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Expanded Federal Question: On the Independent Viability of Declaratory Claims

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NOTES

The Expanded Federal Question: On The "Independent Viability" of Declaratory Claims

In 1934, Congress passed the Federal Declaratory Judgment Act (FDJA).[1] The FDJA created a new federal remedy,[2] the declaratory judgment, which permits controversies to be settled before laws are violated, contracts are breached,[3] or unnecessary damage has accrued.[4] The declaratory remedy also acts as a milder alternative to the "strong medicine" of the injunction.[5] Originally the FDJA was used to test the constitutionality of state criminal statutes.[6] Later, the FDJA became significant in suits claiming federal preemption of state law.[7]

In enacting the FDJA, Congress afforded federal courts a new remedy but did not enlarge federal subject matter jurisdiction.[8] The Supreme Court has insisted that the established constitutional,[9] statutory,[10] and procedural requirements[11] of federal question jurisdic-

1 28 U.S.C. §§ 2201, 2202 (1976). § 2201 provides:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

2 "The principle involved in this form of procedure is to confer upon the courts the power to exercise in some instances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts." H.R. REP. NO. 1264, 73d. Cong., 2d Sess. 2 (1934).

3 *See, e.g.*, Keener Oil & Gas Co. v. Consolidated Gas Util. Co., 190 F.2d 985, 989 (10th Cir. 1951).

4 *See, e.g.*, E. Edelman & Co. v. Triple-A Specialty Co., 88 F.2d 852, 854 (7th Cir.), *cert. denied*, 300 U.S. 680 (1937).

5 Steffel v. Thompson, 415 U.S. 452, 466 (1974).

6 *Id.*; Perez v. Ledesma, 401 U.S. 109, 111-15 (1971).

7 Kassel v. Consolidated Freightways, 101 S. Ct. 1309 (1981); Chapman v. Houston Welfare Rts. Org., 441 U.S. 600 (1979); New York Tel. Co. v. New York Labor Dep't., 440 U.S. 519 (1979); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Super Tire Eng'r Co. v. McCorkle, 550 F.2d 903 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977); Glendale Fed. Sav. & Loan v. Fox, 481 F. Supp. 616 (C.D. Cal. 1979).

8 Perez v. Ledesma, 401 U.S. 109, 111-15 (1971); Skelly Oil Co. v. Phillips Petroleum Co., 337 U.S. 667, 671-72 (1950). As used in this note, the term "federal jurisdiction" shall refer solely to federal subject matter jurisdiction as provided in 28 U.S.C. § 1331 (1976).

9 U.S. CONST. art. III. *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

10 *See* text accompanying notes 21-24 *infra*.

11 Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237 (1952); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).

tion be satisfied before a federal court may adjudicate the merits of a declaratory claim.[12] Nevertheless the FDJA has greatly complicated federal question jurisdiction. When faced with a declaratory claim seeking constitutional[13] immunity from a state law cause of action, federal courts have struggled to apply the various guidelines governing federal question jurisdiction. Although established jurisdictional guidelines bar federal jurisdiction over a claim which is asserted "in the nature of a defense,"[14] the First,[15] Fifth,[16] and Ninth[17] Circuits have upheld federal jurisdiction over declaratory claims which assert that federal law preempts a state cause of action. By upholding federal jurisdiction based upon the "independent viability" of the declaratory claims, the courts have introduced a new rule expanding federal question jurisdiction.

This note examines the emerging "independent viability rule" and considers its effect on existing federal jurisdictional doctrine. Part I reviews the constitutional, statutory, and judicial limitations on federal question jurisdiction. Part II examines the specialized jurisdictional rules governing federal declaratory actions. Part III analyzes four federal appellate cases applying the independent viability rule. Part IV assesses the soundness of the independent viability rule, and Part V proposes that the federal courts uniformly accept the emerging rule.

I. Historical Limits to Federal Question Jurisdiction

Article III of the Constitution of the United States is the source of federal judicial power.[18] Section one vests all judicial power in a Supreme Court and empowers Congress to ordain and establish inferior courts.[19] Section two extends federal jurisdiction to "all cases, in law and equity, arising under this Constitution, the laws of the

12 *See* Moore v. Sims, 442 U.S. 415 (1979); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

13 Article VI of the United States Constitution provides that "the laws of the United States . . . shall be the supreme law of the land." U.S. CONST. art. VI. The preemption doctrine is the heart of "our federalism." Given a "collision" between an Act of Congress and a state statute, the state law must "yield to the law of Congress." Gibbons v. Ogden 22 U.S. (9 Wheat.) 1, 210 (1824). *See* note 7 *supra*. *See generally* Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978-79); Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

14 Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237 (1952).

15 First Fed. Sav. & Loan v. Greenwald, 591 F.2d 417 (1st Cir. 1979).

16 Braniff Int'l, Inc. v. Florida Pub. Serv. Comm'n, 576 F.2d 1100 (5th Cir. 1978).

17 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); Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, (1979).

18 U.S. CONST. art. III.

19 *Id.* § 1.

United States, and treaties made, or which shall be made, under their authority . . . ."[20] Pursuant to its constitutional power, Congress created the federal district courts[21] and granted them original jurisdiction in all "civil actions wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."[22]

Although the courts have not developed a completely satisfactory test for determining when a claim in fact "arises under" federal law,[23] the Supreme Court, through a number of decisions, has established guidelines governing federal question jurisdiction.[24] The first of these cases, *Osborn v. The Bank of the United States*,[25] is most significant for establishing the constitutional limits of "arising under" jurisdiction.[26] Since Congress first enacted a federal question statute in 1875, the Supreme Court has focused on the meaning of "arising under" in the statute rather than in the Constitution.[27] The Court

20 *Id.* § 2.

