1-1-1987

There's No Reason For It; It's Just Our Policy: The Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction

Donald L. Doernberg
Elisabeth Haub School of Law at Pace University

Articles

There's No Reason For It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction

by
DONALD L. DOERNBERG*

Many criteria have been laid down for determining when a suit arises under federal law. They can be classified, but they cannot be harmonized.[1]

Introduction

The jurisdiction of the federal courts in cases involving issues of federal law is set out in two provisions, one constitutional and one statutory, both of which allow jurisdiction for cases arising under the Constitution or federal statutes.[2] Problems of federal question jurisdiction[3] have attracted much judicial attention. Since the early nineteenth century, the

* Professor of Law, Pace University. B.A. 1966, Yale University; J.D. 1969, Columbia University.

I gratefully acknowledge the thoughtful editorial suggestions of my wife Cynthia A. Pope, of Dean Janet A. Johnson, and of Professors David I. Levine and Donald H. Zeigler, as well as the research assistance of David Karas and Andrew Stroud.

1. McGoon v. Northern Pac. Ry., 204 F. 998, 1000 (D.N.D. 1913).

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

3. Jurisdiction invoked under the quoted portion of art. III, § 2 or 28 U.S.C. § 1331 (1982) is commonly referred to as "federal question" jurisdiction, *see, e.g.,* Merrell Dow Pharmaceuticals v. Thompson, 106 S. Ct. 3229, 3231 (1986); Bowen v. Michigan Academy of Family Physicians, 106 S. Ct. 2133, 2137 (1986), or "arising under" jurisdiction, *see, e.g.,* Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480, 494 (1983); Hornstein, *Federalism,*

Supreme Court has attempted to settle upon a consistent meaning for the cryptic phrase "arising under." At issue is the scope of federal judicial power and, consequently, part of the balance of power between federal and state governments. The struggle has not been one of the Court's most successful efforts. From Chief Justice Marshall's exposition of the first test in *Osborn v. Bank of the United States*[4] to the Court's most recent essay at clarification in *Merrell Dow Pharmaceuticals v. Thompson,*[5] the boundaries of federal question jurisdiction have remained unclear.

The problem is exacerbated because there are two "arising under" clauses with which the Court must deal. Regrettably (at least from the standpoint of simplicity), the Court has not interpreted the two provisions in the same manner, despite repeated argument that it should.[6] The result is not one but two sets of confusing doctrine.

One of the best known tests for statutory federal question jurisdiction in the district courts is the "well-pleaded complaint" rule, which is associated with *Louisville & Nashville Railroad v. Mottley.*[7] There the Court insisted that the federal question necessarily appear on the face of the plaintiff's well-pleaded complaint.[8]

> It is the settled interpretation of these words ["arising under"], as used in this statute [the predecessor of 28 U.S.C. § 1331], conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some pro-

Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis, 56 IND. L.J. 563, 564 (1981).

4. 22 U.S. (9 Wheat.) 738 (1824).

5. 106 S. Ct. 3229 (1986).

6. *See infra* notes 26-30 and accompanying text. *But see infra* note 31.

7. 211 U.S. 149 (1908). In fact, the rule substantially antedates *Mottley. See infra* notes 71-96 and accompanying text. Nonetheless, *Mottley* is the case most commonly cited for the proposition today. *See, e.g., Merrell Dow,* 106 S. Ct. at 3232; Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10 (1983); Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480, 494 (1983). This Article will follow that convention.

8. A "well-pleaded complaint" is one containing only allegations essential to stating the plaintiff's cause of action, without surplusage such as anticipated defenses. 1 W. BARRON & A. HOLTOFF, FEDERAL PRACTICE & PROCEDURE 25 (C. Wright ed. 1960); M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 72 (1980). "Under the 'well-pleaded complaint' rule, federal question jurisdiction exists only where the plaintiff would be required to plead and prove a proposition of federal law in order to win a default judgment." League to Save Lake Tahoe v. B.J.K. Corp., 547 F.2d 1072, 1074 (9th Cir. 1976). Therefore, matters anticipating possible defenses and replying to them before they are raised are not properly considered by the courts in evaluating the jurisdictional sufficiency of the plaintiff's case. *See infra* notes 71-103 and accompanying text.

> vision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution.[9]

Thus, even if a case turns upon an important question of federal law, and even if that is the only issue in the case,[10] federal question jurisdiction does not exist unless the federal question appears in the "right" place, that is, in the plaintiff's well-pleaded complaint.

The Court asserts that the limitations it has placed on statutory federal question jurisdiction, including the *Mottley* rule, have been produced by "the demands of reason and coherence, and the dictates of sound judicial policy."[11] This Article suggests that the *Mottley* test, for all its venerability, produces neither reason nor coherence, is not dictated by sound judicial policy, and ought to be abandoned because it is a chief cause of the mischief that abounds in the area of federal question jurisdiction.[12]

---

9. *Mottley*, 211 U.S. at 152.

10. *See, e.g.*, Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) (discussed *infra* notes 201-15 and accompanying text); *Mottley*, 211 U.S. 149 (1908) (discussed *infra* notes 98-103 and accompanying text).

11. Romero v. International Terminal Operating Co., 358 U.S. 354, 379 (1959), *quoted with approval in* Merrell Dow Pharmaceuticals v. Thompson, 106 S. Ct. 3229, 3233 (1986).

12. Others have trod this path. *See, e.g.*, AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969); Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639 (1942); Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890 (1967); Forrester, *The Nature of a "Federal Question,"* 16 TUL. L. REV. 362 (1942); Fraser, *Some Problems in Federal Question Jurisdiction*, 49 MICH. L. REV. 73 (1950); Hirshman, *Whose Law Is It Anyway? A Reconsideration of Federal Question Jurisdiction over Cases of Mixed State and Federal Law*, 60 IND. L.J. 17 (1984). *But see, e.g.*, Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17 (1947); Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953).

On the other hand, "[a]lthough it has been the target of substantial criticism, particularly as applied in the removal context, and despite its long history, the rationale of the well-pleaded complaint rule has seldom been thoroughly analyzed." Note, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634, 638 (1984).

I am sensitive to Justice Frankfurter's admonition in *Romero*, 358 U.S. at 370-71 (1959):

> The history of archeology is replete with the unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old judiciary enactment. The presumption is powerful that such a far-reaching, dislocating construction as petitioner would now have us find in the Act of 1875 was not uncovered by judges, lawyers or scholars for seventy-five years because it is not there.

With all respect to Justice Frankfurter, however, from time to time previously unsuspected meanings are discovered lurking in statutory or constitutional provisions, even judiciary provisions. After all, shortly before Justice Frankfurter's elevation to the bench, the Court discovered its own archeological treasure in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), declaring that for 96 years the Court had acted unconstitutionally by following the doctrine of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). Justice Frankfurter did note that "[f]or reasons that would

The Court and commentators have not carefully scrutinized the development of the rule, which has proceeded by a series of almost imperceptible steps to take the Court far from its starting point: the broad congressional grant of federal question jurisdiction.[13] As will be shown, over the years several cases have come to be relied upon for propositions for which they do not stand. Finally, several recent cases—the latest, *Merrell Dow,* decided in July 1986—dramatically illustrate the increasing problems caused by the rule.

This Article is presented in three parts. Section I traces the statutory and case development of federal question jurisdiction, both under the constitutional and statutory "arising under" language. Section II demonstrates the problems that the *Mottley* rule has caused in building a rational system of federal question jurisdiction, particularly in cases seeking declaratory judgments. Section III contends that the *Mottley* rule is irrational because it is a mechanical rule that ignores important policy considerations underlying the existence of federal question jurisdiction.[14] Section III goes on to suggest that federal question jurisdiction should depend upon the centrality of the federal issue to the litigation and the importance of federal, rather than state, resolution of the issue.[15] Finally, section III urges that federal jurisdiction ought to exist when a

take us too far afield to discuss, *Erie* . . . is no exception." *Romero,* 358 U.S. at 370 n.27a. The numbering of the footnote suggests that Frankfurter inserted it as an afterthought, and I readily confess that the reasons *Erie* is not apposite are by no means as clear to me as the Justice's cryptic assertion implies they were to him. On the substantive side, were not occasional discoveries of this sort possible, Plessy v. Ferguson, 163 U.S. 537 (1896), could never have been followed by Brown v. Board of Educ., 347 U.S. 483 (1954).

13. Professor Tribe has strongly criticized the Burger Court's constitutional jurisprudence for exhibiting the tendency to cover great distances in misleadingly small increments. The Court, he says, invites

> "the tyranny of small decisions," a lovely phrase coined some time ago by the economist Alfred Kahn. He used the phrase to describe the fallacies of those economists and managers who tend to look down at their feet to figure out how far they've gone and where they're heading. It's not a very illuminating view. They may think they've taken but a short step from where they were just a moment ago; it's no surprise that, by the time they realize it, they've departed a remarkable distance from their first premises.

Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve,* 36 HASTINGS L.J. 155, 162 (1984) (footnote omitted).

14. "Like any rule of thumb . . . it operates blindly to preclude original federal jurisdiction in cases where, as a matter of sound policy, the parties ought to be permitted to choose a federal forum." Cohen, *supra* note 12, at 894.

15. As Professor Mishkin has urged, "[t]he general approach favoring restricted access to the federal courts should not operate to justify the imposition of an unwieldy limitation unrelated to the purposes of federal question jurisdiction." Mishkin, *supra* note 12, at 182. I will later show that the *Mottley* rule is entirely unrelated to the purposes of federal question jurisdiction, whatever might be its other virtues. *See infra* notes 216-54 and accompanying text.

plaintiff anticipates a federal defense, and that either party ought to be permitted to remove a case from state to federal court when any of the pleadings raises a pivotal federal issue. Only in this manner can the purposes underlying federal question jurisdiction be served consistently.

I. A Short History of Federal Question Jurisdiction

A. The Statutory Development

The constitutional language creating federal question jurisdiction has not changed since 1787. Congress first permitted the exercise of this jurisdiction in the famous "Midnight Judges Act," which substantially tracked the constitutional language: "[T]he said circuit courts respectively shall have cognizance of . . . all cases in law or equity, arising under the constitution and laws of the United States, and treaties made, or which shall be made, under their authority."[16] The Act did not, however, survive the Federalists' departure from power for long; it was repealed barely one year later by the Jeffersonian Congress.

It was not until 1875 that Congress again granted federal question jurisdiction to the inferior federal courts. The 1875 Act, still the foundation for such jurisdiction, provided:

> That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority . . . .[17]

This statute, too, substantially tracked the constitutional language, except that the 1875 statute specified that federal question jurisdiction shall be concurrent with the states and used "or" rather than "and" as a conjunction between "Constitution," "laws," and "treaties."

The 1875 Act also provided for removal jurisdiction in federal question cases for the first time:[18]

> [A]ny suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and

16. Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, *repealed by* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132. The "Midnight Judges Act" is far more famous as the spawning ground of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the Supreme Court's first assertion of the power to declare legislation unconstitutional.

17. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

18. The short-lived 1801 statute had provided for removal in several classes of cases, but not those raising federal questions; they are simply not mentioned in the removal portion of the "Midnight Judges Act." Act of Feb. 13, 1801, ch. 4, § 13, 2 Stat. 89, 92.

> arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, . . . either party may remove said suit into the circuit court of the United States for the proper district.[19]

The meaning of the provision is reasonably clear apart from what one may think of its grammar and syntax: arising-under cases were made removable at the instance of either party. One may wonder why a plaintiff might wish to remove a federal question case, since he might have brought it in federal court initially. The only logical explanation is that plaintiffs were given removal power in the event that the answer or reply raised a federal question. No other explanation is plausible. The significance of this provision for the development of the *Mottley* rule should not be underestimated.

The 1875 statute contained one other paragraph destined to become central to the century-long debate about the meaning of "arising under." Section 5 provided:

> That if, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, . . . the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require . . . .[20]

This language might suggest several meanings, and it has been the subject of some scholarly debate.[21] It might suggest that a case arising under federal law within the meaning of the Constitution and the first section of the 1875 Act could nonetheless be considered too insubstantial to warrant the expenditure of federal judicial energy.[22] On the other hand, as Professor Forrester has contended, it might have been intended only to permit the court to review its subject matter jurisdiction sua sponte, eliminating the need for a party to enter a plea in abatement.[23] Finally, it may represent Congress' rejection, for statutory purposes, of Chief Justice Marshall's argument in *Osborn v. Bank of the United States* that an underlying federal issue, even if not disputed by the parties, was sufficient to

19. Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 470-71.

20. Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 470, 472 (codified as amended at 28 U.S.C. § 1447(c) (1982)).

21. *See, e.g.*, Chadbourn & Levin, *supra* note 12, at 643-44; Forrester, *Federal Question Jurisdiction and Section 5,* 18 TUL. L. REV. 263 (1943).

22. Chadbourn & Levin, *supra* note 12, at 670-72. In Merrell Dow Pharmaceuticals v. Thompson, 106 S. Ct. 3229 (1986), the Court seems also to have adopted this view of statutory arising-under jurisdiction. *See infra* notes 179 & 188-92 and accompanying text.

23. Forrester, *supra* note 21, at 269-71.

confer jurisdiction under the constitutional provision.[24] In any case, the 1875 Act used language that later became central to the morass surrounding the *Mottley* rule.

There is almost no legislative history concerning the intended scope of "arising under" in the 1875 Act, but what little exists is unambiguous. Senator Carpenter, recalling Justice Story's argument that Congress was constitutionally required to vest the full scope of federal judicial power in the inferior federal courts,[25] declared, "This bill does [vest such power]. . . . This bill gives precisely the power which the Constitution confers—nothing more, nothing less."[26] The only contemporaneous commentator adopted Senator Carpenter's view, explaining Congress' action in light of the Civil War and the continuing reconstruction effort.[27] Many later commentators have expressed a similar understanding.[28]

Shortly after 1875, in cases construing the Act, the Court appeared to adopt this broad view. Its repeated citations of cases construing constitutional "arising under" jurisdiction suggest that the Court believed that Congress intended the constitutional language to define the scope of

24. 22 U.S. (9 Wheat.) 738, 823-24 (1824); see *infra* notes 43-55 and accompanying text for a discussion of *Osborn.*

25. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 330 (1816). Justice Story's position, though apparently shared by Justice Washington, *see Ex parte* Cabrera, 1 Wash. C.C. 232, 237 (1805) (Washington, Circuit J.), has not been adopted. *See, e.g.,* Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845); H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 2 (1973); Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49, 69-70 (1923).

26. 2 CONG. REC. 4986-87 (1874) (statement of Sen. Carpenter). Senator Carpenter (R. Wis.) was president *pro tempore* of the Senate and apparently the only legislator to comment on the 1875 Act on the Senate floor. The fact that Justice Story's interpretation of Congress' obligation was never widely adopted, *see supra* note 25, does nothing to undercut the scope or clarity of Senator Carpenter's remarks.

27. A.I., *Our Federal Judiciary,* 2 CENT. L.J. 551, 553 (1875):

> A very natural result of this [reaction to the theory of states' rights and the fact of secession] was to induce Congress in its attempts to strengthen the government, to confer upon the federal courts, from time to time, the reserved jurisdiction which it had not been thought fit originally to confer. Thus we see, that commencing in 1864, before the close of rebellion, and culminating in March, 1875, at the very close of the last session, Congress has exhausted its power; and has conferred upon the federal courts all the jurisdiction authorized by the constitution.

28. *See, e.g.,* C. WRIGHT, THE LAW OF FEDERAL COURTS § 17 (4th ed. 1983); Forrester, *supra* note 12, at 375-77; Fraser, *supra* note 12, at 74-75; Hirshman, *supra* note 12, at 24; London, *"Federal Question" Jurisdiction—A Snare and a Delusion,* 57 MICH. L. REV. 835, 838 (1959); Shapiro, *Jurisdiction and Discretion,* 60 N.Y.U. L. REV. 543, 568 (1985). Justice Frankfurter, on the other hand, took the position that Congress gave the matter little thought. *See* Romero v. International Terminal Operating Co., 358 U.S. 354, 398-99 (1959); *see supra* note 12.

the statute.[29] In 1893, referring to the statute as amended in 1887 and 1888, a unanimous Court declared:

> The intention of Congress is manifest, at least as to cases of which the courts of the several States have concurrent jurisdiction, and which involve a certain amount or value, to vest in the Circuit Courts of the United States full and effectual jurisdiction, as contemplated by the Constitution, over each of the classes of controversies above mentioned . . . .[30]

Notwithstanding this history, however, it is clear that the statutory provision has not generally been accorded the same breadth as the constitutional grant.[31]

In 1887, Congress amended the 1875 Act in several respects. It made no change in the original jurisdiction of the trial courts except to increase the jurisdictional amount from $500 to $2000. The statutory language governing removal, however, was radically altered:

> [A]ny suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district . . . .[32]

This language reflects two significant changes. First, Congress deleted the language that had closely paraphrased the "arising under" clause of the Constitution and replaced it with a reference to the section of the statute conferring original jurisdiction, a section that had remained sub-

29. *See, e.g.,* Starin v. New York, 115 U.S. 248, 257 (1885); Ames v. Kansas *ex rel.* Johnston, 111 U.S. 449, 469-72 (1884); Railroad Co. v. Mississippi, 102 U.S. 135, 140-41 (1880).

30. *In re* Hohorst, 150 U.S. 653, 659 (1893).

31. "[T]he majority of the Court . . . [has] interpreted the Congressional acts of 1875 and 1887 in such a way as to refute any notion that either or both of these acts were designed to bring *every* federal case into the federal courts." Bergman, *supra* note 12, at 38 (emphasis in original). Professor Wechsler observes:

> Though the decisions are not free from vacillation, their essential purpose is to hold the meaning of the statute limited to cases where the plaintiff's cause of action . . . is the product of the federal law. This seems quite plainly the correct solution. . . . The general clause should not be cast in constitutional language.

Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 LAW & CONTEMP. PROBS. 216, 225 (1948); *see generally infra* section I.B.

32. Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553. The quoted portion of the statute goes on to refer, rather ungrammatically, to diversity and other types of actions subject to removal. The proliferation of grammatical and syntactical errors in the 1887 Act caused Congress to amend it only a year later. *See infra* notes 39-41 and accompanying text; *see also* Hornstein, *supra* note 3, at 606 n.234.

stantially unchanged from the 1875 version. Second, the plaintiff's power to remove was eliminated.

The first change either may have signified an intent to change the substantive standard governing removal or may simply have been a way to avoid repeating the constitutional language another time.[33] The second change, eliminating the plaintiff's removal option, supports, even if it does not compel, the inference that Congress intended that a federal defense in an otherwise nonfederal action should no longer support federal question jurisdiction under the statutory grant.[34] Thus, both of the changes could support the inference that the scope of removal jurisdiction had been narrowed.

There is, however, a problem with such an inference. The removal section of the 1875 Act had been broadly worded, supporting the assumption that Congress intended to permit plaintiffs to remove cases presenting federal defenses. Moreover, the language conferring removal jurisdiction was identical to that conferring original jurisdiction.[35] The use of identical language suggests that under the original jurisdiction section of the 1875 Act, plaintiffs would have been permitted to begin otherwise nonfederal cases in the federal trial courts by anticipating a federal defense.[36] Congress' failure, in the 1887 Act, to change the language conferring original jurisdiction cannot reasonably be interpreted as altering the requirements for asserting it. If this be the case, one is confronted with the apparent anomaly that the 1887 Act permitted plaintiffs access to a federal court if they anticipated a federal defense and therefore proceeded in the federal court in the first instance, but denied them such access if they sued in state court originally, were met with a federal defense, and attempted to remove. Of course, one possible way to resolve this difficulty is to hypothesize that Congress was giving plaintiffs both the burden of anticipating potential defenses and the responsibility to choose their desired forum correctly in the first instance.[37] Thus, it is possible to construe the 1887 Act as continuing to permit plaintiffs to invoke original federal jurisdiction by anticipating federal defenses while

33. In Tennessee v. Union & Planters' Bank, 152 U.S. 454, 462 (1894), the Court asserted that Congress intended to reduce the scope of removal jurisdiction, but the Court based its position on a misreading of Metcalf v. Watertown, 128 U.S. 586 (1888), a case involving original jurisdiction. *See infra* notes 81-93 and accompanying text.

34. The Court subsequently took the view that the 1887 amendments were intended to impose this limitation. Arkansas v. Kansas & Tex. Coal Co., 183 U.S. 185, 188 (1901).

35. *See supra* text accompanying notes 19-20.

36. This, of course, is the practice that the *Mottley* rule later condemned. *See infra* notes 98-103 and accompanying text.

37. *See* Fraser, *supra* note 12, at 83.

at the same time denying them the option to remove cases after federal defenses were raised.[38]

In 1888, Congress tried to clarify the poorly drafted language of the 1887 Act.[39] But, the 1888 statute left the language conferring original jurisdiction on the circuit courts unchanged, while amending the section dealing with removal jurisdiction to eliminate the run-on sentence.[40] The amended section continued to restrict removal to defendants and to refer to the original jurisdiction language of the preceding section of the statute.[41]

Beginning in 1911, Congress recodified the statutory provisions concerning original and removal jurisdiction on several occasions, making only minor changes in the language.[42] Thus, for practical purposes, by 1888 Congress had settled on the final statutory contours of federal question jurisdiction, whether invoked originally or by removal. With that

38. Whether this is sound policy is another question. I will later suggest that it is not, because it undercuts the purposes of federal question jurisdiction, whether invoked originally or by removal. *See infra* section III.

