# REVEALING REDUNDANCY: THE TENSION BETWEEN FEDERAL SOVEREIGN IMMUNITY AND NONSTATUTORY REVIEW

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I. INTRODUCTION

Absent a waiver of the federal government’s sovereign immunity from suit, courts lack jurisdiction to review cases challenging official action.\(^1\) While Congress has enacted many statutory waivers of sovereign immunity, all of those waivers have holes through which a plaintiff might fall.\(^2\) “Nonstatutory review” fills those gaps by allowing suits against officers of the United States for injunctive relief in the absence of a statutory waiver of sovereign immunity.\(^3\) Nonstatutory review, however,

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1. See discussion infra Part II.
2. See discussion infra Part III.
conflicts with the Supreme Court’s sovereign immunity jurisprudence. A 
debate rages between those who argue that federal sovereign immunity is 
an anachronism that is best forgotten and those who argue that it provides 
a critical balance between the three branches of the federal government. 
However, limitations on federal jurisdiction and narrow standards for 
reviewing official federal action often yield the same results as sovereign 
immunity doctrine and can take its place to preserve the proper balance of 
power among the three branches of government. Thus, this Article 
suggests that federal sovereign immunity doctrine has become largely 
superfluous, and courts should rely instead on more relevant and 
doctrinally sound modes of analysis in cases challenging official federal 
action.

Part II briefly outlines the requisites of a suit against the United 
States and the most noteworthy waivers of federal sovereign immunity. 
Part III describes some of the holes left in those waivers. The development 
of nonstatutory review as a mechanism for filling the gaps left by the 
statutory waivers of sovereign immunity is briefly recounted in Part IV. 
Part V examines the criticisms and defenses of sovereign immunity 
document, followed by a discussion of how sovereign immunity has been 
rendered superfluous by case law limiting the availability of nonstatutory 
review and by the growth of other doctrines that yield the same results in 
Part VI. Finally, in Part VII this Article concludes with an analysis of the 
impact of that doctrinal redundancy and an explanation of why federal 
sovereign immunity should be left to gather dust.

II. SUING THE UNITED STATES

In a suit against the United States, a plaintiff must state a basis for the 
court’s jurisdiction, a cause of action, and a waiver of the government’s 
sovereign immunity. Although the same statute may provide all three 
elements, these are three separate inquiries.

First, the Supreme Court currently requires the plaintiff to 
demonstrate that Congress has waived the government’s immunity from
suit. At the time of the Constitution’s adoption and the Supreme Court’s decision in *Chisholm v. Georgia*, sovereign immunity was in doubt. Yet by the time the Court decided *United States v. Lee* in 1882, the Supreme Court recognized that “it has always been treated as an established doctrine.” Contemporary doctrine holds that absent a waiver of sovereign immunity, the court lacks subject matter jurisdiction. “It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.” “[W]aiver[s] of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text”; they may not be implied or inferred. “Waivers of immunity must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires.” Because any waiver must appear clearly in the statutory text, legislative history cannot be used to clarify an ambiguity.


7. See Jackson, supra note 5, at 523 (noting that during this time, the federal government’s immunity was “not a settled constitutional fact”).


9. *Id.* at 207 (citing United States v. Clarke, 33 U.S. (8 Pet.) 436 (1834)); see also Jackson, supra note 5, at 533.


13. *U.S. Dep’t of Energy*, 503 U.S. at 615 (citations and internal quotation marks omitted). Where a waiver would subject the government to regulation under state law, the rule requiring the waiver to be unambiguous applies with special force.

Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is a clear congressional mandate, specific congressional action that makes this authorization of state regulation clear and unambiguous.


While many federal statutes waive the government’s immunity from suit, several are notable. The Tucker Act of 1887,\(^{15}\) one of the first broad waivers of the United States’ sovereign immunity, authorizes suits seeking damages against the United States based on the Constitution, statutes, regulations, or contracts.\(^{16}\) The Federal Tort Claims Act of 1946 (FTCA)\(^{17}\) waives the United States’ sovereign immunity from certain tort claims arising from the conduct of federal employees.\(^{18}\) The Quiet Title Act of 1972 (QTA)\(^{19}\) waives the government’s immunity from “civil actions to adjudicate title disputes involving real property in which the United States claims an interest.”\(^{20}\) The most notable of the many statutes that waive the


> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.


18. 28 U.S.C. § 2674; *see also* FDIC v. Meyer, 510 U.S. 471, 475 (1994). *See generally FALLON*, supra note 3, at 962–68 (discussing the FTCA’s procedures and exceptions); Sisk, *supra* note 5, at 160–336 (same). The FTCA provides in part that “[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.” 28 U.S.C. § 2674.


20. Block v. North Dakota *ex rel.* Bd. of Univ. & Sch. Lands, 461 U.S. 273, 275–76 (1983). The QTA provides in part: “The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real
United States’ sovereign immunity, however, is the Administrative Procedure Act (APA).\footnote{Administrative Procedure Act (APA), ch. 324, 60 Stat. 237 (1946) (current version codified at 5 U.S.C. §§ 551–559, 701–706 (2000)).} When Congress eliminated the amount in controversy requirement from suits against federal agencies and officers in 1976, it also added a waiver of sovereign immunity to § 702 of the APA.\footnote{Act of Oct. 21, 1976, Pub. L. No. 94-574, § 702, 90 Stat. 2721 (codified at 5 U.S.C. § 702); see also FALLON, supra note 3, at 968.} The APA now provides both a cause of action and a waiver of sovereign immunity in suits against federal agencies seeking relief other than money damages.\footnote{The APA provides in part: A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States . . . .} 

Court held that the Tucker Act waives the government’s sovereign immunity from “claims founded upon statutes or regulations that create substantive rights to money damages.” To bring a successful Tucker Act suit against the United States, however, a plaintiff must also show a substantive right for money damages based on “some other source of law.”

Subject matter jurisdiction is usually supplied by 28 U.S.C. § 1331 in cases against federal agencies. Before 1976, § 1331 extended jurisdiction only to cases in which the amount in controversy exceeded $10,000. That created a “problem . . . in actions for judicial review of administrative action [where] the right asserted cannot be valued in dollars and cents.” In 1976, Congress eliminated that “unfortunate gap in the statutory jurisdiction of the Federal courts” in cases against the United States, federal agencies, and federal officials sued in their official capacities.

III. HOLES IN THE MAJOR WAIVERS OF SOVEREIGN IMMUNITY

Congress left significant gaps in the waivers of sovereign immunity cited previously. The Tucker Act provides the sole mechanism for obtaining monetary relief in excess of $10,000 from the United States.

27. Id. at 218.
28. Id. at 216.
33. Jackson, supra note 5, at 570 (observing that some common law tort claims, such as claims based on government misrepresentation and claims for specific performance of contracts, are not available against the United States).
But the availability of monetary relief impliedly precludes the availability of other types of relief, such as specific performance in contract suits. Likewise, the QTA provides the exclusive remedy for actions involving property to which the United States claims title, which precludes relief under the APA. Furthermore, the FTCA provides the exclusive remedy for torts committed by federal employees in the course of official duties, but it exempts discretionary functions “whether or not the discretion involved be abused.” And the Feres v. United States doctrine exempts injuries to servicemen arising out of military service from the FTCA.

The APA, for its part, has some well-known limitations. It does not authorize suits against the President, suits challenging actions that are committed to agency discretion, or suits seeking relief that is expressly or

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38. 28 U.S.C. § 2680(a); Sisk, supra note 5, at 239; see also Krent, supra note 35, at 1545 (arguing that the FTCA’s discretionary function and other exceptions “protect majoritarian policy from secondguessing”).


40. United States v. Stanley, 483 U.S. 669, 672 (1987) (citing Feres, 340 U.S. at 146); see also Sisk, supra note 5, at 332–36 (analyzing the Feres decision).

41. See Kronish, supra note 3, at 130 (discussing specific limitations regarding jurisdiction and waiver of immunity for the actions of only those agencies listed in the Act).

42. Dalton v. Specter, 511 U.S. 462, 476–77 (1994) (holding that “the President is not an ‘agency’” under the meaning of the APA); Guerrero v. Clinton, 157 F.3d 1190, 1191 n.2 (9th Cir. 1998) (citing Franklin v. Massachusetts, 505 U.S. 788, 797 (1992)). “[R]espect for the separation of powers and the unique constitutional position of the President” preclude courts from reviewing presidential actions under the APA without an express statement by Congress. Franklin, 505 U.S. at 800–01. See generally Siegel, supra note 3, at 1617–21 (providing a detailed analysis of the Franklin decision).

43. 5 U.S.C. § 701(a) (2000) (“This chapter applies . . . except to the extent
impliedly precluded by another statute. One of the less familiar holes in the APA's waiver of sovereign immunity is the exception for suits challenging "military authority exercised in the field in time of war." The phrase "in the field" has been interpreted broadly as including "any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted."
Interpreting the phrase “in the field” in what is now the Uniform Code of Military Justice (UCMJ), the Fourth Circuit held that Camp Jackson, a training cantonment near Columbia, South Carolina, was “in the field.” The phrase “time of war” is interpreted broadly as well. Courts have long held that Congress need not issue a declaration of war for combat to qualify as a “time of war.”

47. Hines v. Mikell, 259 F. 28, 35 (4th Cir. 1919). In Hines, a civilian employee at Camp Jackson was charged with violating the Articles of War under a provision granting military jurisdiction “in time of war” over “persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States.” Id. at 30 (internal quotation omitted). The court considered “in the field” to be a term of art that encompassed troops “engaged in training and preparing for service on the firing line overseas,” as well as troops being trained as “a reserve force . . . to be available in the case of an emergency.” Id. at 31, 33. Because Camp Jackson served as a location for training troops, the court held it was “in the field.” Id. at 35.

48. See The Prize Cases, 67 U.S. (2 Black) 635, 666–70 (1862) (holding that the Civil War constituted a de facto state of war); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 41–42 (1800) (opinion of Washington, J.) (concluding that conflict with France constituted war); id. at 43–44 (opinion of Chase, J.) (same); id. at 45–46 (opinion of Paterson, J.) (same); Koohi v. United States, 976 F.2d 1328, 1334 (9th Cir. 1992) (indicating that the Tanker War did constitute a “time of war” despite not being “supported by a formal declaration of war”); Minns v. United States, 974 F. Supp. 500, 506 (D. Md. 1997) (holding that the Persian Gulf War constituted a “time of war” under the FTCA without a formal declaration); see also Campbell v. Clinton, 203 F.3d 19, 39 (D.C. Cir. 2000) (Tatel, J., concurring) (discussing several cases in which courts determined whether a “time of war” existed in the absence of a formal declaration); Mitchell v. Laird, 488 F.2d 611, 613 (D.C. Cir. 1973) (recognizing that under certain circumstances, the President may wage war without congressional approval). “Although the United States has committed its armed forces into combat more than a hundred times, Congress has declared war only five times: the War of 1812, the Mexican-American War of 1848, the Spanish-American War of 1898, World War I, and World War II.” Campbell, 203 F.3d at 29 n.6 (Randolph, J., concurring).
Thus, a broad range of domestic military operations might potentially fall through the holes in the APA’s waiver of sovereign immunity.50

IV. A BRIEF HISTORY OF NONSTATUTORY REVIEW51

A. The Turn of the Twentieth Century

Nonstatutory review fills some of the gaps left in the primary waivers of sovereign immunity discussed above. In the early part of the twentieth century, nipping at the heels of the Supreme Court’s first broad statement of federal sovereign immunity in *Lee* in 1882,52 injunctive relief was available against federal officials even in the absence of a statutory review provision.53 A plaintiff could bring a private action for damages against a federal officer “alleg[ing] conduct by the officer which, if not justified by his official authority, [constituted] a private wrong to the plaintiff, entitling

49. *Koohi*, 976 F.2d at 1335. The court observed that the military actions in Korea, Vietnam, Panama, Grenada, Kuwait, and Iraq were not preceded by declarations of war, “[y]et no one can doubt that a state of war existed.” *Id.* at 1334.

