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Federal Jurisdiction Not Present When State Seeks Declaration That Federal Law Does Not Preempt State's Regulations, Franchise Tax Board v. Construction Laborers Vacation Trust, 103 S. Ct. 2481 (1983)

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CASE COMMENTS

FEDERAL JURISDICTION NOT PRESENT WHEN STATE SEEKS DECLARATION THAT FEDERAL LAW DOES NOT PREEMPT STATE'S REGULATIONS

Franchise Tax Board v. Construction Laborers Vacation Trust, 103 S. Ct. 2481 (1983).

In *Franchise Tax Board v. Construction Laborers Vacation Trust*,[1] the United States Supreme Court took the first step toward constructing a framework for determining whether federal jurisdiction exists when a litigant seeks a declaration regarding the preemptive effect of federal law.[2] The case originated in California state court. The Franchise Tax Board[3] (the Board) alleged a violation of a state tax law[4] that authorized it to levy against funds the Construction Laborers Vacation Trust[5] (CLVT) held pursuant to a collective bargaining agreement.[6] Anticipating CLVT's defense, the Board requested the state court to declare[7]

1. 103 S. Ct. 2841 (1983).

2. *See infra* notes 48-71 and accompanying text.

3. The Franchise Tax Board (the Board) is a California state agency that is responsible for enforcing the state personal income tax. The Board may require any person in possession of "credits or other personal property" belonging to a delinquent taxpayer to transfer the amount owing to the Board. CAL. REV. & TAX CODE ANN. § 18817 (Deering Supp. 1984).

4. *See* CAL. REV. & TAX CODE §§ 18815 & 18817 (Deering Supp. 1984) (authorizing levies and imposing liability for failure to comply). In arguing the jurisdictional issues, the parties did not raise the question of whether CLVT's holdings fell within the statutory definition.

5. Construction Laborers Vacation Trust (CLVT) is a trust that administers the vacation provisions of a collective bargaining agreement. CLVT qualifies as a "welfare benefit plan" under § 3 of the Employment Retirement Income Security Act (ERISA). *See* 29 U.S.C. § 1002(1) (1982). Thus, CLVT is subject to extensive regulation under ERISA.

6. CLVT received several requests from the Board to transfer funds belonging to beneficiaries of the trust. Acting on advice from the United States Department of Labor, CLVT refused to pay the Board's levies, asserting that ERISA preempted the state law creating the Board's authority to levy against funds held by CLVT.

CLVT received the requests in 1977 and 1978. After each request, CLVT informed the Board that it had requested an "opinion letter" from the Administrator for Pension and Welfare Benefit Programs of the Department of Labor. The letter, which arrived in 1980, stated that the Department believed that 29 U.S.C. § 1144 (1982) preempted any "process" under which a state officer attempted to levy against an ERISA covered plan for unpaid taxes. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 103 S. Ct. 2841, 2844 n.4 (1983).

ERISA specifies that it supersedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (1982).

7. *See* CAL. CIV. PROC. CODE § 1060 (Deering 1973) (governing procedure for declaratory judgments).

that the Employment Retirement Income Security Act[8] (ERISA) did not preempt the state tax statute.[9]

CLVT removed the action to a federal district court,[10] which denied the Board's motion to remand to the state court, and held that ERISA did not preempt the state law.[11] The Ninth Circuit reversed with one judge dissenting.[12] On appeal the United States Supreme Court unanimously held that a state's action to obtain a declaration that federal law does not preempt its regulations is not within the original jurisdiction of the federal courts.[13]

Article III of the Constitution[14] grants the federal courts jurisdiction over cases "arising under" the Constitution, federal statutes, and treaties.[15] Section 1331 of Title 28 of the United States Code[16] substantially duplicates this language.[17] Although the Supreme Court has

8. 29 U.S.C. §§ 1001-1381 (1982).

9. Franchise Tax Bd. v. Construction Laborers Vacation Trust, No. C326040 (Sup. Ct. of Cal. for County of Los Angeles June 26, 1980), *reprinted in* Brief for Appellant at app., Franchise Tax Bd. v. Construction Laborers Vacation Trust, 103 S. Ct. 2841 (1983) (available Mar. 19, 1984 on LEXIS, Genfed library, Briefs file).

10. "[A]ny civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441 (1982). An action may not be removed unless it falls within the original jurisdiction of the federal courts. Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894). The Court in *Union & Planters' Bank* eliminated its earlier distinction between original federal jurisdiction and removal jurisdiction. *See* Metcalf v. Watertown, 128 U.S. 586 (1888). *See also* Trautman, *Federal Right Jurisdiction and the Declaratory Remedy,* 7 VAND. L. REV. 445, 455-56 (1954). The American Law Institute has proposed that removal be allowed on the basis of a federal defense. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1312 (Official Draft 1969).

11. Franchise Tax Bd. v. Construction Laborers Vacation Trust, No. 80-02741-R (C.D. Cal. Oct. 16, 1980), *reprinted in* Brief for Appellant at app., Franchise Tax Bd. v. Construction Laborers Vacation Trust, 103 S. Ct. 2841 (1983) (available Mar. 19, 1984 on LEXIS, Genfed library, Briefs file).

12. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 679 F.2d 1307 (9th Cir. 1982). The majority did not consider the jurisdiction issue. Judge Tang dissented, asserting that the court lacked federal jurisdiction. *Id.* at 1309-13 (Tang, J., dissenting). Judge Tang proceeded to disagree with the majority on the merits. *Id.*

13. 103 S. Ct. at 2852-53.