21 The judicial power of the federal courts is grounded, in general, in two separate statutory provisions governing subject matter jurisdiction. Under 28 U.S.C. § 1332 (1976), the federal courts have original jurisdiction over "diversity of citizenship" cases. Under the "federal question" provision of 28 U.S.C. § 1331 (1976), the federal courts have original jurisdiction over certain cases presenting issues primarily rooted in federal law. *See* Gully v. First Nat'l Bank, 299 U.S. 109 (1936); C. WRIGHT, LAW OF FEDERAL COURTS §§ 17-22 (3d ed. 1976) [hereinafter cited as C. WRIGHT]; Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953).

22 28 U.S.C. § 1331 (1976) (Supp. 1981). Though the statutory basis for federal question jurisdiction has traditionally been qualified by a requisite monetary "amount in controversy," this requirement has recently been eliminated. *Id.*

23 Professor Mishkin has devised a succinct test which states that "a substantial claim founded 'directly' upon federal law" is necessary to invoke original federal question jurisdiction. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 165, 168 (1953). Several courts have approved of this test. *See, e.g.*, Keaukaha-Panaewa Comm'n v. Hawaiian Homes Comm'n, 588 F.2d 1216 (9th Cir. 1978); Mescalero Apache Tribe v. Martinez, 519 F.2d 479 (10th Cir. 1975).

Further attempts have been made to state precisely when a case does arise under federal law. One recent example: "[A] suit arises under federal law whenever the plaintiff's complaint discloses actual, substantial reliance — at the time the judicial power is invoked — on a proposition of law that touches on federal primary relationships." Note, *The Outer Limits of "Arising Under"*, 54 N.Y.U.L. REV. 978, 979 (1979).

24 Gully v. First Nat'l Bank, 299 U.S. 109 (1936); People of Puerto Rico v. Russell & Co., 288 U.S. 476 (1933); Starin v. New York, 115 U.S. 248 (1885); Pacific R.R. Removal Cases, 115 U.S. 1 (1885); Gold-Washing & Water Co. v. Keyes, 96 U.S. (6 Otto) 199 (1877); Bank of the United States v. Planters' Bank, 22 U.S. (9 Wheat.) 904 (1824); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

25 22 U.S. (9 Wheat.) 738 (1824).

26 In *Osborn*, Justice Marshall construed broadly the arising under language of the Constitution. Under the *Osborn* test, federal jurisdiction existed whenever an element of federal law was an ingredient of the cause of action. *Id.* at 824.

27 Professor Wright has argued that this statutory construction is entirely proper and

has interpreted the statutory "arising under" language more restrictively than it interpreted the constitutional language in *Osborn*; this restrictive interpretation has narrowed significantly the scope of federal question jurisdiction.[28] In *Gully v. The First National Bank in Meridian*,[29] Justice Cardozo assessed federal question jurisdiction by distinguishing basic federal issues from collateral federal issues and necessary federal controversies from merely potential federal controversies.[30] Although further attempts have been made to develop a succinct test for original federal question jurisdiction, none has been universally embraced by the federal courts.[31] Later cases have established, however, that the "arising under" requirement will be satisfied if a federal right or immunity is a basic element of the plaintiff's cause of action.[32]

Foremost among common law restrictions on federal question jurisdiction is the requirement that the federal issue appear on the face of a well-pleaded complaint.[33] A determination of jurisdiction by examination of the plaintiff's initial pleadings is consistent with the notion that a court must first possess power over a case before it can require responsive pleadings.[34] A federal issue raised solely in the

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distinguishable from the *Osborn* constitutional construction. C. WRIGHT, *supra* note 21, at 64-66.

28 *Id.*

29 299 U.S. 109 (1936).

30 *Id.* at 118.

31 C. WRIGHT, *supra* note 21, at 67. Because subject matter jurisdiction may never be waived, when the federal courts have assumed jurisdiction over any federal question case the "arising under" requirement has been satisified.

32 "[C]ases raising a serious question whether jurisdiction exists are comparatively rare. . . . . It is the exceptional case in which the meaning of arising under poses any serious problem." 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE, Jurisdiction § 3562, at 398 (1976)(Supp. 1981).

The most formidable barrier to federal question jurisdiction is not § 1331, but rather the wealth of judge-made law which has interpreted the statute and limited its proper use. "The existing doctrines as to when a case raises a federal question are neither analytical nor entirely logical, but a considerable body of case law has been built up on this subject that is reasonably well understood by courts and litigants, and that works well in practice." AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURSIDICTION BETWEEN STATE AND FEDERAL COURTS, p. 179 (1969). Therefore, although a precise definition of "arising under" has not been articulated, the operative limits of arising under jurisdiction have been established by a vast body of case law.

33 This rule was first applied in Gold-Washing & Water Co. v. Keyes, 96 U.S. (6 Otto) 199 (1877), and has been applied in modern times. *See* Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127-28 (1974).

34 *See* C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE, JURISDICTION § 3566 (1976) (Supp. 1981). An inquiry into federal question jurisdiction, therefore, must begin and end within the four corners of the plaintiff's complaint. *Id.*

defendant's answer is insufficient to support federal jurisdiction.[35] Likewise, a complaint which raises a federal issue in anticipation of a particular defense does not establish federal question jurisdiction.[36] In most cases, the well-pleaded complaint rule contributes convenience and certainty to the federal courts' analysis of jurisdiction, avoiding the somewhat inequitable results which obtain when a case is dismissed for lack of jurisdiction at a more advanced stage of litigation.[37] Nonetheless, the rule has created a great deal of uncertainty when applied in federal declaratory judgment actions.

II. Federal Jurisdiction Over Declaratory Claims

Under the FDJA, a party to a justiciable controversy may petition the federal district court to adjudicate his rights and liabilities.[38] The Supreme Court has established that, although the FDJA creates a noncoercive[39] federal remedy, it does not expand federal subject matter jurisdiction.[40] The article III "case or controversy" requirement[41] as well as the section 1331 "arising under" requirement[42] must at all times be respected.[43] Nevertheless, litigants have used the FDJA to test the limits of federal question jurisdiction, thus raising the danger that subject matter jurisdiction may be invoked improperly.