50. But see *Doe v. Sullivan*, 938 F.2d 1370, 1380 (D.C. Cir. 1991) (holding that the APA’s “time of war” exception did not apply to the issuance of regulations by the Food and Drug Administration (FDA) under the Food, Drug, and Cosmetic Act).

51. Other commentators have provided more complete outlines of the development of nonstatutory review. See generally *Cramton*, supra note 3, at 394–417 (addressing the highlights of nonstatutory review); Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 541–58 (2001) (detailing the development of the *Ex parte Young* doctrine).


[W]hile the exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has since [*Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821)] been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.

*Id.* at 207 (citations omitted). But see Hill, supra note 51, at 540 (identifying *United States v. McLemore*, 45 U.S. (4 How.) 286 (1846), as the first case in which the Supreme Court “sustained the sovereign immunity of the United States”). In *McLemore*, the plaintiff sought to enjoin the United States from collecting a judgment, but the Court held that “[t]here was no jurisdiction of this case in the Circuit Court, as the government is not liable to be sued, except with its own consent, given by law.” *McLemore*, 45 U.S. (4 How.) at 288.

the latter to recover damages." A plaintiff could also file for an “equity injunction,” which was likewise based on “the answerability of a Government officer as a private individual for conduct injurious to another” and depended upon “the assumption that unless enjoined the officer will commit acts which will entitle the plaintiff to maintain an action for damages.” In other words, a plaintiff could sue a federal officer to enjoin particular actions if the suit was in the nature of a common law tort action.

For example, in Noble v. Union River Logging Railroad Co., the Court explained that a federal official may be enjoined where he has acted “ultra vires, and beyond the scope of his authority.” In addition, “[i]f he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do.” In Noble, a railroad company filed an action in equity to enjoin the Secretary of the Interior from revoking approval of a right of way over federal land. The Court concluded that because the company’s property right had already vested, the Secretary’s revocation was an unconstitutional and ultra vires interference with the company’s property rights.

In American School of Magnetic Healing v. McAnnulty, the Court

54. FALLON, supra note 3, at 940 (quoting ATTORNEY GEN.’S COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 77-8, at 81 (1st Sess. 1941)); see also John Harrison, Jurisdiction, Congressional Power, and Constitutional Remedies, 86 GEO. L.J. 2513, 2517 (1998) (“While the government could not be sued as such, officers could be sued for acts that would be wrongful if committed without official privilege.”).

55. FALLON, supra note 3, at 942 (quoting ATTORNEY GEN.’S COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 77-8, at 81 (1st Sess. 1941)).

56. See Idaho v. Coeur d’Alene Tribe of Idaho, 521 U.S. 261, 272–73 (1997) (opinion of Kennedy, J.) (citing numerous cases in which government officers were held liable for common law torts); FALLON, supra note 3, at 1016–17; Hill, supra note 51, at 541 (noting that traditionally “[w]hen an injunction was granted, it was to restrain the commission of a common-law tort”).


58. Id. at 171–72.

59. Id. at 172.

60. Id. at 165.

61. Id. at 176.

reiterated that “in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.” The Court held that “the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion” and, as opposed to factual determinations, was “certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud.” Because the postmaster’s actions were unauthorized and violated the school’s property rights, the Court held that the school was entitled to injunctive relief.

B. The Larson-Dugan Era

Over time, the fiction of bringing a common law tort action against a federal officer fell away and was replaced by the theory that a federal officer acting unlawfully is not acting on behalf of the sovereign and hence, is not protected by sovereign immunity. In Larson v. Domestic & Foreign Commerce Corp., the Supreme Court explained that actions of a government officer that are ultra vires or unconstitutional “are considered individual and not sovereign actions,” and hence, may be restrained. But Larson also marked what one commentator characterizes as “a significant retrenchment” in nonstatutory review doctrine. Ultimately, the Court in

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63. McAnnulty, 187 U.S. at 108.
64. Id. at 103, 109–11.
65. Id. at 105.
66. Id. at 110–11.
67. See Clackamus County v. McKay, 219 F.2d 479, 488 (D.C. Cir. 1954), vacated as moot, 349 U.S. 909 (1955) (observing that this new theory was “a bit of fiction designed to reconcile the maxim that the King can do no wrong with the plain fact that the King, and every other government, frequently does do very wrong,—a fact which we in this country in no wise attempt to deny”).
69. Id. at 689–90; see also id. at 693 (holding it insufficient for a plaintiff to allege that a government officer acted illegally; “it must also appear that the action to be restrained or directed is not action of the sovereign”).
70. Siegel, supra note 3, at 1657–59, 1663–65 (opining that Larson revealed the weaknesses of nonstatutory review and ultimately led to the 1976 amendment adding a waiver of sovereign immunity to the APA); see also Cramton, supra note 3, at 428–31 (advocating the addition of a waiver of sovereign immunity to the APA based in large part on Larson); David A. Webster, Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief, 49 OHIO ST. L.J. 725, 728–30 (1988) (arguing that Larson
Larson ordered the dismissal of a claim to enjoin the sale of surplus coal by the War Assets Administration. The Court held that as long as a federal officer is acting within his statutory authority, his action is attributed to the sovereign and barred by sovereign immunity—the flip side of its holding is that ultra vires or unconstitutional actions are not protected by sovereign immunity. Because the War Assets Administrator was empowered by statute to make the decision he did, “the effort to enjoin it must fail as an effort to enjoin the United States.” The Court’s analysis could have ended there. But the Court extended its holding further and said that even where a federal officer’s actions are ultra vires or unconstitutional, a suit will nonetheless be barred by sovereign immunity “if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign.”

The Supreme Court continued this constriction of nonstatutory review in Dugan v. Rank, where it explained that “if the effect of the judgment would be ‘to restrain the Government from acting, or to compel it to act,’” the suit is against the United States and a waiver of sovereign immunity is required. In Dugan, the relief sought would have enjoined federal officials from impeding the flow of the San Joaquin River, thereby prohibiting those officials from operating a project “which has not only been fully authorized by the Congress but paid for through its continuing appropriations.” The Court ordered the case dismissed because if declaratory or injunctive relief were granted, “[t]he Government would, indeed, ‘be stopped in its tracks.” Effectively reversing the order of the

conflicted with the long history of nonstatutory review). But see Hill, supra note 51, at 565 (arguing that “Larson has made no meaningful change in the law”).

71. Larson, 337 U.S. at 684–85, 705.
72. Id. at 691–92, 695.
73. Id. at 703.
74. Id. at 691 n.11.
76. Id. at 620 (quoting Larson, 337 U.S. at 704); see also Larson, 337 U.S. at 687 (“the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign”); Hensel v. Office of Chief Admin. Hearing Officer, 38 F.3d 505, 509 (10th Cir. 1994) (stating that “sovereign immunity protects the United States against judgments that would require an expenditure from public funds, that interfere with public administration or that would ‘restrain the Government from acting, or to compel it to act’”); Coleman v. Espy, 986 F.2d 1184, 1189 (8th Cir. 1993) (holding that “[a] suit against the sovereign is one where the judgment sought would expend the public treasury, restrain the government from acting, or compel it to act”).
78. Id. at 621 (quoting Larson, 337 U.S. at 704); see also Hawaii v. Gordon,
Larson analysis, the Court dubbed cases alleging ultra vires or unconstitutional action “exceptions to the . . . general rule.” Because the federal officers acted within the scope of their authorization and the bounds of the Constitution, the Court held “that this case comes under the rule of Larson.” The Court continued by emphasizing that while injunctive relief was not proper . . . damages were clearly ascertainable; although the plaintiffs could not halt the project, they could bring an action for just compensation.

In between Larson and Dugan, the Supreme Court affirmed the continuing availability of nonstatutory review in Leedom v. Kyne. On appeal, the National Labor Relations Board conceded that it had acted contrary to its own governing statute. The Supreme Court characterized the action as “one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act” that was “clear and mandatory.” The Court considered it beyond peradventure that the federal courts would have jurisdiction to correct such a wrong. Citing McAnnulty, the Court said, “[t]his Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.” Where Congress creates a right, “it must be held that it intended that right to be

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373 U.S. 57, 58 (1963) (dismissing suit because relief would operate against the sovereign).

79. Dugan, 372 U.S. at 621.

80. Id. at 622.

81. Id. at 624, 626 (“Rather than a stoppage of the government project, this is the avenue of redress open to respondents.”). Professor Hill contends, in essence, that the Larson-Dugan test lends the Supreme Court’s “seeming zigzagging” on nonstatutory review and sovereign immunity “a rational and defensible pattern.” Hill, supra note 51, at 585. Hill posits that the Court does not allow the government to rely on sovereign immunity “defensively” to bar claims “seeking some affirmative advantage from the government.” Id. at 557–58; see also id. at 491–92.


83. Id. at 187.

84. Id. at 188; see also Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233, 238 (1968) (allowing judicial review to correct “blatantly lawless” action).

85. Leedom, 358 U.S. at 189 (“Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.”).

86. Id. at 190 (citing Harmon v. Brucker, 355 U.S. 579 (1958); Stark v. Wickard, 321 U.S. 288 (1944); Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902)).
enforced."87

Despite the reassertion of the availability of nonstatutory review, Larson, Dugan, and other cases yielded considerable confusion in the federal courts. By 1976, Congress found that “the time has finally come when the injustice and inconsistency resulting from the unpredictable application of the sovereign immunity doctrine should be remedied.”88 Since the inclusion of a broad waiver of sovereign immunity in the APA in 1976, nonstatutory review has fallen into disuse.89 Although Congress did not intend to preempt nonstatutory review, Professor Siegel observed that the success of the 1976 amendment “rendered nonstatutory review much less familiar to most lawyers” and “far less important.”91 Fallon goes so far as to say that the 1976 amendment “essentially mooted” nonstatutory review.92

C. The Turn of the Twenty-First Century

But it survived. In Chamber of Commerce of the United States v. Reich,93 the plaintiffs, advancing statutory and constitutional claims, challenged an executive order that authorized the Secretary of Labor to disqualify certain employers from federal contracts.94 To oversimplify a very complicated opinion, the court held that review under the APA was not available because the complaint challenged presidential action.95 Searching for both a cause of action and a waiver of sovereign immunity, the court held that under McAnnulty and its progeny, the plaintiffs did not need to cite a statutory cause of action,96 and under Larson, “there is no

87. Id. at 191.
89. See Siegel, supra note 3, at 1663–65 (noting that after the amendment was passed, “nonstatutory review receded considerably in the collective legal consciousness”).
91. Siegel, supra note 3, at 1614 n.12, 1665.
92. FALLON, supra note 3, at 960, 969.
94. Id. at 1324.
95. Id. at 1326–27.
96. Id. at 1327–28 (stating that “we have never held that a lack of a statutory
sovereign immunity to waive—it never attached in the first place.” This Article later will address the court’s treatment of "McAnnulty" as substituting for a cause of action. For purposes of this discussion, suffice it to say that nonstatutory review is alive and well in the D.C. Circuit.