14. U.S. CONST. art III, § 2, cl. 1.

15. *Id. See infra* note 17.

16. 28 U.S.C. § 1331 (1982) (originally enacted as Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470).

17. *Compare* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all *Cases* . . . arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority . . . .") *with* 28 U.S.C. § 1331 (1982) ("The district court shall have original jurisdiction of all *civil actions* arising under the Constitution, laws, or treaties of the United States.")

given the Article III language extremely broad scope,[18] it has interpreted narrowly the statutory grant of jurisdiction.[19]

In construing the statute, the Court developed the well-pleaded complaint rule to limit the scope of original federal jurisdiction.[20] Federal courts must look only to the plaintiff's complaint to determine whether a suit presents a federal question within the original subject matter jurisdiction of the federal courts.[21] In *Louisville & Nashville Railroad v. Mottley*,[22] the Supreme Court held that the well-pleaded complaint rule disallows original federal jurisdiction over a case in which the plaintiff's complaint raises a federal issue by anticipating a federal defense to a state cause of action.[23] The Court reasoned that federal

(emphasis supplied). *See* Mishkin, *The Federal "Question" in the District Courts,* 53 COLUM. L. REV. 157, 160-61 (1953). *See generally* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3562 (1983).

18. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). Chief Justice Marshall, writing for the Court, stated that federal jurisdiction exists whenever a construction of the Constitution or a law of the United States is an "ingredient" in the case. *See* London, *"Federal Question" Jurisdiction—A Snare and a Delusion,* 57 MICH. L. REV. 835, 835-41 (1959); Mishkin, *supra* note 17, at 160-61.

19. Mishkin, *supra* note 17, at 160-61. Although practical reasons exist for giving the statute's similar language a narrower scope, Congress may have intended to confer the whole of Article III jurisdiction on the lower federal courts. C. WRIGHT, THE LAW OF FEDERAL COURTS § 17, at 92 (4th ed. 1983).

20. The well-pleaded complaint rule originated in Gold Washing & Water Co. v. Keyes, 96 U.S. 199 (1877). *See* 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 17, § 3566, at 434; Trautman, *supra* note 10, at 451-52. The policy behind the rule is to allow the court to determine at the outset whether it has jurisdiction. Mishkin, *supra* note 17, at 160; Note, *Federal Jurisdiction Over Declaratory Suits Challenging State Action,* 79 COLUM. L. REV. 983, 984-85 (1979).

In addition to the well-pleaded complaint rule, *infra* note 21 and accompanying text, the Court also has imposed the requirement that the federal question be an "essential" element of the plaintiff's complaint. *See* Gully v. First Nat'l Bank, 299 U.S. 109, 112 (1936).

In *Gully*, Justice Cardozo delineated the limitations on federal question jurisdiction.

> [A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect and defeated if they receive another. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto . . . and the controversy must be disclosed on the face of the complaint, unaided by the answer or petition for removal. . . . [T]he complaint itself will not avail as a basis for jurisdiction in so far as it . . . anticipates or replies to a possible defense.

Id. at 112-13.

21. *See* C. WRIGHT, *supra* note 19, § 18, at 98-100.

22. 211 U.S. 149 (1908).

23. *Id.* at 152. In *Mottley*, the plaintiff asked a federal court to enforce a settlement agreement against a non-diverse defendant. *Id.* at 150-51. In 1871, the plaintiffs signed a contract releasing the defendant railroad from liability for injuries they had suffered in a train collision. In exchange, plaintiffs received free passes on the railroad for the rest of their lives. *Id.* at 150. The

courts lack original subject matter jurisdiction when no part of the plaintiff's cause of action derives from federal law.[24]

In *Skelly Oil Co. v. Phillips Petroleum Co.*,[25] the Supreme Court first considered the applicability of the *Mottley* rule in the context of a federal declaratory judgment action.[26] The Court held that federal question jurisdiction does not extend to a declaratory judgment action in which the plaintiff asserts that federal law determines whether the defendant has breached a contract that is enforceable in state court.[27] The Court reasoned that, absent diversity, the plaintiff could not have brought a contract action in federal court prior to the enactment of the Declaratory Judgment Act.[28] Because the Court had held previously that the Declaratory Judgment Act did not extend the jurisdiction of the federal courts,[29] it found no basis for jurisdiction.[30]

The rationale in *Skelly Oil* allows a federal court to entertain a declaratory judgment action only if the hypothetical underlying coercive suit would present a federal question.[31] Patent cases in which the

railroad refused to renew the plaintiffs' free passes in 1907, contending that federal law forbade issuing free passes. *Id.* at 150-51. The plaintiffs' complaint asserted that the federal statute did not prevent performance of the agreement, and that the statute was unconstitutional insofar as it might preclude enforcement. *Id.* at 151.

24. *Id.* at 152.

25. 339 U.S. 667 (1950).

26. Congress enacted the Federal Declaratory Judgment Act in 1934. It currently is codified at 28 U.S.C. § 2201 (1982) (original version at ch. 512, § 2471, 48 Stat. 955 (1934)). Although the Supreme Court earlier expressed doubt as to the constitutionality of the declaratory judgment remedy, *see, e.g.*, Willing v. Chicago Auditorium Ass'n, 277 U.S. 274 (1928), the Court upheld the procedure in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). For a discussion of the historical development of declaratory judgments, see *Developments in the Law—Declaratory Judgments—1941-49,* 62 HARV. L. REV. 787, 787-94 (1949).