In order to fully respect the "arising under" requirement, federal

35 Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894).

36 This rule was first applied in Metcalf v. City of Watertown, 128 U.S. 586 (1888). It has been consistently applied ever since. *See, e.g.*, Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974); Madsen v. Prudential Fed. Sav. & Loan Ass'n, 635 F.2d 797 (10th Cir. 1980), *cert. denied*, 101 S.Ct. 3007 (1981); Smart v. First Fed. Sav. & Loan Ass'n, 500 F. Supp 1147 (E.D. Mich. 1980); Michigan Sav. & Loan League v. Francis, 490 F. Supp. 892 (E.D. Mich. 1980).

37 Note, *Federal Jurisdiction over Declaratory Suits*, 79 COLUM. L. REV. 983, 984-86 (1979). *See* Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890 (1967).

38 *See* note 1 and accompanying text *supra*.

39 A "non-coercive" remedy establishes the rights and liabilities of a party but does not compel or enjoin further specific conduct.

40 Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-74 (1950). A federal court may not condition declaratory relief on a showing that a coercive remedy is possible. Perez v. Ledesma, 401 U.S. 82, 115-18 (1971); New York Life Ins. Co. v. Roe, 102 F.2d 28 (8th Cir. 1939).

41 U.S. CONST. art. III. The Supreme Court first considered the constitutionality of the FDJA in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). The Court upheld the constitutionality of the Act, stating that article III is satisfied as long as declaratory relief is limited to cases of "real and substantial controversy". *Id.* at 241.

42 28 U.S.C. § 1331(a) (Supp. 1981).

43 Jurisdiction may also be based on diversity of citizenship. 28 U.S.C. § 1332 (1976).

courts must apply the well-pleaded complaint rule.[44] The rule, however, is often difficult to apply in declaratory actions. The plaintiff in a declaratory action may assert federal rights that, in an action for traditional remedies, would not have appeared on the face of a well-pleaded complaint.[45] For example, the declaratory complaint may raise a claim which, absent declaratory procedure, would appear as a reply to the defendant's expected defense.[46] Similarly, the declaratory plaintiff may, in effect, "respond" to a state law cause of action by seeking a declaration of his federal rights.[47] In actions for traditional, non-coercive remedies, neither claim would satisfy the well-pleaded complaint rule. Prior to the FDJA's enactment, federal jurisdiction would have been improper.

To help ensure that the FDJA not expand subject matter jurisdiction,[48] the Supreme Court modified the well-pleaded complaint rule for declaratory actions. In *Skelly Oil Co. v. Phillips Petroleum Co.*,[49] the Court rejected the suggestion that federal courts should apply the well-pleaded complaint rule mechanically to declaratory complaints and grant jurisdiction if a complaint raises any federal claim.[50] The Court instead adopted a narrower version of the well-pleaded complaint rule.[51] Under the modified rule, a federal court may consider a request for declaratory relief only if a complaint in a hypothetical[52] suit brought absent the declaratory remedy would contain a substan-

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44 *See* notes 33-37 and accompanying text *supra*.

45 The realistic position of the parties is reversed in a declaratory suit. "A petition for a declaration, however, may frequently assert as a cause of action what would be a defense or a reply in a conventional suit." *Developments in the Law — Declaratory Judgments — 1941-1949*, 62 HARV. L. REV. 787, 802 (1949).

46 *See, e.g.*, Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).

47 *See, e.g.*, Home Fed. Sav. & Loan v. Insurance Dep't, 571 F.2d 423 (8th Cir. 1978); Allegheny Airlines v. Pennylvania Pub. Serv. Comm'n, 465 F.2d 237 (3d Cir. 1972). *See also* Milprint, Inc. v. Curwood, Inc., 562 F.2d 418 (7th Cir. 1977); McCorkle v. First Pa. Banking & Trust Co., 459 F.2d 243 (4th Cir. 1972); Thiokol Chem. Corp. v. Burlington Indus., Inc., 448 F.2d 1328 (3d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972).

48 *See* Perez v. Ledesma, 401 U.S. 109, 111-15 (1971).

49 339 U.S. 667 (1950).

50 *Developments in the Law — Declaratory Judgments — 1941-1949*, 62 HARV. L. REV. 787, 802-03 (1949).

51 Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 672-73 (1950).

52 If the declaratory relief were sought by a defendant in a pending state proceeding, the court would look to the complaint in the state proceeding in order to establish jurisdiction over the dispute. If no suit were yet brought, the court would invent a hypothetical coercive suit and examine its complaint for the necessary federal question. Therefore, the nature of the actual or threatened controversy determines the existence of federal question jurisdiction. *Id.*; *Developments in the Law — Declaratory Judgments — 1941-1949*, 62 HARV. L. REV. 787, 802-03 (1949).

tial federal question.[53] Federal jurisdiction, therefore, may be improper despite the averment of a federal issue on the face of a declaratory complaint.[54] Indeed, the Court in *Skelly Oil* held that the declaratory plaintiff's federal claim was, in effect, a reply to an anticipated federal defense.[55] The Court, focusing on the true nature of the controversy, found that the hypothetical complaint did not raise the essential federal question.[56] Thus, jurisdiction was improper.

In *Public Service Commission v. Wycoff Co.*,[57] the Court addressed *Skelly Oil*'s application to situations in which the declaratory plaintiff sues to establish a federal defense to a state law cause of action. The plaintiff in *Wycoff* had commenced a declaratory action in federal district court.[58] The complaint had sought 1) the court's declaration that the Wycoff Company's transportation of motion picture film over interstate highways within Utah was an activity within the scope of interstate commerce; and 2) the court's injunction of Public Service Commission of Utah's interference with transporation in interstate commerce.[59] The Supreme Court dismissed the request for injunctive relief on constitutional grounds, holding that the defendant's "threatened or probable act"[60] did not present the requisite "actual controversy."[61] The company had adduced insufficient evidence of any state administrative or judicial action seeking to prohibit its activity.[62] Noting that the dispute had not "matured to a point where we can see what, if any, concrete controversy will develop,"[63] the Court declined to exercise jurisdiction over the declara-

53 If federal jurisdiction is determined on the basis of pleadings in a hypothetical coercive action, then only those declaratory cases which would also have attained jurisdiction in coercive form will be allowed. 48 U. CINN. L. REV. 150, 153 (1979).