Cases in other circuits allowing nonstatutory review of federal action, as defined here, are much fewer and further between. Nonstatutory review clearly is still available in cases alleging constitutional violations. For cause of action is per se a bar to judicial review). The court relied in part on its earlier holding in "Dart v. United States," where the court, relying on "McAnnulty" and "Leedom," held that a statute barring judicial review of particular orders of the Secretary of Commerce did not bar nonstatutory review of a claim that the Secretary exceeded his statutory authority. "Dart v. United States," 848 F.2d 217, 224 (D.C. Cir. 1988). Reading the statute narrowly, the court found no “clear and convincing evidence” that Congress intended to preclude judicial review. "Id." (internal quotation marks omitted). The Secretary in that case had reversed an administrative law judge’s decision and imposed on the plaintiff a fine of $150,000 and a fifteen-year ban on the plaintiff’s export privileges that “essentially prohibited [him] from pursuing his present livelihood.” "Id." at 218–19. The governing statute, however, did not authorize the Secretary to reverse the type of order at issue, but only to “affirm, modify, or vacate.” "Id." at 221 (internal quotation marks omitted). The court opined that if “such unauthorized actions [were] to go unchecked, chaos would plainly result.” "Id." at 224.

97. "Reich," 74 F.3d at 1329.
98. See discussion infra Part VI.B.2.
99. See, e.g., "Lepre v. Dep’t of Labor," 275 F.3d 59, 72 (D.C. Cir. 2001) (“Even when Congress has not expressly provided for judicial review, it may nonetheless be available.” (citing "Bowen v. Mich. Acad. of Family Physicians," 476 U.S. 667, 672 (1986))); "Swan v. Clinton," 100 F.3d 973, 981 (D.C. Cir. 1996) (recognizing the "Larson-Dugan" exception). In "Aid Ass’n for Lutherans v. United States Postal Service," the court relied upon nonstatutory review in striking down certain Postal Service regulations. "Aid Ass’n for Lutherans v. U.S. Postal Serv.," 321 F.3d 1166, 1168 (D.C. Cir. 2003). The court held that the regulations “totally pervert the meaning of the statute.” "Id." at 1175. This case suggests that the D.C. Circuit might use nonstatutory review to overturn agency pronouncements whenever it concludes that the agency’s position conflicts with a statute. Treating agency pronouncements that a court determines conflict with a statute as ultra vires would expand the scope of nonstatutory review dramatically and sidestep the limitations in the APA.
100. E.g., "Mitchum v. Hurt," 73 F.3d 30, 31, 35 (3d Cir. 1995) (allowing nonstatutory review where Veterans Administration employees alleged retaliation in violation of their First Amendment rights and sought declaratory and injunctive relief). In "Rhode Island Department of Environmental Management v. United States," the court relied on nonstatutory review to hear a case in which Rhode Island challenged a federal agency’s rejection of the State’s sovereign immunity defense in an ongoing administrative proceeding. "Rhode Island Dep’t of Env’t Mgmt. v. United States," 304 F.3d 31, 41–43 (1st Cir. 2002). The court emphasized the constitutional stature of the State’s arguments in reaching its decision on the merits. "Id." at 41, 43; see also James E. Pfander, "Sovereign Immunity and the Right to Petition: Toward a First Amendment
example, in *Made in the USA Foundation v. United States*, the Eleventh Circuit held that sovereign immunity did not bar an action against the President challenging the constitutionality of the North American Free Trade Agreement (NAFTA). But in cases alleging ultra vires conduct, courts more often decline to exercise nonstatutory review. If nothing else, the fact that the courts go to the effort of discussing nonstatutory review demonstrates that the federal bench still considers it a viable doctrine.

The relative rarity of nonstatutory review cases stands in stark contrast to the plethora of cases dismissing claims for lack of an applicable sovereign immunity waiver. Recently, the Supreme Court in *Sosa v. Alvarez-Machain* addressed a claim for damages for false arrest under the FTCA brought by a Mexican citizen who was abducted from Mexico for trial in the United States and subsequently acquitted. The Supreme Court held that the plaintiff was without a remedy because his claim fell within the exception to the FTCA’s “waiver of sovereign immunity for claims ‘arising in a foreign country.’” At this point, between sovereign immunity and nonstatutory review, the former is clearly the more dominant doctrine.

V. THE DEBATE: FEDERAL SOVEREIGN IMMUNITY VERSUS NONSTATUTORY REVIEW

Members of the academic community have vigorously debated the question of whether nonstatutory causes of action should be allowed and

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102. *Id.* at 1308 n.20.
103. *See, e.g.*, Painter v. Shalala, 97 F.3d 1351, 1358–59 (10th Cir. 1996); *see also discussion infra Part VI.A.
104. *See, e.g.*, Dep’t of the Army v. Blue Fox, Inc., 525 U.S. 255, 263 (1999) (stating that an action to enforce an equitable lien on funds due under a contract does not fall under any waiver of sovereign immunity); Delta Commercial Fisheries Ass’n v. Gulf of Mex. Fishery Mgmt. Council, 364 F.3d 269, 274 (5th Cir. 2004) (holding that the Magnuson Act does not provide a waiver of sovereign immunity); City of Jacksonville v. Dep’t of the Navy, 348 F.3d 1307, 1320 (11th Cir. 2003) (holding that Congress did not intend “to waive the federal government’s sovereign immunity from punitive penalties” under the Clean Air Act).
106. *Id.* at 697–99.
107. *Id.* at 699 (quoting 28 U.S.C. § 2680(k) (2000)).
whether the Supreme Court’s sovereign immunity jurisprudence has gone too far. Some commentators agree with Professor Chemerinsky that “[s]overeign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law.”\(^\text{108}\) Comparing sovereign immunity to “[s]lavery, enforced racial segregation, and the subjugation of women,” Chemerinsky finds sovereign immunity to be “a repugnant doctrine, at odds with the most basic precepts of the American Constitution, [that] should be repudiated.”\(^\text{109}\) Professor Pfander agrees that “acquiescence in the ancient doctrine of sovereign immunity for no reason other than its doctrinal longevity” is “positively feudal.”\(^\text{110}\) Others opine that sovereign immunity “maintain[s] a proper balance among the branches of the federal government, and . . . a proper commitment to majoritarian rule.”\(^\text{111}\)

Although defenders of federal sovereign immunity in the academic community are few and far between, the federal judiciary’s dedication to the doctrine is obvious.\(^\text{112}\)

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108. Erwin Chemerinsky, Against Sovereign Immunity, 53 STAN. L. REV. 1201, 1201 (2001). Criticism of sovereign immunity doctrine was particularly emphatic in the years preceding the 1976 amendment of the APA. See, e.g., Cramton, supra note 3, at 417–20. But the doctrine lives on and, of course, so does the scholarly criticism.


110. Pfander, supra note 100, at 963. Professor Pfander suggests that “[w]e should exchange [sovereign immunity] . . . for a right to petition rooted in the Petition Clause” of the First Amendment. Id. at 990. But see Gary Lawson & Guy Seidman, Downsizing the Right to Petition, 93 NW. U. L. REV. 739, 763–66 (1999) (contending that the right to petition is not relevant to federal sovereign immunity).

111. Krent, supra note 35, at 1530. Professor Jackson summarizes the debate:

On the one hand, constitutionalism entails a commitment that government should be limited by law and accountable under law for the protection of fundamental rights; if the “essence of civil liberty” is that the law provide remedies for violations of rights, immunizing government from ordinary remedies is in considerable tension with all but the most formalist understandings of law and rights. On the other hand, a commitment to democratic decisionmaking may underlie judicial hesitation about applying the ordinary law of remedies to afford access to the public fisc to satisfy private claims, in the absence of clear legislative authorization.

Jackson, supra note 5, at 521 (footnote omitted).

A. Immunity and Sovereignty

Those who defend sovereign immunity contend that “immunity is an inherent attribute of sovereignty.” 113 As Hamilton said in The Federalist No. 81, “[i]t is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind.” 114 Justice Holmes wrote that trying “to sue the government is ‘like shaking one’s fist at the sky, when the sky furnishes the energy that enables one to raise the fist.’” 115 But Professor Amar has documented exhaustively how sovereignty in the United States is vested in “we the people” 116 and how sovereign immunity doctrine conflicts with that “first postulate of popular sovereignty.” 117

By allowing both federal and state governments to invoke “sovereign immunity” from liability for constitutional violations, the Court has misinterpreted the Federalist Constitution’s text, warped its unifying structure, and betrayed the intellectual history of the American Revolution that gave it birth. In effect, the Court has transformed “sovereignty” into the very tool of government supremacy that our Revolutionary forebears wielded pen and sword to destroy. 118

B. Textual Basis for Sovereign Immunity

Critics of the federal sovereign immunity doctrine point out that it

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113. Hill, supra note 51, at 489.
115. Chemerinsky, supra note 108, at 1219 (quoting Letter from Justice Oliver W. Holmes to Harold J. Laski 2 (Jan. 29, 1926), quoted in HOLMES-LASKI LETTERS 822 (Mark DeWofe Howe ed., 1953)).
117. Id. at 1490; see also id. at 1466–92 (discussing the tension between the rights of the people and sovereign immunity).
118. Id. at 1466; see also id. at 1520 (“Today’s Court seems to have lost sight of the People—and so it has transmogrified doctrines of federalism and sovereignty into their very antitheses. Sovereign immunity allows ‘sentinels’ hired to uphold the law to become gunmen who are a law unto themselves.”).
has no explicit basis in the Constitution. To the contrary, Article III’s extension of the “judicial Power” to “controversies to which the United States shall be a Party” can be understood as providing consent to suit. Alternatively, Article III’s grant of jurisdiction in “all cases” arising under federal law may provide federal courts adequate authority to review federal action using nonstatutory review. In addition, as a structural matter, “the central purpose of the Constitution is to limit the actions of government and government officers.” Judicial review provides the mechanism for ensuring that federal action adheres to the Constitution and federal laws, as a common law doctrine, should not trump the Constitution, the “supreme Law of the Land.”

On the other hand, although the scope of Congress’s power over the federal courts is debatable, “the existence of an important congressional

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119. Jackson, supra note 5, at 523; Pfander, supra note 100, at 981–82. Courts and commentators generally do not distinguish between federal and state sovereign immunity and nonstatutory review. E.g., ERWIN CHEMERINSKY, FEDERAL JURISDICTION 610 n.1 (4th ed. 2003) (“The relationship between the sovereign immunity of the federal and state governments is unclear because the Supreme Court has focused on federal principles in justifying the latter.”); Siegel, supra note 3, at 1624 n.65 (“Nonstatutory review theory is the same in suits against both state and federal officers . . . .”). Professor Jackson points out that in the first Supreme Court case discussing sovereign immunity in depth, Chisholm v. Georgia, two of the four justices in the majority considered state and federal sovereign immunity to be distinct. Jackson, supra note 5, at 529–30 (citing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 472, 478 (1793)). But, since then, “[l]ittle distinction has been drawn between the immunities afforded to the two levels of government and the caselaw has borrowed one from the other—to the detriment of clear explication of the source or nature of this immunity.” Id. at 540–41. This Article focuses on federal sovereign immunity.

