The Federal Preemption Question - A Federal Question - An Analysis of Federal Jurisdiction over Supremacy Clause Issues

A. Mark Segreti Jr.

Follow this and additional works at: http://engagedscholarship.csuohio.edu/clevstlrev

Part of the Civil Procedure Commons, and the Jurisdiction Commons

How does access to this work benefit you? Let us know!

Recommended Citation
THE FEDERAL PREEMPTION QUESTION—A FEDERAL QUESTION? AN ANALYSIS OF FEDERAL JURISDICTION OVER SUPREMACY CLAUSE ISSUES

A. Mark Segreti, Jr.*

I. INTRODUCTION ................................................................. 653

II. DETERMINATION OF FEDERAL QUESTION JURISDICTION FROM THE PLAINTIFF'S "WELL-PLEADED COMPLAINT" ........................................... 659

III. FEDERAL PREEMPTION AND THE "AGGRESSOR AS MASTER" RATIONALE ......................................................... 665

A. Introduction ........................................................................ 665

B. Misdirection of Gully, Skelly Oil and Wycoff .......................... 666

C. Federal Declaratory Judgments: Recent Application of Jurisdictional Doctrine ......................................................... 675

IV. FEDERAL PREEMPTION AND REMOVAL JURISDICTION .... 683

A. Introduction ................................................................. 683

B. Removal of State Actions for Coercive Relief ................. 684

1. Federal Preemption: The Claim or Defense Dilemma ................. 685

2. Determining the Extent of Federal Preemption .................... 689

C. Removal of State Actions for Declaratory Relief ............ 696

V. CONCLUSION ................................................................. 705

I. INTRODUCTION

There is much recent concern about the volume of litigation in the federal courts.1 Chief Justice Burger sees the issue as an educational one and has suggested that law schools emphasize the resolution of dis-


1 In fiscal year 1982, 183,098 civil actions were initiated in the United States District Courts. DIRECTOR OF ADMIN. OFFICE OF THE UNITED STATES COURTS, 1982 ANNUAL REPORT 96 (1983). Civil actions not involving the United States as a party, and based on "federal question" jurisdiction, totaled 79,197. Id. at 98. However, prisoner petitions totaled over 29,000, social security claims almost 13,000 and bankruptcy actions over 2,300. Id. at 99. Thus, approximately 35,000 were civil actions between private parties based on federal law.

Comparatively, 1,639,518 civil actions were filed in the state courts of California alone. Flango and Eisner, The Latest State Court Caseload Data, 7 STATE CT. J. 16, 18 (1983). Despite federal court publicity, the bulk of civil litigation is done in the state courts. Behind California followed New York at 793,896, Texas at 679,107, Illinois at 647,096, and Ohio at 619,043. Id.
putes without litigation, rather than promoting litigation by stressing advocacy skills and the adversary nature of the legal process.  

In the face of this rhetoric, the Supreme Court has continued to base the question of access to the federal courts on rationale akin to "trial by combat." Rather than recognizing the courts as just one of many dispute-resolving mechanisms available in our society, the Court has determined the jurisdictional question by favoring the party it views as the aggressor. The assumption of such an approach is that the courts are a forum for battle initiated by the aggrieved or injured party. In other words, the offended pugilist has the right to choose the forum of battle to vindicate its honor.

Undoubtedly, an injured party is an initiator of court action. However, a dispute is often a continuum of actions and reactions.  

The disputant who resorts to litigation may be no more or less an aggressor than the other disputant. Often there is no clear wrongdoer, and both disputants are taking positions based on legal authority.

One area where this jurisdictional doctrine has surfaced is where one disputant asserts that the laws adopted by the Congress of the United States preempt laws adopted by the states. The assertion produces a corollary jurisdictional question of substantial import: whether the issue of the supremacy of federal law over state law is to be decided primarily by state courts or federal courts. The issue involves the relationship of federal jurisdiction doctrines derived from article III of the United States Constitution and the doctrine of the supremacy of federal law contained in article VI of the United States Constitution.

