understanding, Preis argues that the Court errs, by applying mismatched concepts, when it uses cause-of-action jurisprudence to resolve "rights" issues. In short, Scalia's inferred cause-of-action jurisprudence is wrong. Similarly, the Court errs, at least most of the time, when it applies cause-of-action jurisprudence to federal question subject matter jurisdiction. In short, Justice Holmes' jurisdictional position is wrong. Finally, because the modern Court tends to link causes of action with specific remedies, the contemporary Court errs when it

continues to invoke outdated rulings such as *Bell v. Hood*'s holding that the "federal courts may use any available remedy to make good the wrong done." In short, Justice Brennan is wrong to insist that cause of action is analytical prior to remedy. According to Preis, in other words, everyone, from the right to the left, is confused.

I have my quibbles, of course, with some of the nuances of his view. For example, Preis treats sovereign immunity as a matter of cause of action, while I conclude that immunity is a defense with jurisdictional implications. See, e.g., *United States v. Interstate Commerce Comm'n*, 337 U.S. 426, 462 (1949) (treating immunity as a defense). I also think Preis undervalues the binary nature of successfully bringing a cause of action as opposed to the scalar nature of most damages insofar as this relates to his thesis that the concepts of cause of action and remedy are essentially identical.

Quibbles aside, I think Preis hits the nail on the head. The Court, through sloppy usage of cause of action, has created a host of problems that are readily avoided by more careful deployment of the term.

Most law review articles would stop right there. Not Preis. Instead of just griping about what a mess the Court has made, Preis drafts language to fix it. In three mock opinion sections—readily designed to be cut & pasted by the Court into its next case dealing with causes of action—Preis illustrates precisely how the Court can use cause of action more precisely and avoid past doctrinal headaches.

I'll be honest with you—I often learn a lot when I read legal scholarship, but seldom do I have fun. By ending his fine piece with the chutzpah to just go ahead and draft the Court's next opinion, I couldn't help but smile. I think you will too.

Cite as: Lumen N. Mulligan, *Federal Causes of Action and Everything that Follows*, JOTWELL (December 11, 2014) (reviewing John F. Preis, *How Federal Causes of Action Relate to Rights, Remedies and Jurisdiction*, 67 **Fla. L. Rev.** __ (forthcoming 2015, available at SSRN)), https://courtslaw.jotwell.com/federal-causes-of-action-and-everything-that-follows-2/.