39. *See supra* note 32 and accompanying text. Congress began by misquoting the title of the 1887 Act, calling it:

> An act to correct the enrollment of an act approved March third, eighteen hundred and eighty-seven, entitled "An act to amend sections one, two, three, and ten of an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes, approved March third, eighteen hundred and seventy-five."

Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433. However, the 1887 Act had made no restrictive references to the sections of the 1875 Act it purported to amend, and it is thus difficult to know how much weight to place on this "corrective effort."

40. *Compare* Act of Aug. 13, 1888, ch. 866, §§ 1-2, 25 Stat. 433, 433-34 *with* Act of Mar. 3, 1887, ch. 373, §§ 1-2, 24 Stat. 552, 552-53.

41. *See supra* notes 32-33 and accompanying text.

42. The 1911 amendments changed the language of original jurisdiction to read:

> The district courts shall have original jurisdiction . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority . . . .

Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091. The language concerning removal was changed only in two inconsequential aspects: the leading word "that" was omitted, and the reference to the circuit courts was changed to district courts to reflect the change in federal court structure occasioned in 1911. *See id.* at 1087. *Compare id.* at 1094 *with* Act of Aug. 13, 1888, ch. 866, § 2, 25 Stat. 433, 434.

Succeeding recodifications occurred in 1948, 1958, 1976, and 1980. For provisions relating to original jurisdiction, see Act of June 25, 1948, ch. 646, § 1331, 62 Stat. 869, 930; Act of July 25, 1958, Pub. L. No. 85-554, § 1331(a), 72 Stat. 415; Act of Oct. 21, 1976, Pub. L. No. 94-574, § 733(2), 90 Stat. 2721. The current version is codified at 28 U.S.C. § 1331 (1982). For provisions relating to removal jurisdiction, see Act of June 25, 1948, ch. 646, § 1441, 62 Stat. 869, 937; 28 U.S.C. § 1441 (1982). None contained changes of significance, except that in 1980 Congress eliminated the jurisdictional amount requirement in federal question cases. Act of Dec. 1, 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369.

structure in place, it is time to consider how the courts have dealt with constitutional and statutory federal question jurisdiction.

B. The Constitution's Arising-Under Clause

It is impossible to understand the development of statutory federal question jurisdiction properly without first examining the constitutional standard underlying it. The Supreme Court has seldom considered the scope of the constitutional language, but two signal cases help to set the stage for examination of statutory federal question jurisdiction: *Osborn v. Bank of the United States*[43] and *Verlinden B.V. v. Central Bank of Nigeria.*[44]

In *Osborn,* the Bank of the United States sued to recover money seized by an Ohio official for state taxes. The action was brought in federal court pursuant to a congressional statute conferring on the Bank, a federal corporation, the right to sue and be sued in any court of the United States. The defendants contested the court's jurisdiction, arguing first that the statute did not grant subject matter jurisdiction to the circuit court, and second, that even if it did, the grant was unconstitutional.[45] Chief Justice Marshall, writing for the Court, disposed of the first point quickly, holding that "[t]he act of incorporation [of the Bank] . . . confers jurisdiction on the Circuit Courts of the United States."[46] That left for the Court the question of whether Congress had the power to grant such jurisdiction, and that, in turn, depended on the meaning of the phrase "arising under" appearing in article III, section 2 of the Constitution.

In the course of his opinion upholding the grant, Chief Justice Marshall announced three different tests for constitutional arising-under jurisdiction. First, he said that the clause "enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it."[47] By this, Marshall apparently meant that any justiciable question with federal components could be federally adjudicated. Second, Marshall expressed the view that "it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the op-

43. 22 U.S. (9 Wheat.) 738 (1824).
44. 461 U.S. 480 (1983).
45. 22 U.S. (9 Wheat.) at 817.
46. *Id.* at 818.
47. *Id.* at 819.

posite construction."[48] Thus, the Court said that if the resolution of a question of federal law might determine the outcome of the case, jurisdiction would lie. Finally, discussing the jurisdictional power that Congress could grant to the inferior federal courts, the opinion said: "We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause . . . ."[49] The Court had thus announced three separate but overlapping tests for federal question jurisdiction under the Constitution.

The mere announcement of the tests did not, however, indicate how they would be applied, and the Chief Justice proceeded to illustrate how they would work. Congress had said that any case involving the Bank might be brought in the circuit courts. For that grant to be constitutional, it was necessary to find that any case involving the Bank arose under federal law, as prescribed in the constitutional language. Marshall hypothesized a contract case involving the Bank and found a federal issue in the question of the Bank's capacity to sue and be sued. This question, he said, arose in every case concerning the Bank.[50] Since the Bank was a federal corporation, its capacity was a federal question. Moreover, the question was outcome-determinative, since if the court ruled that the Bank lacked capacity, the case would end, whereas if it had capacity, the case could go forward. Marshall's analysis did not end after identifying a federal question on which to predicate jurisdiction; he went on to say that even if the question of capacity were not contested, it still was a part of the case for jurisdictional purposes.

> Whether it be in fact relied on or not, in the defense, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.[51]

This language painted an extremely broad picture of federal jurisdic-

48. *Id.* at 822. The quoted language was actually part of the Court's consideration of whether federal jurisdiction under the Constitution could extend to cases involving nonfederal as well as federal questions. In the course of holding that it could, the Court made clear that the quoted language was an appropriate test for jurisdiction. *See id.* at 824; *see also* Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480, 492 (1983) (citing the quoted language as "[t]he rule . . . laid down" by *Osborn*).

49. 22 U.S. (9 Wheat.) at 823.

50. *Id.* at 823-24.

51. *Id.* at 824.

tion.[52] Any case that might involve a potentially dispositive federal issue was a federal question case for constitutional purposes. Of the tests mentioned in *Osborn,* the second, the outcome-determinative test, was to play a critical part in the evolution of the standards for statutory federal question jurisdiction.[53] However, the Court subsequently refused to allow a statutory federal question case to be based upon issues not actually raised by the parties, even if they were potentially dispositive of the litigation.[54] Nonetheless, *Osborn* takes its place as perhaps the most important case to deal with the scope of constitutional arising-under jurisdiction.[55]

The Court reaffirmed *Osborn*'s importance in its most recent treatment of constitutional arising-under jurisdiction, *Verlinden B.V. v. Central Bank of Nigeria.*[56] Nigeria[57] and Verlinden, a Dutch corporation, entered into a contract for the purchase of cement by Nigeria, subject to certain carefully defined credit terms. When Nigeria unilaterally altered

52. The Court would later refer to this language in an extremely misleading manner in Tennessee v. Union & Planters' Bank, 152 U.S. 454, 459 (1894), a case severely limiting the scope of statutory arising-under jurisdiction. *See infra* notes 84-86 and accompanying text.

53. *See infra* notes 109, 114, 143 & 166 and accompanying text.

54. City of Shreveport v. Cole, 129 U.S. 36, 43-44 (1889); *see infra* notes 77-80 and accompanying text. Congress did its part to compel this result when it enacted § 5 of the 1875 Act. *See supra* notes 20-24 and accompanying text. In *Osborn* itself, Justice Johnson dissented, objecting to the idea of jurisdiction being based on an issue not actually in dispute. 22 U.S. (9 Wheat.) at 884-89 (Johnson, J., dissenting).

55. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), had implied the broad tests for federal question jurisdiction that Chief Justice Marshall made explicit in *Osborn.* In *Cohens,* the defendant had been convicted in state court of the unlawful sale of lottery tickets. He had defended on the ground that a federal statute had authorized his activity and precluded conviction under the inconsistent state statute. *Id.* at 375. The defendant brought a writ of error in the Supreme Court, where Virginia moved to dismiss on the ground that jurisdiction did not lie because no federal statute or constitutional provision was directly violated by the judgment of conviction in the Virginia courts. *Id.* at 376. In other words, the state asserted that cases involving questions of federal supremacy, *see* U.S. CONST. art. VI, § 2, were not within the Supreme Court's appellate power. 19 U.S. (6 Wheat.) at 424-25. Chief Justice Marshall began the Court's consideration of its appellate jurisdiction by noting that federal review of cases involving federal questions is necessary to ensure uniformity in the interpretation of federal law, a theme that had been mentioned before *Cohens* and would be repeated long after. *See infra* notes 218-25 and accompanying text. Accordingly, he found that the Constitution gave the Court appellate power over arising-under cases coming from the state courts. 19 U.S. (6 Wheat.) at 416-23. Finally, the Chief Justice declared that questions of the ambit of federal statutes, particularly those seeming to conflict with state statutes, called for construction of federal constitutional (because of the supremacy clause) and statutory law. *Id.* at 428-30. The presence of such a question, the Court ruled, was sufficient to establish its appellate jurisdiction under the Constitution: "But if, in any controversy depending in a court, the cause should depend on the validity of . . . a [state] law [measured against the Constitution], that would be a case arising under the constitution, to which the judicial power of the United States would extend." *Id.* at 405.

56. 461 U.S. 480 (1983).

57. The Central Bank of Nigeria was an instrumentality of the government. *Id.* at 482.

the terms of the agreement, Verlinden sued in federal district court. The Foreign Sovereign Immunities Act[58] was central to the dispute for two reasons. First, it provided federal jurisdiction for cases against foreign states, and second, it set out the exceptions to the doctrine of sovereign immunity that would permit foreign sovereigns to be sued in United States courts.[59] The district court dismissed the action, finding that there was subject matter jurisdiction but that Nigeria was immune from suit because none of the exceptions to sovereign immunity specified in the statute applied.[60]

The Second Circuit affirmed the dismissal, but on different grounds. Analyzing the case in light of decisions construing statutory federal question jurisdiction, the court found no subject matter jurisdiction because the question of Nigeria's immunity arose only as a defense, and therefore did not satisfy the demands of the well-pleaded complaint rule.[61] The court thus applied the *Mottley* rule to assertions of federal subject matter jurisdiction pursuant to article III of the Constitution.[62]

The Supreme Court reversed, and underscored both the continuing vitality of *Osborn* as the measure of constitutional arising-under jurisdiction and the limitation of the *Mottley* rule to cases depending on statutory arising-under jurisdiction. First, the Court declared that *Osborn* is still the controlling decision on the scope of article III federal question jurisdiction, and that the test of jurisdiction under *Osborn* is the outcome-determinative test discussed above.[63] Second, the Court observed that the Foreign Sovereign Immunities Act automatically applies to every action against a foreign government, since subject matter jurisdiction depends on the existence of an exception to sovereign immunity.[64] Finally, the Court criticized the Second Circuit for failing to recognize that constitutional arising-under jurisdiction is broader than that conferred by statute.[65] The Court made clear that the well-pleaded com-

58. 28 U.S.C. §§ 1602-1611 (1982).

59. *See id.* § 1330(a).

60. *Verlinden*, 461 U.S. at 484-85.

61. *Id.* at 494.

62. *Id.*

63. *Id.* at 492; *see supra* note 48 and accompanying text.

64. At the threshold of every action in a district court against a foreign state, therefore, the court must satisfy itself that one of the exceptions [to the Foreign Sovereign Immunities Act] applies—and in doing so it must apply the detailed federal law standards set forth in the Act. Accordingly, an action against a foreign sovereign arises under federal law, for purposes of Article III jurisdiction.

Verlinden, 461 U.S. at 493-94.

65. *Id.* at 494-95 (citing Powell v. McCormack, 395 U.S. 486, 515 (1969); Romero v. International Terminal Operating Co., 358 U.S. 354, 379 (1959); Shoshone Mining Co. v. Rutter, 177 U.S. 505, 509 (1900)).

plaint rule does not apply to jurisdiction asserted directly under the Constitution, but rather applies to federal question jurisdiction only when it is asserted under the statute. The Court then applied the outcome-determinative test from *Osborn* and concluded that every case brought against a foreign sovereign is within federal court jurisdiction asserted under article III of the Constitution.[66] *Verlinden* thus reaffirmed the vitality of the outcome-determinative test established by Chief Justice Marshall in *Osborn* and also limited the application of the well-pleaded complaint rule to the context of statutory federal jurisdiction. With the test for constitutional arising-under jurisdiction now in place, it is time to examine how the Court developed the well-pleaded complaint rule as a limitation on the jurisdiction of the inferior federal courts.

C. Cases Construing Congressional Grants of Jurisdiction

(1) Original Jurisdiction Cases

No case involving the original federal question jurisdiction of the circuit courts reached the Supreme Court until *Robinson v. Anderson* in 1887.[67] As a result, it is the only instance of Supreme Court interpretation of the original jurisdiction language of the 1875 Act, which was amended the same year as the *Robinson* decision. The Court, speaking

66. The Court's broad reading of the *Osborn* test is unmistakable:

> [I]f a court determines that none of the exceptions to sovereign immunity applies, the plaintiff will be barred from raising his claim in any court in the United States—manifestly, "the title or right set up by the party, may be defeated by one construction of the . . . laws of the United States, and sustained by the opposite construction."
>
> . . . The resulting jurisdictional grant is within the bounds of Article III, since every action against a foreign sovereign necessarily involves application of a body of substantive federal law, and accordingly "arises under" federal law, within the meaning of Art. III.

Verlinden, 461 U.S. at 497. This language makes clear that the Court viewed sovereign immunity as being at issue even if the parties did not raise the matter, much as Chief Justice Marshall had argued that the Bank's capacity was at issue whether disputed by the parties or not. This contrasts with the position Congress took in 1875 with respect to statutory federal question jurisdiction, *see supra* notes 20-24 and accompanying text, and that the Court adopted in cases decided under the congressional grant. *See infra* notes 77-82 & 162-68 and accompanying text.

67. 121 U.S. 522 (1887). Robinson sued to recover certain lands, alleging that the case arose under United States law and the Treaty of Guadelupe-Hidalgo. *Id.* at 522. The actual dispute turned on a Mexican land grant subsequently confirmed and patented under United States law. The boundaries of the grant depended on the description in the patent, but not otherwise on federal law itself. The plaintiff alleged that the defendants' claims to the land relied upon an earlier Mexican grant and United States confirmation, but no defendant made such a claim in his answer. *Id.* at 523. The district court dismissed the complaint for lack of jurisdiction, and the plaintiff appealed to the Supreme Court. *Id.* at 522.

through Chief Justice Waite, clearly implied that a plaintiff's anticipation of a federal defense could establish jurisdiction.

> Even if the complaint, standing by itself, made out a case of jurisdiction, which we do not decide, it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defences against the title of the plaintiffs would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defences were relied on.[68]

Thus, the Court implicitly acknowledged that a complaint whose anticipation of a federal defense was not undercut by the answer could entitle the plaintiff to a federal forum even though it found that no real and substantial federal law controversy existed in the case once the answers were received. The Court also noted that this case was exactly the type to which section 5 of the 1875 Act[69] was intended to apply. That being the case, the circuit court had a duty to dismiss, since resolution of a question involving federal law could not determine the outcome of the case.[70]

The Court next considered original jurisdiction in *Metcalf v. Watertown*.[71] Plaintiff's assignors recovered a judgment against the city of Watertown and assigned the judgment to Metcalf, who sued on it. The judgment had been recovered in 1866 and assigned in 1873; suit was brought in 1883. Wisconsin statutes of limitations provided a twenty-year period to sue on Wisconsin judgments and a ten-year period for all others. The plaintiff, said Justice Harlan, sought only to enforce a property right not grounded in federal law at all. The only possible federal issue concerned Wisconsin's discrimination against non-Wisconsin judgments, and that issue did not arise until Metcalf replied to Watertown's

68. *Id.* at 524.

69. The section required a circuit court to dismiss a case that had been commenced or removed if the cases did "not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court." *See supra* text accompanying note 20.

70. *Robinson*, 121 U.S. at 524. This portion of the *Robinson* opinion is doubly significant. First, the Chief Justice cited Starin v. New York, 115 U.S. 248 (1885), in support of his application of the outcome-determinative test. *Starin* involved removal jurisdiction, *see infra* note 121, and its inclusion demonstrates the Court's customary recognition that the standards for original and removal jurisdiction were the same. Second, *Starin* derived the outcome-determinative test from a succession of cases, including Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), and Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738 (1824). Those cases, however, construed the language of art. III, § 2, *see supra* note 2, there being no statutory grant of federal question jurisdiction at that time. This use of cases construing the constitutional standard as authority with respect to a construction of the statutory standard strongly suggests that the Court viewed the two as interchangeable. *See supra* note 29 and accompanying text.

71. 128 U.S. 586 (1888).

assertion of the statute of limitations as a defense. That issue had not been originally pleaded by the plaintiff, and the Court held that the case did not arise under federal law.[72]

> Where . . . the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance.[73]

However, Justice Harlan observed that jurisdiction could attach if a federal defense were raised, though he noted that that had only occurred in removal cases. The reason for the difference, he explained, was the necessity that subject matter jurisdiction exist when a case initially reached the federal courts.[74]

Metcalf has often been cited as the source of the well-pleaded complaint rule.[75] This is a questionable assertion for two reasons. First, Justice Harlan did not say that plaintiffs could not invoke original jurisdiction by pleading the existence of a federal issue subsequently to be raised by the defendants; he merely said that Metcalf had not done so.

---

72. Diversity jurisdiction apparently was not possible. Metcalf was a citizen of Ohio. *Id.* at 586. The record of the case implies that Metcalf's assignors were from Wisconsin, as was the defendant, *id.* at 588, and the 1875 Act forbade establishing diversity jurisdiction in contract cases by assignment, *id.* at 587.

73. *Id.* at 589.

74. *Id.* ("[I]n other words, the case, at the time the jurisdiction of the Circuit Court of the United States attached, by removal, clearly presented a question or questions of a Federal nature."). *Metcalf* was followed in Colorado Cent. Consol. Mining v. Turck, 150 U.S. 138 (1893), in which the Court again insisted, in response to the defendant's argument that all of the pleadings could be consulted to determine jurisdiction, that

> [t]his view, however, ignores the settled doctrine that the inquiry, in cases such as this, into the jurisdiction of the Circuit Court, is limited to the facts appearing on the record in the first instance. This has been often so held in the enforcement of the inflexible rule which requires this court in the exercise of its appellate power to deny the jurisdiction of the courts of the United States in all cases where such jurisdiction does not affirmatively appear in the record on which it is called upon to act.

Id. at 142-43 (citation omitted). But it is significant that the Court made no reference to a *well-pleaded* complaint, thus leaving open for the plaintiff the possibility of anticipating a defense. Justice Harlan's subsequent dissenting position in Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894), *see infra* notes 89-91 and accompanying text, also casts doubt on the interpretation later placed on *Metcalf*.

The importance of federal jurisdiction appearing at the outset has been cited as a justification for the *Mottley* rule. But, as will be shown, that requirement does not compel adherence to the *Mottley* rule. *See infra* notes 237-44 and accompanying text.

75. *See, e.g.*, Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 672 (1950); Louisville & N.R.R. v. Mottley, 211 U.S. 149, 154 (1908); Third St. & Suburban Ry. v. Lewis, 173 U.S. 457, 460 (1899); Tennessee v. Union & Planters' Bank, 152 U.S. 454, 460 (1894); Colorado Cent. Consol. Mining v. Turck, 150 U.S. 138, 143 (1893).

Second, the Court did not direct dismissal of the action; it reversed the finding of the circuit court that Metcalf's action was barred by the Wisconsin statute of limitations and remanded the case for the lower court to consider whether the pleadings could be amended to bring the case within its jurisdiction. In fact, Justice Harlan's concluding paragraph suggests that the problem in *Metcalf* arose from the condition of the record rather than from the posture of the case itself. "It results, that from any view of the case, *as presented by the record,* it is one in respect to which the plaintiff could not, under the act of 1875, invoke the original jurisdiction of the Circuit Court."[76] Thus, the Court seemed to suggest that Metcalf might amend his complaint to include the federal issue. Metcalf could do that, however, only by anticipating the city's statute of limitations defense and arguing that federal law prevented its success. Thus, the federal issue would arise, not in the plaintiff's claim per se, but in his complaint by way of a premature reply to an unfiled answer. *Metcalf,* therefore, left open the possibility that original federal question jurisdiction could be based upon federal issues to be raised by way of defense or reply.

In *City of Shreveport v. Cole,*[77] the Court took another step toward what would become known as the *Mottley* rule. It refused to allow jurisdiction when the plaintiff incorrectly predicted the nature of the defense and anticipatorily raised a federal question trying to rebut it. Contractors brought an action against the city of Shreveport, Louisiana, to collect wharfage dues allegedly owed them by the city. Plaintiffs asserted that article 208 of the 1879 Louisiana Constitution impaired their contractual right to such dues by limiting municipal taxation rates, preventing the city from levying wharfage dues and making it impossible for plaintiffs to collect under the contract.[78] For that reason, plaintiffs argued, article 208 of the Louisiana Constitution was unconstitutional.

The city pleaded that article 208 did not apply to contracts in force when the new constitution was adopted, thus undercutting plaintiffs' assertion of the constitutional issue. The court and jury apparently accepted the city's assertion, returning a verdict for plaintiffs.[79] The Supreme Court reversed and remanded with directions to dismiss the

76. *Metcalf,* 128 U.S. at 590 (emphasis added). This qualification may explain why the case was remanded for amendment rather than dismissal. *See* Fraser, *supra* note 12, at 76-77.