Due to the growth of our federal government, federal legislation now deals with many issues previously within the domain of state and local governments. Both Congress and the state legislatures enact laws governing the same conduct, resulting in conflicting regulatory standards.

---

4 The judicial power of the federal courts over federal cases is based on U.S. Const. art. III, § 2: "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 . . . ." The doctrine of federal preemption is based on U.S. Const. art. VI which provides that the laws of the United States "shall be the supreme Law of the Land." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Pursuant to this authority Congress may enact federal laws that preempt state laws in a regulatory area. In other words, Congress may provide expressly that its law shall govern a given dispute in lieu of state law. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The courts have found this congressional intent where Congress has enacted comprehensive statutory schemes that do not leave room for state regulation of the particular conduct. Pennsylvania R.R. Co. v. Public Serv. Comm'n, 250 U.S. 566, 569 (1919). They have also found preemption where the state law conflicts with federal law. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).
Often a state agency is pursuing an entity also regulated by federal law. The disputants disagree on whether the regulated activity is governed by federal or state law. They also may not agree on whether their dispute over the regulated conduct should be heard in federal or state court. The validity of the choice of a federal forum is based on the premise that the dispute "arises under" the federal law and not the state law.6

Logically, a dispute involving conduct regulated by a federal statute that preempts state law would be a case "arising under" federal law authorizing federal court jurisdiction. Commentators have assumed this to be the case.6 However, the federal courts have determined this issue on

* Federal courts, like all courts, are courts of limited jurisdiction in the generic sense of the term. In the technical sense, federal courts are limited to specific types of cases while most state trial courts are not limited by the subject matter except in certain specific areas where state legislatures have created special courts, e.g., to hear juvenile matters, probate matters, or domestic disputes. F. JAMES, JR. & G. HAZARD, CIVIL PROCEDURE 35 (2d ed. 1977)[hereinafter cited as JAMES & HAZARD].

In 28 U.S.C. § 1331 (1982), Congress provided the federal district court with original jurisdiction over civil cases "arising under" the Constitution, or other federal laws. This original jurisdiction is considered to be less than the full article III judicial power. Verlinden B.V. v. Central Bank, 461 U.S. 480 (1983).

There is confusion in many discussions of federal court jurisdiction between the court's authority to grant particular forms of relief and the court's authority to entertain the case.

In Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950), Justice Frankfurter defined jurisdiction in the sense of the power of the federal courts to entertain litigation as "the kinds of issues which give right of entrance to federal courts." Id. at 671 This definition distinguishes the question of jurisdiction over the subject matter of the case from notions of jurisdiction related to the type of relief requested. For example, prior to the merger of law and equity into one civil action, the jurisdiction of each was often based on the type of remedies available. Thus, equity had "jurisdiction" if the legal remedy was inadequate. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.7 (1973)[hereinafter cited as DOBBS]. In fact, section 16 of the Judiciary Act of 1789 provided "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." 1 Stat. 73 (1789). However, U.S. CONST. art. III § 2 extends judicial power to "all cases, in Law and Equity," basing federal court jurisdiction on the subject matter and the parties involved, rather than the relief requested. Federal courts were given judicial authority over common law cases and cases traditionally handled in equity to "put right an injustice." R. MEGARRY AND P. BAKER, SNEILL'S PRINCIPLES OF EQUITY 6 (26 ed. 1966).


* See 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3722,
the basis of which party raises the issue in the pleadings and whether the issue is an essential part of the right of action asserted. Essentially, if the plaintiff's complaint asserts a claim based on federal law then there is federal court jurisdiction. If the defendant raises federal law defensively, the case does not "arise under" federal law. Despite the preemptive na-

at 567-69 (1976)[hereinafter cited as WRIGHT, MILLER & COOPER]; M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 63 (1980). Professor Redish points out that the issue of whether Congress has preempted state law is "a federal question, capable of determination by a federal court . . ...." Id. However, it is unclear whether he was referring to original federal jurisdiction in the district courts as opposed to federal jurisdiction generally.