54 Home Fed. Sav. & Loan v. Insurance Dep't, 571 F.2d 423 (8th Cir. 1978); Allegheny Airlines v. Pennsylvania Pub. Serv. Comm'n, 465 F.2d 237 (3d Cir. 1972).

55 Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. at 672-73.

56 *Id.*

57 344 U.S. 237 (1952).

58 *Id.* at 239-40. The action was brought in the United States District Court for the District of Utah.

59 *Id.*

60 *Id.* at 241.

61 *Id.*

62 *Id.* at 246-47. The Commission had, in fact, filed a petition in Utah state court seeking to enjoin the Wycoff Company from intrastate operation. "[B]ut that process was never served and nothing in the record tells us what happened to this action." *Id.* at 245. In his dissent, Justice Douglas considered it significant that the suit was pending in the Utah court. *Id.* at 251-52 (Douglas, J., dissenting).

63 *Id.* at 245.

tory claim.[64] By declining jurisdiction on ripeness grounds, the Court did not have to reach the issue of jurisdiction over the declaratory suit.[65] Nevertheless, the Court in *Wycoff* suggested in dicta that jurisdiction would have been improper because the complaint sought to establish a federal defense to a threatened state court action:

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal defense before the state court begins the case under state law.[66]

Following the dicta in *Wycoff*, many lower federal courts have held that a party who commences,[67] or is about to commence,[68] a state court action based upon state law may not be haled into federal court as a defendant in a declaratory suit based on federal law.[69] In *Home Federal Savings and Loan v. Insurance Department of Iowa*,[70] the Eighth Circuit declined to exercise jurisdiction over a declaratory action challenging on federal preemption grounds a state agency's attempt to regulate a savings and loan association. In *Allegheny Airlines v. Pennsylvania Public Service Commission*,[71] the Third Circuit held that a

64 "We conclude that this suit cannot be entertained as one for injunction and should not be continued as one for a declaratory judgment." *Id.* at 249.

65 "Since this case should be dismissed in any event, it is not necessary to determine whether, on the the record, the alleged controversy over an action that may be begun in state court would be maintainable . . . ." *Id.* at 248-49.

66 *Id.* at 248.

67 *See, e.g.*, Home Fed. Sav. & Loan Ass'n v. Insurance Dep't, 571 F.2d 423 (8th Cir. 1978); Milprint, Inc. v. Curwood Inc., 562 F.2d 418 (7th Cir. 1977). *See also* Monks v. Hetherington, 573 F.2d 1164 (10th Cir. 1978).

68 *See, e.g.*, Nuclear Eng'r Co. v. Scott, 660 F.2d 241 (7th Cir. 1981); Madsen v. Prudential Fed. Sav. & Loan Ass'n, 635 F.2d 797 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 3007 (1981).

69 *See, e.g.*, Thiokol Chem. Corp. v. Burlington Indus., Inc., 448 F.2d 1328 (3d. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); McCorkle v. First Pa. Banking & Trust Co., 459 F.2d 243 (4th Cir. 1972); Product Eng'r & Mfg., Inc. v. Barnes, 424 F.2d 42 (10th Cir. 1970); Arden-Mayfair, Inc. v. Lovart Corp, 434 F. Supp. 580 (D. Del. 1977); First Fed. Sav. & Loan Ass'n v. McReynolds, 297 F. Supp. 1159 (W.D. Ky. 1969).

70 571 F.2d 423 (8th Cir. 1978).

71 465 F.2d 237 (3d Cir. 1972) (dictum), *cert. denied*, 410 U.S. 943 (1973).

declaratory claim seeking to invalidate state regulation of airlines on federal preemption grounds must fail for lack of jurisdiction.[72] In both *Home Federal* and *Allegheny*, the averment of a federal question, rooted in the Supremacy Clause of the Constitution, was insufficient to confer federal question jurisdiction because the averment constituted only a defense to a real or hypothetical state law claim.[73] Thus a strict application of the well-pleaded complaint rule in declaratory actions, as expressed in *Skelly Oil* and *Wycoff*, has prevented federal courts from exercising jurisdiction over declaratory claims challenging the constitutionality of state actions.

III. The Development of the Independent Viability Rule

Three federal appellate courts have upheld jurisdiction over *Wycoff*-type declaratory claims. While attempting to distinguish the *Wycoff* dicta, the First,[74] Fifth,[75] and Ninth[76] Circuits have developed the "independent viability" rule. This rule states that a declaratory claim which is viable in its own right will satisfy jurisdictional requirements even if asserted in the nature of a defense. The three federal appellate courts have applied the independent viability rule solely where a complainant, faced with a pending or clearly threatened state action, brings a federal suit against a state official seeking a declaration that federal law preempts state law. Under the rule, federal jurisdiction is based on the allegation that the declaratory claim of preemption arises under federal law.[77]

A. Rath Packing Co. v. Becker

In *Rath Packing Co. v. Becker*,[78] the Ninth Circuit distinguished *Wycoff* by inquiring into the policy aims inherent in the *Wycoff* dicta and noting their inapplicability.[79] By characterizing the cause of action as 1) ripe for adjudication and 2) capable of being asserted as an

72 *Id.* at 241.

73 *Id.*; Home Fed. Sav. & Loan Ass'n v. Insurance Dep't, 571 F.2d 423, 426-27 (8th Cir. 1978).