120. Chemerinsky, supra note 108, at 1202.

121. Jackson, supra note 5, at 528, 535 (quoting U.S. CONST. art. III, § 2).

122. See Pfander, supra note 100, at 953 (arguing that while Article III “appears to recognize some degree of congressional control over the suability of the United States,” it “more than adequately assures the federal courts of the power to test the legality of government action”).


124. See id. at 1211 (“Without judicial review, there is no way to ensure that the Constitution and federal laws are supreme.”).

125. U.S. CONST. art. VI; Chemerinsky, supra note 108, at 1211.

126. See generally, e.g., Barry Friedman, A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction, 85 NW. U. L. REV. 1, 2 (1990) (offering as “an alternative to the congressional control approach to federal jurisdiction[,] . . . a view of federal jurisdiction . . . in which the contours of federal jurisdiction . . .”).
power is not.” 127 Article III limits and gives Congress some control over the federal courts’ jurisdiction. 128 The “conventional view [is] that Congress does not have to create inferior federal courts at all and thus can exclude from federal adjudication all cases, with the exception of the small category of original jurisdiction cases.” 129 In addition, Congress’s control over federal jurisdiction permits it to refuse to authorize suits against the United States. 130 Article III, Section 2 extends the judicial power to “all Cases, in Law and Equity, . . . all Cases affecting Ambassadors, . . . [and] all Cases of admiralty or maritime Jurisdiction,” but omits the word “all” in extending the judicial power to “[c]ontroversies to which the United States shall be a Party.” 131 That omission “seemingly allows Congress to determine the scope of this head of jurisdiction.” 132 By the same token, the federal government is one of limited powers, and the federal courts may only operate within the confines of federal subject matter jurisdiction. “As the Court itself has insisted: ‘The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation of powers, result of an interactive process between Congress and the Court on the appropriate uses and bounds of the federal judicial power’”;


127. F ALLON, supra note 3, at 319.
128. See U.S. CONST. art. III, § 1 (vesting federal judicial power in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”); id. § 2, cl. 2 (appellate jurisdiction of the Supreme Court is subject to “such Exceptions . . . as the Congress shall make”).
129. Jackson, supra note 5, at 536.
130. Id. at 546; Pfander, supra note 100, at 950 (“[T]he framers expected Congress to retain some discretion over the suability of the United States as an entity.”). Professor Jackson posits that “Congress’ substantial control of federal jurisdiction may help explain the degree of relatively unreasoned acceptance of ‘sovereign immunity’ as part of U.S. law.” Jackson, supra note 5, at 550 n.112.
132. Pfander, supra note 100, at 950; see also Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 336–37 (1816) (holding that Congress has the power to affect jurisdiction in cases against the United States).
restraining the courts from acting at certain times, and even restraining
them from acting permanently regarding certain subjects.”

Nonstatutory review is inconsistent with those concepts. For the courts to
determine the scope of their own power conflicts with accepted
understandings of Article III and sets the judiciary apart from the other
two branches of government. The sovereign immunity doctrine properly
vests control over the courts’ authority to hear cases against federal entities
in Congress.

Of course, Congress’s control over federal jurisdiction has its
limitations. On one hand, Congress’s control “legitim[izes] the courts’
antidemocratic decisions: the very fact that Congress could limit the
federal courts’ jurisdiction, but has not, affords the courts’ decisions a
degree of political legitimacy.” On the other hand, “subjecting the
judiciary’s power to relatively unlimited political checks cuts against the
judiciary’s very justification.... Congress’s power over jurisdiction
reinstates the very majoritarian pressures that the Framers designed life
tenure to remove.”

In that balance between the majoritarian legislature and the
countermajoritarian judiciary, commentators posit that Congress
can only limit remedies for constitutional violations if some adequate
remedy remains available. The courts apply a “clear statement rule” to
congressional efforts to restrict federal jurisdiction and construe such
statutes to preserve jurisdiction to review constitutional claims absent an
express congressional statement to the contrary.

133. Laura S. Fitzgerald, Is Jurisdiction Jurisdictional?, 95 NW. U. L. REV.
(1998)).
134. See id. at 1274–77.
135. David Cole, Jurisdiction and Liberty: Habeas Corpus and Due Process as
136. Id. at 2482.
137. See id. at 2489 (“Congress may not deny all avenues for judicial redress of
a constitutional claim.”); see also Daniel J. Meltzer, Congress, Courts, and
Constitutional Remedies, 86 GEO. L.J. 2537, 2563 (1998) (arguing that it would not be
unconstitutional for Congress to preclude anticipatory actions because an adequate
remedy remains—defense in a subsequent enforcement proceeding). Elsewhere
Professors Meltzer and Fallon discussed “two general principles”: first, a presumption
that Constitutional rights violations can be redressed, and second, a “structural
principle that constitutional remedies must be adequate to keep government generally
within the bounds of law.” Id. at 2559 (citing Richard H. Fallon, Jr. & Daniel J.
Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 HARV. L. REV.
1731, 1778–79 (1991)).
138. See Cole, supra note 135, at 2490, 2507 (internal quotation marks omitted)
(“Under this rule, courts construe statutes to preserve jurisdiction over constitutional
interpretation, the Supreme Court has never found a constitutional claim to be entirely barred.\(^{139}\)

Another textual basis for sovereign immunity is the vesting in Congress of control over the federal fisc.\(^{140}\) “Congress may have primary authority over whether Treasury moneys are put to any particular use, including satisfying judgments.”\(^{141}\) In the context of suits for money damages, sovereign immunity can be seen as at least consistent with, if not required by, the Constitution.\(^{142}\) As a prudential matter, sovereign immunity provides a basis for courts to refuse to issue judgments that Congress may not pay.\(^{143}\) Those concerns also leak into cases seeking injunctive or declaratory relief where compliance would require significant expenditures.

Along the same lines, judicial independence hinges on the ability to grant effective relief.\(^{144}\) But the power of the courts is limited because they must rely on the executive to enforce their judgments.\(^{145}\) To avoid confrontations with Congress that might undermine the enforceability of judgments, and consequently the authority of the judiciary, courts use sovereign immunity to avoid granting relief in a form or a context that Congress has not expressly authorized.\(^{146}\) Professor Jackson demonstrates

\(^{139}\) Id. at 2490; FALLON, supra note 3, at 347 (“The Supreme Court has never squarely faced the question that would be presented by a congressional attempt to strip all courts of jurisdiction to entertain constitutional claims.”).

\(^{140}\) U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power . . . to pay the Debts . . . of the United States . . . .”); id. § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .”).

\(^{141}\) Jackson, supra note 5, at 535; see also Pfander, supra note 100, at 950 (noting that “[t]he Constitution confers broad powers on Congress to control the disposition of money, property and legal obligations of the federal government”).

\(^{142}\) Jackson, supra note 5, at 538.

\(^{143}\) Id. at 540; see also id. at 539 (positing that absent an appropriation, money judgments “may prove inefficacious”). Even Professor Chemerinsky admits that “[s]overeign immunity unquestionably has the virtue of protecting government treasuries from the costs of damage suits.” Chemerinsky, supra note 108, at 1216–17. But he questions whether that is “more important than ensuring government accountability,” and opines that “it is better to spread the costs of injuries from illegal government actions among the entire citizenry.” Id. at 1217.

\(^{144}\) Jackson, supra note 5, at 574.

\(^{145}\) Siegel, supra note 3, at 1687.

\(^{146}\) See Jackson, supra note 5, at 604 (positing that “courts hesitant to give opinions that were subject to executive revision might well have been hesitant to enter judgments of money relief against the treasury in the face of common law traditions
that federal “[s]overeign immunity is perhaps most intimately bound up with this Article III concern over the effectiveness and enforcement of judgments.” She shows that sovereign immunity is, at least in part, a “judicially developed doctrine of self-restraint” through which courts sought to protect “the appearance of judicial independence” and to avoid confrontations with coordinate branches of government. Thus, sovereign immunity “empowered courts to at least appear to be in control.”

Professor Jackson also explains how judges respond to congressional enactments through their sovereign immunity jurisprudence. “In the inter-branch dynamic, both Congress and the Court have refrained at critical junctures from pressing constitutional limits, a restraint that has created an arguably beneficial ambiguity about the relationship of the judicial power to the legislative power in resolving claims against the government.” Professor Jackson demonstrates that sovereign immunity and nonstatutory review jurisprudence are “strongly influenced” by congressional enactments. “As Congress has expanded the arena of government liability . . . so have Congress and the Court narrowed the availability of actions against federal government employees.” For example, Jackson sees Larson’s expansion of sovereign immunity in part as a reaction to the availability of remedies in the Court of Claims. In Larson, the Court relied on the availability of a Court of Claims remedy to distinguish Lee and “emphasized that Congress ‘has permitted suits for damages, but, significantly, not for specific relief in the Court of Claims.’”

and congressional power over appropriations for fear they would be ignored”).
147.  Id. at 590.
148.  Id. at 604.
149.  Id. While Professor Jackson acknowledges the functions sovereign immunity doctrine serves, she concludes that the scope of the doctrine “should be reconsidered and narrowed” because “it is and should be the role of courts to seek within the limits of their jurisdiction to do justice.” Id. at 607–08.
150.  Id. at 522.
151.  Id. at 552.
152.  Id. at 564. Professor Cramton recognized this dynamic when he advocated expanding governmental liability under the Tucker Act and the FTCA. “So long as there are unjustified gaps in the availability of monetary compensation, there is pressure to grant specific relief, even in instances in which monetary relief is clearly preferable. Such pressure creates a substantial risk to the development of an orderly and coherent body of law.” Cramton, supra note 3, at 434 n.213.
154.  Id. at 559 (quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 705 (1949)). However, as this Article discusses later, Professor Jackson asserts that the courts can check themselves “without resort to the rubric of sovereign immunity.” Id. at 564 (internal quotation marks omitted); see also infra note 247 and
Professor Krent provides another structural model of federal sovereign immunity. He posits that because judicial review can interfere with and usurp Congress's policymaking function, sovereign immunity is justified and best understood as a means for Congress to protect its policymaking turf.\textsuperscript{155} He contends that sovereign immunity “maintain[s] a proper balance among the branches of the federal government, and . . . a proper commitment to majoritarian rule.”\textsuperscript{156} Going a step further, Professor Krent contends that policymaking can safely be left to federal agencies as well, because the political and administrative process “constrains government policy and minimizes the potential for arbitrary government conduct.”\textsuperscript{157} Professor Krent’s analysis sidesteps some obvious objections. For example, where the political or administrative process breaks down, such as when an agency does not adhere to the rules of the procedural game, judicial review must be justified. More fundamentally, Congress enunciates its policies in statutes; when federal officials violate those statutes, judicial review reinforces Congress's policymaking function by forcing adherence to its pronouncements. Still, Professor Krent’s basic point, that federal sovereign immunity preserves some balance between Congress and the courts, is important.

C. Sovereign Immunity and the Remedial Imperative

Perhaps the strongest criticism of sovereign immunity is that it undermines the basic notion that “government officials can do wrong and must be held accountable.”\textsuperscript{158} Some suggest that the Due Process Clause “should be understood as imposing a constitutional mandate that those who suffer a loss of life, liberty, or property at the hands of the government are entitled to redress” in a judicial forum.\textsuperscript{159} Whatever the textual basis for the so-called remedial imperative, the Supreme Court enunciated the accompanying text.