77. 129 U.S. 36 (1889).

78. *Id.* at 37-39. Although it is nowhere stated explicitly in the report of the case, plaintiffs presumably argued that the Louisiana constitutional provision violated the federal contracts clause. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.").

79. *Cole,* 129 U.S. at 40.

complaint. The Court declared that jurisdiction could not be founded on potential defense theories, particularly in a case such as this, when an available construction of the challenged state provision could avoid the constitutional question entirely.[80] *Cole* thus resembles the ultimate articulation of the well-pleaded complaint rule, with the difference that in *Cole,* the plaintiffs were mistaken about the use of a defense that would have allowed them to raise the federal question in reply. *Cole* also seemed to confer upon defendants the power to defeat federal jurisdiction by avoiding certain defenses, and it left open the question of whether plaintiffs' assertion of federal jurisdiction would have been permitted if they had correctly anticipated the defense to be presented.

Tennessee v. Union & Planters' Bank[81] was a watershed. In the lead case,[82] Tennessee sued the Union and Planters' Bank in federal court to recover taxes alleged to be due. The complaint alleged that the defendant would argue that its charter exempted it from such taxes and that the attempt to tax therefore violated the contracts clause of the Constitution.[83] The Bank did, in fact, defend on the anticipated basis, but the Court nevertheless held that the case did not arise under federal law. Curiously, in denying the existence of jurisdiction, the Court relied upon *Osborn v. Bank of United States,*[84] in which Chief Justice Marshall had asserted an expansive view of federal jurisdiction. Moreover, the Court quoted *Osborn* in a misleading manner, diametrically opposed to the meaning Marshall had intended to convey.

> And "when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." But "the right of the plaintiff to sue cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The question which the case involves, then, must determine its character, whether those questions be made in the cause or not."[85]

Thus quoted, *Osborn* seemed to assert—and the *Planters' Bank* Court

80. *Id.* at 43-44.

81. 152 U.S. 454 (1894).

82. The reported case is actually three consolidated cases. In two, the state brought federal actions seeking equitable relief. In the third, the state sued in equity in the state courts, and the defendant removed the case to federal court. All three cases involved the same substantive issues, and only the lead case will be discussed here.

83. U.S. CONST. art. I, § 10, cl. 1; *see supra* note 78.

84. 22 U.S. (9 Wheat.) 738 (1824); *see supra* notes 43-55 and accompanying text.

85. *Planters' Bank*, 152 U.S. at 459 (quoting Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 819, 823-24 (1824)).

relied upon it for the proposition—that a plaintiff could not establish jurisdiction by anticipating the defense that might be raised. The Court reached that position, however, by omitting the preceding sentence of the *Osborn* quotation in which Chief Justice Marshall had said almost exactly the reverse of what the *Planters' Bank* Court suggested, that "[w]hether it be in fact relied on or not, in the defense, it [the federal issue] is still a part of the cause and may be relied on."[86]

The Court went further, however, to clarify its full meaning. It asserted that under the 1875 Act, original jurisdiction was never permitted unless the federal question appeared in the plaintiff's statement of his own claim.[87] The Court thus declined to permit plaintiffs to anticipate defenses and to ground federal jurisdiction either on the federal character of the defense or of a reply to the defense.

Justice Harlan, dissenting, argued that the case removed from the *Planters' Bank* trio should have been retained.[88] Justice Harlan's argument proceeded in two parts. First, he argued that the term "arising under" comprehended federal issues raised by either party to the litigation,[89] and pointed out that if that were not the rule, the statute would

86. *Osborn,* 22 U.S. (9 Wheat.) at 824; *see supra* text accompanying note 51. In *Osborn,* the Bank's capacity to sue was held to be a threshold question even if the defendant did not choose to contest the suit on that basis. It was this situation to which Chief Justice Marshall referred in the portion of his opinion quoted in *Planters' Bank.* What he was attempting to convey, therefore, was that if the plaintiff identified a federal issue in a case, the defendant could not undercut that issue as a ground for jurisdiction by refusing to contest it. It is strange indeed, therefore, that in 1894 the Court should have relied upon Marshall's language as a reason for denying jurisdiction.

Only a year before *Planters' Bank,* the Court, without dissent, had recognized a similar principle. In Cooke v. Avery, 147 U.S. 375 (1893), an action in trespass to try title to a tract of land, the defendant set up a defense based on federal law that defendant argued gave it title superior to plaintiff's. On appeal to the Supreme Court, the defendant attempted to change its position and to assert that the plaintiff was correct that the federal law previously relied upon did not govern the controversy. Thus, defendant argued, there was no real and substantial controversy upon which to ground federal jurisdiction.

The Court quoted the same language from *Osborn* that it subsequently misused in *Planters' Bank. Cooke,* 147 U.S. at 385; *see supra* text accompanying note 85. In *Cooke,* however, the Court used that language properly, stating that once the issue had been introduced into the case (even though by the defendant), the defendant could not undercut jurisdiction by refusing to contest it. Jurisdiction was upheld.

87. *Planters' Bank,* 152 U.S. at 460 (citing Metcalf v. Watertown, 128 U.S. 586, 589 (1888)). In *Metcalf,* however, as has been pointed out, *see supra* notes 71-75 and accompanying text, the Court merely asserted that the complaint had to demonstrate the existence of jurisdiction, not that the issue upon which jurisdiction was predicated had to be a part of the plaintiff's claim proper.

88. *Planters' Bank,* 152 U.S. at 458, 465 (Harlan, J., dissenting).

89. As the Justice put it:

> There can be no question as to the import of the words "arising under the Constitution or laws of the United States," to be found in the acts of 1875 and 1887. It

discriminate against a defendant presenting a federal issue by denying him access to the federal courts.[90] Second, Justice Harlan pointed out an anomaly created by the Court's position in *Planters' Bank:* if the holder of a federal right could get himself into the position of the plaintiff, the case would support federal question jurisdiction, but if the holder of the right were forced to invoke it defensively, determination of the same question would not suffice for federal jurisdiction.[91]

The majority and dissent thus differed about the meaning of "arising under" in the 1875 and 1887 Acts and about the significance of the provision in the 1887 Act that limited removal jurisdiction to cases described in the original jurisdiction section of the Act. The majority took the position that only cases that could have been brought as original jurisdiction cases could be removed to federal court.[92] Justice Harlan, on the other hand, insisted that the purpose of section 2 of the 1887 Act was to restrict the right of removal to defendants, not to restrict defendants' right of removal.[93] It is clear, however, that after *Planters' Bank,* a case could not qualify for original or removal jurisdiction unless some federal issue was involved in the plaintiff's statement of his own claim. The Court did not, however, explicitly hold that the statement of the federal

---

> has long been settled that a suit was of that class if it necessarily involved a title, right, privilege, or immunity asserted, *by either party,* under the Constitution or laws of the United States. If the defence was based upon the Constitution or laws of the United States, the suit was one arising under that Constitution or those laws, although the *plaintiff* may not have asserted, in *his* pleading, any claim whatever of a Federal nature.

Id. at 468 (Harlan, J., dissenting) (emphasis in original) (citing Bock v. Perkins, 139 U.S. 628, 630 (1891); Bachrack v. Norton, 132 U.S. 337 (1889); Starin v. New York, 115 U.S. 248, 257 (1885); Pacific R.R. Removal Cases, 115 U.S. 1 (1885); Ames v. Kansas *ex rel.* Johnston, 111 U.S. 449, 462 (1884); Feibelman v. Packard, 109 U.S. 421 (1882); Railroad Co. v. Mississippi, 102 U.S. 135, 140 (1880)). Justice Harlan, the author of the Court's opinion in *Metcalf,* thus cast doubt on the majority's reading of the rule of that case.

90. *Planters' Bank,* 152 U.S. at 470-71 (Harlan, J., dissenting).

91. In the context of *Planters' Bank* itself, Justice Harlan pointed out:

> [I]f, instead of suing to enforce the lien given by the statute, the State had levied upon the property of the bank, the officer making the levy could have been enjoined, at the suit of the bank, upon the very ground now set forth in its answer, namely, that the statute under which that officer proceeded was repugnant to the contract clause of the Constitution of the United States. Such a suit would have been one arising under the Constitution, and, therefore, cognizable by the Circuit Court. . . . Yet, under the decision just rendered, the bank cannot, by removing the present suit, invoke the jurisdiction of the Circuit Court for the determination of the same question.

Id. at 471-72 (Harlan, J., dissenting). This portion of Justice Harlan's dissent eerily anticipated the posture of the federal jurisdiction issue in Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983). *See infra* notes 201-13 and accompanying text.

92. *Planters' Bank,* 152 U.S. at 461-62.

93. *Id.* at 469 (Harlan, J., dissenting).

issue had to be *necessary* to proper pleading of the plaintiff's claim. That refinement awaited another day.

That day came in *Third Street & Suburban Railway v. Lewis.*[94] There the plaintiff sued to foreclose a mortgage, proceeding in federal court on the ground of diversity. Defendant's demurrer was overruled and judgment for the plaintiff was entered and affirmed by the Ninth Circuit. The defendant then sought Supreme Court review. The Court pointed out that the merits of diversity cases were not reviewable in the Supreme Court,[95] at which point the defendant asserted that the case involved a federal question because the defendant had acquired its interest in the property at a federal judicial sale. The Court ruled that this circumstance did not make the case a federal question case, since the manner in which the defendant acquired its interest in the property was irrelevant for purposes of stating the plaintiff's claim. It described as "thoroughly settled" the rule that neither original nor removal jurisdiction existed unless the federal issue appeared as a necessary part of the plaintiff's claim.[96] Lack of such jurisdiction, said the Court, cannot be made up by allegations of the defense.

The statement of the well-pleaded complaint rule was thereafter followed by the Court without variation.[97] The rule was, therefore, firmly in place well before the case with which it is most often associated. But *Louisville & Nashville Railroad v. Mottley*[98] deserves attention if for no other reason than the historical importance attached to it. The case arose when the Mottleys were injured in a collision on the defendant's railroad in 1871. In settlement of their claim, they entered into a con-

94. 173 U.S. 457 (1899).

95. *See* Act of Aug. 13, 1888, ch. 866, § 2, 25 Stat. 433, 435.

96. *Lewis*, 173 U.S. at 460 (citing *Planters' Bank*, 152 U.S. 454; Colorado Cent. Consol. Mining v. Turck, 150 U.S. 138, 142-43 (1893); Metcalf v. Watertown, 128 U.S. 586, 589 (1888)).

97. *See, e.g.*, Boston & Mont. Consol. Copper & Silver Mining v. Montana Ore Purchasing, 188 U.S. 632 (1903):

> "Hence it has been settled that a case cannot be removed from a state court into the Circuit Court of the United States on the sole ground that it is one arising under the Constitution, laws or treaties of the United States, unless that appears by plaintiff's statement of his own claim; and if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal or in the subsequent pleadings. And moreover that jurisdiction is not conferred by allegations that defendant intends to assert a defence based on the Constitution or a law or treaty of the United States, or under statutes of the United States, or of a State, in conflict with the Constitution."

Id. at 639-40 (quoting Arkansas v. Kansas & Tex. Coal Co., 183 U.S. 185, 188 (1901)); *accord* Devine v. Los Angeles, 202 U.S. 313, 333-34 (1906); Defiance Water Co. v. Defiance, 191 U.S. 184, 190-91 (1903).

98. 211 U.S. 149 (1908).

tract providing them with lifetime free passes on the railroad. All went well until 1907, when the railroad company refused to renew the passes on the ground that Congress had forbidden the giving of free passes or free transportation.[99] The Mottleys then sought specific performance of the contract in federal circuit court, arguing that the statute did not forbid the giving of free passes in the Mottleys' circumstances, or that if it did, it violated the fifth amendment as a taking without due process. The defendant demurred, but its demurrer was overruled, and the circuit court granted the Mottleys' prayer for relief.[100]

When the case reached the Supreme Court, the Court declined to consider the merits. On its own motion, it raised the question of jurisdiction.[101] In what is now the most famous statement of the well-pleaded complaint rule, the Court refused to consider a case to be one arising under federal law unless the federal issue were part of the plaintiff's cause of action. That an important federal question would come up as a defense or a reply was declared to be an insufficient ground for federal question jurisdiction, even if the federal issue was the only dispute in the case.[102] The Court noted the already long history of that rule, tracing it back to *Metcalf v. Watertown* and through seventeen other cases decided by the Court between 1888 and 1903. Thus, although *Mottley* is the case now most often cited as the source of the well-pleaded complaint rule, the Court that decided it did not so regard it.[103] But it is at least clear

99. *Id.* at 150-51; *see* Act of June 29, 1906, ch. 3591, § 1, 34 Stat. 584.

100. *Mottley*, 211 U.S. at 151.

101. *Id.* at 152.

102. *See supra* note 9 and accompanying text. The Court cited *Planters' Bank* for this proposition, but that case had, in turn, relied upon Metcalf v. Watertown, 128 U.S. 586 (1888). Thus, the rule was viewed by the Court as antedating *Mottley* by 20 years. *See Mottley,* 211 U.S. at 154.

103. In fact, even decisions after *Mottley* did not regard the case itself as of great historical importance. At least four subsequent cases decided in conformity with the rule did not cite *Mottley,* though they did cite cases antedating it. *See* Hopkins v. Walker, 244 U.S. 486, 489 (1917); The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913); Shulthis v. McDougal, 225 U.S. 561, 569-70 (1912); Lynchburg Traction & Light v. City of Lynchburg, 16 F.2d 763, 764-65 (4th Cir. 1927).

One may wonder, of course, why the Supreme Court was forced to articulate the rule on so many occasions. The question may have been regarded as well settled by the Supreme Court, but evidently the lower federal courts were slow to get the message. This uncertainty occurred because the Court's statements in the years prior to *Mottley,* or at least prior to Third St. & Suburban Ry. v. Lewis, 173 U.S. 457 (1899), *see supra* notes 94-96 and accompanying text, were at best ambiguous and lent themselves to differing interpretations of what the Court had actually directed. *See supra* notes 71-80 and accompanying text; *see, e.g.,* Minnesota v. Duluth & I.R.R., 87 F. 497 (C.C.D. Minn. 1898):

> [I]t is not necessary that it should appear that plaintiff's right to recover is based upon and supported by some provision of the constitution or statutes of the United States. A federal question is equally presented *if it appears from plaintiff's statement*

that *Mottley* left the law with an unambiguous statement of what was required to constitute a federal question case in a matter begun in the federal courts. The development of the same jurisdictional principle in the context of removal cases must now be considered.

(2) Removal Cases

The Court was asked to deal with jurisdictional problems arising in removal cases far sooner and more often than occurred with original jurisdiction cases. In the 1878 case of *Gold-Washing & Water Co. v. Keyes,*[104] the Court gave its first indication that the new statutory authority would be strictly construed. Keyes had sued in equity in state court, complaining that Gold-Washing's mining operation was polluting the river on which Keyes' farm was located. The company petitioned for removal, alleging that it claimed the mines under federal law and that the processing system used was the only one effective to capture the gold. The defendant also alleged that two federal statutes authorized such processing,[105] and that construction of those statutes was necessary to resolve the dispute. The state court accepted the petition and transferred the action to the federal court.

The circuit court remanded the action on the ground that it presented no real or substantial federal controversy.[106] The Supreme Court affirmed the remand, noting that the basis upon which federal jurisdiction was asserted must be contained in the record at the time of removal, and, "if it is not, and the omission is not afterwards supplied, the suit must be remanded."[107] The Court did not explain how a later submission would cure an initial deficiency in the record for jurisdictional purposes,[108] but it did explain the insufficiency of Gold-Washing's

of facts that a construction, which may be fairly claimed and contended for, of a provision of such constitution or statutes, would *defeat* plaintiff's right of recovery.

Id. at 498 (emphasis added); *see also* Arkansas v. Kansas & Tex. Coal Co., 96 F. 353, 355-57 (C.C.W.D. Ark. 1899), *rev'd,* 183 U.S. 185, 188 (1901); Lowry v. Chicago, B. & Q.R.R., 46 F. 83, 86 (C.C.D. Neb. 1891). These cases show clearly that the lower federal courts interpreted the Supreme Court's cases, including *Planters' Bank*, to permit a plaintiff to anticipate federal questions arising in the case but not as part of his cause of action.

104. 96 U.S. 199 (1878).

105. *See* Act of July 26, 1866, ch. 262, 14 Stat. 251; Act of May 10, 1872, ch. 152, 17 Stat. 91.

106. *Gold-Washing*, 96 U.S. at 203-04.

107. *Id.* at 201.

108. The reference to later supplementation of the jurisdictional record is significant, since it implicitly contradicts the Court's subsequent assertions about the necessity of the record of the case showing, at the outset, the existence of federal jurisdiction. *See, e.g.,* Metcalf v. Watertown, 128 U.S. 586 (1888), discussed *supra* notes 71-76 and accompanying text. From such assertions, the *Mottley* rule was later to develop.

papers. The Court characterized the complaint as presenting only a private nuisance case and pointed out that the defendant's demurrer in the state court mentioned no federal law. Therefore, the Court reasoned, federal jurisdiction must be found in the removal petition itself or not at all.

In reading the petition for removal, the Court refused to indulge any inferences from the defendant's conclusory allegations, even though such inferences would have demonstrated the existence of facts presenting a federal issue. The petition was found wanting, but the Court used language that suggested the problem was in defendant's pleading style rather than in any inherent inability to base federal jurisdiction on the existence of a federal defense. The defendants "state[d] no facts to show the right they claim[ed], or to enable the court to see whether it necessarily depend[ed] upon the construction of the statutes. . . . The immunities of the statutes [were], in effect, conclusions of law from the existence of particular facts."[109] Thus, the Court seemed to say only that the defendants had not pleaded with sufficient precision to justify the assertion of federal jurisdiction, not that they could not, as a matter of law, invoke federal jurisdiction with an appropriate pleading.[110] More important, however, is what the Court did not say. There is no mention in *Gold-Washing* of the impropriety of a case being removed to the federal courts merely because the federal issue involved is presented by the defense rather than by the plaintiff's claim, although the case has often been misread as espousing that view.[111]

In *Tennessee v. Davis,*[112] the Court unambiguously confirmed the possibility of removal based on the existence of a federal defense. Davis, a federal revenue officer, was indicted in Tennessee for murder and sought removal, arguing that he had acted in self-defense. He relied upon a federal statute[113] permitting removal in cases involving acts done under color of federal office or rights claimed under the federal revenue law. The Court held that removal was proper. In doing so, it apparently disposed of the idea that removal could only be based upon some character-

109. *Gold-Washing,* 96 U.S. at 203.

110. *See* London, *supra* note 28, at 842. Justice Bradley dissented, arguing that the petition stated enough to show that the case would turn upon the construction of the congressional enactments relied upon by Gold-Washing. 96 U.S. at 204 (Bradley, J., dissenting).

111. *See, e.g.,* Third St. & Suburban Ry. v. Lewis, 173 U.S. 457, 460 (1899); Tennessee v. Union & Planters' Bank, 152 U.S. 454, 459 (1894); 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3566 (1984).

112. 100 U.S. 257 (1880).

113. Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171.

istic of the plaintiff's cause of action, an idea that was later to resurface in the *Mottley* rule.

> What constitutes a case thus arising was early defined in [*Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 379 (1821)]. It is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted.[114]

The Court therefore left no doubt that an issue supporting federal question jurisdiction could be raised by the defense, and implicitly supported the idea that the jurisdictional problem in *Gold-Washing* had been caused by the defendants' failure to conform to the pleading rules of the day rather than by any inherent defect in the structure of the case for federal jurisdictional purposes.[115]

The theory of federal defense removal in *Davis* was not an aberration, nor did it depend on the special 1866 statute under which *Davis* had been removed. The Court relied upon the theory to uphold federal question jurisdiction in several cases in the 1880s.[116] Thus, *Gold-Washing*

114. *Davis,* 100 U.S. at 264.

115. Justice Clifford, joined by Justice Field, dissented, arguing that nothing in federal law prohibited a state from trying a federal official for murder. *Id.* at 281-82 (Clifford, J., dissenting). He also asserted that in cases involving a state as a party, the Constitution conferred only appellate jurisdiction on the federal courts. *Id.* at 289 (citing U.S. CONST art. III, § 2). But he took no issue with the majority's general position that federal defenses provided an appropriate basis for removal.

116. In Railroad Co. v. Mississippi, 102 U.S. 135 (1880), the Court took a similar position in a civil case. Mississippi had sought a writ of mandamus in state court to compel the defendant to remove a bridge it had erected over a navigable state boundary stream. On review in the Supreme Court, the defendant argued that a federal statute had authorized construction of the bridge and that the defendant had succeeded to the right to erect the bridge because of a contract with Mississippi, which the defendant argued the state was attempting to impair.

The Court found two federal issues in the case. The first arose because Mississippi claimed that permitting the bridge to remain would violate one of the conditions of its admission as a state in 1817. *Id.* at 139. This federal question might have been considered directly presented in the complaint, thus avoiding all possible jurisdictional problems. The Court, however, chose not to rely upon that ground exclusively, noting that even if it were not necessary to construe the 1817 statute, the courts would still have to deal with the federal defense raised by the Railroad Company. "[I]t could not evade, but must meet and determine, the question, distinctly raised by the answer, as to the operation and effect of the act of Congress of 1868." *Id.* at 140. The Court, speaking through Justice Harlan (later to author Metcalf v. Watertown, 128 U.S. 586 (1888), *see supra* notes 71-74), upheld removal jurisdiction, and repeated the strong language of Tennessee v. Davis, 100 U.S. 257, 264 (1880), *see supra* text accompanying note 114, permitting the assertion of federal jurisdiction based on issues raised

clearly did not support the proposition that federal defenses were insufficient grounds for the assertion of federal question jurisdiction. That case, whether read in isolation or in the context of cases decided within two years of it, cannot properly be read as furnishing any basis for the *Mottley* rule.