Federal preemption is the ultimate principle of our federalism. It establishes the supremacy of federal substantive law. Federal jurisdiction is limited as an accommodation to the sovereignty of the state courts. The question is whether the protection of limited federal court jurisdiction permits state courts to be the primary decision makers in deciding whether a federal substantive law supersedes a state substantive law.

It is contradictory to interpret federal jurisdiction so that state courts have the primary opportunity to decide Supremacy Clause issues. Such a restrictive approach carries the concept of limited federal jurisdiction to an inappropriate extreme. In seeking to protect state court sovereignty from the intrusion of federal court authority, this approach makes state courts the primary decision makers of the ultimate federalism issue as to the governing substantive law. The procedural issue of jurisdiction is permitted to control the substantive constitutional issue of which sovereign's rules of decision govern.

For example, the courts often characterize federal preemption as a defense and, therefore, not an adequate basis for federal question jurisdiction. See Lawrence County v. South Dakota, 668 F.2d 27, 31 (8th Cir. 1982); First Nat'l Bank v. Aberdeen Nat'l Bank, 627 F.2d 843, 850-53 (8th Cir. 1980)(en banc).

Justice Rehnquist, dissenting in Hagens v. Levine, 415 U.S. 528, 553 (1973), expressed the view that federal preemption of state law under the Supremacy Clause may be the basis of a federal claim sufficient for federal question jurisdiction. Thus, federal preemption of state law also may be an essential element of the claim.

United States Supreme Court decisions have divided federal question jurisdiction under 28 U.S.C. § 1331 (1982) into two distinct areas, both governed by the plaintiff's cause of action. In the first area there is no discretion. If the cause of action is created by federal law, the federal district court has jurisdiction. American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916). If the cause of action is created by state law, there may be federal district court jurisdiction if granting relief is dependent upon the construction of a substantial question of federal law. Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921).

In the latter area, the federal courts have used the "well-pleaded complaint" rule as a discretionary vehicle to limit the number of such cases that may be heard in the federal district courts. It provides latitude for choosing which federal questions are sufficient and which are not.

The development and use of this doctrine has been fostered by the Supreme Court. Prior to 1983, three Supreme Court decisions have been the primary authority for use of this doctrine: Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950); Gully v. First Nat'l Bank, 299 U.S. 109 (1936); and Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1909). At the end of its 1963 spring term, the Supreme Court added Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) to the federal question jurisprudence. Unfortunately, the Court's latest attempt to define "arising under" only perpetuated, if not exacerbated, the unnecessarily perplexing doctrines advanced in its previous decisions.

http://engagedscholarship.csuohio.edu/clevstlrev/vol33/iss4/5
ture of federal law in the dispute, federal court authority to hear the dispute depends on the mechanics of pleading practice.

Careful analysis demonstrates that basing jurisdiction on rules of pleading is superficial and confusing. The constitutional basis of the doctrine of federal preemption, as well as its exceptional stature in other jurisdictional contexts, emphasizes that federal question jurisdiction should be cognizable where federal law controls the dispute. The existing pleading analysis ignores the basis of federal court jurisdiction in the very area where federal policy has been declared to be preeminent.

Furthermore, the "proper-pleading" approach for determining jurisdiction has not worked well. The precise meaning of the simple phrase "arising under" is uncertain. The federal courts have been unable to develop a reasonably clear test for determining what cases arise under federal law and what cases do not. As one commentator has observed: "One of the most perplexing exercises in American law practice is the effort to define with certainty the original jurisdiction of the lower federal courts in matters where there is no diversity of citizenship."8

Of course, the Supreme Court is responsible for the problem; its decisions have established an unacceptable framework for the lower courts to apply in determining their jurisdiction.