27. 339 U.S. at 667-73. In *Skelly Oil*, suppliers of natural gas had conditioned certain sales agreements on the purchasers' obtaining certain certificates from the Federal Power Commission prior to a stated date. The Commission announced the issuance of the certificates, but on a conditional basis, and did not issue the certificates themselves until after the deadline. The purchasers unsuccessfully sought a declaration that the certificates had been issued within the meaning of the Natural Gas Act, and that the contract was thus still in effect. *Id.* at 670-71.

28. *Id.* at 671-72.

29. " '[T]he operation of the Declaratory Judgment Act is procedural only.' . . . Congress enlarged the range of remedies available in federal courts, but it did not extend their jurisdiction." *Id.* at 671 (citations omitted) (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937)). *But cf.* Illinois *ex rel.* Barra v. Archer Daniels Midland Co., 704 F.2d 935, 939 (7th Cir. 1983) ("[T]he [above quoted] statement cannot have been intended literally."). For a criticism of the Court's "procedural only" approach, see Mishkin, *supra* note 17, at 178 n.99.

30. 339 U.S. at 673.

31. *See id.* at 671-72. *Skelly Oil*, however, bars federal jurisdiction if the declaratory plaintiff's complaint asserts a federal defense to the defendant's underlying state law coercive action.

plaintiff seeks a declaration of noninfringement illustrate the fulfillment of this requirement for federal jurisdiction.[32] Generally, courts hold that an alleged infringer may bring suit in federal court to challenge the declaratory defendant's infringement claim because the latter has a hypothetical coercive cause of action that arises under federal law.[33]

In *Public Service Commission v. Wycoff Co.*,[34] the Supreme Court set forth in dicta[35] a formula for determining when a potential coercive defendant's preemption-based claim raises a federal question in declaratory judgment actions.[36] The plaintiff in *Wycoff* asked a federal court to declare its business immune from Utah Public Service Commission regulations that interfered with its operating in a manner authorized by the Interstate Commerce Commission.[37] Although the Court held that the case was nonjusticiable,[38] it went on to analyze the case under the well-pleaded complaint rule. The Court stated that it is the nature of

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See 10A C. WRIGHT, A. MILLER & E. COOPER, *supra* note 17, § 2767 at 744-45. Commentators have extensively criticized the *Skelly Oil* rule, often charging the Court with rigid formalism in its treatment of the declaratory remedy. *See, e.g.,* Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction,* 28 STAN. L. REV. 395, 413, 478-79 & n.446 (1976); Trautman, *supra* note 10, at 465-68; Note, *supra* note 20 at 989.

32. *E.g.,* E. Edelman & Co. v. Triple-A Specialty Co., 88 F.2d 852, (7th Cir.), *cert. denied,* 300 U.S. 680 (1937) (defendant's hypothetical suit for infringement establishes federal jurisdiction).

33. *See, e.g.,* Hanes Corp. v. Millard, 531 F.2d 585, 594 n.8 (D.C. Cir. 1976) (explaining in detail basis for jurisdiction); E. Edelman & Co. v. Triple-A Specialty Co., 88 F.2d 852, 853-54 (7th Cir.), *cert. denied,* 300 U.S. 680 (1937) (finding jurisdiction based on the nature of the declaratory judgment remedy, the exclusivity of federal jurisdiction in patent cases, and the consequences for plaintiff if no jurisdiction found). *See also* Note, Thiokol Chemical Corp. v. Burlington Industries, Inc.: *The Availability of Federal Declaratory Judgments to Licensees Challenging Patent Infringement,* 34 U. PITT. L. REV. 43, 43-45 (1972) (discussing factual variations in patent cases).

34. 344 U.S. 237 (1952).

35. *See infra* notes 38-39 and accompanying text.

36. The Court stated that it is the "character of the threatened action, and not of the defense" that determines whether federal jurisdiction exists. 344 U.S. at 248. Many courts have applied this standard. *E.g.,* La Chemise Lacoste v. Alligator Co., 506 F.2d 339, 343 (3d Cir. 1974), *cert. denied,* 421 U.S. 937 (1975); Allegheny Airlines v. Pennsylvania Pub. Util. Comm'n, 465 F.2d 237, 241 (3d Cir. 1972), *cert. denied,* 410 U.S. 943 (1973).

37. 344 U.S. at 239. The Wycoff Company was in the business of transporting motion picture films within the state of Utah. Although its business was wholly intrastate, the company sought a declaration that, for purposes of the commerce clause, its business constituted interstate commerce, and was thus immune from state regulation. *Id.*

38. *Id.* at 244-45. The Court found that the case had not "matured" because the state had not threatened to enforce the regulations. The Court contended that the plaintiff was merely seeking to establish a defense in the event the state attempted to enforce its regulations. Justice Jackson, writing for the Court, commented, "So what?" *Id.* at 244.

the state's threatened action, rather than the plea for a declaration, that determines whether federal jurisdiction exists.[39]

Although mindful of the Supreme Court's refusal to broaden federal jurisdiction in *Skelly Oil* and *Wycoff*,[40] federal courts have had difficulty defining the contours of federal jurisdiction in declaratory judgment actions when litigants attempt to obtain federal jurisdiction by alleging federal preemption of a state law.[41] Some federal courts recently have departed from the majority view,[42] and have decided to adjudicate declaratory actions in which a party's assertion of preemption is the basis for jurisdiction.[43] These courts have failed to identify

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39. *Id.* at 248. *See supra* note 36.