The high-water mark for this expansive view of the federal courts' jurisdiction came in the *Pacific Railroad Removal Cases.*[117] The primary question the cases presented was whether the defendant railroads' status as federal corporations would permit them to remove state causes of action. The Court held that the cases had been properly removed, and cited in support of its conclusion the doctrine of *Osborn v. Bank of the*

---

in defense as well as those raised in the plaintiff's original claim. *Railroad Co.,* 102 U.S. at 141.

In Ames v. Kansas *ex rel.* Johnston, 111 U.S. 449 (1884), the Court expounded at greater length on its understanding of the purposes and structure of the 1875 legislation. The Attorney General of Kansas brought a quo warranto proceeding against a former Kansas railroad corporation, its successor federal corporation, and their directors, alleging wrongful alienation by the Kansas corporation of its charter, rights, and duties. The defendants responded that the formation of the national corporation had been authorized by Congress and sought removal. The circuit court, however, granted the plaintiff's motion to remand, and the defendants then sought a writ of error in the Supreme Court.

Chief Justice Waite, speaking for the Court, observed that the only question was whether the case arose under federal law. He found that it clearly did. *Id.* at 462. The purpose of the action, the Court noted, was to test the validity of the national corporation authorized by Congress, and the validity of the legislation would determine the outcome of the suit. In so holding, the Court clearly recognized that the federal issue entered the case by way of defense, but just as clearly felt that that circumstance was not an impediment to the existence of federal jurisdiction.

> Clearly, therefore, the cases arise under these acts of congress, for, to use the language of Chief Justice Marshall . . . an act of congress "is the first ingredient in the case,—is its origin,—is that from which every other part arises." The right set up by the company, and by the directors as well, will be defeated by one construction of these acts and sustained by the opposite construction. When this is so, it has never been doubted that a case is presented which arises under the laws of the United States.

Id. (quoting Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 825 (1824)). Nearly one hundred years later, the same reasoning could have been applied in Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983), but the Court there would hold such circumstances insufficient for jurisdiction because the federal issue, as in *Ames,* was injected by the defense. *See infra* notes 201-13 and accompanying text.

In concluding that federal jurisdiction clearly existed, the *Ames* Court also asserted that the evident purpose of the 1875 legislation was to make the jurisdiction of the circuit courts as broad as permitted by the Constitution. 111 U.S. at 471. Thus, by 1884, the Supreme Court had said three times that federal jurisdiction could be invoked by plaintiffs or defendants on the basis of federal issues appearing in any part of a case.

117. 115 U.S. 1 (1885). Seven cases were consolidated for decision by the Court. Five of the cases involved negligence claims brought by passengers or employees of the railroads; one was a wrongful death action, and one an eminent domain proceeding. *Id.* at 3-10.

United States[118] that any action by or against a federally chartered corporation was, for that reason alone, a federal question case.[119] Having reached that conclusion, the Court found that all of the cases fell within the removal provisions of the 1875 legislation.[120] Thereafter, the Court continued to recognize federal jurisdiction when federal defenses were asserted in otherwise nonfederal actions.[121]

118. 22 U.S. (9 Wheat.) 738 (1824); *see supra* notes 43-55 and accompanying text.

119. *Pacific R.R.*, 115 U.S. at 11. This part of the *Osborn* holding was subsequently overruled by statute. Act of Feb. 13, 1925, ch. 229, § 12, 43 Stat. 936, 941 (codified as amended at 28 U.S.C. § 1349 (1982)). Federal jurisdiction based on incorporation as a railroad was specifically eliminated ten years earlier. Act of Jan. 28, 1915, ch. 22, § 2, 38 Stat. 803.

120. *Pacific R.R.*, 115 U.S. at 17; *see* Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, 470-71. In what must have been a surprise to his colleagues, Chief Justice Waite dissented, arguing that Congress had not intended to confer jurisdiction as broad as that described by Chief Justice Marshall in *Osborn*. 115 U.S. at 24 (Waite, C.J., dissenting). He did not dispute that Congress had the power to do so; he merely asserted that it had not. This position seems inconsistent with his stance a year earlier in *Ames, see supra* note 116, and Congress had taken no action between 1884 and 1885 to indicate either its support or disapproval of the Court's construction of the boundaries of federal jurisdiction that would explain the Chief Justice's change of view. One possible explanation was suggested by the Chief Justice himself. In an 1868 statute, Act of July 27, 1868, ch. 255, 15 Stat. 226, 227, Congress had authorized removal of cases brought against federal corporations, but required the removing defendant to file a verified petition affirming the existence of a federal defense. Chief Justice Waite reasoned that if any case against a federal corporation were ipso facto federal, the required affirmation would have been a redundancy. Hence, he concluded, Congress in the 1868 statute must have regarded arising-under jurisdiction as too narrow to support a case merely brought against a federal corporation. Finally, Waite reasoned, though without citing support, that the 1875 Congress had intended the same restrictive use of "arising under." *Pacific R.R.*, 115 U.S. at 24-25 (Waite, C.J., dissenting). Professor Forrester has suggested that Waite was consistent in his view of the 1875 Act, but confused about the scope of *Osborn,* and that this confusion explains his vacillation in the period from *Gold-Washing* to the *Pacific Railroad Removal Cases.* Forrester, *supra* note 12, at 381.

121. Starin v. New York, 115 U.S. 248 (1885), while at first glance appearing to deviate from this trend, really did not. The city of New York sought to enjoin Starin's operation of a ferry service between two specified points in New York, on the ground that the city had an exclusive charter right (antedating the Constitution) to do so. The defendants removed, arguing that the complaint as drafted interfered with their federal license. *Id.* at 253. The Court, however, found only two issues in the complaint: whether the original charter of the city gave it an exclusive right to operate a ferry between the two points, and whether the defendants were interfering with that right. The complaint raised no question about anything in federal law being in derogation of the city's charter rights. *Id.* at 257-58. *Starin* is important because it reaffirmed that *Osborn*'s outcome-determinative test was the appropriate standard for federal question jurisdiction, *id.* at 257, and because it demonstrates how the Court interchangeably cited both cases interpreting the constitutional and statutory arising-under language and those dealing with original and removal jurisdiction. *See supra* note 70. The *Starin* Court did not, however, suggest either in holding or dictum that a federal defense would not support federal jurisdiction, either originally or on removal, and subsequent Supreme Court decisions relying upon *Starin* cite it only for the proposition that a federal issue raised by any of the pleadings must be outcome-determinative for the case to qualify for federal jurisdiction. *See, e.g.*, City of Shreveport v. Cole, 129 U.S. 36, 41 (1889); Carson v. Dunham, 121 U.S. 421, 427-28 (1887);

In *Southern Pacific Railroad v. California,*[122] *Carson v. Dunham,*[123] and *Bock v. Perkins*[124] the Court continued to affirm that a federal issue arising in the defense of an action allowed jurisdiction on removal of the case from the state court. Therefore, by the time *Bock* was decided in 1891, the Court had said on several occasions that federal defenses were grounds for removal. It had never said otherwise. Moreover, *Bock* was decided after the 1887 and 1888 amendments of the removal statute, strongly suggesting that the Court viewed the amendments as having little effect on the scope of federal jurisdiction.[125]

In *Chappell v. Waterworth,*[126] however, the Court for the first time refused to allow removal in a case in which the defendant seeking removal had properly pleaded the existence of a federal defense.[127] The Court relied not on any prior removal case,[128] nor on the language of the removal statute, but rather upon the doctrine announced in *Tennessee v. Union & Planters' Bank.*[129] That case, said the Court, stood for the proposition that a federal question case existed only if the plaintiff's statement of his own claim demonstrated the existence of the federal issue. A lack of jurisdictional foundation in the plaintiff's claim could not be remedied by the defendant's petition for removal or by subsequent pleadings.[130] Finally, the Court held that because the complaint in ejectment raised no federal issue directly, removal could not be sustained.[131]

Robinson v. Anderson, 121 U.S. 522, 524 (1887). *Starin* itself merely held that on the pleadings of the case no federal issue was presented for resolution. 115 U.S. at 259.

122. 118 U.S. 109 (1886).

123. 121 U.S. 421 (1887). In *Carson*, the Court, again speaking through Chief Justice Waite, affirmed a circuit court order remanding the case to the state court. The basis for the Court's action, however, was similar to that in *Gold-Washing. See supra* notes 104-11 and accompanying text. The *Carson* Court held that the defendant's allegations on removal were mere conclusions of law and thus were insufficient to support jurisdiction. 121 U.S. at 426. The Court did not suggest that, had the defendant satisfied the pleading requirements then in force, federal jurisdiction would not have existed.

124. 139 U.S. 628 (1891).

125. *See supra* notes 32-41 and accompanying text.

126. 155 U.S. 102 (1894).

127. Chappell brought an ejectment proceeding and sought damages. Waterworth removed, alleging federal question jurisdiction on the ground that the land at issue was federally owned and that he had been appointed to keep a lighthouse there. The defendant also alleged that the land on which the lighthouse stood had been ceded by Maryland to the United States. *Id.* at 102-04. The defendant prevailed against plaintiff's motion to remand, and then won on the merits. Upon plaintiff's writ of error, the Supreme Court declined to reach the merits, finding removal improper. *Id.* at 107-08.

128. It could not have done so; they were all opposed to the result reached in *Chappell. See supra* notes 104-25 and accompanying text.

129. 152 U.S. 454 (1894); *see supra* notes 81-93 and accompanying text.

130. *Chappell,* 155 U.S. at 108.

131. *Id.*

The year 1894 thus saw the unification of the lines of cases dealing with original and removal jurisdiction, and confirmed, in both situations, the well-pleaded complaint rule some fourteen years before the decision in *Mottley*.[132] The decision in *Mottley* itself, therefore, is properly seen as mere confirmation of a preexisting line of cases in which the Court first required parties invoking federal jurisdiction to plead with great specificity,[133] then required the federal issue to appear in the complaint,[134] and finally insisted that the federal issue not only appear in the complaint, but also that it be a necessary element of the plaintiff's cause of action.[135] The application of the *Mottley* rule, however, has not been without its problems, and it is to those that we now turn.

II. Problems with Federal Question Jurisdiction Under the Well-Pleaded Complaint Rule

The *Mottley* decision in 1908 did not end the controversy over federal question jurisdiction; it merely restated one of the rules that the Supreme Court had developed since 1875, when Congress conferred general federal question jurisdiction on the inferior courts. After *Mottley,* a party seeking to invoke federal question jurisdiction had to demonstrate that the plaintiff's cause of action could not be adjudicated without resolution of a federal issue. The Court had never, however, dealt explicitly with the issue of how central to the case the federal question had to be to permit the exercise of jurisdiction under the federal question statute. After *Mottley,* it began to confront that question in coercive cases. More recently, it has had to deal with the special difficulties posed by declaratory judgment cases that raise federal questions.

A. Actions for Coercive Relief

American Well Works Co. v. Layne & Bowler Co.[136] involved a dispute over a pump that American Well Works alleged it manufactured and had patented or was in the process of patenting. The company as-

132. *Chappell* was followed in Walker v. Collins, 167 U.S. 57, 59 (1897), and Arkansas v. Kansas & Tex. Coal Co., 183 U.S. 185, 188 (1901).

133. *See, e.g.*, Metcalf v. Watertown, 128 U.S. 586, 589 (1888) (discussed *supra* notes 71-76 and accompanying text); Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203-04 (1878) (discussed *supra* notes 104-11 and accompanying text).

134. *Chappell*, 155 U.S. at 108 (discussed *supra* notes 126-31 and accompanying text); *Planters' Bank*, 152 U.S. at 464 (discussed *supra* notes 81-93 and accompanying text).

135. *Mottley*, 211 U.S. at 154 (1908) (discussed *supra* notes 98-103 and accompanying text); Third St. & Suburban Ry. v. Lewis, 173 U.S. 457, 460 (1899) (discussed *supra* notes 94-96 and accompanying text).

136. 241 U.S. 257 (1916).

serted that the defendant Layne & Bowler had defamed the company's title to the pump, had brought unjustified lawsuits against its customers, and had threatened actions against anyone who used the pump. The defendant claimed that the plaintiff was infringing the defendant's patent of a similar device. American Well Works sought damages in state court, and Layne & Bowler removed the case.[137]

The Supreme Court held that the action did not arise under federal law. Justice Holmes, writing for the Court, stated that no part of the plaintiff's proof of its own case would properly involve matters of patent law. The plaintiff, said Justice Holmes, was essentially complaining that it had lost business because of what the defendant had said and threatened to do. Under Massachusetts law, "it [was] enough to allege and prove the conduct and effect, leaving the defendant to justify [it] if he [could]. . . . [A]ll such [patent law] justifications [were] defenses, and raise[d] issues that [were] no part of the plaintiff's case."[138] Thus, the Court found that a well-pleaded complaint would not have presented a patent issue for adjudication. In this respect, the Court clearly indicated that the plaintiff had failed to satisfy the *Mottley* rule. However, the Court did not cite *Mottley* or any other case articulating the well-pleaded complaint rule.

Justice Holmes did not end his opinion with that analysis of the complaint; he went on to announce a bright–line test for federal question jurisdiction: "A suit arises under the law that creates the cause of action."[139] In this case, the Justice said, neither the defendant's argument that it held a patent that justified its actions nor the plaintiff's assertion of its own patent rights in reply to that defense could change the essential character of the plaintiff's original cause of action—a state law claim

137. Because the standards for the assertion of original jurisdiction and removal jurisdiction had merged following the Court's decision in Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894), *see supra* notes 81-96 & 132 and accompanying text, I will no longer separate the discussion of those two types of cases. After *Planters' Bank,* the method by which a case reached the federal trial court had no bearing on whether the invocation of jurisdiction was proper.

138. *American Well Works*, 241 U.S. at 259.

139. *Id.* at 260. Taken literally, Justice Holmes' test would also preclude many assertions of jurisdiction under art. III, § 2 of the Constitution, including Supreme Court appellate jurisdiction. It is clear, however, that Holmes referred only to statutory, and not constitutional, "arising under" jurisdiction. Nonetheless, he did not offer any analysis in *American Well Works* that explains why his test ought to be applied to one provision and not the other.

Several years earlier, the Court had taken a position inconsistent with Holmes' test. "[T]he mere fact that a suit is an adverse suit authorized by the statutes of Congress is not in and of itself sufficient to vest jurisdiction in the Federal courts." Shoshone Mining Co. v. Rutter, 177 U.S. 505, 513 (1900).

of trade defamation.[140] This latter part of the analysis, which can only be characterized as dictum, was to become the most important portion of the opinion, as succeeding courts attempted to work out an enduring test for federal question jurisdiction.[141]

Justice Holmes' formulation ran into difficulty only five years after *American Well Works,* when the Court confronted a case in which federal law had been incorporated into state law. *Smith v. Kansas City Title & Trust Co.*[142] involved a shareholder's derivative action against a Missouri corporation and its directors. The plaintiff alleged that Missouri law authorized corporations to invest only in lawfully issued instruments, that certain federal bonds the directors proposed to purchase had been unconstitutionally issued, and that the improper investment should therefore be enjoined. The plaintiff filed the case in federal court, and neither party objected to the court's jurisdiction.

The Supreme Court held that the case arose under federal law. Justice Day, for the majority, returned to a general statement of the test for jurisdiction:

> The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable

140. *American Well Works*, 241 U.S. at 260. Justice McKenna dissented, briefly suggesting that the case involved a substantial controversy under the patent laws. It is impossible to know from the Justice's one-sentence dissent whether he disagreed with the majority's *Mottley* analysis, or whether he was simply dissatisfied with Holmes' new test. *Id.* (McKenna, J., dissenting).

There is something to be said in favor of finding federal jurisdiction in a case such as *American Well Works.* The trial was likely to resemble an ordinary patent case, with the plaintiff simultaneously asserting its patent interest and that its machine did not, in fact, infringe any patent that the defendant might hold. The report of the case gives no indication that the defendant denied making the statements or taking the actions attributed to it by the plaintiff. Thus, although substantive Massachusetts law of trade libel may have precluded the plaintiff from asserting a federal question in its complaint, it is quite possible that the *only* issues in the case were federal. As will be suggested below, this sort of situation shows the *Mottley* rule in its worst light and demonstrates why it should be abandoned. *See infra* notes 214-15 & 233-35 and accompanying text.

141. There is an irony to *American Well Works.* The district court, on receiving the case following its removal from the Massachusetts state court, had dismissed it on the ground that the cause of action arose under the patent laws. Because jurisdiction in patent cases was exclusively federal, *see* 28 U.S.C. § 1338 (1982), the district court ruled that the state court in which the action had originated lacked jurisdiction, and therefore the district court had no jurisdiction on removal. *American Well Works,* 241 U.S. at 258. Thus, the defendant's attempt to remove the case failed in the district court because the judge felt the case was a matter of exclusive federal jurisdiction. After Supreme Court review, however, the defendant could not remove the case because there was no federal jurisdictional ground at all, exclusive or otherwise. Some days it doesn't pay to get out of bed.

142. 255 U.S. 180 (1921).

> foundation, the District Court has jurisdiction under this [statutory] provision.[143]

No mention was made of the Holmes test from *American Well Works.*[144] The majority, relying upon *Cohens v. Virginia*[145] and *Osborn v. Bank of the United States,*[146] merely observed that the plaintiff's claim that the bonds were unconstitutional was outcome-determinative and that his case could not be stated without alleging the federal issue.[147] The district court's jurisdiction was affirmed.

Justice Holmes wrote a strongly worded dissent. He had, after all, believed that he had articulated the reigning test for federal question jurisdiction only five years earlier in *American Well Works,* and five other members of the Court had supported his opinion.[148] His *Smith* dissent applied his own test to demonstrate that the plaintiff should have been sent to the state courts for his remedy. Holmes pointed out that the action in question was a shareholder's derivative suit, authorized by the law of Missouri, not by federal law. That, for him, was the beginning and end of the question; state law created the cause of action, so the action could not give rise to jurisdiction in the district court. "The mere adoption by a state law of a United States law as a criterion or test, when the law of the United States has no force *proprio vigore,* does not cause a case under the state law to be also a case under the law of the United States . . . ."[149]

---

143. *Id.* at 199.

144. It is even possible to read Justice Day's articulation as permitting deviation from the *Mottley* rule, since a plaintiff's right to relief may depend on the construction or application of federal law used as a defense. However, nothing in *Smith* suggests that the Court meant to abandon the rule.

145. 19 U.S. (6 Wheat.) 264, 379 (1821); *see supra* note 55.

146. 22 U.S. (9 Wheat.) 738, 822 (1824); *see supra* notes 43-55 and accompanying text.

147. *Smith,* 255 U.S. at 199. It is here that *Smith* is clearly distinguishable from *American Well Works.* American Well Works could state its cause of action without reference to the patent laws or the parties' dispute over the patents to the pumps. *See supra* note 138 and accompanying text. Smith, on the other hand, would have seen his complaint dismissed for insufficiency had he not pleaded the illegality of the bonds.

148. When *American Well Works* was decided, the Court consisted of Chief Justice White and Associate Justices McKenna, Holmes, Day, Hughes, Van Devanter, Lamar, Pitney, and McReynolds, but Justices Day and Lamar did not participate in the decision in *American Well Works. See* 241 U.S. iii (1916).

149. *Smith,* 255 U.S. at 215 (Holmes, J., dissenting). Justice Holmes relied upon Miller's Ex'rs v. Swann, 150 U.S. 132, 136-37 (1893), and Louisville & N.R.R. v. Western Union Tel. Co., 237 U.S. 300, 303 (1915), to support his argument. In *Swann,* however, an adequate and independent state ground supported the judgment and precluded Supreme Court review, because although Alabama had adopted some federal law as a criterion, the meaning or validity of the federal law was not in dispute. The only issue was the extent to which Alabama had adopted it. That, said the Court, was solely a state issue. *Swann,* 150 U.S. at 136-37.

Western Union similarly presented no disputed federal question of any sort. The Louisi-

The apparent shift in the Court between 1916 and 1921 cast doubt on the significance of Justice Holmes' opinion in *American Well Works.* The membership of the Court had not changed sufficiently to alter the result of *American Well Works*; Justices Brandeis and Clarke had replaced Justices Lamar and Hughes. Yet Chief Justice White and Justices Van Devanter and Pitney had moved from rejecting the assertion of jurisdiction in *American Well Works* to supporting it in *Smith.* Justice McKenna again differed with Holmes, and Justice McReynolds again supported him. There is no indication as to why the three Justices abandoned Holmes' position, but there are two possibilities. First, they may have become persuaded that the test of *American Well Works* was overly restrictive, in which case their divergence from Holmes represents a true shift in the Court's position. This interpretation of events, however, seems unlikely because if the Court were striking out in a new direction or abandoning a recent innovation on a matter as significant as subject matter jurisdiction, one would expect the new and old tests to be discussed more fully and to be compared and contrasted with each other. But the majority opinion in *Smith* makes no mention of Holmes' test; it is as if it had never been announced. This omission supports the inference that the *Smith* majority did not see Holmes' test as one that the Court was abandoning, which leads to the second possibility: the apparent shift of the three Justices may be illusory. As previously mentioned,[150] Holmes' test from *American Well Works* is dictum. If Justices White, Van Devanter, and Pitney thought that the *Mottley* rule was dispositive in *American Well Works,* then their silent acquiescence in the majority opinion may never have stood for agreement with Justice Holmes' gratuitous announcement of a new test for federal question jurisdiction.