74 First Fed. Sav. & Loan Ass'n v. Greenwald, 591 F.2d 417 (1979).

75 Braniff Int'l, Inc. v. Florida Pub. Serv. Comm'n, 576 F.2d 1100 (5th Cir. 1978).

76 Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980); 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).

77 In all cases, the state proceedings are either actually pending or clearly threatened, so that the declaratory claim is capable of being construed as "in the nature of a defense."

78 530 F.2d 1295 (9th cir. 1975), *aff'd sub. nom.* Jones v. Rath Packing Co., 430 U.S. 519 (1977).

79 *Id.* at 1303-06.

affirmative as well as a defensive claim, the *Rath* court distinguished *Wycoff* and created the independent viability distinction.[80] In *Rath* California officials inspected Rath Packing Company meat products, found that the company had overstated the products' net weight, and issued an off-sale order.[81] In response to California's allegations in state court that the company's actions violated state law,[82] Rath Packing Company brought suit in federal district court seeking a declaration that federal law preempted state regulations.[83] The federal district court granted the company's motion for summary judgment.[84]

On appeal, the state contended that the company's attempt to use a federal declaratory judgment as a defense to a state action was barred by *Wycoff*.[85] The Ninth Circuit found that although the company could have raised the declaratory claim as a defense to the state action,[86] the company also could have asserted offensively a federal preemption action to seek redress for any harm caused by the off-sale order.[87] The court held that the federal action based on preemption had ripened into a substantial federal controversy due to the off-sale order.[88] The federal declaratory claim was therefore not dependent on the state litigation,[89] and the federal court had jurisdiction over it.

B. Braniff International, Inc. v. Florida Public Service Commission

In *Braniff International, Inc. v. Florida Public Service Commission*,[90] Southern Airways petitioned a federal court to declare a state statute invalid and to enjoin its further enforcement.[91] Southern alleged

80 *Id.* Since other federal appellate courts have relied on these two factors when seeking to distinguish *Wycoff*, the distinction may now fairly be called a rule.

81 *Id.* at 1298-1301. An "off-sale" order is an administrative order that, if disobeyed, would lead to an enforcement proceeding.

82 People v. Rath Packing Co., 44 Cal. App. 3d 56, 118 Cal. Rptr. 438 (1974). The California statute allegedly violated was CAL. BUS. & PROF. CODE § 12211. Rath Packing Co. v. Becker, 530 F.2d 1295, 1302 (9th Cir. 1975).

83 Rath Packing Co. v. Becker, 357 F. Supp. 529 (C.D. Cal. 1973).

84 *Id.* at 535.

85 Rath Packing co. v. Becker, 530 F.2d 1295, 1303-06 (9th Cir. 1975).

86 "That Rath's claim is or can be the basis for a defense to the state court actions states a mere truism . . . ." *Id.* at 1306.

87 "Rath's claims have a vitality in the absence of the litigation in state court; Rath had a right to a federal forum before the institution of the state court actions." *Id.* at 1305.

88 "The off-sale orders themselves are sufficient state action to create an actual controversy." *Id.*

89 "The present controversy was not created by the institution of the state court actions against Rath, but arose independently thereof by virtue of the off-sale orders." *Id.*

90 576 F.2d 1100 (5th Cir. 1978).

91 *Id.* at 1102.

that the defendant Commission's attempt to regulate interstate airlines pursuant to the questioned state statute violated the Supremacy and Commerce clauses of the Constitution.[92] Finding that the action sought "merely to obtain for plaintiffs a federal defense,"[93] the federal district court held that the sole claim relevant to jurisdiction involved only state law issues.[94] Following *Wycoff* and *Allegheny Airlines*,[95] the court dismissed the action for lack of subject matter jurisdiction.[96] The Fifth Circuit reversed:[97] "That appellants' constitutional claim ever may be a defense to the Commission's actions states a mere truism; it is not, under the circumstances, a limitation upon the power of the district court to entertain the controversy before it."[98] After discussing the *Wycoff* dicta in detail, the court questioned the dicta's continued validity and established an exception to its application:

> [W]e hold that where a party seeks injunctive and declaratory relief based upon the unconstitutionality of a state statute, and where there are no other concrete impediments to a proper exercise of federal question jurisdiction, the mere fact that the constitutional claims might be raised before a state administrative body charged with enforcement of the statute does not alone deprive the court of jurisdiction.[99]

Federal courts will not settle unripe controversies; indeed the Court in *Wycoff* had declined to grant injunctive relief on ripeness grounds.[100] The Fifth Circuit characterized *Wycoff* as having reflected a "concern that a plaintiff not be allowed . . . to proceed . . . in a case which otherwise could not be heard in federal court."[101] While in *Wycoff* there had been no evidence of threatened state action, *Braniff* involved an impending action by the Florida Public Service Commission.[102] Thus the Fifth Circuit in *Braniff* found that the existence of "adverse legal interests of sufficient immediacy and

92 *Id.*

93 *Id.* at 1103.

94 *Id.*

95 319 F.Supp. 407 (E.D. Pa. 1970), *aff'd*, 465 F.2d 237 (3d Cir. 1972) *cert. denied*, 410 U.S. 943 (1973).

96 Braniff Int'l, Inc. v. Florida Pub. Serv. Comm'n, 576 F.2d 1100, 1103 (5th Cir. 1978).

97 Braniff Int'l, Inc. v. Florida Pub. Serv. Comm'n, 576 F.2d 1100 (5th Cir. 1978).

98 *Id.* at 1106.

99 *Id.*

100 Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 240-41 (1952).

101 Braniff Int'l, Inc. v. Florida Pub. Serv. Comm'n, 576 F.2d 1100, 1106 (5th Cir. 1978).

102 Southern had been ordered to show cause why "it should not be penalized by fine and/or ordered to cease and desist from future violations . . . ." *Id.* at 1102.

reality to warrant relief"[103] ensured a ripe article III[104] controversy.