A central theme of this Article is that subject matter jurisdiction is a procedural doctrine and should function as such. Nothing is more important for procedure than simplicity and predictability. A doctrine governing access to the federal courts should be understandable, usable, and predictable. It should not be the subject of numerous judicial opinions.9

---

The Franchise Tax Bd. decision is particularly significant to this discussion because it is the only Supreme Court decision in this century addressing "arising under" jurisdiction with regard to an assertion that federal law preempts state law. A critical analysis of the Franchise Tax Bd. opinion will follow a brief description of the development of the existing jurisdictional doctrine.

8 London, supra note 5, at 835. Some lower federal courts have made a similar observation. See, e.g., First Fed. Sav. and Loan Ass'n v. Anderson, 681 F.2d 528, 532 (9th Cir. 1982). Other judges have not been sympathetic about this problem. In Lawrence County v. South Dakota, 668 F.2d 27, 28 (8th Cir. 1982), Judge Bright stated: "The precedential value of this case lies in its message to the practicing bar. Parties and their counsel should not bring cases to the federal courts without first making sure of the existence of federal jurisdiction."

9 In 1982, there were ten circuit courts of appeals decisions involving federal question jurisdiction based on an assertion of federal preemption: Alton Box Bd. Co. v. Esprit De Corps, 682 F.2d 1267 (9th Cir. 1982); First Fed. Sav. & Loan Ass'n v. Detroit Bond & Mortgage Inv. Co., 687 F.2d 143 (6th Cir. 1982); Stone & Webster Eng'g Corp. v. Ilsley, 690 F.2d 323 (2d Cir. 1982) aff'd sub nom. Arcudi v. Stone & Webster Eng'g Corp., 463 U.S. 1220 (1983); Illinois v. Kerr-McGee Chem. Corp., 677 F.2d 571 (7th Cir. 1982); Lawrence County v. South Dakota, 668 F.2d 27 (8th Cir. 1982); Michigan Sav. & Loan League v. Francis, 683 F.2d 967 (6th Cir. 1983); Lafferty v. Solar Turbines Int'l, 666 F.2d 408 (9th Cir. 1982); First Fed. Sav. & Loan Ass'n v. Anderson, 681 F.2d 528 (8th Cir. 1982); City Nat'l Bank v. Edmisten, 681 F.2d 942 (4th Cir. 1982); and Franchise Tax Bd. v. Construction Laborers Vacation Trust, 679 F.2d 1307 (9th Cir. 1982), rev'd, 463 U.S. 1. In Franchise Tax Bd., the jurisdic-
Although procedural, subject matter jurisdiction is highly significant. The lack of subject matter jurisdiction may be raised at any time, even initially in the Supreme Court.\(^\text{10}\) The institutional concern that a court only decide matters within its jurisdiction may overshadow the significance of the dispute and the substantive issues involved. Thus, this procedural issue remains an unknown variable lurking in the crowd of substantive issues. It may be invoked to nullify judicial efforts to resolve a dispute after the expenditure of extensive resources by the parties and the courts.\(^\text{11}\)

The existing judicial analysis of federal question jurisdiction has not met the test of simplicity and predictability required of procedural law. It has consumed an undue amount of judicial resources.\(^\text{12}\) The uncertainty surrounding subject matter jurisdiction is not justifiable, especially when crowded court dockets threaten the administration of justice. An unworkable test should not continue merely because a few previous Supreme Court decisions have parroted it as dogma. Such a test is particularly troublesome and illogical when it results in a case governed by preemptive federal law being deemed as not "arising under" federal law. Rather, a more logical and usable test should be adopted.

Furthermore, the Court's jurisdictional doctrine favors the aggressive disputant. The "aggressor as master" rationale enables the more hostile disputant's description of the dispute to control the forum of its resolution.

This approach is contrary to current notions that litigation is merely a step in the process of resolving disputes rather than a forum for battle to vindicate the "injured" party's interests. The jurisdiction of the federal courts to hear a legal issue should not depend on a combative classification of the disputants.