40. *See supra* notes 25-39 and accompanying text.

41. *See, e.g.,* Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1259-60 (9th Cir. 1979), *aff'd mem.,* 445 U.S. 921 (1980) (plaintiff asked for federal declaration that federal law was preempted); Braniff Int'l, Inc. v. Florida Pub. Serv. Comm'n, 576 F.2d 1100, 1101 (5th Cir. 1978) (same); Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n, 405 F. Supp. 819, 822 (N.D. Ill. 1975) (plaintiff asked for state declaration; defendant removed on basis of preemption).

42. The majority view asserts that *Skelly Oil* and *Wycoff* preclude the exercise of federal jurisdiction in this situation. *See, e.g.,* Michigan Sav. & Loan League v. Francis, 683 F.2d 957, 960 (6th Cir. 1982) ("Plaintiff's assertion of federal preemption was in effect a defense to the threatened enforcement of [conflicting state law and] could not provide the basis for [federal] jurisdiction."); Home Fed. Sav. & Loan Ass'n v. Insurance Dep't of Iowa, 571 F.2d 423, 426 (8th Cir. 1978) ("it is not enough to ground federal jurisdiction . . . that [plaintiff raises] federal preemption, in defense to the state action").

Under *Skelly Oil* and *Wycoff*, federal preemption of state law does not present a basis for federal jurisdiction because the preemption issue would only arise as a defense to a state-law cause of action. *See* 1A J. MOORE, B. RINGLE & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.160[4]; *supra* notes 25-39 and accompanying text.

43. *E.g.,* Rath Packing Co. v. Becker, 530 F.2d 1295, 1303-05 (9th Cir. 1975); *aff'd sub nom.* Jones v. Rath Packing Co., 430 U.S. 519 (1977); Bailey v. First Fed. Sav. & Loan, 467 F. Supp. 1139, 1141 (C.D. Ill. 1979); Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n, 405 F. Supp. 819, 823 (W.D. Ill. 1975). *See also* First Fed. Sav. & Loan v. Greenwald, 591 F.2d 417, 423 & n.8 (1st Cir. 1979) (endorsing finding of jurisdiction based on preemption).

The Second and Fifth Circuits have found federal jurisdiction based on an issue of preemption, while the Third, Fourth, Sixth, Eighth, and Tenth Circuits have adhered to *Skelly Oil* and *Wycoff*, rejecting this analysis. *Compare* Michigan Sav. & Loan League v. Francis, 683 F.2d 957, 960 (6th Cir. 1982) ("Plaintiff's assertion of federal preemption was in effect a defense to the threatened enforcement of [conflicting state law and] could not provide the basis for [federal] jurisdiction.") *and* Home Fed. Sav. & Loan Ass'n v. Insurance Dep't of Iowa, 571 F.2d 423, 426 (8th Cir. 1978) ("it is not enough to ground federal jurisdiction . . . that [plaintiff] raises federal preemption in defense, to the state action") *with* Stone & Webster Eng'g Corp. v. Ilsley, 690 F.2d 323, 328 (2nd Cir. 1982) ("a declaratory plaintiff can come into federal court asserting that preemption affords it insulation from a state-based claim") *aff'd mem.,* 103 S. Ct. 3564 (1983) *and* Braniff Int'l, Inc. v. Florida Pub. Serv. Comm'n, 576 F.2d 1100, 1106 (5th Cir. 1976) ("that [preemption] is or may be a defense to [defendant's] actions states a mere truism"). For other examples in which the issue is stated less clearly, see Exxon Corp. v. Hunt, 683 F.2d 69 (3d Cir. 1982); City Nat'l Bank v. Edmis-

any uniform criteria for determining whether federal jurisdiction exists.[44] In a dissent from a denial of certiorari,[45] Justice White noted this conflict among the circuits and urged the Supreme Court to resolve this issue.[46] He recognized a trend, in "conflicting regulations" cases, however, toward distinguishing declaratory judgment suits that seek to establish a federal defense from those that seek to negate a federal defense.[47]

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ten, 681 F.2d 942 (4th Cir. 1982); Madsen v. Prudential Fed. Sav. & Loan Ass'n, 635 F.2d 797 (10th Cir. 1980), *cert. denied,* 451 U.S. 1018 (1981).

The First Circuit has endorsed "preemption" or "conflicting regulations" jurisdiction, *see infra* note 61 and accompanying text, without so holding. First Fed. Sav. & Loan Ass'n v. Greenwald, 591 F.2d 417, 423 & n.8 (1st Cir. 1979).

In the Seventh and Ninth Circuits, different panels have reached separate conclusions. In the Seventh Circuit, *compare* Illinois *ex rel.* Barra v. Archer Daniels Midland Co., 704 F.2d 935, 941 (7th Cir. 1983) (preemption "not a valid basis for original or removal jurisdiction") *with* Illinois v. General Elec. Co., 683 F.2d 206, 209-10 (7th Cir. 1982) (declaratory action asserting federal preemption of state law within federal jurisdiction). These decisions are probably reconcilable on the basis of the interests at stake between the parties. In *Archer Daniels*, the State of Illinois sought a preenforcement declaration of the validity of a state labor regulation. The company removed the action. Judge Posner, writing for the court, found no "good reason" to entertain the preemption question in federal court. 704 F.2d at 940; *see infra* note 66. In *General Electric*, the state sought to enforce a hazardous waste control statute. General Electric was under a contractual obligation to accept the wastes which the state sought to prohibit. Because of this conflict and the overriding issue of the Illinois statute's constitutionality, the court found jurisdiction. 683 F.2d at 211.