C. First Federal Savings & Loan v. Greenwald

In *First Federal Savings and Loan v. Greenwald*,[105] the First Circuit considered a district court holding that federal preemption of state banking laws presented a federal question sufficient to support removal jurisdiction.[106] On appeal from the Federal District Court for the District of Massachusetts, the First Circuit recognized the unresolved federal jurisdictional questions involved in asserting federal preemption as a defense to a state law claim.[107] The court declined to resolve the uncertainty, noting that jurisdiction could stand even if removal were improper.[108]

In a footnote, however, the court explained how it may have resolved the jurisdictional question.[109] The court noted that the conflicting requirements of the state and federal regulations caused harm to the regulated parties and ripened the controversy.[110] The controversy was thus justiciable regardless of whether the Commissioner brought a state action.[111] Therefore, the plaintiff savings and loan associations could have brought the declaratory action as an original federal action.[112] The claim could have been brought affirmatively,

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103 Braniff Int'l, Inc. v. Florida Pub. Serv. Comm'n, 576 F.2d at 1105 (quoting Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941)).

104 U.S. CONST. art. III.

105 591 F.2d 417 (1979).

106 *Id.* at 422. The jurisdictional issues involved in *Greenwald* arose in a complex factual setting. The Massachusetts Commissioner of Banks commenced a state court action against the Association seeking declaratory and injunctive relief regarding the interpretation and enforcement of Massachusetts banking laws. As an affirmative defense, the Association averred that the the Massachusetts laws were preempted by federal regulations promulgated under the Real Estate Settlement Procedures Act (RESPA). The defendant Association removed the case to federal district court and counterclaimed, seeking declaratory relief. Jurisdiction was based on the federal issues "arising under" RESPA. An identical claim was asserted by the Association as declaratory plaintiff in a separate civil action against the Commissioner. Both actions were consolidated into one district court suit with the Association as party plaintiff. *Id.* at 419-22.

107 *Id.* at 422-23.

108 The rationale, as articulated by the court, was that "the district court clearly had jurisdiction over the associations' separate declaratory judgment action which involved the same issues and was consolidated with the Commissioner's action for hearing and decision. The court added that "[t]he matter of preemption and related federal issues were the focal point of the declaratory judgment suit, hence federal question jurisdiction [was proper]." *Id.* at 423.

109 *Id.* at 423 n.8.

110 *Id.*

111 *Id.*

112 "[The regulations in conflict] would have presented a justiciable controversy even if

to vindicate a federal right, as well as defensively, to seek immunity from a state cause of action. Since the declaratory claim was not solely capable of being asserted "in the nature of a defense," it had the requisite vitality and met the requirements of federal subject matter jurisdiction.[113]

D. Conference of Federal Savings & Loan Associations v. Stein

The Ninth Circuit applied the independent viability rule most recently in *Conference of Federal Savings and Loan Associations v. Stein*.[114] In *Stein*, the California Secretary of Business and Transportation directed that all lending institutions which operated in California would be required to abide by the California Housing Financial Discrimination Act of 1977 (CHFDA).[115] In response to the directive, the Conference sued the Secretary seeking a declaration that the CHFDA was preempted by federal law.[116] After the declaratory suit had been commenced, the Secretary brought suit in state court seeking statutory damages for noncompliance with the CHFDA.[117] The federal district court found that jurisdiction was proper, and held for the declaratory plaintiff.[118]

On appeal, the Secretary claimed that the declaratory claim founded in preemption was merely a defense to a potential state claim, and that under *Wycoff* the district court lacked federal question jurisdiction.[119] The Ninth Circuit rejected the Secretary's argument and affirmed the district court, distinguishing *Wycoff* on the basis of justiciability.[120] Whereas in *Wycoff* there had been no proof of any state action which might have caused irreparable injury,[121] in *Stein* there was an actual conflict created by the declaratory suit.[122]

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the declaratory suit had been brought prior to the Commissioner's enforcement action." *Id.* (citing Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 506-08 (1972)).

113 *Id.* (citing Rath Packing Co. v. Becker, 530 F.2d 1295, 1305-06 (9th Cir. 1975), *aff'd sub. nom.* Jones v. Rath Packing Co., 430 U.S. 519 (1977)).

114 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980).

115 Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1258-59 (9th Cir. 1979). The CHFDA prohibited "redlining," or credit discrimination based on the characteristics of the neighborhood surrounding the borrower's dwelling. *Id. See* National State Bank v. Long, 630 F.2d 981 (3d Cir. 1980).

116 Conference of Fed. Sav. & Loan Ass'ns v. Stein, 495 F. Supp. 12 (E.D. Cal 1979).

117 People v. West Coast Fed. Sav. & Loan Ass'n, No. 220012 (Cal. Super. Ct. Feb. 28, 1978).

118 Conference of Fed. Sav. & Loan Ass'ns v. Stein, 495 F. Supp. 12 (E.D. Cal. 1979).

119 Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256 (9th Cir. 1979).

120 *Id.* at 1259.

121 Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 240-41 (1952).

122 Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1259 (9th Cir. 1979).

Citing *Greenwald*, the court determined that the conflicting requirements of state and federal regulations created an "actual justiciable controversy" over which it had jurisdiction.[123] Thus the Ninth Circuit, although focusing its discussion on ripeness, implicitly recognized that a declaratory claim of preemption raised "in the nature of a defense"[124] will not be barred by the *Wycoff* dicta.[125]

IV. Probing the Operative Limits of Federal Question Jurisdiction

Wycoff[126] and subsequent cases[127] have sought to ensure that federal jurisdiction not be expanded by a misapplication of the well-pleaded complaint rule in declaratory actions.[128] By insisting that a declaratory plaintiff not base federal jurisdiction on a federal right asserted in the nature of a defense, these cases prevent federal courts from allowing the declaratory remedy to upset actual, or threatened, state court proceedings.[129]

The independent viability rule, having evolved from attempts to distinguish the *Wycoff* dicta, stands in contrast to *Wycoff* and its progeny. *Wycoff* has been distinguished on two separate grounds which together constitute the independent viability rule. First, rights arising under the Supremacy Clause of the Constitution[130] may be asserted offensively as well as defensively to vindicate a federal right. Second, a controversy will "ripen" when the federal preemption issue crystalizes.