\textsuperscript{155} Krent, \textit{supra} note 35, at 1535, 1578–79.

\textsuperscript{156} \textit{Id.} at 1530; \textit{see also id.} at 1531 (sovereign immunity “is not so much a barrier to individual rights as it is a structural protection for democratic rule”).

\textsuperscript{157} \textit{Id.} at 1551.

\textsuperscript{158} Chemerinsky, \textit{supra} note 108, at 1202; \textit{see also} Jackson, \textit{supra} note 5, at 573 ("The idea of ‘sovereign immunity’ is thus in many ways wholly antithetical to an independent judiciary holding government accountable to law.").

\textsuperscript{159} \textit{E.g.}, Chemerinsky, \textit{supra} note 108, at 1215; \textit{see also} United States v. Lee, 106 U.S. 196, 218–20 (1882) (stating that the Fifth Amendment provides sufficient authority for the Court to award just compensation to citizens whose property has been seized).
basic principle in Marbury v. Madison:\textsuperscript{160}

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.\ldots

In the 3d vol. of his Commentaries, p. 23. [sic] Blackstone states two cases in which a remedy is afforded by mere operation of law.

“In all other cases,” he says, “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.”

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The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.\textsuperscript{161}

Later, in Lee, the Court declared the following:

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.\textsuperscript{162}

It is the role of the courts, where a citizen has been deprived of his legal rights, to provide a remedy.\textsuperscript{163}

Commentators argue that sovereign immunity is in tension with that

\textsuperscript{160.} Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
\textsuperscript{161.} Id. at 163; see also Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 HARV. L. REV. 1733, 1787–90 (1991) (discussing the function of constitutional remedies in redressing injuries, reinforcing the rule of law, and upholding constitutional values); Jackson, supra note 5, at 532 (stating that Marbury “stands importantly for the proposition that the law will generally provide a remedy for breach of certain rights even if the breach is caused by the acts of the government”).
\textsuperscript{162.} Lee, 106 U.S. at 220.
\textsuperscript{163.} See, e.g., id. at 218–20; Marbury, 5 U.S. (1 Cranch) at 163.
fundamental concept\textsuperscript{164} and advocate nonstatutory review as a mechanism for remedying unlawful government action.\textsuperscript{165} Professor Jaffe took the argument a step further and suggested that judicial review “is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.”\textsuperscript{166} The provision of judicial remedies makes administrative power possible and “gives it its remarkable vitality and flexibility.”\textsuperscript{167} Judicial accountability simply “produces better government.”\textsuperscript{168}

Answering the remedial imperative, Justice Scalia wrote that it is simply untenable that there must be a judicial remedy for every constitutional violation. Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are.\textsuperscript{169}

Thus, resort for relief in some circumstances will be to the elected branches of government. All three branches of the federal government have a duty to comply with and enforce the Constitution.\textsuperscript{170} If the courts,

for whatever reason, do not or cannot provide an appropriate or effective remedy, the executive and legislative branches have an obligation “to step in to remedy the injustice.”171

Following the remedial imperative to its extreme would hinder the operation of government.

It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception.172

Sovereign immunity “protect[s] the government from undue interference by the judiciary[,] . . . preserves the unhampered exercise of discretion and limits the amount of time the government must spend responding to lawsuits.”173 It “furthers the separation of powers by limiting judicial oversight of executive conduct” and “avoids situations where the courts will impose orders on the other branches of government that might be disregarded.”174 Even during the period preceding the 1976 amendment of the APA, when the academic community was particularly hostile to sovereign immunity doctrine,175 commentators admitted that “official actions of the Government must be protected from undue judicial interference.”176

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171. Id. at 1169.
173. Chemerinsky, supra note 119, at 611 (footnote omitted).
174. Id. at 612; see also Kronish, supra note 3, at 119 (stating that the doctrine of sovereign immunity reflects the separation of powers and prevents unwarranted judicial interference in government actions).
175. See discussion supra Part IV.B.
176. Cramton, supra note 3, at 397; see also id. at 415 (“Fictions aside, the application of sovereign immunity doctrine should rest on whether the benefits of judicial review of administrative action are outweighed by the possible interference with governmental programs that may result from the grant of relief.”); id. at 426 (identifying the protection of governmental programs from “indiscriminate interference” as “[t]he essential and sound policy underlying sovereign immunity”); id. at 432 (claiming sovereign immunity’s “only valid function” is to “prevent [] undue judicial interference with governmental programs”); Joseph D. Block, Suits Against
Both sides of the federal sovereign immunity versus nonstatutory review debate present valid arguments. While the Constitution does not in so many words immunize the federal government from suit, its structure implies that Congress is empowered to limit the courts’ ability to hear suits and grant relief against federal entities.\textsuperscript{177} There can be no doubt that as a general proposition, remedies must be provided to right governmental wrongs.\textsuperscript{178} But we must also concede that federal sovereign immunity is part of the balance between Congress and the courts that has developed over more than 100 years. Sovereign immunity cannot be abandoned unless some other rule steps in to preserve that longstanding balance of power and to protect the administrative functions of the federal government from unrestrained judicial interference. The next section of this Article examines the nominees to fill that office.

\textbf{VI. THE REDUNDANCY OF FEDERAL SOVEREIGN IMMUNITY DOCTRINE}

Nonstatutory review itself, along with other judicial doctrines, limits the federal courts’ ability to hear cases against the United States and its officers to such an extent that the federal sovereign immunity doctrine has become largely redundant and unnecessary. We must recognize that federal sovereign immunity is “firmly established,”\textsuperscript{179} and the Supreme Court is not likely to eliminate it “any time soon.”\textsuperscript{180} But Professor Jackson posits that the goals of federal sovereign immunity “could in all likelihood better be served through other doctrines.”\textsuperscript{181} In 1969, in his piece advocating the addition of a waiver of sovereign immunity to the APA, Professor Cramton opined that the “growing body of law that governs the availability, timing, and scope of judicial review offers a more discriminating and rational” means of protecting the government from “undue judicial interference with administration” than “the confusing

\textit{Government Officers and the Sovereign Immunity Doctrine,} 59 HARV. L. REV. 1060, 1061 (1946) (noting that the “real policy basis for the doctrine of sovereign immunity” is the “serious interference” that might result from “the subjection of the state and federal governments to private litigation”); Clark Byse, \textit{Proposed Reforms in Federal “Nonstatutory” Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus,} 75 HARV. L. REV. 1479, 1484 (1962) (“The practical or policy justification of the immunity is avoidance of undue judicial intervention in the affairs of government.”).

\textsuperscript{177} See discussion supra Part V.B.
\textsuperscript{178} See discussion supra Part V.C.
\textsuperscript{179} Chemerinsky, supra note 108, at 1204.
\textsuperscript{180} \textit{Id.} at 1203.
\textsuperscript{181} Jackson, supra note 5, at 550–51.
metaphysics of sovereign immunity.” 182 Professor Cramton thought that
deciding cases based on implied statutory preclusion of judicial review,
ripeness, standing, and other “more discriminating rules and doctrines of
judicial review” would “have the great virtue of directing the mind to
considerations that are relevant to the questions of whether judicial review
should be available and whether a particular form of relief is
appropriate.” 183 Professor Cramton concluded that sovereign immunity
doctrine is “unnecessary” and “superfluous.” 184 As Scalia wrote in support
of the proposed amendments to the APA in 1976, “many (indeed, I would
say most) of the cases disposed of on the basis of sovereign immunity could
have been decided the same way on other legal grounds.” 185 Since Scalia
made that statement as Assistant Attorney General in 1976, it has, if
anything, become even more true, as the courts have further constricted
the boundaries of nonstatutory review and at the same time broadened
other doctrines that limit judicial review of federal action. 186

A. Limitations Inherent in Nonstatutory Review

First, as currently conceived, nonstatutory review is only available in
cases of ultra vires or unconstitutional federal action. 187 A plaintiff must
allege more than that an agency acted illegally or even interfered with his
rights; he must allege that the agency did so in a manner that exceeded its
statutory or constitutional authority. 188 For example, in *United Tribe of
Shawnee Indians v. United States*, 189 a group of Indians alleged that it was
entitled to acknowledgment as a federally recognized Indian tribe because
it was descended from a tribe with which the United States signed a treaty
in 1854. 190 To overcome the inapplicability of the APA, 191 the group urged

182. Cramton, supra note 3, at 425.
183. Id.
184. Id. at 426.
186. Essentially, the question here is: what happens if the federal sovereign
immunity doctrine is abandoned? Professor Jackson has answered the same question
with regard to state sovereign immunity and concluded that the basic function of state
sovereign immunity can be retained via other common law principles. Vicki C.
Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*,
98 YALE L.J. 1, 72 (1988).
187. See discussion supra Part IV.C.
188. See discussion supra Part IV.
189. United Tribe of Shawnee Indians v. United States, 253 F.3d 543 (10th Cir.
2001).
190. Id. at 546.
the court to exercise nonstatutory review and alleged that the Bureau of Indian Affairs (BIA) exceeded its authority under the relevant statute when it refused federal recognition. The court rejected that invitation, holding that the BIA acted within its delegated authority in determining whether the group was entitled to acknowledgment.

Second, although, as discussed previously, *Leedom* affirmed the continuing availability of nonstatutory review, in effect it constricted the availability of relief against federal officers in the absence of a waiver of sovereign immunity by requiring violation of a clear statutory mandate. Following *Leedom*, the federal courts of appeals have held that when a statute “is capable of two plausible interpretations,” an officer’s “decision to adopt one interpretation over the other does not constitute a violation of a clear statutory mandate,” and in the absence of such a violation, “the case must be dismissed for lack of subject matter jurisdiction.”

Third, because the underlying basis for jurisdiction in nonstatutory review cases is 28 U.S.C. § 1331, a case must arise under federal law to be

191. The court held that the district court lacked jurisdiction under the APA because the group had not exhausted its administrative remedies. *Id.* at 546, 551.

192. *Id.* at 548.

193. *Id.* at 549; *cf.* Wyoming v. United States, 279 F.3d 1214, 1229–30 (10th Cir. 2002) (holding that the United States Fish and Wildlife Service’s decision to not allow the State of Wyoming to vaccinate elk was not ultra vires); Del-Rio Drilling Programs Inc. v. United States, 146 F.3d 1358, 1362 (Fed. Cir. 1998) (holding that ultra vires conduct cannot give rise to a Fifth Amendment taking).