The Ninth Circuit cases are more difficult to explain. *Compare* Miller-Wohl Co. v. Commissioner of Labor & Indus., 685 F.2d 1088 (9th Cir. 1982) *and* Alton Box Bd. Co. v. Esprit De Corp., 682 F.2d 1267 (9th Cir. 1982) *with* Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.,* 445 U.S. 921 (1980) *and* Rath Packing Co. v. Becker, 530 F.2d 1295 (9th Cir. 1975), *aff'd sub nom.* Jones v. Rath Packing Co., 430 U.S. 519 (1977).

44. Stone & Webster Eng'g Co. v. Ilsley, 690 F.2d 323 (2d Cir. 1982) (to obtain jurisdiction based on preemption, vindication of state law); Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1259 (9th Cir. 1979) (jurisdiction found in case coming within *Wycoff* dictum because "actual conflict" found between parties) *aff'd mem.,* 445 U.S. 921 (1980); Rath Packing Co. v. Becker, 530 F.2d 1295, 1306 (9th Cir. 1975) (test is whether plaintiff asserting a claim based on preemption has created a federal controversy where none existed or is seeking an adjudication of a claim which is meaningful only when pleaded as a defense to a particular pending state court action) *aff'd sub nom.* Jones v. Rath Packing Co., 430 U.S. 519 (1977).

45. United Air Lines v. Division of Indus. Safety, 454 U.S. 944 (1981) (White, J., dissenting from denial of certiorari) (declaratory plaintiff sought federal declaration that federal preemption prevented application of state regulations to its business). *Cf. supra* notes 34-39 and accompanying text (discussing *Wycoff* dictum).

46. 454 U.S. at 950 (White, J., dissenting from denial of certiorari).

47. In United Air Lines, Inc. v. Division of Indus. Safety, 633 F.2d 814 (9th Cir. 1980), *cert. denied,* 454 U.S. 944 (1981), United attempted to obtain a federal declaration that Federal Aviation Administration regulations preempted certain California airplane maintenance standards. *Id.* at 816. The Ninth Circuit reversed a California district court order that had granted United's motion for a preliminary injunction against the California Occupational Safety and Health Appeals Board, and held that United's complaint failed to present a federal question. *Id.* at 816-17.

In *Franchise Tax Board v. Construction Laborers Vacation Trust*,[48] the Court considered whether the *Skelly Oil* rationale applies with equal force to state and federal declaratory judgment actions.[49] The Court held that federal courts could not obtain jurisdiction over a state declaratory judgment action on removal if, on the same facts, *Skelly Oil* would have precluded original jurisdiction in a federal declaratory judgment action.[50] The Court reasoned that holding otherwise would allow litigants to circumvent the *Skelly Oil* rule simply by seeking a declaration of federal law under a state declaratory judgment statute and removing the case to a federal court.[51]

The Supreme Court subsequently denied certiorari. 454 U.S. 944 (1981). Justice White, dissenting from the denial of certiorari, expressly discounted the precedential effect of the *Wycoff* dictum, *id.* at 949-50 (White, J., dissenting from denial of certiorari), and distinguished United's attempt to establish a defense of federal preemption from an attempt to adjudicate the validity of an anticipated federal defense to a state law cause of action. *Id.* at 946-47.

In Illinois v. Kerr-McGee Chem. Corp., 677 F.2d 571 (7th Cir.), *cert. denied,* 103 S. Ct. 469 (1982), the State of Illinois brought a civil complaint in an Illinois state court against Kerr-McGee alleging violations of state laws regulating the disposal of hazardous wastes in the company's operation of a hazardous waste dump. Kerr-McGee removed the case to federal court, alleging that federal law preempted the Illinois statute. *Id.* at 574. The United States District Court for the Northern District of Illinois determined that it had jurisdiction over the case and dismissed the state's complaint on preemption grounds. *Id.* The Seventh Circuit reversed, finding that Kerr-McGee's claim was purely defensive and insufficient to present a federal question. *Id.* at 577-78. The Supreme Court denied certiorari. 103 S. Ct. 469 (1982).

The Seventh Circuit's decision arguably conflicts with the Second Circuit's finding of federal jurisdiction on similar facts in North Am. Phillips Corp. v. Emery Freight Corp., 579 F.2d 229 (2d Cir. 1978). In *Emery*, the plaintiff filed a tort claim against an interstate carrier in a New York state court, and the carrier removed the action to federal court. The Second Circuit found federal jurisdiction, holding that the "pivotal issue" in the case was a federal question, and that Congress had totally occupied the field of interstate carriage. *Id.* at 233-34.

Justice White contrasted Kerr-McGee's defensive assertion of preemption, which the Seventh Circuit held insufficient to create a federal question, with the Second Circuit's holding in *Emery* that a federal question exists when the pleadings in a case reveal that federal law is the pivotal issue. Kerr-McGee Chem. Corp. v. Illinois, 103 S. Ct. 469, 470 (1982) (White, J., dissenting from denial of certiorari). *But see id.* at 469 (Blackmun, J., concurring in the denial of certiorari) (arguing that Justice White had confused two distinct lines of case law in finding a conflict among the circuits).