The Ninth Circuit in *Rath*[131] and the Fifth Circuit in *Braniff*[132] concentrated on the first aspect of independent viability;[133] both phrased the issue differently than the standard *Wycoff* "test". Instead of asking whether the declaratory claim might be in the nature of a defense, both circuits asked whether the claim might be asserted offensively, independently of the state litigation, to protect a federal

123 *Id.*

124 Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 248 (1952).

125 Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1259 (9th Cir. 1979).

126 *See* text accompanying note 66 *supra*.

127 *See* notes 67-69 *supra*.

128 *See* notes 50-56 and accompanying text *supra*.

129 *See* notes 58-72 and accompanying text *supra*.

130 U.S. CONST. art. VI.

131 Rath Packing Co. v. Becker, 530 F.2d 1295 (9th Cir. 1975).

132 Braniff Int'l, Inc. v. Florida Pub. Serv. Comm'n, 576 F.2d 1100 (5th Cir. 1978).

133 *Rath* and *Braniff* also discussed the ripeness issue in detail. *See* notes 88, 102 & 103 and accompanying text *supra*.

right. The declaratory claims in *Greenwald*[134] and *Stein*[135] were likewise viable both offensively and defensively. The First Circuit in *Greenwald* and the Ninth Circuit in *Stein*, however, focused on justiciability and distinguished *Wycoff* on the basis of ripeness. Both circuits noted that the federal and state law "collisions"[136] were ripe for adjudication; the claims were therefore not dependent on any state proceedings for viability.[137] Thus, by upholding federal jurisdiction over declaratory claims asserted in the nature of defense, the First, Fifth and Ninth Circuits established the independent viability rule.

The independent viability rule has expanded federal question jurisdiction. In *Rath*, *Braniff*, *Greenwald* and *Stein*, the declaratory claims alleged that federal law preempted state law.[138] The "preemption doctrine"[139] is grounded in the Supremacy Clause of the Constitution;[140] a claim of preemption "arises under" federal law.[141] The mere fact that a claim "arises under" federal law may satisfy section 1331,[142] but it does not ensure federal question jurisdiction over the claim. Federal question jurisdiction will be improper if the well-pleaded complaint rule is not satisfied.[143] *Wycoff* effectuates the well-pleaded complaint rule in declaratory suits, denying jurisdiction over a federal claim if it is in effect a defense to a threatened or pending state court proceeding.[144] The independent viability rule, however, nullifies *Wycoff*'s jurisdictional barrier and opens federal question jurisdiction to federal claims which otherwise would be barred. Thus the independent viability rule respects the constitutional and statutory "arising under" requirements[145] and violates solely the post-FDJA *Wycoff* dicta.

The Supreme Court affirmed the Ninth Circuit decisions in

134 First Fed. Sav. & Loan Ass'n v. Greenwald, 591 F.2d 417 (1st Cir. 1979).

135 Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256 (9th Cir. 1979).

136 *See* note 13 *supra*.

137 *See* notes 109-12, 120-23 and accompanying text *supra*.

138 *See* Part III *supra*.

139 *See* note 13 *supra*.

140 U.S. CONST. art. VI.

141 Burks v. Lasker, 441 U.S. 471 (1979); Perez v. Campbell, 402 U.S. 637 (1971); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). "[W]hen a federal statute condemns an act as unlawful the extent and nature of legal consequences of the condemnation . . . are . . . federal questions . . . . Legal rules which impact significantly upon the effectuation of federal rights . . . (are) treated as raising federal questions." Burks v. Lasker, 441 U.S. 471, 477-78 (1979) (quoting Sola Electric Co. v. Jefferson Co., 317 U.S. 173, 176 (1942)).

142 28 U.S.C. § 1331 (1976). *See* notes 21-24 and accompanying text *supra*.

143 *See* notes 33-37 and accompanying text *supra*.

144 Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 248 (1952).

145 *See* notes 18-37 and accompanying text *supra*.

Rath[146] and *Stein*[147] despite their inconsistencies with the *Wycoff* dicta. In neither opinion did the court discuss any of the jurisdictional issues considered by the Ninth Circuit. Subject matter jurisdiction may never be waived, and the Supreme Court had a duty to consider the jurisdictional issues *sua sponte*.[148] The Supreme Court has countenanced the development of the independent viability rule by deciding *Rath* and *Stein* on their merits. The operative limits of federal question jurisdiction have been expanded.[149]

V. Proposed Adoption of the Independent Viability Rule in the Federal Courts

Although the First, Fifth, and Ninth Circuits have developed the rule exempting a certain type of declaratory claim from the *Wycoff* dicta, the majority of federal courts have adhered faithfully to the dicta. A careful analysis of the *Wycoff* dicta, however, reveals that it restricts federal jurisdiction unnecessarily. The independent viability rule nullifies the unwarranted federal jurisdictional restrictions imposed by *Wycoff*; therefore, the rule should be uniformly adopted in the federal courts.

The *Wycoff* dicta seeks primarily to respect the integrity of federal question jurisdiction by limiting federal declaratory judgments to ripe federal controversies appearing on a "hypothetical complaint."[150] This policy is advanced by *Wycoff*'s statement that federal courts should look to the "character of the threatened action" in applying the modified well-pleaded complaint rule.[151] A strict application of the *Wycoff* dicta thus bars federal courts from exercising jurisdiction over a federal declaratory claim which arises in response to a state cause of action.[152] This construction of the well-pleaded complaint rule may well enhance judicial convenience and jurisdictional certainty.[153] However, it reduces federal subject matter jurisdiction to less than that allowed prior to the enactment of the FDJA.