This Article focuses on the issue of simplicity and predictability in analyzing federal question jurisdiction and recommends making federal court jurisdiction, in the area of federal preemption, consistent with logic. Federal question jurisdiction should be based on the source of the controlling substantive law. This approach is more logical, and therefore easier to understand. It is also more certain and therefore more predictable since it bases jurisdiction on the more realistic standard of governing law, rather than on speculation as to which party is the aggressor.

This Article is not a recommendation to expand federal court jurisdiction.

---

\(^{10}\) Federal Rules of Civil Procedure, Rule 12(h). See infra note 19. This principle is exemplified by the Mottley case, 211 U.S. 149 (1908), in which lack of jurisdiction was raised initially by the Supreme Court, and the Franchise Tax Bd. case, 463 U.S. 1 (1983), in which an action for $380.56 in taxes was found to be outside the district court's jurisdiction by the Supreme Court after the merits had been heard by the district court and the court of appeals.

\(^{11}\) See infra note 19.

\(^{12}\) See supra note 9.
tion; it is a recommendation that federal question jurisdiction, at least in the area of federal preemption, function as a procedural doctrine. It is hoped that the result would be a reduction in "procedural" litigation.

Although the Supreme Court has recently addressed this issue in Franchise Tax Board v. Construction Laborers Vacation Trust, it has not resolved the difficulties involved in its pleading analysis. The Franchise Tax Board decision looked at the jurisdictional issue in the context of a state declaratory judgment action that had been removed to federal court. A critical analysis of the decision will be made after exploring the development of the existing doctrine.

II. DETERMINATION OF FEDERAL QUESTION JURISDICTION FROM THE PLAINTIFF'S "WELL-PLEADED COMPLAINT"

It is the so-called "well-pleaded complaint" rule that prevents a finding of jurisdiction based on federal preemption of state law. In fact, the claim that federal law preempts state law was at issue in a Supreme Court decision viewed as originating the well-pleaded complaint rule. In Gold-Washing and Water Co. v. Keyes, the owners of agricultural lands adjacent to the Bear River in California brought a private nuisance action to enjoin the mining company from depositing its tailings and debris into a channel of the river. The company demurred to the complaint and petitioned for removal to federal court. The lower federal court remanded the case to state court for lack of federal court jurisdiction. The Supreme Court affirmed the remand because the assertions of federal preemption were improperly pleaded as conclusions of law, not as specific facts. Accordingly, the federal courts would decide the jurisdictional issue only on the basis of properly pleaded allegations.

In Louisville & Nashville Railroad v. Mottley, the United States Supreme Court applied the "proper pleading" rule to an original action in federal district court. In fact, the Court further restricted the inquiry. Federal jurisdiction must be presented by properly pleaded allegations

---

13 463 U.S. 1, (1983).
15 96 U.S. 199 (1877). Interestingly, the Gold-Washing case did not limit its inquiry to the plaintiff's initial pleading. Of course, the Court construed the removal statute prior to the congressional amendment equating removal jurisdiction expressly with original federal jurisdiction. Nevertheless, the Court looked for jurisdictional facts in the record, not merely in the plaintiff's complaint. See Trautman, Federal Right Jurisdiction and the Declaratory Remedy, 7 Vand. L. Rev. 445, 452 (1954).
16 211 U.S. 149 (1908).
and those allegations must be in the plaintiff's complaint. The Court stated that federal jurisdiction exists in an action arising 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." Improperly anticipating a defense and asserting that the defense is unconstitutional would not be sufficient. The allegations essential to plaintiff's claim were the sole source for determining federal court jurisdiction.

Three separate rationales support restricting the inquiry to the plaintiff's initial pleading. First, the restriction is a corollary of the notion that federal courts are courts of limited jurisdiction. Thus, it is incumbent on the plaintiff to demonstrate federal jurisdiction. Second, the restriction addresses the concern that jurisdiction be determined at the earliest pos-

---

17 Id. at 152.
18 Id. The common law pleading rule was that each party was to make out his own case or defense. Anticipating the other party's defense was, "according to Hale, C.J. . . . 'like leaping before one comes to the stile.'" B. SHIPMAN, HANDBOOK OF COMMON LAW PLEADING 428-29 (2d ed. 1895). On demurrer, such anticipatory allegations would be disregarded.