48. 103 S. Ct. 2841 (1983).

49. *Id.* at 2850.

50. *Id.* at 2851.

51. *Id. Franchise Tax Board* nominally presented the Court with an opportunity to attenuate or overrule the *Skelly Oil* doctrine. Given the force of precedent in jurisdictional issues and the current climate surrounding federal jurisdiction, such an outcome was unlikely. *See* Cohen, *The Broken Compass: The Requirement that a Case Arises "Directly" Under Federal Law,* 115 U. PA. L. REV. 890, 910 (1967) ("[T]he various irreconcilable formulae for measuring federal jurisdiction have a tendency to survive.") *See also* Verlinden B.V. v. Central Bank of Nigeria, 103 S. Ct. 1962

The Court then had to decide whether the Board's preemption claim came within the *Skelly Oil* rule.[52] The Court observed that a declaratory plaintiff can obtain federal jurisdiction for a nonfederal claim if the declaratory defendant's hypothetical coercive action to enforce the contested right would raise a federal question.[53] The Court also noted that a person subject to conflicting regulations may obtain federal jurisdiction.[54] Ultimately, however, the Court distinguished these cases, noting that they presented plaintiffs with a "clear interest" in immedi-

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(1983) (example of recent expression of concern by the Court about a possible expansion of federal jurisdiction).

Thus, the extension of the *Skelly Oil* rule to include a state's declaratory judgment action commenced in state court is a logical, if not an inevitable, result. The Court hesitated only because the *Skelly Oil* decision "relied significantly on the precise contours of the federal Declaratory Judgment Act," 103 S. Ct. at 2850, and because the Court viewed as possible that the California declaratory judgment statute might have a more substantive purpose than the *Skelly Oil* court attributed to the federal statute. *Id.* at 2850 n.16.

52. The Court stated that *Skelly Oil*'s application to the Board's suit was "somewhat unclear." 103 S. Ct. at 2851. The confusion resulted because the Board based the second count of its complaint on the California Declaratory Judgment Act, CAL. CIV. PROC. CODE § 1060 (Deering 1973), yet the complaint seemed to fulfill the requirements of a federal well-pleaded complaint. *Id.* at 2848-49. The Board asked for a determination of federal law in a manner that did not anticipate the defendant's defense. In addition, the second count could not be disposed of without an interpretation of federal law. Finally, the complaint stated a present controversy. *See supra* notes 12-21 and accompanying text. The case presented another difficult feature because its procedural posture resembled that of some of the cases the Court had found to satisfy the well-pleaded complaint rule. *See infra* notes 53-55 and accompanying text.

53. 103 S. Ct. at 2851 & n.19. In this situation, as the patent cases illustrate, the declaratory plaintiff has federal jurisdiction to assert that the defendant does not have a federal right. *See id.* at 2851 n.19. *See also supra* notes 32-33 and accompanying text (discussing basis for federal jurisdiction in patent cases).

For another context in which this type of jurisdiction has been found, see Wisconsin v. Baker, 698 F.2d 1323 (7th Cir.), *cert. denied,* 103 S. Ct. 3537 (1983). In *Baker*, the state sued for a declaration that an Indian tribe had no federal right to limit non-tribe members' use of navigable waters within the reservation. *Id.* at 1325-26. The tribe threatened to sue offenders. *Id.* at 1326. The court held that federal jurisdiction was proper because the tribe's suit to enforce its right would necessarily have raised a federal question. The state also had an interest in removing the cloud on its citizens' use of waters. *Id.* at 1229-30. *See also* Oneida Indian Nation of New York State v. County of Oneida, 414 U.S. 661 (1974) (federal jurisdiction found for ejectment action brought by Indian tribe claiming title to land under a federal grant even though state cause of action for ejectment raised no federal issue).

54. 103 S. Ct. at 2852 n.20. The Court states in a footnote:

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

Id.

ate federal adjudication, a factor not present in *Franchise Tax Board*.[55]

Franchise Tax Board thus bars states from using the federal declaratory procedure to test the validity of their regulations.[56] The Court's holding requires state courts to decide preemption issues that states pose in anticipation of a federal defense.[57] The Court thus has implied that a state's declaratory judgment action illustrates a situation in which a defendant subject to conflicting state and federal regulations does not have a clear interest in immediate federal adjudication.[58]

The *Franchise Tax Board* Court implied a jurisdictional standard centered on the identifiable "clear interests" of the plaintiff in certain exceptional declaratory actions. The Court offered three illustrations of the standard's application.[59] In patent cases, the Court found that plaintiffs who challenge the validity of the defendant's patent have a clear interest in removing any cloud on the use of patented objects or processes.[60] Similarly, the Court noted that persons subject to conflict-

55. The Court stated that the adequacy of the state tribunal for deciding the preemption question negated the parties' having a "clear interest" in federal jurisdiction similar to that of an alleged patent infringer or a person subject to conflicting regulations. *Id.* at 2852 & n.23.

56. *See supra* notes 53-55 and accompanying text.

57. 103 S. Ct. at 2852-53. The necessary implication of this rule is that a declaratory defendant cannot remove such an action on the basis of a preemption defense, as CLVT attempted to do in this case. *Id.* at 2853.