Irrespective of the true explanation, within five years the Court had purported to announce two different tests for determination of federal question jurisdiction.[151] The decision in *Smith* did not cause Holmes' test to fade into obscurity,[152] and promised to present its own difficulties.

---

ana Legislature had merely decided to use a provision of federal law to describe the ambit of a Louisiana statute. Neither party disputed the meaning or applicability of the federal statute. The only question was Western Union's right to acquire an easement over Louisville & Nashville's property by use of a state-conferred eminent domain power. *Western Union,* 237 U.S. at 300.

150. *See supra* notes 139-41 and accompanying text.

151. "The almost simultaneous decisions in *Smith* and *American Well Works* set up a situation where two incompatible approaches to the problem enjoyed equal precedential status." Hirshman, *supra* note 12, at 31.

152. *See infra* note 176 and accompanying text. But Professor Hirshman suggests that *American Well Works* is more closely followed, Hirshman, *supra* note 12, at 31, viewing *Smith* as an aberration, *id.* at 28.

Smith did, however, seem to be a fair summary of the test that the Court had been developing since the beginning of statutory federal question jurisdiction in 1875, and, indeed, of the trend in construing arising-under jurisdiction under the Constitution since 1821.

The difficulties remaining after *Smith* were soon confronted in *Moore v. Chesapeake & Ohio Railway.*[153] The case is unusual because, although it was the plaintiff who had sued in the federal court, it was also he who argued that no federal question was presented. Moore sought to recover for injuries suffered during his employment with the defendant railroad. There were two counts, one under the Federal Employers Liability Act[154] and the other under the Kentucky Employers Liability Act, certain regulations of the Interstate Commerce Commission, and the Federal Safety Appliance Act.[155] The Kentucky Act incorporated federal law by reference, providing that an employer's negligence could not be negated by the employee's contributory negligence or assumption of risk if "the violation by [the employer] of any statute, state or federal, enacted for the safety of employees contributed to the injury or death of such employee."[156] The plaintiff's jurisdictional problem arose because the Federal Safety Appliance Act and the relevant Interstate Commerce Commission regulations required actions to be prosecuted in the employer's home state; Moore had sued in Indiana though the defendant corporation was a citizen of Virginia. The defendant argued that the action had to be dismissed because venue was improper.[157] The plaintiff countered by asserting that his second cause of action was not federal, and therefore should not be governed by special Interstate Commerce Commission venue provisions. Thus, though the second cause of action apparently fell into the *Smith* pattern, the plaintiff did not want *Smith* to govern.[158]

The Court agreed with the plaintiff and held that the second cause of action arose under Kentucky law despite that law's wholesale adop-

153. 291 U.S. 205 (1934).

154. Act of Apr. 22, 1908, ch. 149, 35 Stat. 65.

155. Act of Mar. 2, 1893, ch. 196, 27 Stat. 531; Act of Apr. 1, 1896, ch. 87, 29 Stat. 85; Act of Mar. 2, 1903, ch. 976, 32 Stat. 943; Act of Apr. 14, 1910, ch. 160, 36 Stat. 298 (current versions at 45 U.S.C. §§ 1-12 (1982)). The Federal Safety Appliance Act provided no cause of action, though it did prescribe federal standards for equipment on railroads engaged in interstate commerce. *Moore,* 291 U.S. at 215.

156. *Moore,* 291 U.S. at 213.

157. The defendant also argued that the plaintiff's first cause of action should be dismissed on the ground that his injuries were suffered while he was working in intrastate commerce, making the Federal Employers Liability Act inapplicable. *Id.* at 209.

158. Moore had no need of federal question jurisdiction because diversity jurisdiction was available. He was a citizen of Indiana; the defendant a citizen of Virginia. *Id.* at 211.

tion of federal standards. The plaintiff's invocation of diversity jurisdiction in the Indiana district court was therefore secure. The Court, however, did not explain how its decision was to be distinguished from *Smith,* in which state law had also imported federal law to supply standards in a state-created cause of action.[159]

The two cases can, however, be distinguished. In *Smith,* the plaintiff could not state his cause of action without pleading the unconstitutionality of the congressional act authorizing issuance of the bonds. In *Moore,* by contrast, the federal issue would arise only if the defendant pleaded that the plaintiff had been contributorily negligent or had assumed the risk, since Kentucky law made compliance with the federal safety standards a prerequisite to the availability of these defenses. Thus, the federal issue entered the case only if certain defenses were interposed. A case in such a posture did not present an issue under the federal safety standards in the well-pleaded complaint, so jurisdiction was properly denied.[160] Unfortunately, in *Moore,* the Supreme Court never mentioned *Mottley* as the basis for the different results. The opinion merely asserted that incorporation of federal standards into state causes of action is insuf-

159. *See supra* notes 142-47 and accompanying text.

160. It would, nonetheless, present a federal question eligible for Supreme Court review. The *Moore* Court reaffirmed that "[q]uestions arising in actions in state courts to recover for injuries sustained by employees in intrastate commerce and relating to the scope or construction of the Federal Safety Appliance Acts are, of course, federal questions which may appropriately be reviewed in this Court." 291 U.S. at 214. The Court thus indicated that the case could be reviewed in the Supreme Court under the constitutional arising-under standard, but could not be heard originally in the federal courts under the statutory standard.

This apparent inconsistency derived from the differences between constitutional and statutory arising-under jurisdiction. The *Mottley* rule required that a federal issue appear on the face of a well-pleaded complaint to invoke federal court jurisdiction under the statute. There was no such requirement for the exercise of the Supreme Court's appellate jurisdiction under art. III, § 2 of the Constitution. In *Smith,* the Court seemed to blend the constitutional arising-under standard announced in *Osborn* with the well-pleaded complaint rule of *Mottley. See supra* text accompanying note 143. Although it had not done so at the time, the Court years later would explicitly hold that *Mottley* had no application to constitutional arising-under jurisdiction. Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480, 494 (1983); *see supra* notes 56-66 and accompanying text.

Mottley itself is another example of a case in precisely the same posture as *Moore.* The federal issue there was the unconstitutionality of the act prohibiting free passes or transportation. The plaintiffs' cause of action, however, was for breach of the contract to provide the free passes. Only when the defendant invoked the congressional act to justify its breach of the contract could plaintiffs properly respond with their constitutional argument. The case in this posture was held not to present a federal question under the statute, Louisville & N.R.R. v. Mottley, 211 U.S. 149, 152 (1908), but it did permit review of the merits when the case came up from the Kentucky state courts three years later. Louisville & N.R.R. v. Mottley, 219 U.S. 467 (1911). The Mottleys then lost on the merits of the constitutional issue they raised. *Id.* at 472.

ficient to establish statutory arising-under jurisdiction.[161] This assertion, of course, brings *Moore* into direct conflict with *Smith.* For better or worse, *Smith* has been followed and *Moore* largely ignored.[162]

The Court decided one more important case that again failed to apply the *Mottley* rule when it would have been dispositive. In *Gully v. First National Bank,*[163] a Mississippi state official sued a federally chartered bank in state court for taxes alleged to be due.[164] The defendant removed to federal court on the ground that Mississippi could not have taxed it at all but for congressional enabling legislation allowing the states to tax national banks.[165] In one of Justice Cardozo's most famous opinions, the Court denied jurisdiction. In the course of the opinion, Cardozo set out what he saw as the test for arising-under jurisdiction, in the process demonstrating the blending of constitutional and statutory decisions that has become the modern standard for jurisdiction under 28 U.S.C. § 1331:

> To bring a case within the statute, 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 upon the face of the complaint, unaided by the answer or by the petition for removal.[166]

161. *Moore,* 291 U.S. at 214-15. One of the problems with the *Mottley* rule is that it was not always rigorously applied by the Court, even in situations where it would have resolved the case without the need to break new ground or introduce apparent conflict into the law. *American Well Works* is an example of the former; *Moore* of the latter.

162. *See* M. REDISH, *supra* note 8, at 67. *But see* Hirshman, *supra* note 12, at 30 (suggesting that *Smith* is an aberration). Justice Brennan has taken the position that *Smith* and *Moore* are fatally inconsistent and that *Moore* should be overruled. Merrell Dow Pharmaceuticals v. Thompson, 106 S. Ct. 3229, 3239 n.1 (1986) (Brennan, J., dissenting). A majority of the Court, however, asserts that the two are distinguishable because the issue in *Smith* was of greater national importance than that in *Moore. Id.* at 3236 n.12; *see infra* note 180 and accompanying text. *But see infra* notes 183-92 & 261-63 and accompanying text, criticizing this concept.

163. 299 U.S. 109 (1936).

164. The defendant had become liable for state taxes by assuming the assets and liabilities of an insolvent bank that already owed state taxes. *Id.* at 111.

165. *Id.* at 112. The enabling legislation was necessary to overcome the effect of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), which had held that the supremacy clause, U.S. CONST. art. VI, § 2, forbade the states to tax a national bank, at least without congressional leave.

166. *Gully,* 299 U.S. at 112-13 (citations omitted). Justice Cardozo also, in a call later to be echoed by the majority in Merrell Dow Pharmaceuticals v. Thompson, 106 S. Ct. 3229, 3235 (1986), *see infra* notes 170-92 and accompanying text, emphasized the necessity of a common-sense accommodation of judgment to kaleidoscopic situations which char-

The Justice thus invoked portions of the Court's earlier opinions in *Cohens, Osborn, Robinson v. Anderson,*[167] and *Mottley.* There was, however, an easier way that would have given *Mottley* its due without announcing a more complex test for federal jurisdiction.

The bank's petition for removal asserted that Gully's claim depended upon the federal enabling statute. Gully had not pleaded the statute; he merely stated a cause of action in contract for the taxes due. If the enabling act were truly a necessary part of Gully's cause of action under Mississippi law, the bank should have moved to dismiss in the state court for Gully's failure to state a cause of action, or in the federal court for failure to state a claim upon which relief could be granted. But those motions would have failed, because it was not necessary for Gully to plead the enabling statute to state his cause of action in contract. The statute would have arisen as an issue only if the bank sought to defend on the ground that it was immune to state taxation, at which point Gully would have replied that Congress had authorized such taxation. Thus, the federal issue would have come up in the plaintiff's reply to a defense. If this situation sounds familiar, it is because it exactly parallels the posture of *Mottley,* in which the federal constitutional issue could only properly arise in reply to a potential defense of the railroad.[168] The Court, therefore, could have decided *Gully,* as it could have decided *Moore,* by simply declaring that the case did not satisfy the *Mottley* test. The Justices elected not to do that, however, and so *Gully,* notwithstanding Justice Cardozo's eloquence, takes its place as one of the cases that ignored

---

> acterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

Gully, 299 U.S. at 117-18 (citations omitted). Professors Chadbourn and Levin have remarked that "[t]his is prose so beautiful that it seems almost profane to analyze it." Chadbourn & Levin, *supra* note 12, at 671. Professor Cohen suggests that Justice Cardozo's fears have been realized. *See* Cohen, *supra* note 12, at 905. It *is* beautiful prose. However, I respectfully suggest analysis, profane or otherwise, shows that it was not necessary for Justice Cardozo to consult his compass at all in order to decide *Gully. See infra* notes 167-69 and accompanying text.

167. 121 U.S. 522 (1887); *see supra* notes 67-70 and accompanying text.

168. *See supra* notes 98-103 and accompanying text; *see also* Cohen, *supra* note 12, at 903-04.

the dispositive effect of *Mottley* on the controversy presented.[169]

Gully seemed to complete the doctrinal development of the tests for arising-under jurisdiction in coercive cases. The Court's next treatment of the subject did not come for fifty years. In July 1986, in *Merrell Dow Pharmaceuticals v. Thompson,*[170] the Court did not ignore the effect of *Mottley*; indeed, the Court demonstrated that in an action for coercive relief, satisfaction of the *Mottley* test could be insufficient to establish federal question jurisdiction.[171]

The issue in *Merrell Dow* was highlighted at the outset of the majority opinion: "whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one 'arising under the Constitution, laws, or treaties of the United States,' " under the statute conferring federal question jurisdiction.[172] The plaintiffs sued to recover damages for birth defects they said defendant's drug caused their children to suffer. They stated causes of action for negligence, breach of warranty, strict liability, fraud, and gross negligence. The negligence claim alleged that the drug had been misbranded in violation of federal law,[173] thus raising a rebuttable presumption of negligence under state law.[174] The defendant removed the case, arguing that, pursuant to *Smith,* the case arose under federal law. The substantive questions of federal law upon which the defendant alleged the outcome of the case depended were whether the drugs had been misbranded and whether the federal statute would be construed to apply to drugs sold in foreign countries.[175]

169. *American Well Works, see supra* notes 136-41 and accompanying text, may also be seen as exemplifying this pattern, but in that case Justice Holmes did discuss the fact that the plaintiff's statement of its state-law claim for trade defamation would not properly contain allegations of the federal patent issues separating the parties. *American Well Works*, 241 U.S. at 259. Thus, the *Mottley* principle was in use, though neither *Mottley* nor any of its predecessors were cited for the point. On the other hand, *American Well Works* resembles *Moore* and *Gully* because the Court went on to state a test for federal jurisdiction that would have been unnecessary had *Mottley* been cited and faithfully applied. *See id.* at 260.

170. 106 S. Ct. 3229 (1986).

171. The text refers specifically to coercive cases because actions for declaratory relief have been decided differently. *See infra* notes 201-13 and accompanying text.

172. 106 S. Ct. at 3231 (quoting 28 U.S.C. § 1331 (1982)). This statement distinguishes *Merrell Dow* from *Smith,* which presented no question of congressional intent to create a cause of action because the plaintiff alleged a constitutional violation.

173. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-392 (1982).

174. *Merrell Dow*, 106 S. Ct. at 3231. Justice Brennan noted that the complaint asserted that the violation established negligence per se. *Id.* at 3240 (Brennan, J., dissenting).

175. *Id.* at 3241 (Brennan, J., dissenting). *Merrell Dow* was actually a consolidation of two "virtually identical" actions. The Thompsons were Canadian citizens and the other plaintiffs, the MacTavishes, resided in Scotland. *Id.* at 3231.

The Court refused to find federal question jurisdiction. Justice Stevens' opinion for the Court commenced with a brief recitation of the articulated rules governing federal question jurisdiction and the observation that the "vast majority" of federal question cases would satisfy the Holmes test from *American Well Works.*[176] However, the Court admitted that there is a second category of federal question cases, those satisfying the outcome-determinative test announced in *Smith* and recently reaffirmed in *Franchise Tax Board v. Construction Laborers Vacation Trust.*[177] Justice Stevens then noted that Congress did not intend to create a private right of action for violations of the Food, Drug, and Cosmetic Act.[178] This, he argued, compelled the conclusion that it would violate congressional intent to permit an action to come into the federal courts merely because a state had adopted the federal standard as a rebuttable presumption relating to proximate cause under the state's negligence cause of action. "We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction."[179]

The majority found *Smith* and *Moore* distinguishable, but not on the ground that the *Mottley* rule barred jurisdiction in *Moore* but not in *Smith,* as I have previously suggested.[180] Rather, Justice Stevens argued that federal jurisdiction had been appropriately exercised in *Smith* because the federal issue—the constitutionality of a congressional program—was of considerable importance to the federal government, while in *Moore,* the use and construction of a federal standard to negate a state-created defense to a state-law action was of insufficient importance to the national government to warrant federal jurisdiction.[181] Finally, the Court concluded that "a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a[n] [arising-under] claim."[182]

The Court's decision provoked spirited dissent from four of its

176. *Id.* at 3232-33; *see American Well Works,* 241 U.S. at 260 ("[A] suit arises under the law that creates the cause of action.").

177. 463 U.S. 1 (1983); *see infra* notes 201-15 and accompanying text.

178. *Merrell Dow,* 106 S. Ct. at 3234.

179. *Id.* at 3236 (footnote omitted).

180. *See supra* text accompanying note 160.

181. *Merrell Dow,* 106 S. Ct. at 3236 n.12.

182. *Id.* at 3237 (citing 28 U.S.C. § 1331 (1982)).

members. Justice Brennan, joined by Justices Blackmun, Marshall, and White, argued that the language of section 1331 suggests that the district courts should have the full breadth of power conferred by the Constitution, but he conceded that the Court had never so interpreted statutory federal question jurisdiction. Nonetheless, Brennan insisted that the statute's similarity to the constitutional language compels careful consideration of any limitations placed on the statute.[183]

Justice Brennan also criticized the majority for linking federal jurisdictional principles with the body of law concerning implication of private rights of action in federal statutes. "Why," he asked, "should the fact that Congress chose not to create a private federal *remedy* mean that Congress would not want there to be federal *jurisdiction* to adjudicate a state claim that imposes liability for violating the federal law?"[184] Upon examining Congress' reasons for not creating a private right of action under the Food, Drug, and Cosmetic Act, Brennan concluded that Congress' explicit direction that all of the Act's express remedies be provided in the federal courts strongly suggests, contrary to the majority's conclusion, that the federal courts are the more appropriate forum for resolution of questions about that law.[185]

Several other points should be noted about the Court's decision in *Merrell Dow.* Apart from the issues raised by Justice Brennan's dissent, the majority opinion changes the manner in which federal jurisdictional questions are approached in at least three other ways. First, the majority implied that Congress has some continuous role in the interpretation of federal jurisdictional statutes. It is not just Congress' intent at the time that section 1331 was enacted that is important; the Court implicitly stated that any later Congress, even when enacting a statute that does not deal with jurisdiction, may be inferred to have added its own intent as a gloss on the interpretation of the jurisdictional statute. This is strong medicine indeed. The Court did not, however, provide any guidelines for determining when a Congress that fails to mention federal subject matter jurisdiction in a new statute dealing with a different topic nonetheless intends to alter an existing interpretation of federal jurisdiction. There is another problem with the Court's idea. One may well question why Congress, even if it does silently intend to change the interpretation of the jurisdictional statute, ought to be permitted to accomplish that end with-

183. *Id.* at 3238 (Brennan, J., dissenting).

184. *Id.* at 3242 (Brennan, J., dissenting) (emphasis in original).

185. *Id.* at 3245 (Brennan, J., dissenting). The Court's recent restriction of the practice of implying rights of action in federal statutes necessitated this argument. *See infra* note 186.

out amending, repealing, or reenacting the statute through the normal legislative process. The majority opinion nowhere addressed this issue.

Second, even assuming the validity of this process of silent amendment, the Court offered no suggestion about which nonjurisdictional statutes are to be understood to amend section 1331 and which are not. The majority's reasoning is sufficiently general to embrace the assertion that every time Congress passes a law and fails to create a private cause of action, it implicitly directs that cases concerning the new statute not be brought in the federal courts under the federal question jurisdiction provision. If this is so, it represents a de facto result far more restrictive than the rule of *American Well Works,*[186] and no cause of action not created by Congress will be able to be heard in the federal courts pursuant to section 1331.[187]

186. The Court that decided *American Well Works* would have implied a private cause of action in a federal statute far more easily than the current Court. The test for implication of a private right of action then was merely whether a violation of a statutory command harmed a member of the class to be protected by the statute. Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916). The *Rigsby* Court, which decided *American Well Works* barely a month later, clearly would have implied a right of action under the statute involved in *Merrell Dow.* More recently, however, the Court has substantially cut back on implication of private rights of action. The current test revolves around "the ultimate issue [of] whether Congress intended to create a private right of action." California v. Sierra Club, 451 U.S. 287, 293 (1981) (citations omitted). That intent, in turn, is determined by examination of the four factors the Court announced in Cort v. Ash, 422 U.S. 66 (1975):

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? [Fourth,] is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (quoting Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916) (emphasis in original)). Hence, the single relevant factor in 1916 is now only one of four. Thus, the possibilities of finding a federal cause of action were greater when *American Well Works* was decided than they are now.

187. The majority implied that it had not followed a new and severely restrictive approach when it quoted with approval the Court's recent unanimous opinion in Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983): "[I]t is well settled that Justice Holmes' test is more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction." The majority also cited Judge Friendly's original formulation of that idea in T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964). *Merrell Dow,* 106 S. Ct. at 3233 n.5. But because the Court offered no indication of the boundaries of its new theory, it is difficult to see how this result will be avoided, or even to be certain that the majority is, in fact, at all interested in avoiding it.