There is no presumption that federal courts have subject matter jurisdiction to hear a specific type of case. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1206, at 76 (1969)[hereinafter cited as WRIGHT & MILLER]. Therefore, it is incumbent on the one presenting the case to the federal forum to establish jurisdiction. As stated in Ramirez & Feraud Chili Co. v. Las Palmas Food Co., 146 F. Supp. 594, 597 (S.D. Cal. 1956), aff'd 245 F.2d 874 (9th Cir. 1957), cert. denied, 355 U.S. 927 (1959): "Jurisdiction is the threshold issue in every case in the federal courts . . . so the first question is whether the facts exist 'upon which the court's jurisdiction depends.'"

The requirement that the plaintiff affirmatively plead jurisdiction was found in former Equity Rule 25 which required that the initial bill contain "a short and plain statement of the grounds upon which the court's jurisdiction depends." The Equity Rules of 1912 became effective in 1913. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WESCHLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 665 (2d ed. 1973)[hereinafter cited as HART AND WECHSLER]. The same requirement is now contained in FED. R. CIV. P. 8.

However, Fed. R. Civ. P. 12(h) makes the question of the lack of subject matter jurisdiction a non-waivable defense. The language used may be traced to section 80 of the Judiciary Act of 1875. Dobbs, Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment, 51 MINN. L. REV. 491, 511 (1967). The concern that the court may exercise judicial power in other than a few prescribed circumstances has greater historical importance than the concern of the parties that the dispute be resolved. See Mansfield, Coldwater & L.M. Ry. v. Swan, 111 U.S. 379 (1884). The doctrine that jurisdiction of the subject matter may be challenged at any time, see Capron v. Van Noorden, 6 U.S. (2 Cr.) 128 (1804), forms the basis of Rule 12(h).

The inequity to the parties due to belated "discovery" that the lower federal court lacked jurisdiction is demonstrated by Mottley, 211 U.S. 149 (1908), where the issue was initially raised in the Supreme Court. The American Law Institute has recommended a procedure for foreclosing the jurisdictional issue after the commencement of trial. A.L.I. STUDY, supra note 14, at 366-69. There is case law prior to the Federal Equity Rules which supports this view. In Smith v. Kernochten, 48 U.S. (7 How.) 198 (1849), the Supreme Court held that subject matter jurisdiction had to be raised by a plea in abatement: "The objection came too late, after the general issue." Id. at 216. Such an approach has not been followed in the twentieth century.
sible time in the litigation. Third, the restriction reflects the belief that a plaintiff should be able to choose the controlling law and the forum. The aggressive action of filing suit entitles one to be the master of the applicable law. This “aggressor as master” rationale is the most signifi-

---

20 Resolving whether the case is in the right court immediately upon filing is more efficient than doing so after the parties have used the court to inquire into the controversy. Limiting the inquiry to the properly pleaded allegations in the first pleading was intended to make the determination easier and more certain.

It is paradoxical that the Supreme Court shifted the inquiry in federal declaratory judgment actions, not merely away from the proper allegations in the plaintiff's complaint, but to speculations about potential claims not yet filed. See infra note 22. This shift indicates that the “aggressor as master” rationale overshadows other reasons for the well-pleaded complaint rule. See infra notes 21 and 22.