58. *Accord* Illinois v. Kerr-McGee Chem. Corp., 677 F.2d 571 (7th Cir.), *cert. denied,* 103 S. Ct. 469 (1982). *But see id.* at 470 (White, J., dissenting from denial of certiorari) (acknowledging conflict between circuits on whether preemption can be a basis for removal of any action). For a discussion of Justice White's opinion, see *supra* note 47.

59. *See also* Illinois *ex rel.* Barra v. Archer Daniels Midland Co., 704 F.2d 935 (7th Cir. 1983). Judge Posner, faced with facts similar to those presented in *Franchise Tax Board*, set forth a similar frame of analysis. He asserted that in order to obtain a federal jurisdiction, a declaratory plaintiff (or the declaratory defendant by removal) whose claim is based on a claim of preemption must have a "good *reason*," apart from the assertion that federal law is preempted, to gain federal jurisdiction. *Id.* at 940 (emphasis in original). The "good reason" rule may be slightly more restrictive than the "clear interest" rule, in that Judge Posner seems to see fewer circumstances in which preemption can serve as a basis for federal jurisdiction. *Id.* at 941. For further discussion of this case, see *supra* note 42.

60. *See* 103 S. Ct. at 2852 n.23. *See also* Wisconsin v. Baker, 698 F.2d 1323 (7th Cir.), *cert. denied,* 103 S. Ct. 3537 (1983) (finding federal jurisdiction for state's action challenging Indian tribe's restriction of state waterways because of state's strong interest in clarifying rights to usage of its waterways). For a discussion of *Baker*, see *supra* note 53.

In *Franchise Tax Board*, the Court noted that CLVT could have brought suit in federal court pursuant to ERISA provisions that specifically granted the federal courts exclusive jurisdiction over suits brought by certain groups to enjoin violations of ERISA. *Id.* at 2851-52. Section 502(a)(3) of ERISA grants fiduciaries such as CLVT a cause of action "to enjoin any act or practice which violates any provision of this subchapter or the terms of the [covered] plan." 29 U.S.C. § 1132(a)(e)(A) (1982). Section 502(e)(1) vests exclusive jurisdiction of such suits in the federal

ing regulations may face immediate debilitating liability if recourse to a federal declaratory action is unavailable.[61] Finally, the Court held that states have no clear interest in testing the validity of their regulations in federal court because their own courts are adequate.[62]

The Court's use of patent and conflicting regulations cases to illustrate its clear interest standard indicates the limitations the Court will impose on the exercise of federal jurisdiction over cases that are arguably analogous to these situations. The Court's statement that federal jurisdiction exists in the patent type cases because the declaratory defendant's coercive suit would "necessarily" present a federal question[63] implies approval of lower federal court decisions that denied jurisdiction when the defendant had alternative state or federal coercive actions.[64] In addition, the Court's discussion of CLVT's cause of action

courts. 29 U.S.C. § 1132(e)(1) (1982). CLVT's charter agreement provides that funds held by CLVT may not be pledged, assigned, or encumbered, 103 S. Ct. at 2844 & n.3, and therefore the Board's levies violated "the terms of [a covered] plan." *See* 29 U.S.C. § 1132 (1982). If CLVT had exercised its statutory right to enjoin the Board's levies as a violation of ERISA, *see* 29 U.S.C. § 1132(a)(3)(A) (1982), its cause of action clearly would have arisen under federal law.

Thus, the Court could have found federal question jurisdiction by applying the rationale of the patent cases. The Court acknowledged that in patent cases "[f]ederal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question." 103 S. Ct. at 2851 & n.19. *Cf. supra* notes 32-33 and accompanying text (discussing basis of federal jurisdiction in patent cases). The Court rejected this analysis on the basis of the limited scope of this cause of action. 103 S. Ct. at 2852-53. It stated that the congressional grant of exclusive federal jurisdiction did not extend to suits *against* persons named in ERISA. 103 S. Ct. at 2852.

61. 103 S. Ct. at 2852 n.23. *See, e.g.,* Rath Packing Co. v. Becker, 530 F.2d 1295, 1303-06 (9th Cir. 1975), *aff'd sub nom.* Jones v. Rath Packing Co., 430 U.S. 519 (1977). For a discussion of the *Rath Packing* decision, see *supra* notes 43-44.

In *Franchise Tax Board* the Court recognized a trend toward finding jurisdiction in conflicting regulations cases that arguably come within the *Wycoff* dictum because the threatened state action does not present a federal issue. *See id.* at 2852 n.23. For a discussion of Justice White's recognition of this trend, see *supra* notes 45-47 and accompanying text. The Court could have extended the rule of the conflicting cases to encompass the Board's declaratory action by finding that CLVT's interest in immediate federal adjudication of the preemption question was sufficient to support federal jurisdiction. Nonetheless, the Court reasoned that considerations of comity and practicality outweigh the federal interest in uniform adjudication of federal issues when a state seeks a declaration of non-preemption. 103 S. Ct. at 2852.

62. 103 S. Ct. at 2852. *See also* Illinois *ex rel.* Barra v. Archer Daniels Midland Co., 704 F.2d 935 (7th Cir. 1983) (state has no "good reason" to invoke federal jurisdiction to test the validity of its regulations). For further discussion of the *Archer Daniels* decision, see *supra* notes 42 & 59.

63. 103 S. Ct. at 2851 & n.19.