The Court has also recognized, moreover, that Holmes' test is not always reliable even as a test of inclusion. "[D]espite the usual reliability of the Holmes test as an inclusionary princi-

Third, the majority has introduced a new criterion into decisions on federal question jurisdiction. It did not dispute that adjudication of the plaintiff's case would require answering a federal question: whether the Food, Drug, and Cosmetic Act applies to misbranded drugs sold abroad. Clearly, if the Act applied, it would establish defendant's negligence per se, and the cause of action would go forward with plaintiffs having only to prove their damages. On the other hand, if the Act were held not to apply, the plaintiffs' cause of action might well have failed, since they would then have had to establish defendant's negligence under traditional fault standards. Thus, the federal question could be considered outcome-determinative as that term has been interpreted since Chief Justice Marshall first considered arising-under jurisdiction.[188] Nonetheless, the Court found no federal jurisdiction because the federal issue was not substantial enough, relying upon Justice Frankfurter's dissent in *Textile Workers Union v. Lincoln Mills,*[189] and upon *Gully v. First National*

---

ple, this Court has sometimes found that formally federal causes of action were not properly brought under federal-question because of the overwhelming predominance of state-law issues." *Id.* at 3236 n.12 (citing Shulthis v. McDougal, 225 U.S. 561, 569-70 (1912); Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900)).

There is, however, a middle position. Presumably, as Justice Brennan pointed out, if Congress *had* created a federal right of action, the majority would have found evidence of congressional intent to allow plaintiffs to proceed on their state claim, even if they did not pursue the available federal cause of action. *Id.* at 3241 n.4 (Brennan, J., dissenting). Whether such a result makes any sense is left to the reader.

188. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 822 (1824); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 443 (1821).

The fact that answering the federal question may not end the case does not make it less outcome-determinative. It is only necessary that the answer to the federal question helps to produce one outcome or the other. In *Osborn* itself, for example, *see supra* notes 50-54 and accompanying text, if the Bank had been found to lack capacity, the case would have been dismissed. On the other hand, even if it were found to have capacity, it still might lose the case on the merits. In *Merrell Dow,* if the federal question were answered in the plaintiffs' favor, their negligence claim would have ended favorably to them, needing only proof of damages. If the answer went against them, they still might win, but would have to prove negligence. Both federal questions were outcome-determinative because the answers to each of them could have ended part of the litigation.

189. 353 U.S. 448 (1957). *Lincoln Mills* is best known for its holding that in enacting § 301(a) of the Taft-Hartley Act, 29 U.S.C. § 185(a) (1982), Congress not only gave the federal courts jurisdiction over collective-bargaining disputes affecting commerce, but also directed the courts to "fashion a body of federal law for the enforcement of these collective bargaining agreements." 353 U.S. at 451. Justice Frankfurter, unable to agree that § 301(a) was more than a jurisdictional statute, was forced to reach the question of the constitutionality of such a grant of jurisdiction in the absence of a controlling federal law. He concluded that, since there was no federal substantive law in this area, § 301(a) exceeded the boundaries of the constitutional arising-under clause, asserting that "federal law must be in the forefront of the case and not collateral, peripheral or remote" for a grant of jurisdiction to remain within the scope of the Constitution's arising-under clause. *Id.* at 470 (Frankfurter, J., dissenting).

Bank.[190]

Whether the Court's reliance on *Lincoln Mills* and *Gully* is analytically sound or not, it is clear that the Court has changed the nature of the inquiry concerning federal question jurisdiction.[191] An issue must not only be presented for decision and be outcome-determinative, it must also be a "*substantial,* disputed question of federal law."[192] Unfortunately, the Court has not explained how to distinguish a substantial outcome-determinative federal question from an insubstantial one such as that presented in *Merrell Dow.* The result of the decision in *Merrell Dow,* therefore, is that a new factor of considerable elasticity and invisible boundaries has been injected into the determination of federal jurisdiction. Completion of the picture as it has developed over the years now requires only consideration of federal jurisdictional problems presented in cases seeking declaratory relief.

B. Declaratory Judgment Cases

Declaratory judgment cases presented a new dimension of difficulty that the Court first confronted in *Skelly Oil Co. v. Phillips Petroleum Co.*[193] Phillips and the defendant oil companies entered into a contract under which the defendants would supply natural gas to Phillips, provided that the Federal Power Commission ("FPC") issued a needed certificate by a specified date. The defendants were given an option to cancel the contract if the certificate was not timely issued, provided that the cancellation occurred before actual issuance. The dispute in the case arose because the FPC announced the grant of a conditional certificate on one day, but did not formally issue it until two days later. In between, the defendants sought to exercise their cancellation option.

Phillips brought an action in federal court, seeking a declaration

190. 299 U.S. 109, 115 (1936); *see supra* notes 163-68 and accompanying text. There is a distinction, however, between *Merrell Dow* and *Gully.* In *Gully,* the federal "issue" involved a background question of federal law that neither party wished to litigate. In *Merrell Dow,* by contrast, one of the plaintiff's causes of action turned upon the construction of the Food, Drug, and Cosmetic Act, and there is every reason to think that the parties would have litigated the issue vigorously.

191. Professor Cohen would undoubtedly argue that *Merrell Dow* presents nothing new. "In personal injury cases then, the question of whether the case arises under federal law is uniformly decided by reference to the question whether federal law gives an express or implied cause of action, or whether federal law merely sets a standard of conduct for a state cause of action." Cohen, *supra* note 12, at 911.

192. *Merrell Dow,* 106 S. Ct. at 3235 (quoting Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 13 (1983) (emphasis added)). Professor Cohen would endorse this result, and in some sense he predicted it. *See* Cohen, *supra* note 12, at 906.

193. 339 U.S. 667 (1950).

that as a matter of federal law the certificate had been issued when announced, and that therefore the defendants could not cancel the contract. The Supreme Court denied jurisdiction, with reasoning that requires careful attention to the posture of the case. On its face, the case satisfied all of the existing tests for federal jurisdiction. The only issue between the parties was federal: the effective date of the issuance of the certificate by the FPC. The issue was certainly disputed. Moreover, it necessarily appeared in the plaintiff's complaint seeking declaratory relief; had Phillips not pleaded it, the complaint would have stated no controversy at all. Thus, the case seemed to satisfy the complex test announced in *Gully,*[194] including the well-pleaded complaint requirement.

However, the Court observed that the Declaratory Judgment Act[195] was intended by Congress only to create a new remedy, not to expand the jurisdiction of the federal district court. To allow Phillips' action to proceed would have expanded the district court's jurisdiction by allowing it to hear a case that it could not have heard prior to the Declaratory Judgment Act. If the declaratory remedy were unavailable, said the Court, the plaintiff's action would sound in contract for the defendants' nondelivery of the promised natural gas. The defendants would argue that they had canceled the contract and the plaintiff would reply that the attempted cancellation was ineffective because the FPC certificate antedated it. Thus, the federal issue would have been injected into the case by the plaintiff's reply, a situation exactly paralleling *Mottley*[196] and therefore not qualifying for federal question jurisdiction. For the district court to hear the case because the federal issue necessarily appeared in a complaint under the Declaratory Judgment Act would thus give the Act a jurisdictional effect it was not intended to have.[197]

The Court thereby announced a new method for determining the existence of federal jurisdiction.[198] When a party brings a declaratory judgment case, the court should look beneath the complaint and hypoth-

194. *See supra* text accompanying note 166.

195. 28 U.S.C. §§ 2201-2202 (1982).

196. *See supra* notes 98-103 and accompanying text.

197. *Skelly Oil,* 339 U.S. at 672-73.

198. The method was new only at the Supreme Court level. In E. Edelmann & Co. v. Triple-A Specialty Co., 88 F.2d 852 (7th Cir.), *cert. denied,* 300 U.S. 680 (1937), the Seventh Circuit had examined an action for declaratory judgment by looking to the underlying controversy. In that case, involving the validity of a patent, the court found jurisdiction on the theory that prior to the Declaratory Judgment Act the case would have involved the patentee's action for infringement, a case clearly within the jurisdiction of the federal courts. The declaratory suit, the Seventh Circuit held, presented exactly the same controversy and therefore was properly entertained in the federal courts. 88 F.2d at 853-54; *see also* Webster Co. v. Society for Visual Educ., 83 F.2d 47 (7th Cir. 1936).

esize what the plaintiff's underlying coercive action would have been.[199] The court then must hypothetically draft and examine the complaint in the nonexistent coercive action. If that complaint would satisfy the tests for federal question jurisdiction, particularly the *Mottley* test, then the court has jurisdiction over the suit seeking declaratory relief. Otherwise, the declaratory action must be dismissed. In *Skelly Oil,* since Phillips' complaint in an action for breach of contract could not properly have raised the issue of the timing of the issuance of the FPC certificate,[200] the action for declaratory relief could not be viewed as raising that issue for federal jurisdictional purposes.

Skelly Oil established the method of analysis of jurisdictional questions in declaratory judgment cases. The test, though requiring the lower courts to engage in a bit of mental gymnastics, seemed workable until the Court decided *Franchise Tax Board v. Construction Laborers Vacation Trust*[201] in 1983. Then its true problems and another absurdity resulting from adherence to the *Mottley* rule became manifest.

The dispute arose when California attempted to collect taxes owed by beneficiaries of an employee benefit welfare plan subject to regulation under ERISA.[202] The Construction Laborers Vacation Trust, which administered the plan, failed to honor levies issued by the California tax authorities.[203] The California Franchise Tax Board thereupon brought

199. A special problem arises when the plaintiff's claim implicates no corresponding coercive action for the plaintiff, as when a party seeks a declaration of federal immunity to a state claim, or of the nonexistence of a state claim on federal grounds. As Professor Mishkin points out, *see* Mishkin, *supra* note 12, at 179 & n.103, the authorities are split. Professor Mishkin predicted that, "[p]resumably, even under the more restrictive view, a declaratory action will come within federal jurisdiction if either party might have brought a coercive action (on the same facts) which would 'arise under' national law." *Id.* at 180 n.107. In Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983), the Supreme Court would prove him wrong. *See infra* notes 201-13 and accompanying text.

200. Phillips' complaint in a traditional contract action properly could have pleaded only the existence of the contract to supply natural gas, the defendants' failure to do so, and Phillips' damages occasioned by the breach. The federal certificate issue, if pleaded, would have been surplusage.

Indeed, even if one hypothesizes a coercive action by Skelly Oil and the other natural gas suppliers for Phillips' breach of the contract, the federal issue would not arise in the complaint. Such an action would have to be an action for nonpayment after delivery of the natural gas. The suppliers would have no need to or interest in referring to a cancellation of the contract by reason of the nonissuance of the certificate, and the issue could then only arise if Phillips pleaded it defensively. This would not satisfy the *Mottley* rule.

201. 463 U.S. 1 (1983).

202. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001-1461 (1982 & Supp. 1987)).

203. Under the terms of the trust agreement, the administrators were forbidden to transfer or encumber the interest of any beneficiary of the Trust. *Franchise Tax*, 463 U.S. at 5. Moreover, ERISA itself seemed to forbid honoring the levies. *See* 29 U.S.C. § 1104(a)(1) (1982).

two causes of action in state court, the first for damages for the dishonored levies, and the second for a declaration that ERISA did not preempt state law and preclude the trustees from paying the taxes.

The defendant Trust removed the case to the federal court, which denied the plaintiff's motion to remand and ruled for the plaintiff on the merits. The Ninth Circuit reversed, also on the merits, rejecting the Tax Board's argument that there was no federal subject matter jurisdiction. The Supreme Court reversed, finding no subject matter jurisdiction, and ordered the case remanded to the California courts.

The reasoning of Justice Brennan's opinion for a unanimous Court is tortured. It begins by briefly reviewing the history of federal question jurisdiction. In particular, Justice Brennan praised the *Mottley* rule, stating that it helps to avoid federal-state conflicts, though he did not explain how.[204] He did allow, however, that "[t]he rule . . . may produce awkward results."[205] *Franchise Tax* demonstrates the soundness of that concession.

The Court had no trouble concluding that the *Mottley* rule precluded jurisdiction of the cause of action to collect the tax. To be sure, the issue of ERISA preemption would arise, but only because the defendant would seek to avoid the levies by pleading and proving that ERISA did not permit compliance. Thus, the federal issue, instead of being an element of the plaintiff's cause of action, was the centerpiece of the defense.

The cause of action under the California Declaratory Judgment Act presented a far more difficult problem. The parties had no controversy except over the applicability and effect of ERISA, and the Court quickly conceded that the Tax Board's action for declaratory relief could not be well pleaded without including the preemption issue.[206] Moreover, Justice Brennan recognized that *Skelly Oil* was not directly controlling, since the Board had not brought an action under the Federal Declaratory Judgment Act, but rather under a similar state provision. While the Court had been willing to assert that Congress had not intended the federal statute to have any jurisdictional effect, the same could not be said of the state provision. Nonetheless, the Court held that "fidelity to [*Skelly*'s] spirit" required its rule to be extended to cases brought under state declaratory judgment statutes.[207] Otherwise, the Court foresaw that cases ineligible for federal jurisdiction under *Skelly* would be

204. *Franchise Tax*, 463 U.S. at 10.
205. *Id.* at 12.
206. *Id.* at 14.
207. *Id.* at 17-18.

framed to qualify for it under state declaratory judgment provisions. The Court viewed such manipulation as a form of evasion of the limitations of the federal statute and ruled, therefore, that an action brought pursuant to a state declaratory provision cannot be brought in federal court if it could not have been brought there under the federal standard.[208]

The Court recognized, however, that its *Skelly* problem was not entirely solved; the federal courts had routinely been accepting jurisdiction of federal declaratory judgment actions if the *defendant's* coercive action would have qualified for federal question jurisdiction.[209] ERISA does provide trustees a cause of action for injunctive relief to protect funds subject to ERISA, and that cause of action is exclusively federal.[210] In addition, even if the Trust had paid the tax and then sought its return in a coercive action under California law,[211] the Trust's well-pleaded complaint would have centered around the ERISA preemption question. The Court then asked, logically, if the Trust's ability to bring a federal claim compelled the conclusion that the Franchise Tax Board's declaratory judgment action could be maintained in the federal court.

The answer was no. The Court expressed no principled reason for this conclusion, as if recognizing that prior cases seemed to require the opposite result, but it cited instead the twin considerations of practicality and necessity, culled from *Gully,* and asserted that policy reasons justified the federal courts' refusal to hear cases like *Franchise Tax.* First, the Court observed, the states would not be "significantly prejudiced" by an inability to get such cases into the federal courts.[212] The Court did not discuss whether the party opposing the state might be prejudiced—a curious omission, since it was the Trust, not the Tax Board, that was assert-

208. *Id.* at 18-19. At this point, one must note that the Court has prescribed two levels of purely hypothetical analysis to determine whether a declaratory judgment action may be maintained in the federal courts. First, if the action has been brought under a state provision, one must pretend that it was really brought pursuant to the Federal Declaratory Judgment Act. Second, one must pretend that it was not really brought under any declaratory judgment provision, but was magically transformed into some sort of coercive action. Finally, one must analyze whether the nonexistent coercive action, analogous to the nonexistent federal declaratory action, satisfies the test for federal question jurisdiction. Some might view this as convoluted procedure.

209. *Id.* at 19 (citing E. Edelmann & Co. v. Triple-A Specialty Co., 88 F.2d 852 (7th Cir.), *cert. denied,* 300 U.S. 680 (1937); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 896-97 (2d ed. 1973)).

210. *Franchise Tax,* 463 U.S. at 19-20.

211. Such actions may be maintained pursuant to CALIF. CONST. art. XIII, § 32, and CAL. REV. & TAX. CODE § 19082 (West 1983).

212. *Franchise Tax,* 463 U.S. at 21.

ing the federal interest.[213]

Second, the opinion noted that while suits by ERISA trustees are exclusively federal, Congress did not require that actions against trustees be federal. Thus, said the Court, if the trustee decides not to sue, he cannot later seek the federal forum if an action is filed against him. This reasoning is odd in two ways. First, if Congress showed enough concern about ERISA problems to provide an exclusive federal action, one would expect Congress to support, not to oppose or to be indifferent to, removal of actions involving the same types of problems. Second, the Court's theory sets up a race to the courthouse. Federal jurisdiction will exist if an ERISA trustee can anticipate trouble with state authorities and file a federal action for injunctive relief before the state officials file their state action, but not otherwise. One might have hoped that important questions of federal jurisdiction, not to mention important substantive questions of federal preemption, would depend for the locus of their resolution on something more principled than whether counsel is fleet of foot.[214]

But the absurdities created by *Franchise Tax* do not quite end with the Court's rationale for denying jurisdiction over the declaratory judgment action. Consider a fact pattern parallel to *Franchise Tax.* Instead of the procedure followed in *Franchise Tax,* however, here the trustee learns that the state is planning to sue for a declaratory judgment and to collect the taxes. The trustee does not bring the action for injunctive relief authorized by Congress. Instead, he seeks federal declaratory relief, and the state, seeing that litigation is already commenced to resolve the question, never files its action. The question presented to the federal court is whether ERISA preempts enforcement of the state's tax levy. Analysis of the trustee's action under *Skelly* requires examination of whether the possible underlying coercive suit would be a proper federal

213. Moreover, Justice Brennan clearly was aware of the real interest in federal jurisdiction in this case, for he discussed the struggle the Tax Board had put up to keep the case out of the federal courts. *Id.* at 21 n.22.

214. In Hicks v. Miranda, 422 U.S. 332 (1975), a case involving federal abstention under the doctrine of Younger v. Harris, 401 U.S. 37 (1971), Justice Stewart observed in dissent:

> There is, to be sure, something unseemly about having the applicability of the *Younger* doctrine turn solely on the outcome of a race to the courthouse. The rule the Court adopts today, however, does not eliminate that race; it merely permits the State to leave the mark later, run a shorter course, and arrive first at the finish line.

Hicks, 422 U.S. at 354 (Stewart, J., dissenting). *Hicks* permitted a federal case to be dismissed because of a later-filed state prosecution against the federal plaintiff. Justice Stewart's criticism is relevant here because the *Younger* doctrine also involves the question of when the federal courts will exercise jurisdiction. But, at least it can be said of the footraces created by the rule of *Franchise Tax* that the parties will run the same course, and the first one to file a complaint wins.

action.[215] The underlying coercive action is one for injunctive relief and, wholly apart from Congress having made it exclusively federal, it cannot be pleaded without asserting the preemptive effect of ERISA. Because assertion of the federal issue would be part of the well-pleaded complaint in the coercive action, and because it obviously is outcome-determinative, the federal declaratory judgment action is properly brought. Yet, in *Franchise Tax,* when the state brought a declaratory judgment proceeding to determine the very same question, the Court found that no federal jurisdiction existed. With all due respect to the Court, I suggest that this result cannot be supported on any rational ground, and that a jurisdictional structure saddled with rules that give rise to such a result is a structure sorely in need of change.

One might at first think that these problems are caused by *Skelly Oil,* but in fact that doctrine was only an application of the *Mottley* rule. Were it not for the self-imposed command that the federal question must appear on the face of the well-pleaded complaint, the federal courts could have spared themselves the charade of seeking out a plaintiff's underlying and unstated coercive action in a suit for a declaratory judgment. Without the *Mottley* rule, it would not have mattered whether the dominant federal issue in the case entered by way of complaint, answer, or reply. The absurd result of *Franchise Tax* could then have been avoided, and an important question of federal preemption could have been heard by the federal courts in the first instance without awaiting possible Supreme Court review of a state court decision. The next section will propose how the structure of federal question jurisdiction might be altered to yield more rational results.

III. Toward a More Rational System of Federal Question Jurisdiction

A. The Purposes of Federal Question Jurisdiction

"Form ever follows function."[216] That observation holds true for any construct. One cannot evaluate the worth of part of a legal system without knowing what function it is to serve. It is appropriate, therefore, before proposing modifications to the structure of federal question juris-

215. It does not matter that relief in the hypothetical action was sought under the Federal Declaratory Judgment Act rather than a parallel state provision. Even had the trustee sought to proceed under a state act, the principles articulated in *Franchise Tax* compel analysis of the jurisdictional question under the doctrine of *Skelly Oil. See supra* notes 206-08 and accompanying text.

216. Sullivan, *The Tall Office Building Artistically Considered,* LIPPINCOTT'S MAGAZINE (March 1896), *quoted in* J. BARTLETT, FAMILIAR QUOTATIONS 681 (E. Beck 15th ed. 1980).

diction, to examine the reasons for its existence. Particularly with respect to the *Mottley* rule, I suggest that the current structure arose with little consideration of the reasons for the existence of federal question jurisdiction. Indeed, the Supreme Court virtually never discussed the purposes of federal question jurisdiction in the cases that developed the *Mottley* rule. This failure in part explains the "awkward results"[217] to which the rule sometimes drives the Court.

The first mention of federal question jurisdiction antedates the Constitution. Alexander Hamilton, urging the establishment of a national judiciary, argued that cases concerning the Constitution or arising out of federal law were properly within federal judicial cognizance.[218] Hamilton did not merely paraphrase the proposed constitutional language. He explained why he took that position.

> What, for instance, would avail restrictions on the authority of the state legislatures, without some constitutional mode of enforcing the observance of them? . . . No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct infractions of them. This power must either be a direct negative on the state laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of the union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and I presume will be most agreeable to the States.
>
> As to the second point, it is impossible by any argument or comment to make it clearer than it is in itself. If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.[219]

In those short sentences, Hamilton outlined both of the reasons for federal question jurisdiction that were articulated in the next two hundred years: the fear of state hostility to federal laws and the need for uniformity in their interpretation and application.[220]

---

217. *See supra* text accompanying note 205.

218. THE FEDERALIST NO. 80, at 534 (A. Hamilton) (J. Cooke ed. 1961):

> It seems scarcely to admit of controversy, that the judiciary authority of the Union ought to extend to these several descriptions of causes: 1st, to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2d, to all those which concern the execution of the provisions expressly contained in the articles of union . . . .