195. Hanauer v. Reich, 82 F.3d 1304, 1309 (4th Cir. 1996); see also Lundeen v. Mineta, 291 F.3d 300, 312 (5th Cir. 2002) (recognizing that *Kyne* “permit[s] injunctions ‘only in a very narrow situation in which there is a plain violation of an unambiguous and mandatory provision of the statute’” (quoting Am. Airlines, Inc. v. Herman, 176 F.3d 283, 293 (5th Cir. 1999))); Am. Soc’y of Cataract & Refractive Surgery v. Thompson, 279 F.3d 447, 456 (7th Cir. 2002) (deciding that the Secretary of the Department of Health and Human Services’ regulation was “a reasonable interpretation of an unclear statutory mandate”); Senerchia v. United States, 235 F.3d 129, 131–33 (2d Cir. 2000) (opining that judicial review of these violations is very limited and so long as the government’s interpretation of the statute is reasonable, there is no violation); Griffith v. Fed. Labor Relations Auth., 842 F.2d 487, 494 (D.C. Cir. 1988) (ruling that the Federal Labor Relations Authority’s interpretation of a statute “is not the sort of plain error the doctrine requires”). But see *Dart* v. United States, 848 F.2d 217, 231 (D.C. Cir. 1988) (“We find . . . that the requirement that the Secretary of Commerce ‘affirm, modify or vacate’ ALJ enforcement decisions is ‘clear and mandatory and was nevertheless violated.’”).

cognizable. That requirement might pose an obstacle in cases that turn on a federal question but rest on a state law cause of action. The Supreme Court held in *Merrell Dow Pharmaceuticals Inc. v. Thompson*\(^{197}\) that exercising jurisdiction in such cases “would flout, or at least undermine, congressional intent.”\(^{198}\) However, nonstatutory review is based on the general equity jurisdiction of the federal courts.\(^{199}\) Professor Duffy points out that *McAnnulty* was an equity case, and the Court’s decision “flowed simply from an application of the traditional principles of equity,” i.e., irreparable injury and no adequate remedy at law.\(^{200}\) Thus, reliance on the federal common law of equity could conceivably provide grounds for

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198. Id. at 812. The Supreme Court recently explained that a federal cause of action is not a prerequisite to federal jurisdiction under 28 U.S.C. § 1331. *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 125 S. Ct. 2363, 2367–70 (2005) (“[I]n certain cases federal question jurisdiction will lie over state-law claims that implicate significant federal issues.”). The federal issue raised must implicate “a serious federal interest in claiming the advantages thought to be inherent in a federal forum,” and federal jurisdiction must be “consistent with congressional judgment about the sound division of labor between state and federal courts.” Id. at 2367. In *Grable*, the Court held that a state quiet title action that turned on the question of whether the plaintiff received adequate notice of a tax sale under a federal statute raised a federal question that justified the exercise of “arising under” jurisdiction. Id. at 2368. *But see City of Chi. v. Int’l Coll. of Surgeons*, 522 U.S. 156, 164 (1997) (upholding removal of case raising federal constitutional challenge to local administrative action under state law cause of action). *See generally* John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What “Arise Under” Federal Law?*, 76 Tex. L. Rev. 1829 (1998) (providing a more thorough analysis of *Merrell Dow* and similar cases).


exercising jurisdiction under § 1331. But if equity provides the basis for jurisdiction, courts should adhere to equitable principles, which will limit the bounds of nonstatutory review. A nonstatutory review plaintiff who relies on equity for jurisdiction should have to prove irreparable injury, lack of an adequate legal remedy, and a right that is free from doubt. For example, the dismissal in Larson turned in part on the availability of an adequate legal remedy—compensation under the Tucker Act.

B. Other Limitations on Judicial Review of Federal Action

1. Implied Exclusion of Jurisdiction over Cases Challenging Federal Action

A further potential jurisdictional hurdle to nonstatutory review is the


202. See Duffy, supra note 3, at 151–52 (“[I]f the legitimacy of nonstatutory review is justified by the historical equity jurisdiction, then courts should treat cases for nonstatutory review as equity cases.”). The merger of law and equity in the Federal Rules of Civil Procedure left the “substantive principles” of equity “unaffected.” Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 382 n.26 (1949). Professor Yoo discusses the history of Article III’s grant of equitable jurisdiction, and concludes that it was not intended to grant a “wideranging remedial power,” but merely jurisdiction “over certain types of cases.” See Yoo, supra note 170, at 1158, 1161.

203. Duffy, supra note 3, at 151 & n.190, 152; see also Simmons v. Burlington, Cedar Rapids & N. Ry. Co., 159 U.S. 278, 287 (1895) (“To constrain a court of equity to grant relief so apparently inconsistent with the previous proceedings, and so destructive of the rights of persons who have since become interested, the case presented should be clear and free from doubt.”).

204. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 697 & n.18, 705 (1949); see also Pfander, supra note 100, at 974 & n.282. Professor Pfander includes Larson in a category of cases in which federal courts “withhold equitable relief where the plaintiff may obtain adequate remedies at law.” Id. at 973. In such cases, sovereign immunity operates not so much as “a threshold barrier to litigation,” but rather “as a tool of equitable discretion.” Id. at 974. That line of cases also demonstrates the “interdependence” between statutory remedies and the invocation of sovereign immunity. Id. at 976. Pfander posits that if Congress were to repeal the Tucker Act and the QTA, the Supreme Court might well reverse Lee. Id. at 977–78.
rule that a grant of jurisdiction impliedly excludes jurisdiction in areas not included in the grant. Congress’s express grants of jurisdiction without provisions for suing the United States impliedly prohibit such suits. For example, the first Judiciary Act, which extended federal jurisdiction to suits in which the United States was a plaintiff, “by relatively clear implication exclude[d] those suits in which it was a party defendant.” Professor Jaffe opined to the contrary that Congress may “exclude judicial review. But judicial review is the rule” based on Congress’s “grant of general jurisdiction” and hence “the intention to exclude it must be made specifically manifest.” But in Block v. Community Nutrition Institute, the Supreme Court explained that “[t]he presumption favoring judicial review of administrative action is just that—a presumption,” and that presumption can be overcome not only by explicit statutory language or legislative history, but also from “the collective import of legislative and judicial history behind a particular statute” or “inferences of intent drawn from the statutory scheme as a whole.” Thus, if a statute provides a particular avenue for review of particular questions, other avenues of review may be precluded so long as the intent to preclude judicial review is


206. Id. at 550; see also Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411–12 (1821) (“The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.”); Jackson, supra note 5, at 547 n.104 (positing that sovereign immunity can be seen “as a canon for interpreting jurisdictional acts based on the First Judiciary Act’s limiting jurisdiction over actions involving the United States to those where it was plaintiff or petitioner”).

207. Jaffe, supra note 62, at 432. Political question doctrine is yet another potential bar to nonstatutory review. See, e.g., Hwang Geum Joo v. Japan, 413 F.3d 45, 48 (D.C. Cir. 2005) (declining to consider whether peace treaties with Japan extinguished or preserved war crimes); Schneider v. Kissinger, 412 F.3d 190, 195–98 (D.C. Cir. 2005) (holding a claim based on alleged U.S. intervention in Chilean presidential election and alleged support of a coup attempt was a nonjusticiable political question); El-Shifa Pharm. Indus. Co. v. United States, 378 F.3d 1346, 1365–70 (Fed. Cir. 2004) (holding that the President’s designation of a pharmaceutical plan as enemy property was nonreviewable). Compare Louis Henkin, Is There a “Political Question” Doctrine?, 85 YALE L.J. 597, 601 (1976) (contending that cases establishing “political question doctrine required no such extra-ordinary abstention from judicial review; they called only for the ordinary respect by the courts for the political domain”), with Martin H. Redish, Judicial Review and the ‘Political Question’, 79 NW. U. L. REV. 1031, 1032 (1984) (positing that political question cases were “premised on recognition of a certain discretionary judicial authority to defer to the other branches that potentially extends well beyond the traditional rationales”).


209. Id. at 349.
“fairly discernible”’ from the statutory scheme.

2. **Constriction of the Availability of Implied Rights of Action**

The plaintiff in a nonstatutory review case must also state a cause of action. The D.C. Circuit in *Reich* treated nonstatutory review under *McAnnulty, Leedom*, and their progeny as precluding the need to state a cause of action, as opposed to review under *Larson, Dugan*, and their progeny, which the court held replaces a waiver of sovereign immunity.

However, Judge Silberman’s analysis for the court is, if not mistaken, at least misstated. In *Larson*, the Supreme Court explained that to state a cause of action, it is sufficient for the plaintiff to allege merely that a federal officer acted illegally so as to interfere with his legal rights. But to overcome sovereign immunity, he must prove that the officer acted ultra vires or unconstitutionally. In addition, even in *Leedom* and *McAnnulty*, the Court spoke of nonstatutory review in jurisdictional terms. Indeed,

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210. *Id.* at 351 (quoting Ass’n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970)); *see also* Dew v. United States, 192 F.3d 366, 372 (2d Cir. 1999); Stockman v. Fed. Election Comm’n, 138 F.3d 144, 152 (5th Cir. 1998); S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, 20 F.3d 1418, 1422 (6th Cir. 1994) (interpreting a statute that provided administrative review to preclude judicial review until the administrative remedies had been exhausted).


213. *Id.*

It is a prerequisite to the maintenance of any action for specific relief that the plaintiff claim an invasion of his legal rights, either past or threatened. He must, therefore, allege conduct which is “illegal” in the sense that the respondent suggests. If he does not, he has not stated a cause of action. This is true whether the conduct complained of is sovereign or individual. In a suit against an agency of the sovereign, as in any other suit, it is therefore necessary that the plaintiff claim an invasion of his recognized legal rights. If he does not do so, the suit must fail even if he alleges that the agent acted beyond statutory authority or unconstitutionally. But, in a suit against an agency of the sovereign, it is not sufficient that he make such a claim. Since the sovereign may not be sued, it must also appear that the action to be restrained or directed is not action of the sovereign.


214. *Leedom* v. Kyne, 358 U.S. 184, 189, 191 (1958); Magnetic Healing v. McAnnulty, 187 U.S. 94, 108 (1902); *see also* Larson, 337 U.S. at 690 & n.10 (noting that in an action based on an ultra vires claim, whether the act was in fact ultra vires determines whether the court has jurisdiction).
the D.C. Circuit itself in an earlier case reversed a dismissal for lack of jurisdiction relying on Leedom and McAnnulty.215 The question of whether a plaintiff states a cause of action, on the other hand, is not jurisdictional, but goes to the merits of the case.216 Thus, the D.C. Circuit was off the mark when it linked Leedom and McAnnulty to stating a cause of action instead of identifying a waiver of sovereign immunity; the plaintiff in a nonstatutory review case must identify a cause of action.217

Despite that apparent error in Judge Silberman’s analysis, his opinion in Reich can also be read as merely recognizing that in nonstatutory review cases, the plaintiff need not rely on a statutory cause of action, but can base his claim on common law.218 That reading of Reich brings the decision into line with the statement in Larson that a plaintiff need only allege that a federal officer acted illegally and interfered with his legal rights to state a cause of action.219 Because the plaintiff must also prove that the officer acted ultra vires or unconstitutionally and must establish standing to sue, the allegations and proof required will often overlap and present little difficulty.

In many cases, however, Congress has expressly provided particular causes of action. The Supreme Court in recent years has continued to constrict the availability of implied rights of action where Congress has expressly provided other avenues of redress.220 Beginning with Cannon v.

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217. Of course, the three prerequisites to suit against the United States—jurisdiction, waiver of sovereign immunity, and cause of action—often intersect. But sovereign immunity and cause of action are analytically distinct inquiries. See Seamon, supra note 25, at 1075 & n.36 (noting the widespread criticism of Larson for confusing waiver of sovereign immunity and stating a cause of action).

218. Chamber of Commerce of the U.S. v. Reich, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (“[W]e have never held that a lack of a statutory cause of action is per se a bar to judicial review.” (citing Five Flags Pipe Line Co. v. Dep’t of Transp., 854 F.2d 1438, 1439 (D.C. Cir. 1988))).