64. *E.g.,* Le Chemise Lacoste v. Alligator Co., 506 F.2d 339 (3d Cir. 1974), *cert. denied,* 421 U.S. 937 (1975); Washington v. American League of Professional Baseball Clubs, 460 F.2d 654 (9th Cir. 1972).

under ERISA[65] seems to exclude from this category actions in which the declaratory defendant's coercive action necessarily presents a federal question, but the declaratory defendant is one of a limited class of parties to whom Congress had given a federal cause of action to enforce statutorily created rights.[66]

The Court's description of conflicting regulations cases implies that a declaratory plaintiff in such cases must satisfy three prerequisites to gain federal jurisdiction.[67] First, the declaratory plaintiff obviously must be subject to conflicting regulations. Second, the declaratory plaintiff must have a "clear interest" in immediate federal adjudication sufficient to justify circumvention of the state court.[68] Third, the declaratory plaintiff must have access to federal injunctive relief.[69] Thus,

65. For a discussion of CLVT's right to bring suit, see *supra* note 60.

The Court used its finding that ERISA's grant of exclusive federal jurisdiction did not extend to suits against persons named in ERISA to explain why the Board's suit did not fall within the doctrine of Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 376 F.2d 337 (6th Cir. 1967), *aff'd,* 390 U.S. 557 (1968). According to the *Franchise Tax Board* Court, *Avco* holds that § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 (1982), is so "powerful" in its preemptive force that it automatically confers federal jurisdiction on any suit brought on a contract between an employer and a union. 103 S. Ct. at 2853. CLVT argued that ERISA likewise preempted state law to such an extent that any action brought within ERISA's ambit arises under federal law for jurisdiction purposes. *Id.* at 2854. The Court rejected this argument on the ground that ERISA's grant of jurisdiction is specific, and not generalized as in section 301 of the LMRA. *Id.* The Court's distinction apparently forecloses or narrows another line of argument for parties who seek to obtain federal jurisdiction for controversies founded in state law forms of action, but dependent on or revolving around federal law.

66. *See* 103 S. Ct. at 2851-53. The Court's language fails to indicate clearly whether the Court means to bar federal courts from hearing all actions in which the defendant has a statutory cause of action similar to CLVT's or only those actions brought by states or their agencies. Federalism plays a leading role in the Court's rationale, *see id.* at 2852, and the implications of the case are limited somewhat by the unusual facts. *See supra* notes 1-9 and accompanying text and note 52.

67. *See infra* notes 68-69 and accompanying text. For quotation of the Court's language in this respect, see *supra* note 54.

68. 103 S. Ct. at 2852 nn.20 & 23. *See* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 LAW & CONTEMP. PROBS. 216, 227-28 (1948).

69. 103 S. Ct. at 2852 n.20. The cases cited in this footnote suggest that the Court, in demanding that a declaratory plaintiff have access to federal injunctive relief, is concerned with questions of justiciability. A problem in declaratory actions in which the plaintiff seeks to establish that state regulations are preempted is that often the state has not enforced or threatened to enforce the regulations. *See* Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 245 (1952); *supra* notes 37-38 and accompanying text. Rath Packing Co. v. Becker, 530 F.2d 1295 (9th Cir. 1975), *aff'd sub nom.* Jones v. Rath Packing Co., 430 U.S. 519 (1977), presents a clearer case. In *Rath Packing*, county officials cited a meat company for violations of a California fair packaging law, and the company's meat was ordered off-sale. *Id.* at 1301. The company instituted a federal declaratory proceeding seeking to have the state regulation declared preempted. *Id.* at 1301-02.

the Court attempted to impose a framework of rules on a class of cases that has elicited conflicting results from the circuit courts.

Franchise Tax Board provides needed, if limited, guidance to the lower federal courts. The Court recognized that the federal courts are continually faced with novel and compelling attempts to obtain federal jurisdiction. Although the Court cites examples of "clear interests,"[70] it fails to provide a firm definition of what constitutes a clear interest or when federal concerns would outweigh the plaintiff's interests. This shortcoming of the opinion poses problems for lower federal courts faced with the myriad issues and parties in declaratory actions presenting preemption issues.[71] The Court's use of dictum and implication in *Franchise Tax Board*, however, allows it to evaluate the efficacy of its views before dealing directly with other preemption-based claims to federal jurisdiction.

J.D.W.

The Ninth Circuit panel distinguished *Wycoff* on the ground that the cost to Rath of the off-sale order created a viable controversy between the parties. *Id.* at 1304-06. The Supreme Court affirmed without discussing the jurisdiction issue. 430 U.S. 519 (1977).

70. 103 S. Ct. at 2852 n.23. *See supra* notes 60-61 and accompanying text.

71. The Court's "clear interest" standard does, however, attempt to accommodate the existing case law and the competing policies in this area. The standard comports with the trend Justice White recognized among circuit court decisions. *See supra* notes 45-47 and accompanying text. According to this scheme the Court reached the appropriate result in *Franchise Tax Board* because the Board's declaratory cause of action sought only to negate CLVT's federal defense. *Cf. supra* note 60 (describing CLVT's cause of action under ERISA). Indeed, the Court's "clear interest" standard may indicate that the Court considers Justice White's dichotomy appropriate. Certainly, one who seeks a declaration that federal law determines the parties' rights has a greater interest in federal adjudication of a dispute than one who claims that state law should govern exclusively.