219. *Id.* at 535.

220. One must note that the concept of state hostility to federal law was thus not exclu-

In the years since *The Federalist*, there has been virtually no disagreement with Hamilton's initial assessment. Most recently, Justice Brennan, dissenting in *Merrell Dow Pharmaceuticals v. Thompson,*[221] reminded his colleagues that as long ago as *Martin v. Hunter's Lessee*[222] the Court itself had recognized the desirability of uniform decisions on federal law.[223] Moreover, Brennan pointed out, the federal forum "specializes in federal law and . . . is more likely to apply that law correctly."[224] Current federal law honors that concept; the doctrine of

---

sively a product of the Civil War, although that conflict certainly provided an impetus for the establishment of general federal question jurisdiction in the inferior federal courts. *See supra* notes 25-28 and accompanying text. Well before North-South tensions reached the boiling point, the Supreme Court had explicitly recognized the federal-state tensions that continue even today. As Professors Chadbourn and Levin noted, Chief Justice Marshall was well aware of the potential for conflict. " '[T]he judicial power should be competent to give efficacy to the constitutional laws of the legislature.' " Chadbourn & Levin, *supra* note 12, at 648 (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 414 (1821)). Moreover,

> Webster and Clay as counsel in the *Osborn* case, after quoting this passage, continued by stating bluntly that "the constitution itself supposes that [state judicial systems] may not always be worthy of confidence, where the rights and interests of the national government are drawn in question." This distrust, the argument continued, necessitates the federal government's protection of its own institutions by means of a judicial system "co-extensive with the power of legislation," the two inseparably associated "so that where one went, the other might go along with it."

Id. (quoting Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 811, 809 (1824)).

Some have suggested that state hostility is no longer the concern that it once was. "As early as 1815 . . . it was found that, in periods of excited local passion, the State Courts could not be trusted to enforce the Federal laws, or to protect Federal officials or the rights of citizens of other States." Warren, *supra* note 25, at 91. "[T]here is now little danger that the State court will not amply protect persons claiming Federal rights." *Id.* at 92. The Court, in applying the abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971), frequently points out that the states are competent and can be trusted to give federal constitutional rights their full scope. But the Court's assertions have been forcefully disputed. *See, e.g.*, Neuborne, *The Myth of Parity,* 90 HARV. L. REV. 1105 (1977); Zeigler, *An Accommodation of the* Younger *Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process,* 125 U. PA. L. REV. 266 (1976); Zeigler, *A Reassessment of the* Younger *Doctrine in Light of the Legislative History of Reconstruction,* 1983 DUKE L.J. 987. Professor Neuborne, commenting on Supreme Court doctrines that remit cases involving federal constitutional issues to the state courts, saw them as "funneling federal constitutional decisionmaking into state courts precisely because they are less likely to be receptive to vigorous enforcement of federal constitutional doctrine." Neuborne, *supra,* at 1105-06. "The need is to remember that the reason for providing the initial federal forum is the fear that state courts will view the federal right ungenerously." Wechsler, *supra* note 31, at 233-34.

221. 106 S. Ct. 3229 (1986); *see supra* notes 170-92 and accompanying text.

222. 14 U.S. (1 Wheat.) 304 (1816).

223. *Merrell Dow,* 106 S. Ct. at 3242 (Brennan, J., dissenting) (citing D. CURRIE, FEDERAL COURTS 160 (3d ed. 1982); Note, *supra* note 12, at 636); *see also* Mishkin, *supra* note 12, at 158-59.

224. *Merrell Dow,* 106 S. Ct. at 3242 (Brennan, J., dissenting) (citing AMERICAN LAW INSTITUTE, *supra* note 12, at 164-65); *see also* AMERICAN LAW INSTITUTE, *supra* note 12, at 4 ("[F]ederal question jurisdiction is necessary to preserve uniformity in federal law and to

pendent jurisdiction is clearly based on the premise that litigants presenting federal issues are entitled to have them adjudicated in the federal courts.[225]

One of the remaining questions concerns to whom the interest in federal adjudication belongs, and there are three possible answers. First, the interest may be that of the federal government. "It is the right and the duty of the national government to have its Constitution and laws interpreted and applied by its own judicial tribunals."[226] Moreover, the vast growth of federal functions and power has increased the importance of the federal courts, both to enforce national policy and to moderate the relationships of the states to the federal government.[227] The *Merrell Dow* Court gave current recognition to this federal interest in its attempt to distinguish *Smith v. Kansas City Title & Trust Co.*[228] on one hand from *Moore v. Chesapeake & Ohio Railway*[229] and *Merrell Dow* itself on the other. In this attempt, which I have characterized as introducing a new criterion into the test for federal question jurisdiction, the Court emphasized that the federal interest in federal court resolution of the issue is an element strongly to be considered.[230]

Second, the party asserting federal law, either as an ingredient of his claim or as a defense, has an interest in obtaining access to a federal tribunal. One commentator, though recognizing such an interest, has suggested that a party relying on federal law defensively may have less of an interest in a federal forum than a party using federal law to establish a claim,[231] but his view has been vigorously disputed: "This position is indefensible because there is nothing to show that there is more likely to be prejudice if the federal question is raised by the plaintiff than by the

protect litigants relying on federal law from the danger that state courts will not properly apply that law, either through misunderstanding or lack of sympathy.").

225. *See* Thompkins v. Stuttgart School Dist. No. 22, 787 F.2d 439, 442 (8th Cir. 1986); Miller, *Ancillary and Pendent Jurisdiction,* 26 S. TEX. L.J. 1, 4 (1985) ("The courts, by recognizing pendent jurisdiction, are effectuating Congress' decision to provide the plaintiff with a federal forum for litigating a jurisdictionally sufficient claim."). The doctrine has been limited to cases in which the plaintiff is able to comply with the *Mottley* rule. Yet, the underlying principle cannot properly be limited to that situation. It is no less important to adjudicate federal rights in the federal forum merely because it is the defendant who asserts the rights.

226. Mayor of Nashville v. Cooper, 73 U.S. (6 Wall.) 247, 253 (1868).

227. Currie, *Foreword,* 13 LAW & CONTEMP. PROBS. 1, 1 (1948).

228. 255 U.S. 180 (1921); *see supra* notes 142-52 and accompanying text.

229. 291 U.S. 205 (1934); *see supra* notes 153-62 and accompanying text.

230. *Merrell Dow,* 106 S. Ct. at 3236-37; see *supra* notes 180-82 & 191-92 and accompanying text for discussion of this portion of the opinion.

231. Bergman, *supra* note 12, at 37.

defendant."[232] The latter argument seems clearly stronger; state courts' presumed lack of sympathy to federal law would prejudice any party relying upon it, irrespective of his posture in the litigation. Moreover, nothing suggests that issues of enduring importance to the federal system are more likely to be raised as part of a cause of action rather than in a defense or reply. A defendant relying upon federal law to avoid a claim has just as great an interest in vindication of federal law as does a plaintiff relying upon it to establish his cause of action. Finally, I suggest that there is a third interest in a federal forum when federal rights are asserted, whether by a plaintiff or a defendant. That is the interest of the party against whom the federal law is invoked. This interest derives from one of the considerations first mentioned by Hamilton and repeated by others: the development of federal expertise in applying federal law. Although such expertise will often benefit the party relying upon federal law, it also may benefit the party opposing the assertion. If one accepts the proposition that the state courts are not as expert in federal law as the federal courts, one must acknowledge the danger that invocations of federal law may be too generously viewed by those lacking experience with it, particularly if one believes that state hostility to federal rights has waned.[233] Thus, the federal courts' expertise may be as essential to a party wishing to avoid an overbroad sweep of federal law as to one seeking to avoid grudging indulgence of it.

B. Grading the Well-Pleaded Complaint Rule

The well-pleaded complaint rule addresses none of these interests. It does not measure the interest of the parties in federal adjudication, nor does it consider any possible interest of the federal government in having its laws interpreted and applied by its own tribunals. The rule is indifferent to the possibilities of local prejudice against federal law or to the dangers of having important federal issues adjudicated by state courts. In short, it serves no legitimate purpose.

Particularly in cases such as *Franchise Tax Board v. Construction Laborers Vacation Trust,*[234] the rule leads to indefensible results. For federal question jurisdiction to be denied because the wrong party brought the suit demonstrates how arbitrary the *Mottley* rule is. "Obviously, the presence in a particular case of the reasons of policy underly-

232. Fraser, *supra* note 12, at 78; *see also* AMERICAN LAW INSTITUTE, *supra* note 12, at 188-89.

233. *See, e.g.,* Warren, *supra* note 25, at 92 ("[T]here is now little danger that the State Court will not amply protect persons claiming Federal rights.").

234. 463 U.S. 1 (1983); *see supra* notes 201-15 and accompanying text.

ing federal jurisdiction are independent of which party introduces the federal question."[235] The question of federal preemption involved in *Franchise Tax* may or may not have been sufficiently important to warrant treatment in the federal courts, but the resolution of that question should not have turned upon whether those interested in the answer assumed the identity of plaintiffs or defendants. *Franchise Tax* is one of several cases in which the federal question was not merely a key issue, but was the *only* issue. *Mottley* itself is another example; the parties had no dispute other than whether the federal statute was constitutional.[236] In light of the purposes of federal question jurisdiction, a rule that keeps important federal issues from being adjudicated in the federal courts must be suspected of irrationality and arbitrariness. However, three reasons are customarily advanced in support of the *Mottley* rule.

(1) Vesting Jurisdiction

The Supreme Court has stated that, as a matter of pleading propriety, jurisdiction must vest at the outset of the case and cannot be supplied by events occurring after the filing of the complaint.[237] In addition, both Congress and the Court have frequently stated that the federal question in a case must be "really and substantially" disputed by the parties.[238] The juxtaposition of these two concepts creates several problems. If one adheres to the idea that only a federal *issue* between the parties

235. Chadbourn & Levin, *supra* note 12, at 660.

236. *See supra* notes 98-103 and accompanying text.

237. *E.g.*, Arkansas v. Kansas & Tex. Coal Co., 183 U.S. 185, 188 (1901); Tennessee v. Union & Planters' Bank, 152 U.S. 454, 459 (1894); Metcalf v. Watertown, 128 U.S. 586, 589 (1888); Chadbourn & Levin, *supra* note 12, at 648; *see also* Shapiro, *supra* note 28, at 567 ("[O]riginal [as distinguished from appellate] jurisdiction is best determined at the outset of the case . . . ."). Professor Trautman suggests this rule is unnecessary. "The Supreme Court has recognized in several diversity cases that jurisdiction of the subject matter may be ascertained and perfected after the action is commenced." Trautman, *Federal Right Jurisdiction and the Declaratory Remedy*, 7 VAND. L. REV. 445, 461 (1954) (citing Sun Printing & Publishing Ass'n v. Edwards, 194 U.S. 377 (1904); Gordon v. Third Nat'l Bank, 144 U.S. 97 (1892); Conolly v. Taylor, 27 U.S. (2 Pet.) 556 (1829)); *see also* Fetzer v. Cities Serv. Oil Co., 572 F.2d 1250 (8th Cir. 1978), *appeal dismissed on other grounds*, 601 F.2d 356 (8th Cir. 1979); Leroux v. Lomas & Nettleton, 626 F. Supp. 962 (D. Mass. 1986). There is no inherent reason for federal question jurisdiction to be treated differently.

238. Congress expressed that view in § 5 of the 1875 statute. Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 470, 472 (codified as amended at 28 U.S.C. § 1447(c) (1982)). The Court most recently took that position in Merrell Dow Pharmaceuticals v. Thompson, 106 S. Ct. 3229, 3236 n.12 (1986) (citing Shulthis v. McDougal, 225 U.S. 561, 569-70 (1912)); *accord* Gully v. First Nat'l Bank, 299 U.S. 109 (1936); The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913); Defiance Water Co. v. Defiance, 191 U.S. 184 (1903); Colorado Cent. Consol. Mining v. Turck, 150 U.S. 138 (1893); City of Shreveport v. Cole, 129 U.S. 36 (1889); Robinson v. Anderson, 121 U.S. 522 (1887).

justifies the exercise of federal jurisdiction, then one is forced to conclude that the inferior federal courts can never exercise original jurisdiction, since at the time the complaint is filed no showing can be made that any particular matter will in fact be disputed by the defendant. Thus, apart from the plaintiff's predictions of what will separate the parties, no actual federal dispute can appear in the complaint.[239]

> The qualifications with which the Court had by this time [after *Mottley*] surrounded the "federal question" concept . . . had the anomalous effect of making it virtually impossible to justify federal jurisdiction on the basis of a federal question. . . . It is difficult to conceive of a case in which it would be possible to determine, upon the basis of the plaintiff's statement of his cause of action alone, before the issues had been framed by the answer, precisely which questions would be in controversy and determinative of the outcome of the litigation.[240]

Indeed, literal application of the language of section 5 of the 1875 Act[241] would force a conscientious court to conclude immediately after the filing of a complaint that no real and substantial dispute or controversy had been shown actually to exist. Every federal question complaint seeking original jurisdiction would therefore have to be dismissed.[242]

---

239. Justice Johnson took this position in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 884-89 (1824) (Johnson, J., dissenting). Its problems have been noted:

> The immediate effect of Johnson's view would, of course, have been that the Bank of the United States could not sue in the Circuit Court. Its far-reaching effect would have been to preclude the Act of 1875 or any other act vesting original federal-question jurisdiction. Original jurisdiction of the subject matter, according to notions then current, could not be made to depend upon what defense defendant presented by his plea. Such jurisdiction, like life, must exist at the outset or not at all. If it was lacking at the beginning, no amendment, no plea, no consent of the parties could cure the defect.

Chadbourn & Levin, *supra* note 12, at 648. Professor Mishkin has pointed out the inherent conflict between the *Mottley* rule and the requirement of a substantial federal dispute. Either one can be satisfied, but never both. Mishkin, *supra* note 12, at 170. His view is that the criterion of "genuine controversy" is better suited as a standard for the exercise of Supreme Court appellate jurisdiction. *Id.*; *accord* Cohen, *supra* note 12, at 892 n.18.

City of Shreveport v. Cole, 129 U.S. 36 (1889), *see supra* notes 77-80 and accompanying text, is an example of the problem at the appellate level of predicting an "actual dispute." There the defendant defeated federal jurisdiction by refusing to contest the federal issue.

240. London, *supra* note 28, at 846-47.

241. *See supra* text accompanying note 20.

242. In addition, many cases founded on federal law involve no controversy over the meaning or application of federal law at all, but concern themselves purely with disputes of fact under an admittedly applicable federal law. Literal application of the outcome-determinative test to decide whether there is a real and substantial controversy would bar such cases from the federal courts. Only the tacit rejection of this literal view permits federal consideration of patent and bankruptcy cases, most of which turn upon questions of fact rather than disputes of law. *See* McGoon v. Northern Pac. Ry., 204 F. 998, 1004 (D.N.D. 1913) ("A suit brought to enforce a right granted by federal law must have that law as its foundation. The particular suit may turn upon questions of fact. The right, nevertheless, arises out of the

Leaving aside the problems of an actual dispute being revealed by a single pleading, a requirement that jurisdiction appear at the outset of federal court involvement does not lead inexorably to the *Mottley* rule. In original jurisdiction cases, there is no reason why a plaintiff cannot anticipate a federal defense, or a federal reply to an anticipated state-law defense, to show the existence of a substantial federal dispute at the outset of the federal court's involvement. For example, in *Franchise Tax,* the Franchise Tax Board made exactly such a showing in its cause of action for declaratory relief, anticipating that in its coercive action the Construction Laborers Vacation Trust would defend on the ground of federal preemption.[243] In removal cases, the defendant's petition for removal will demonstrate the existence of the federal issue between the parties; there will thus be reasonable certainty that it will be "really and substantially" in dispute.[244] As things now stand, the well-pleaded complaint rule arbitrarily distinguishes between two assumptions. Looking only at the complaint, the rule *assumes,* for jurisdictional purposes, that an actual dispute will ensue over the plaintiff's well-pleaded allegations of federal issues. But the rule forbids an assumption that there will be an actual dispute over the plaintiff's allegations that anticipate the defense. Why should the first untested assumption be permissible but not the second?

(2) Controlling the Volume of Federal Litigation

The second common justification for the *Mottley* rule is that it helps control the caseload of the federal courts.[245] Undoubtedly, the rule reduces the number of cases that the district courts are asked to adjudicate, but there are three reasons that this rationale for the well-pleaded complaint rule should be rejected. First, it neatly avoids the question of whether, for policy reasons, a particular case should be decided in the

law."); Cohen, *supra* note 12, at 892; Forrester, *supra* note 12, at 372-73. *But see* Marshall v. Desert Properties, 103 F.2d 551, 552-53 (9th Cir. 1939) (A case governed by federal law that involves only a dispute over facts "is not one arising under the constitution or a law or treaty of the United States, although the respective interests or titles of the parties may be derived through such constitution, law, or treaty."). Moreover, several commentators have pointed out that cases turning on their facts may be the vehicles for vindicating interests based on federal law. *See, e.g.,* Forrester, *supra* note 12, at 370-73; Mishkin, *supra* note 12, at 174-75.

243. *See supra* notes 201-15 and accompanying text.

244. *See supra* note 20 and accompanying text. This, in fact, was part of the basis for Justice Harlan's dissent in Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894). *See supra* notes 88-91 and accompanying text. Of course, if one is looking for absolute certainty of a vigorous dispute, it may be necessary to wait until the trial commences, since a plaintiff may elect not to pursue a potential federal issue identified by the defendant in the removal petition.

245. *See, e.g.,* Forrester, *supra* note 12, at 379 n.61; London, *supra* note 28, at 839-40.

federal courts. As Judge Parker of the Fourth Circuit argued more than half a century ago,

> [I]f . . . a citizen is entitled to have his disputes adjudicated in a tribunal of the sovereignty to which he owes allegiance, it is unthinkable that that sovereignty should shirk its responsibility and abdicate its proper functions because of a comparatively insignificant matter of expense. Congestion should be relieved, if this is necessary, by creating additional courts . . . .[246]

Second, although the rule may decrease the number of cases in the district courts, it does so at the expense of the state courts. "Limiting access to the federal courts, therefore, does not really solve the problem of overburdened judges. The burden is merely shifted to institutions which are often even less able to cope with the caseload."[247]

Third, although the pressure on the federal trial courts may be decreased, there is a subtle increase in pressure on the Supreme Court, an institution far smaller and less elastic in its work capacity than are the district courts. To the extent that the *Mottley* rule is applied, and thus sends important questions of federal law to the state courts for adjudication because they appear in the wrong pleading, the possibility of state court errors with respect to important matters of federal law increases. The only federal adjudication possible in such cases is at the Supreme Court level, and the Court may therefore feel pressure to take additional cases to correct errors of federal law made by the state courts.[248] To

246. Parker, *The Federal Jurisdiction and Recent Attacks upon It,* 18 A.B.A. J. 433, 438 (1932). The Supreme Court itself has echoed this idea, rebuking a district judge for remanding a diversity case within his jurisdiction on the ground that the district court's workload was quite heavy and the case could come to trial more quickly in the state court system:

> It is indeed unfortunate if the judicial manpower provided by Congress in any district is insufficient to try with reasonable promptness the cases properly filed in or removed to that court in accordance with the applicable statutes. But an otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason.

Thermtron Prods. v. Hermansdorfer, 423 U.S. 336, 344 (1976); *see also* Mishkin, *supra* note 12, at 182 ("The general approach favoring restricted access to the federal courts should not operate to justify the imposition of an unwieldy limitation unrelated to the purposes of federal question jurisdiction."). Workload is thus not a justification for judicial creation of jurisdictional rules.

247. Neuborne, *supra* note 220, at 1129 (footnote omitted). Professor Neuborne points out that federal judges' caseloads are substantially lighter than those of state judges. *Id.* at 1122 & n.67; *see also* Chadbourn & Levin, *supra* note 12, at 673 ("[I]t is a short-sighted, parochial policy to keep the federal dockets clear at the expense of cluttering state dockets.").

248. Professor Mishkin points out that the extent to which this phenomenon operates is unclear. Mishkin, *supra* note 12, at 171 n.67. Few can doubt, however, that it operates to some extent, particularly in cases such as *Mottley*, in which the federal issue was the constitutionality of a federal statute, *see supra* notes 98-103 and accompanying text, and *Franchise*

some extent this diversion of cases from federal courts also entangles the Supreme Court in correcting individual errors of the state courts rather than settling questions of broad national concern and constitutional policy. But, as Justice Harlan pointed out,

> [t]he Supreme Court is not a court of errors and appeals in the same sense as most highest state courts. A federal litigant whose case has been through the district court and then the Court of Appeals is deemed to have had his "day in court," so far as the case involves merely the private interests of the parties. If further review is to be had by the Supreme Court it must be because of the public interest in the questions involved.[249]

(3) The Availability of Supreme Court Review

The third justification of the well-pleaded complaint rule is that the litigant consigned to the state courts can always seek Supreme Court review of the federal issues presented by the case.[250] Thus, the reasoning goes, the limitations on federal jurisdiction inherent in the *Mottley* rule do not cause a permanent deprivation of federal adjudication, only a postponement. This argument, however, simply ignores the reality that an extremely small percentage of the cases seeking Supreme Court review actually receive it.[251] The argument may have had some validity when first articulated in the nineteenth century,[252] but it cannot be accepted

---

Tax, in which an important issue of federal preemption was sent to the California state courts for decision, *see supra* notes 201-13 and accompanying text.