220. A “cause of action” is “a factual situation that entitles one person to obtain a remedy in court from another person.” BLACK’S LAW DICTIONARY 235 (8th ed. 2004). A “right of action,” in contrast, is “[t]he right to bring a specific case to court.” Id. at 1349. Thus, “[o]perative facts giving rise to one or more bases for suing comprise a cause of action.” Id. at 235; see also Fraticelli v. St. Paul Fire & Marine Ins. Co., 375 F.2d 186, 188 n.6 (1st Cir. 1967) (recognizing that a cause of action consists of these two elements); Jones v. Pledger, 363 F.2d 986, 988 (D.C. Cir. 1966) (same);
University of Chicago\textsuperscript{221} and Touche Ross & Co. \textit{v.} Redington,\textsuperscript{222} the Supreme Court shifted from “a stance that federal courts had the power to infer remedies... from the Constitution itself and from statutes otherwise silent about private enforcement” to an approach that prohibits the inference of private rights of action “absent specific directives from Congress.”\textsuperscript{223} In \textit{Sosa}, for example, the Supreme Court echoed its earlier conclusion that the grant of general equitable jurisdiction in the Judiciary Act of 1789 empowers the courts to grant only those remedies that were “traditionally accorded by courts of equity.”\textsuperscript{224} \textit{Sosa} held that the Alien Tort Statute in the Judiciary Act of 1789 granted federal courts jurisdiction over a “modest number of international law violations with a potential for personal liability” when the statute was enacted.\textsuperscript{225} The Court refused to expand the reach of the statute beyond that “narrow set of common law actions”;\textsuperscript{226} in particular, the Court declined to recognize a right of action for “arrests by state [i.e., foreign nation] officers who simply exceed their authority.”\textsuperscript{227} Among the Court’s reasons for exercising judicial restraint was its concern that inferring private rights of action in the absence of an express provision raises the issue of “permit[ting] enforcement without the check imposed by prosecutorial discretion.”\textsuperscript{228} The plaintiff had essentially contended that the arrest was unauthorized.\textsuperscript{229} Even though that sounds

\begin{footnotesize}
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\item \textsuperscript{221} Cannon v. Univ. of Chi., 441 U.S. 677 (1979).
\item \textsuperscript{222} Touche Ross & Co. \textit{v.} Redington, 442 U.S. 560 (1979).
\item \textsuperscript{223} Judith Resnik, \textit{Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power}, 78 Ind. L.J. 223, 232–33 (2003) (footnote omitted); see also Duffy, supra note 3, at 139 (identifying Cannon as marking the beginning of “the fall of the New Federal Common Law”). Justice Scalia, writing for the Court in Alexander, identified Cort \textit{v.} Ash as the point at which the Court abandoned its earlier practice of inferring private rights of action from statutory silence. Alexander, 532 U.S. at 287 (citing Cort \textit{v.} Ash, 422 U.S. 66, 78 (1975)). The Court in Cort articulated a list of factors to be considered in determining whether a statute implicitly provided a private remedy. Cort, 422 U.S. at 78.
\item \textsuperscript{225} Sosa, 542 U.S. at 724.
\item \textsuperscript{226} \textit{Id.} at 721.
\item \textsuperscript{227} \textit{Id.} at 737.
\item \textsuperscript{228} \textit{Id.} at 727.
\item \textsuperscript{229} \textit{Id.} at 736–37.
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very much like an ultra vires claim, the Court found it “breathtaking” in its implications.230

3. **Preclusion of Remedies Beyond Those Expressly Provided**

Closely related to, and perhaps, as a practical matter, indistinguishable from, the rule of interpretation that precludes inferring causes of action is the rule of interpretation that precludes extending remedies beyond those expressly provided by statute. Traditionally, equity jurisdiction broadly authorized courts to grant relief in the absence of an adequate remedy at law.231 But the current Supreme Court has held to the contrary that, where a statute provides particular remedies, courts should not infer others.232 Moreover, as the prior discussion shows, the Court has frozen the development of equitable relief in time. Even where Congress authorizes the courts to provide appropriate “equitable relief,” the Court reads that as a limitation on the range of remedies it might provide to those that were “typically” available in equity.233

“[A] precisely drawn, detailed statute” that provides a particular avenue of relief will generally foreclose nonstatutory review.234 For example, in *Block v. North Dakota ex rel. Board of University & School*

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230. *Id.* at 736. Arguably, Sosa had only alleged that the officers had acted illegally, rather than in excess of their delegated authority. But even the Supreme Court characterized the claim as alleging that the officers had “exceed[ed] positive authorization to detain under the domestic law of some government.” *Id.*

231. *Resnik, supra* note 223, at 249–51 & n.137. *But see Yoo, supra* note 170, at 1155–61 (tracing the development of Article III and concluding that its grant of equity jurisdiction did not authorize inherent judicial power, but only the power to hear certain types of cases).


Lands, the Supreme Court remanded the case for a determination of whether the State’s suit was barred by the statute of limitations in the QTA. The State sought to avoid the confines of the QTA by alleging jurisdiction under Larson as a so-called “officer’s suit.” The Supreme Court rejected that effort, holding that “the carefully-crafted provisions of the QTA” preempted “more general remedies” and provided the exclusive means for challenging the United States’ title to real property. “‘It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.’”

Block itself makes clear the interaction between statutory remedies against the government and the Court’s treatment of officer suits, though the opinion has the benefit of not relying on sovereign immunity as a reason to bar the officer suit, rather the Court relies on the pre-emptive effect of a detailed statute on more generally available remedies.

C. Alternative Grounds for Decision

Commentators have criticized the Court’s approach, but the fact remains that the current Supreme Court generally declines to infer rights of action or remedies in the absence of explicit congressional authorization.
For purposes of this discussion, the significance of this trend is that where a court might otherwise dismiss a case on sovereign immunity grounds, it might reach the same result using these rules of interpretation. On the flip side, courts employing nonstatutory means to review federal action could instead dismiss those actions based on the availability of alternative causes of action and remedies or on the limitations inherent in nonstatutory review itself. For example, the D.C. Circuit in Reich could have affirmed the district court's dismissal of the case finding the remedies provided under the Tucker Act exclusive. Thus, the rule of interpretation that counsels against inferring private rights of action and remedies and the boundaries of nonstatutory review can displace the federal sovereign immunity doctrine in many cases.

Indeed, Professor Jackson posits that “today, federal sovereign immunity functions largely as a clear statement rule for the interpretation of jurisdictional statutes and remedial provisions.” For example, the Court's invocation of sovereign immunity in Larson reflects “the Court’s effort to implement Congress’ preferred remedy: to provide damages after the fact in the Court of Claims.” In other words, sovereign immunity was not necessary to the Court's decision; the Court could have reached the same result by simply observing that in providing a particular remedy (damages for breach of contract), Congress impliedly precluded other remedies (specific relief). The same should hold true for any statute that enforce regulations promulgated under § 602”;

Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) (refusing to extend remedies beyond those provided by Congress in the Jones Act); Bush v. Lucas, 462 U.S. 367, 380–90 (1983) (describing federal employees' civil service remedies statutes as “an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations” and concluding that “Congress is in a better position to decide whether or not the public interest would be served by creating [a remedy not expressly provided for]”); Mobile Oil Corp. v. Higginbotham, 436 U.S. 618, 622–26 (1978) (refusing to adopt a different measure of damages than that provided for in the Death on the High Seas Act).

243. See, e.g., Spectrum Leasing Corp. v. United States, 764 F.2d 891, 893 n.2 (1985) (“The legislative history reveals that Congress intended the remedies available under the Tucker Act to be exclusive in cases against the United States based on contracts.”).

244. Jackson, supra note 5, at 527.

245. Id. at 560.

246. Id. at 559 (“Notwithstanding its reference to sovereign immunity, however, the Court’s sense of Congress’ remedial preferences would seemingly be sufficient on its own to support the conclusion that officer suits are barred.”); id. at 564–65 (“Larson should be understood as having much more to do with shifts in the statutory structure of remedies than with anything required by the Constitution.
provides a particular remedy.\textsuperscript{247} Regardless of whether the courts cite sovereign immunity or a rule of interpretation in support of the decision to not allow alternative remedies, the result will be the same.

By the same token, far from standing as a beacon of nonstatutory review, the Supreme Court has read \textit{Leedom} as simply restating the “familiar proposition” that where a statute provides a particular means of redress, the Court will not infer others.\textsuperscript{248} In \textit{Board of Governors v. MCorp Financial, Inc.},\textsuperscript{249} the Court limited \textit{Leedom} to situations where the plaintiff has no other “meaningful and adequate means of vindicating its statutory rights”\textsuperscript{250} and where the statute does not provide “clear and convincing evidence that Congress intended to deny the District Court jurisdiction to review” the agency action.\textsuperscript{251} \textit{Reich} could have been disposed of on this ground as well. By the time the D.C. Circuit heard oral argument, the Secretary of Labor had issued regulations implementing the Executive Order at issue in the case.\textsuperscript{252} The court opined that the regulations were susceptible to an APA challenge, but the plaintiff had not amended its complaint to bring such a challenge.\textsuperscript{253} Because the plaintiff had an alternate means of accomplishing its litigation goal, the court of appeals could have affirmed the district court’s dismissal on that ground.

\textsuperscript{247} In commenting on what became the 1976 amendments to the APA, Justice Scalia, formerly an Assistant Attorney General, pointed out that the federal code was “enacted against the backdrop of sovereign immunity.” H.R. REP. NO. 94-1656, at 28 (1976), reprinted in 1976 U.S.C.C.A.N. 6121, 6147 (Letter from Antonin Scalia, Assistant Attorney Gen., to Hon. Edward M. Kennedy, Chairman, Subcomm. on Admin. Practice & Procedure). Hence, “in most if not all cases where statutory remedies already exist, these remedies will be exclusive; that is no distortion, but simply an accurate reflection of the legislative intent in these particular areas in which the Congress has focused on the issue of relief.” \textit{Id.}


\textsuperscript{250} \textit{Id.} at 43.

\textsuperscript{251} \textit{Id.} at 44 & n.16; \textit{see also} Sturm, Ruger & Co. v. Chao, 300 F.3d 867, 874 (D.C. Cir. 2002); Detroit Newspaper Agency v. NLRB, 286 F.3d 391, 397–98 (6th Cir. 2002); McBrady v. Comm. to Review Circuit Council Conduct & Disability Orders, 264 F.3d 52, 63 (D.C. Cir. 2001); Nebraska State Legislative Board, United Transportation Union v. Slater, 245 F.3d 656, 659 (8th Cir. 2001).

\textsuperscript{252} Chamber of Commerce of the U.S. v. Reich, 74 F.3d 1322, 1326 (D.C. Cir. 1996).

\textsuperscript{253} \textit{Id.} at 1326–27.
VII. THE DANGER OF REDUNDANCY

To the extent that sovereign immunity overlaps with the doctrines discussed above, it has become superfluous. Courts generally interpret statutes and the Constitution to avoid redundancy and apply the same rule at the doctrinal level. Following that rule, sovereign immunity should probably be abandoned. Professor Amar contends, however, that this rule of interpretation “is merely one aspect of a general preference in favor of grace over awkwardness, both as a matter of interpretive charity and as a clue toward likely intended meaning.” Even if all a particular constitutional provision does is clarify “a principle that might otherwise be left to inference,” Amar considers that “something to be desired.” Amar does not believe that rule is “a knock-down, slam-dunk, irrefutable objection,” but rather posits that many constitutional provisions are redundant only in that “they illuminate and clarify what was otherwise merely implicit.”