The Supreme Court in *Wycoff* did not discuss the relevance of

146 Jones v. Rath Packing Co., 430 U.S. 519 (1977).

147 Conference of Sav. & Loan Ass'ns v. Stein, 445 U.S. 921 (1980) (memorandum opinion).

148 Note, *Federal Jurisdiction over Declaratory Suits Challenging State Action*, 79 COLUM. L. REV. 983, 992 n. 51 (1979); 48 U. CINN. L. REV. 150, 154 n.35 (1979).

149 *See* note 32 *supra*.

150 *See* text accompanying note 66 *supra*.

151 Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 248 (1952).

152 *Id.*

153 *See* note 37 and accompanying text *supra*.

the pre-FDJA, *Ex parte Young*[154] decision. In *Ex parte Young*, the central issue was whether the Eleventh Amendment[155] barred an action to enjoin state officials from enforcing an allegedly unconstitutional statute. In exercising jurisdiction over the action and enjoining the state officer, the court recognized that the plaintiff's claim was based on federal law.[156] The Court's finding of jurisdiction is noteworthy because, absent the injunctive action, the federal claim could arise only as a defense to a state enforcement action.[157] *Ex parte Young* establishes that, outside of specific statutory provisions,[158] a federal court has jurisdiction to enjoin a state officer's unconstitutional interference with federal rights.[159] Where a federal court has jurisdiction over an action to enjoin, it may exercise jurisdiction over a corresponding declaratory claim.[160] Accordingly, in the absence of *Wycoff* a federal court would have jurisdiction under *Ex parte Young* to entertain declaratory and equitable challenges to unconstitutional state action, even when asserted "in the nature of a defense." Therefore, the independent viability rule has not expanded federal jurisdiction beyond that which was allowed prior to the enactment of the FDJA.

Moreover, the employment of the independent viability rule does not disregard the essentials of "our federalism."[161] The power to intervene in state proceedings is not identical to the act of intervention. The declaratory judgment is a highly discretionary remedy; a federal judge may, at his discretion, refuse to issue a declaratory judgment.[162] The Court in *Wycoff* nevertheless warned:

> Declaratory proceedings in the federal courts against state offi-

154 209 U.S. 123 (1908).

155 U.S. CONST. amend. XI.

156 Note, *Federal Jurisdiction over Declaratory Suits Challenging State Action*, 79 COLUM. L. REV. 983, 997 (1979).

157 *Id.* at 997 n.84.

158 Several statutory provisions were passed subsequent to *Ex parte Young*. These include the Anti-Injunction statute, 28 U.S.C. § 2283 (1976); The Johnson Act, 28 U.S.C. § 1342 (1976); and the Tax Injuction Act, 28 U.S.C. § 1341 (1976).

159 Note, *Federal Jurisdiction over Declaratory Suits Challenging State Action*, 79 COLUM. L. REV. 983, 998 (1979).

160 The FDJA states that a declaratory suit may be entertained even if coercive relief is unavailable. 28 U.S.C. § 2201 (1976). *See* note 1 *supra*. *See also* H.R. REP. NO. 1264, 73d Cong., 2d Sess. 2 (1934); S. REP. NO. 1005, 7.3d Cong., 2d Sess. 5 (1934); Steffel v. Thompson, 415 U.S. 452, 466-68 (1974); Perez v. Ledesma, 401 U.S. 82, 111-16 (1970) (Brennan, J., concurring in part and dissenting in part).

161 Abstention from federal intervention into state proceedings is grounded in "our federalism." Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); Younger v. Harris, 401 U.S. 37 (1971). *See* Burford v. Sun Oil Co., 319 U.S. 315 (1943). Abstention has been effected through the development of the *Pullman* and *Younger* Abstention Doctrines.

162 As the FDJA states: "[A]ny court of the United States . . . *may* declare the rights and

> cials must be decided with regard for the implications of our federal system . . . . It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the state . . . . Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism.[163]

An adoption of the independent viability rule in all federal circuits, however, would not affect a federal court's discretion to abstain from intervening in state proceedings. It is a federal court's discretion as to the use of judicial power, and not the power itself, which enables the smooth operation of our federal system and respects the delicate balance between state and federal courts.[164]

VI. Conclusion

Although the Supreme Court has countenanced the development of the independent viability rule in the federal courts, it has not relieved the tension between the new rule and the *Wycoff* dicta. The independent viability rule does not offend federal constitutional or statutory jurisdictional guidelines; it does not extend federal jurisdiction beyond that which was cognizable before the FDJA's enactment; and it does not interfere with the federal courts' broad discretion to abstain from intervention in state proceedings. While the rule does expand federal jurisdiction beyond the express limits set forth in *Wycoff*, it empowers federal courts to adjudicate constitutionally-based claims of federal preemption. This power is vital to the full protection of rights guaranteed by the Constitution and laws of the United States. Until the Supreme Court openly articulates

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other legal relations of any interested party. . . ." 28 U.S.C. § 2201 (1976) (emphasis added).

163 Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 247 (1952).

164 Professor Mishkin, discussing the jurisdictional questions arising when a party asks for a declaration of federal immunity to a purported state cause of action, has written:

> What [Justice Jackson in *Wycoff*] seems to have ignored, though the complaint in the case before him did ask for an injunction, was that precisely the same pattern occurs in any suit to restrain allegedly unconstitutional state action. Insofar as his concern is directed toward attempts to use declaratory actions to evade limitations imposed on injuctions against state action (the specific situation before him), there are sufficient tools available to prevent such circumvention though the case be deemed to "arise under" national law. The existence of federal question jurisdiction does not mean that a declaratory judgment must issue; the courts have a broad discretion as to the entertaining of such actions.

Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 179 n.103 (1953).

guidelines governing requests for declaration of constitutional immunity to state actions, the federal courts should uniformly accept the independent viability rule.

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