249. J. HARLAN, MANNING THE DIKES: SOME COMMENTS ON THE STATUTORY CERTIORARI JURISDICTION AND JURISDICTIONAL STATEMENT PRACTICE OF THE SUPREME COURT OF THE UNITED STATES 16-17 (1958) (quoting S. REP. NO. 711, 75th Cong., 1st Sess. 39 (1937) (statement of Chief Justice Hughes)). Chief Justice Taft expressed a similar view: "The function of the Supreme Court is . . . not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are [sic] of wide public or governmental interest, and which should be authoritatively declared by the final court." Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2 (1925); *see also* Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795 (1983). To the extent that the Court actually limits its review to matters of national significance, then the litigants' interest in federal adjudication for the reasons explored above, *see supra* notes 231-33 and accompanying text, may decrease in importance when balanced against these principles governing Supreme Court behavior.

250. *See, e.g.*, Tennessee v. Union & Planters' Bank, 152 U.S. 454, 462 (1894); Railroad Co. v. Mississippi, 102 U.S. 135, 144 (1880) (Miller, J., dissenting).

251. *See generally* Currie, *The Federal Courts and the American Law Institute* (pt. 2), 36 U. CHI. L. REV. 268 (1969). For example, in the October 1985 Term, the Court docketed 4410 cases seeking appellate review. Of those, only 186 were granted review. The chances of securing appellate review by the Court were thus approximately 3.76%. 46 S. Ct. Bull. (CCH) No. 60, at A2 (July 25, 1986). Even if one eliminates cases brought in forma pauperis, the chances of full review are only 7.64% (2171 cases docketed, 166 granted review). *Id.*

252. Discretionary review in the Supreme Court was not introduced until the Evarts Act

today as a serious solution to the potential problem of state mishandling of federal issues. "Initial state adjudication . . . tends . . . to give the states the final voice on any federal questions, for review by the Supreme Court, even when the parties can afford to seek it, can never function on a quantitative basis."[253] Moreover, to the extent that the result of a case may be heavily influenced by the trial court's findings of fact, state court decisions in cases involving federal issues are effectively unreviewable by the Supreme Court, even if it accepts the case.[254] Thus, this justification for the *Mottley* rule also fails to withstand close examination.

In short, no principled justification for the rule has yet been offered. But if the rule is to be discarded, a new system for federal subject matter jurisdiction must be put forth in its place.

C. The Proposal

Much of what Justice Cardozo articulated in *Gully v. First National Bank*[255] is sound and should be retained. It is appropriate to require the party seeking federal jurisdiction to demonstrate the existence of a dispute based upon federal law that can, if adjudicated, determine the outcome of the case. In this respect, I propose retaining the portion of the test from *Osborn v. Bank of the United States*[256] to which the Court has regularly adverted for purposes of determining the existence of federal question jurisdiction: the outcome-determinative test.[257] By outcome-

of 1891, Act of Mar. 3, 1891, ch. 517, 26 Stat. 826, and did not become commonplace until after the Judges' Bill of 1925. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (current version at 28 U.S.C. §§ 1254-1257 (1982)). *See* C. WRIGHT, *supra* note 28, §§ 1, 105. Before those statutes, cases reached the Supreme Court as of right, so those litigants who wished it and could afford it were assured review. This situation contrasts sharply with modern practice. *See supra* note 251. *See generally* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 255-98 (1928).

253. Wechsler, *supra* note 31, at 218; *see also* Mishkin, *supra* note 12, at 137. Professor Matasar, discussing the reasons that the *Mottley* rule has not been applied to the constitutional arising-under clause, *see* Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480 (1983); *supra* notes 56-66 and accompanying text, observes: "This construction of arising under jurisdiction would lead to absurd results if the well-pleaded complaint rule were viewed as constitutional. Important federal questions raised as defenses could not be heard in federal courts under any circumstances." Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction,* 71 CALIF. L. REV. 1399, 1437 n.179 (1983). The absurd results that Matasar notes are, nonetheless, occasioned by the practical limits on the possibilities of Supreme Court review.

254. Mishkin, *supra* note 12, at 172-74.

255. 299 U.S. 109, 112-13 (1936); *see supra* text accompanying note 166.

256. 22 U.S. (9 Wheat.) 738, 822 (1824); *see supra* note 48 and accompanying text.

257. *See, e.g.,* Merrell Dow Pharmaceuticals v. Thompson, 106 S. Ct. 3229, 3232-33 (1986); Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921); Metcalf v. Watertown, 128 U.S. 586, 589 (1888).

determinative, I mean an issue whose decision one way will necessarily cause a result in the case, and whose decision the other way will tend to prevent it. For example, in *Merrell Dow,*[258] the federal issue was whether the Food, Drug, and Cosmetic Act applied to drugs sold outside the United States. If that issue were decided in the plaintiffs' favor, it would raise a presumption under state law that the defendant was negligent. The plaintiffs would then need only to show damages to prevail in their negligence cause of action. On the other hand, if the issue were decided against them, they might still prevail by introducing evidence to show that the defendant breached its duty of reasonable care owed them, but their task would be far more difficult.[259] The presence of an outcome-determinative question of federal law will insure that the parties will vigorously litigate the issue, and its importance to the outcome of the case insures that the courts will not be asked to render advisory opinions in violation of the case-or-controversy clause.[260]

The outcome-determinative test is considerably easier to apply than the Court's suggested test from *Merrell Dow,*[261] which prescribes general consideration of whether a federal issue is sufficiently "substantial" to justify federal jurisdiction but provides no standards or guidelines for making that decision. A criterion for federal question jurisdiction that attempts to measure the abstract importance of the issue to the federal system—as opposed to the far more concrete question of its effect on the

258. *See supra* notes 170-92 and accompanying text.

259. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950), *see supra* notes 193-200 and accompanying text, offers another illustration. The issue there was when the FPC certificate issued. If it were found to have issued after defendants' cancellation notice, the contract would have been effectively canceled and Phillips' action would have failed. On the other hand, if the certificate were found to have antedated the attempted cancellation, the contract would have been upheld. The defendants, nonetheless, might have been able to avoid performing the contract on other grounds. Similar examples can be constructed on the facts of most of the cases discussed in this Article. *See, e.g.,* Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). In cases in which the federal question is the only issue, it will be absolutely dispositive. Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908), is an example. *See supra* notes 98-103 and accompanying text.

The outcome-determinative test has been applied in another context: the choice-of-law problems following the decision in Erie R.R. v. Tompkins, 304 U.S. 64 (1938). For example, in Guaranty Trust v. York, 326 U.S. 99 (1945), the question was whether a state or federal statute of limitations would apply. If the state statute applied, the action was barred. If the federal statute applied, the case could go forward. Therefore, the plaintiff would be defeated by the first result, but might ultimately prevail after the second. But note that the plaintiff might also have gone on to lose on the merits; the favorable decision of the statute of limitations issue would not guarantee victory.

260. U.S. CONST. art. III, § 2.

261. *See supra* notes 179 & 188 and accompanying text.

pending litigation—is, as Justice Brennan pointed out, infinitely elastic.[262] I suspect that the Court will be unable to articulate any criteria, much less a bright-line test, for determining when a potentially dispositive federal issue is sufficiently important to merit the invocation of federal question jurisdiction. The outcome-determinative test, on the other hand, is applied through close examination of the structure of a specific case and the federal issue's role in resolving the matter, not through consideration of the unexpressed interests of the federal government and the fifty state governments that may have nothing to do with the case before the court. The outcome-determinative test will yield a concrete answer in each case in which it is applied. The majority's test from *Merrell Dow* cannot. Because of the importance of federal adjudication of questions of federal law, I would rather the federal courts err on the side of overinclusion, particularly when the alternative is a standardless discretion to be exercised, in the first instance at least, by almost 700 district judges.[263] Moreover, the Court's new standard will undoubtedly generate wasteful appeals when cases presenting insufficiently "important" issues are dismissed from the federal courts. Accordingly, federal question jurisdiction should be upheld whenever either party demonstrates the presence of an outcome-determinative issue based upon federal law.

The well-pleaded complaint rule must also be abandoned. In its place, the federal courts should adopt the following structure for the presentation of federal issues. First, plaintiffs ought to be permitted to anticipate federal defenses and to base jurisdiction upon them. Plaintiffs should also be permitted to anticipate defenses that may call for federal replies, as the plaintiffs attempted to do in *Mottley* itself. This structure adheres to the notion that federal jurisdiction should be shown to exist at the outset since the complaints in such cases will plead the existence of a disputed federal issue. Moreover, the structure provides a solution to the potential problem of a plaintiff anticipating a defense that is never raised. A defendant, either by a motion to dismiss for lack of subject matter jurisdiction or in the answer, should be permitted to renounce the use of the defense alleged to present the federal question. The federal action could then be dismissed, to be recommenced in the state court, where the defendant should be estopped from raising the federal defense.[264]

262. Merrell Dow Pharmaceuticals v. Thompson, 106 S. Ct. 3229, 3239 n.1 (1986) (Brennan, J., dissenting).

263. LAW BUSINESS, INC., THE LAWYER'S ALMANAC 1986, at 766-91 (1986).

264. One may anticipate that this procedure would seldom need to be employed. In the ordinary case, the parties know with fair certainty what issues separate them, so there is no reason to expect plaintiffs routinely to predict the structure of the litigation incorrectly. *Mottley, Skelly Oil,* and *Franchise Tax* are examples of cases in which the plaintiffs were entirely

Second, the courts should return to a system of federal defense removal similar to that which existed prior to *Chappell v. Waterworth*,[265] except that plaintiffs should also be allowed to remove cases based on the interposition of federal defenses or of defenses provoking federally based replies. In short, the removal criteria that prevailed prior to the 1887 amendments should be reinstated. Both parties in a case involving a federal dispute have an interest in proper disposition of the federal question by a court with expertise in that area.[266] Thus, had the Mottleys proceeded in the state courts in the first instance, only to be met with the defense that Congress had forbidden giving free passes, this proposal would permit them to remove the case, either on the basis of the federal statutory defense interposed or on the basis that their fifth amendment rights precluded the statute being applied in their case.

Others have suggested parts of this proposal. For example, the American Law Institute urged return to a system of federal defense removal.[267] Professors Chadbourn, Levin, Mishkin, and Trautman have suggested permitting a plaintiff to anticipate federal defenses, and would allow a court to dismiss if no federal question actually appeared after all the pleadings had been filed.[268] Professor Cohen proposed abandoning the rule of *Skelly Oil,* arguing that declaratory judgment cases should be analyzed in the same manner as coercive cases.[269] But, with all respect to my predecessors in the effort to exorcise the undesirable effects of the *Mottley* rule, their analyses have not focused upon the manner in which it developed, and none of the earlier suggestions for modifications of the rule have sufficiently reflected its lack of foundation in logic or in the early history of Congress' grants of federal question jurisdiction.[270] In

correct about the ultimate issues in the case. Moreover, the expense and loss of time involved in proceeding in an improper forum provide a strong incentive for plaintiffs to use caution.

265. 155 U.S. 102 (1894); *see supra* notes 126-31 and accompanying text.

266. *See supra* notes 223-24 and accompanying text.

267. AMERICAN LAW INSTITUTE, *supra* note 12, at 188-91.

268. *See* Chadbourn & Levin, *supra* note 12, at 665; Mishkin, *supra* note 12, at 164; Trautman, *supra* note 237, at 460-62.

269. Cohen, *supra* note 12, at 915-16; *accord* Currie, *supra* note 251, at 269-70.

270. Admittedly, the fact that Congress has continued to reenact the language of the 1875 Act without substantial change suggests its acquiescence in the Court's interpretation. *See* Comment, *Proposed Revision of Federal Question Jurisdiction,* 40 ILL. L. REV. 387, 388 n.6 (1945) ("Where a statute that has been construed by courts of last resort is reenacted in the same or substantially the same terms, the legislature is presumed to have been familiar with its construction and to have adopted it as a part of the law.") (citing Heald v. District of Columbia, 254 U.S. 20 (1920); Bruce v. Tobin, 245 U.S. 18 (1918); United States v. Falk, 204 U.S. 143 (1907)); *see also* McCaughn v. Hershey Chocolate Co., 283 U.S. 488 (1931). *But see* Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities",* 64 B.U.L. REV. 737, 740 (1985) (criticizing such inferences and citing particularly Justice Frankfurter's condemnation of them in Helvering v. Hallock, 309 U.S. 106, 120-

addition, none of the earlier commentators was confronted with the new ramifications of the *Mottley* rule reflected in *Franchise Tax* and *Merrell Dow*. As a result, no one has urged the full range of solutions proposed here. A fundamental jurisdictional rule lacking a sound basis in logic or policy, however, calls for a vigorous corrective effort.

I therefore suggest the following jurisdictional statute in place of those now delineating the scope of federal question jurisdiction:[271]

> a) The district courts shall have jurisdiction of any civil action in which adjudication of an actual dispute concerning the meaning, construction, or application of federal law may determine the outcome of one or more claims or defenses presented. The question of federal law upon which jurisdiction is based may appear in any of the pleadings.
>
> b) A party may plead that another party will take a position, either in a claim or in a defense, requiring adjudication of the meaning, construction, or application of federal law, and such a pleading shall be sufficient to invoke the jurisdiction of the district court.
>
> c) A party opposing the exercise of jurisdiction as described in the preceding subsection may renounce reliance upon the position ascribed to him and move for dismissal of the action, whereupon, unless there is another ground for the exercise of jurisdiction, the court shall dismiss the action. The party at whose instance the action is dismissed may not thereafter, in any litigation concerning the same transaction or occurrence, adopt the position alleged to require the adjudication of federal law.
>
> d) Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by any party to the district court of the United States for the district and division embracing the place where such action is pending.

Several features of this statute should be noted. First, it permits, but does not require, a party to anticipate the litigation strategy of an opposing party.[272] However, the statute provides a strong incentive for a plaintiff to exercise this option, for if he does not, the defendant, rather than interposing the federal defense, may simply move to dismiss for lack of subject matter jurisdiction, forcing the plaintiff either to amend his complaint or to suffer dismissal and recommence the action.[273]

Second, the statute reflects one of the concerns Justice Cardozo

21 (1940)). Unfortunately, Congress' implicit adoption of the *Mottley* rule does nothing to ameliorate the rule's illogic.

271. 28 U.S.C. §§ 1331, 1441(a) (1982).

272. Although the proposed statute permits any party to exercise the pleading options contained in it, I will discuss it from the plaintiff's standpoint for simplicity.

273. The party seeking to invoke federal jurisdiction bears the burden of demonstrating its existence. *See, e.g.*, Georgiades v. Martin-Trigona, 729 F.2d 831 (D.C. Cir. 1984); Lehigh Valley Indus. v. Birenbaum, 527 F.2d 87 (2d Cir. 1975).

noted in *Gully v. First National Bank:*[274] it requires the matter involving federal law to be disputed by the parties if it is to serve as a basis for federal question jurisdiction. Thus, a potential federal issue lurking in the background of the litigation will not be sufficient to project the case into the federal courts, just as Justice Cardozo would not permit the existence of the taxation enabling act, whose effect and legitimacy no one disputed, to be relied upon to create federal jurisdiction in *Gully.* The statute therefore rejects Chief Justice Marshall's position in *Osborn v. Bank of the United States,*[275] construing constitutional arising-under jurisdiction, that the issue justifying federal jurisdiction need not be raised in the case by either of the parties.[276] Marshall's standard is too broad because it would open the federal courts to a vast number of cases presenting no federal issue to adjudicate. Apart from the undesirability of the courts adjudicating issues that the parties have not vigorously presented,[277] the policies underlying federal question jurisdiction would not be well served by inundating the courts with cases in which no federal issue requires adjudication. The statute will, however, help to ensure early presentation of federal issues, so that judicial and litigant resources will not be expended on a case that later must be dismissed for lack of subject matter jurisdiction.[278]

This proposal offers several advantages. First, it will help to ensure that federal issues are adjudicated in the federal courts, irrespective of where in the structure of the case the issue is technically located. This furthers the policies underlying the creation of federal question jurisdiction, policies that are ill served by a rule that arbitrarily consigns important federal issues to the state courts because they happen to appear in the "wrong" pleading.[279] Second, the proposal eliminates entirely the

274. 299 U.S. 109 (1936); *see supra* notes 163-69 and accompanying text.

275. 22 U.S. (9 Wheat.) 738, 824 (1824); *see supra* notes 43-55 and accompanying text.

276. *See supra* text accompanying note 51.

277. *Cf.* Baker v. Carr, 369 U.S. 186, 204 (1962) (For a party to have standing, the court must be satisfied that he has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.").

278. *Cf.* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) (action dismissed on remand from the Supreme Court because it had been discovered, on the third day of trial in the district court, that there was no diversity between the parties).

279. This concern for the purposes underlying federal question jurisdiction leads me respectfully to take issue with those who urge that the bright-line test announced by Justice Holmes in American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action."); *see supra* notes 136-41 and accompanying text, is the best workable alternative to the present chaos. *See, e.g.*, Hirshman, *supra* note 12, at 63. The *American Well Works* test produces results that are intolerable in light of the purposes of federal question jurisdiction. It simply cannot be demonstrated that important

quandary presented by declaratory judgment cases. It is irrelevant, under this proposal, whether a potentially dispositive federal issue arises in the complaint, the answer, or the reply. Therefore, it is unnecessary to play the game prescribed by *Skelly Oil* to try to determine what the plaintiff's hypothetical coercive cause of action would look like.[280] Finally, because the proposed test is considerably simpler to use than the current test, it will save judicial time and avoid litigant uncertainty, thus promoting greater efficiency.[281]

Conclusion

Despite its great age and the federal courts' now-uniform acceptance of it, the well-pleaded complaint rule should be abandoned. The Supreme Court developed the rule in the late nineteenth century without statutory foundation, relying entirely on highly technical concepts of nice pleading that are inappropriate bases upon which to determine jurisdictional questions. The function of modern federal pleading is to provide the parties and the court with notice of the essential characteristics of the dispute, not to narrow the case to a single dispositive issue, as was its function at common law.[282] The well-pleaded complaint rule focuses entirely upon which pleading properly contains a federal issue alleged to be dispositive of the controversy. As a result of this tunnel vision, many cases containing important federal issues must now be adjudicated in the state courts, despite the wishes of one or both parties to have a federal tribunal rule on the federal issues. Congress has never given an affirmative indication that it favors restriction of federal jurisdiction on such an arbitrary basis; the rule relies for its continuing vitality only upon Congress' failure to repudiate it.

The well-pleaded complaint rule causes confusion for litigants and wastes the time of federal courts. Complaints must be carefully parsed and hypothetically redrafted so that the rule's precise inquiry into pleading propriety can be answered. Such minute scrutiny of complaints distracts federal courts from their primary focus: adjudicating substantive

federal issues arise only as parts of federally created causes of action. *Mottley* and *Franchise Tax* demonstrate the flaws of such a limitation, and show why the Holmes test is dysfunctional.

280. *See supra* notes 198-200 and accompanying text.

281. There will, of course, be an increase in the caseload in the district courts, which are already overburdened, but this will be countered by the corresponding decrease in the load carried by the state courts. Moreover, as previously discussed, *see supra* note 246 and accompanying text, cases presenting justiciable issues ought not to be turned away from the courts for reasons of economy.

282. C. WRIGHT, *supra* note 28, at 438-39.

questions of federal law. The inefficiency caused by the rule is particularly evident when a plaintiff seeks declaratory relief, for in such cases the rule compels the court to analyze a complaint that the plaintiff has never written and to base the jurisdictional decision on the presumed characteristics of the hypothesized complaint. Such excursions into unreality hardly dignify the judicial process.

The well-pleaded complaint rule also fails to honor the purposes for which federal jurisdiction was created. Since the drafting of the Constitution, judges and scholars have recognized the desirability of federal adjudication of questions of federal law, both to avoid state hostility to federal law and to ensure reasonable uniformity in its interpretation and application. The well-pleaded complaint rule in no respect serves either of these goals. Instead, the rule has been justified by the twin desires to limit the caseload borne by federal courts and to ensure that particular cases in fact turn upon federal issues. But the latter goal assumes, notwithstanding many cases to the contrary, that issues necessarily raised in a complaint are more likely to be contested and dispositive than those contained in an answer. The former justification is merely an example of robbing Peter to pay Paul. Cases turned away from federal court must now be heard by even more overburdened state systems, thus insuring that cases involving substantial federal issues will be heard only after greater delays, by judges whose dockets are more crowded than their federal counterparts and who may well lack the expertise in federal law that would render their decisions less subject to appellate attack. Moreover, when state courts do err on federal issues, they increase the pressure on the Supreme Court to hear cases that would otherwise have been disposed of at lower levels in the federal system.

The present system of determining federal question jurisdiction is based on rules unrelated to the reasons for establishing the system in the first place. The disparity between this system and its purposes is irrational. It cannot regularly produce the results it was intended to produce. If we accept the purposes of federal question jurisdiction, then we are compelled to conclude that a rule which arbitrarily turns away cases that unquestionably present issues of the type intended to be adjudicated in the federal courts has no principled justification. There is no reason to keep it. Litigants depending upon federal law or defending against its assertion ought to have their day in federal court.