Along the same lines, Professor Tushnet posits that “[c]ontemporary constitutional doctrine may render the Free Exercise Clause redundant.” However, he believes that the clause is not redundant because it conveys “a sense that religious discourse is somehow importantly different from nonreligious discourse about politics, morals, and the rest of human activity.”

Therefore, even if sovereign immunity can be replaced by other rules as a practical matter, it may not be redundant if it serves some distinct doctrinal purpose. If sovereign immunity clarifies or conveys any distinct

254. E.g., Taylor v. Charter Med. Corp., 162 F.3d 827, 830 (5th Cir. 1998) (“[W]ere it permissible for a court to take judicial notice of a fact merely because it had been found to be true in some other action, the doctrine of collateral estoppel would be superfluous.” (quoting United States v. Jones, 29 F.3d 1549, 1553 (11th Cir. 1994)) (alteration omitted)); Ethicon Endo-Surgery, Inc. v. U.S. Surgical Corp., 149 F.3d 1309, 1317 (Fed. Cir. 1998) (observing that an argument “reducing the application of the doctrine [of equivalence] to nothing more than a repeated analysis of literal infringement” would render the doctrine “superfluous”).


256. Id. at 21.

257. Id. at 2.


259. Tushnet, supra note 258, at 94.
message, it is that the balance of power between the three branches of
government must be preserved and federal administrative functions must
be protected from unrestrained judicial interference. However, that same
message underlies the previously discussed limitations on nonstatutory
review and other limitations on judicial review of federal action. To
review, a plaintiff in a nonstatutory review case must identify some ultra
vires action that violated a clear statutory mandate, must sue under a
statutory grant of jurisdiction and cause of action, and must seek relief that
is not impliedly foreclosed by some other statutory provision. Those
rules defer to Congress's authority to define the scope of the courts'
jurisdiction and to determine when and how federal agencies are sued.
Hence, in general, sovereign immunity does not convey any message or
serve any function that is so unique that it cannot be fulfilled by some other
rule.

Nonetheless, legal redundancy is not inherently problematic. Indeed,
the United States’ legal system is built on redundancies such as concurrent
jurisdiction. Arguably, retaining a superfluous doctrine like sovereign
immunity does no harm because the outcome in any given case will likely
remain the same with or without the doctrine. Indeed, redundancy in the
law might be seen as serving the same function as redundancy in any other
system: it provides a fallback in case the primary function fails, thereby
reducing the possibility of error. If a plaintiff may state alternative
claims for relief, certainly a government lawyer may state alternative
defenses.

On the other hand, retaining excess legal doctrines can cause positive
harm. Overlapping doctrines cause confusion. Doctrinal confusion, in
turn, leads to uncertainty, which not only makes it difficult for agencies and
individuals to conform their actions to prevailing legal standards, but

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260. See discussion supra Part VI.A–B.
261. See Robert M. Cover, The Uses of Jurisdictional Redundancy: Interest,
basic description of the concurrent jurisdiction between state and federal courts).
262. See discussion supra Part VI.C.
264. Statutes that do not provide the public adequate notice of what conduct is
required or prohibited may violate due process. City of Chi. v. Morales, 527 U.S. 41,
55–56 (1999) (finding an antiloitering ordinance void for vagueness); see also John
Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 VA.
L. REV. 189, 244–45 (1985) (suggesting that void-for-vagueness rule is “too simplistic”
and should be replaced by, inter alia, the requirement “that an individual not be
subject to penal sanctions for conduct that a prototypically law-abiding citizen in the
also, on a practical level, burdens the courts by increasing litigation and making it less likely that cases will settle.\textsuperscript{265} In addition, the availability of judicial review certainly informs how federal agencies go about their business. For example, an agency might forgo a certain activity if the burden of litigation and potential liability outweighs the benefits of the activity.\textsuperscript{266} Moreover, “[l]aw that is confused, artificial, and erratic is likely to produce unjust results as well as wasted effort.”\textsuperscript{267} For example, in administrative law, the doctrines of ripeness, finality, and exhaustion of administrative remedies “substantially overlap in untidy ways.”\textsuperscript{268} Professor Wright contends that over time, the instability of doctrinal confusion should give way to clarification because “[c]ourts and commentators take as their charge to reconcile and to clarify, in one fashion or another.”\textsuperscript{269} Thus, over time some doctrines will “fall into disuse as superfluous. Courts have an interest in doctrinal clarity and costless simplification of doctrine.”\textsuperscript{270}

Faced with the choice of deciding a case using the doctrine of sovereign immunity or some alternative route to the same outcome, such as the rule against inferring rights of action or remedies, we should prefer that courts rely on the latter. One might suggest that of the overlapping doctrines discussed earlier, sovereign immunity should be retained because it is the simpler, more easily applied rule. Whether the court relies on

\begin{itemize}
\item \textsuperscript{265} See George L. Priest & Benjamin Klein, \textit{The Selection of Disputes for Litigation}, 13 J. LEGAL STUD. 1, 9–12 (1984) (illustrating that the level of uncertainty in a dispute affects the decisionmaker); see also Joel Waldfogel, \textit{Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation}, 41 J.L. & ECON. 451, 457–66, 471–74 (1998) (demonstrating that more informed plaintiffs and defendants will result in a higher probability of settling disputes).
\item \textsuperscript{266} See Priest & Klein, supra note 265, at 6.
\item \textsuperscript{267} Cramton, supra note 3, at 420, 423 (stating that “consideration of sovereign immunity diverted both litigants and judges from more useful inquiries and resulted in wasted time and effort”); Jackson, supra note 186, at 51 (indicating that “the difficulty of relying on the political process to redress constitutional error places a special burden on the Court to reevaluate its past constitutional decisions, particularly when they have led to a body of inconsistent and fictive doctrines the application of which consumes substantial energy and time”).
\item \textsuperscript{269} Id. at 90.
\item \textsuperscript{270} Id. Doctrinal confusion persists, according to Professor Wright, because it lends both courts and lawyers flexibility in their approaches to different cases. Id. at 90–91, 98.
\end{itemize}
sovereign immunity or the rule against inferring rights of action or remedies, however, it must closely examine the statutory provisions at issue. Thus, the analytical effort should not differ significantly. The alternatives to sovereign immunity are doctrinally preferable, however, because they are more closely tied to the text and purpose of Article III. Nowhere does the Constitution mention the common law based doctrine of sovereign immunity. On the contrary, as discussed previously, Article III provides for judicial review and gives Congress some measure of control over federal jurisdiction.\footnote{See discussion supra Part V.B.} Sovereign immunity presumes that judicial review is unavailable unless Congress provides otherwise, a presumption that is in tension with the Constitution’s grant of the judicial power.\footnote{See discussion supra Part V.B–C.} On the other hand, the alternative rules of interpretation that might replace sovereign immunity, like the rule against inferring rights of action or remedies, are more consistent with the constitutional text since they grant relief unless Congress provides otherwise.\footnote{See discussion supra Part IV.C.} Those alternative rules also focus on more relevant issues concerning when and how federal agency actions should be reviewable in court.

The lack of a textual basis for sovereign immunity should not be taken lightly. Fundamentally, ours is a government of powers conferred in writing. This same constraint limits all three branches of government, because “all government officials are mere agents, exercising only such authority as is delegated by law.”\footnote{Duffy, supra note 3, at 145; see also Amar, supra note 116, at 1440 (positing that the Constitution granted carefully enumerated powers “to various agents who would constitute the new central government”).} Just as federal agencies may only exercise whatever power Congress confers by statute, so the judiciary may only exercise whatever power the Constitution and Congress confer.\footnote{The requirement that courts ground their decisions in the written law “reinforces a basic symmetry of the constitutional order” and is consistent with the requirement that federal agencies ground their actions in some written text. See Duffy, supra note 3, at 144.} Judicial review must ultimately be grounded in some text.\footnote{Id. at 145–46. (“Though the requirement is modest, we can still demand that the courts go through the process of identifying and interpreting the textual provisions on which they base their power. That process provides an essential check on judicial power . . . .”)}
identifiable (as opposed to judicially constructed) federal policy.”277 Even the authority to create federal common law must be textually based.278 Professor Duffy points out that courts reviewing administrative action must be particularly cognizant of their textual limitations, because “[j]udicial oversight of administrative agencies is itself justified in terms of forcing governmental agencies to heed limitations on their authority.”279 If federal courts do not adhere closely to the limitations of their own authority when reviewing federal administrative action, the resulting hypocrisy undermines the legitimacy of that review. Thus, in nonstatutory review cases, sovereign immunity should fall by the wayside where textually based rules can yield the same result.

If we dispense with federal sovereign immunity doctrine, the fiction of nonstatutory review likely will become even less familiar than it is now.280 Nonstatutory review may always be needed to ensure that courts can right official wrongs (particularly constitutional violations), but when cases no longer fall through the holes in the statutory waivers of sovereign immunity, nonstatutory review will no longer be needed to plug those holes.281 Although scholars who enjoy writing about such oddities might
mourn its passing, certainly the law would be well served by dispensing with a fictional mode of judicial review that was created to counteract a theory of sovereign immunity that bears little resemblance to our constitutional structure.\textsuperscript{282} More significantly, though, if a court is going to deny relief for unlawful government action and deny its own essential role in checking abuses of executive power, the decision to do so should not be based on a theory of questionable validity, but rather on an inquiry more closely tied to the balance of power among the branches of government and the need for federal agencies to operate free of undue judicial interference.\textsuperscript{283}

VIII. CONCLUSION

Sovereign immunity immunizes federal agencies from suit. Although Congress has enacted many waivers of the government’s sovereign immunity, they all leave gaps through which a deserving plaintiff might fall. Nonstatutory review fills those gaps by allowing a plaintiff to sue in the absence of an express waiver. But nonstatutory review is in tension with sovereign immunity. While the Supreme Court is clearly dedicated to sovereign immunity, the academic community is quite critical of the doctrine. Both sides of the debate about sovereign immunity make valid points. But in the end, that debate may be merely scholarly static because the limitations inherent in nonstatutory review itself and other limitations on judicial review generally render the sovereign immunity doctrine largely superfluous. Although redundancy is not inherently problematic, this doctrinal redundancy is harmful. As opposed to rules of statutory interpretation that require courts to examine their own authority to grant relief, sovereign immunity bears no real resemblance to the structure of our Constitution. Thus, sovereign immunity should fall by the wayside in favor of doctrines that often will yield the same result, but that legitimize judicial review by engaging in a more valid inquiry about the proper role of the courts in our system of government.

\textsuperscript{282} See discussion supra Part V.B.

\textsuperscript{283} See Cramton, supra note 3, at 420 (“The doctrine of sovereign immunity . . . distract[s] attention from the real issues of whether judicial review or specific relief should be available in a particular situation and by directing attention to the sophistries, false pretenses, and unreality of present law.”); Jackson, supra note 5, at 125 (“[T]he doctrine of state sovereign immunity . . . lacks credibility as a reasoned exegesis. Something else is in fact going on, and a failure to recognize and give voice to that something has detracted from the Court’s ability to serve as a principled expositor of the Constitution.”).