Also, the doctrine that the lack of subject matter jurisdiction may be decided at any time emphasizes that timeliness is not the essence of the determination. See supra note 19. Jurisdictional correctness is an institutional value of more significance than the individual dispute. Fundamentally, therefore, basing the jurisdictional determination on the initial paper filed in the action merely because it is the earliest time the determination could be made is faulty reasoning. The complaint should be a guidepost in assessing the nature of the action. It is not the beginning or the end of the issue. However, the Supreme Court has been preoccupied with determining jurisdiction “at the earliest possible time.” Union of America v. Lincoln Mills, 353 U.S. 448, 481 (1957) (“jurisdiction must be judged at the outset”). Of course, Metcalf, 128 U.S. 586 (1888), see supra note 14, and Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894), used similar language regarding determination of jurisdiction “at the outset.”

21 The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913); Pan Am. Petroleum Corp. v. Superior Court, 366 U.S. 656, 662-63 (1961). The plaintiff, as master of the claim, has the right to determine whether the case may be removed. In Great N. Ry. v. Alexander, 246 U.S. 276, 283 (1918), the Supreme Court stated that “[t]he plaintiff may by the allegations of his complaint determine the status with respect to removability of a case . . . when it is commenced . . .”

On the other hand, the court is not bound by the plaintiff's description of the claim. The court may examine the complaint to assure itself that the plaintiff is not pleading to circumvent the defendant's right to a federal forum. See 14 Wright, Miller & Cooper, supra note 6, § 3722, at 564; see also City of Galveston v. Int'l Org. of Master, Mates & Pilots, 338 F. Supp. 907, 909 (S.D. Tex. 1972). In an attempt to avoid removal jurisdiction, a claim may be misrepresented as a state claim by artful pleading.

Federal preemption is a factor in many of these “artful pleading” cases. See, e.g., Hearst Corp. v. Shopping Center Network, 307 F. Supp. 551, 555 (S.D.N.Y. 1969). In fact, federal preemption has been used to trigger court inquiry to determine if artful pleading is involved in the jurisdictional issue. Eversolve v. Metropolitan Life Ins. Co., 500 F. Supp. 1162, 1170 (C.D. Cal. 1980).

22 The “aggressor-defender” distinction was emphasized by Justice Jackson in Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 248-49 (1952), see infra note 40 and accompanying text, addressing the jurisdictional issue in a declaratory judgment action. Since declaratory relief is not coercive and does not seek immediate enforcement, the declaratory plaintiff is somehow less a master of the action. In effect, the declaratory plaintiff is acting defensively to avoid the necessity for more aggressive coercive relief. Traditionally, the plaintiff's right to control the claim was based on the request for coercive relief. Therefore, the declaratory plaintiff, unlike the traditional plaintiff, does not have a right to control the claim.
cant underlying basis for rejecting federal question jurisdiction over federal preemption issues.

*Smith v. Kansas City Title & Trust Co.*\(^{23}\) represents an early aberration from the well-pleaded complaint rule. The plaintiff, an objecting shareholder, alleged that the trust company invested funds under an unconstitutional federal law. Rather than assessing the correctness of the pleading, the Supreme Court looked to the plaintiff's claim to determine whether "the right to relief depends upon the construction or application of the Constitution or laws of the United States . . . ."\(^{24}\) It found federal jurisdiction, stating: "It is . . . apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question."\(^{25}\)

Justice Holmes, dissenting, argued for a denial of jurisdiction due to anticipatory pleading of the federal issue. He argued that state law was the basis of the plaintiff's claim of illegal investments by the corporate directors; state law created plaintiff's right of action. Thus, plaintiff's bill anticipated the defendant's reliance on the federal statute and responded that it was unconstitutional.

Nevertheless, the majority of the Supreme Court found jurisdiction. It

---

\(^{22}\) 255 U.S. 180 (1921).

\(^{23}\) Id. at 199.

\(^{24}\) Id. at 201. There has been some question as to the continued vitality of *Smith*. In *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205 (1934), the Supreme Court found that there was a need to interpret federal law but that the cause of action was based in state law. The state law defined liability in terms of federal safety standards. Presumably, the plaintiff's claim was not based directly on federal law. The Supreme Court denied federal question jurisdiction. Many commentators suggest that *Moore* indicated an implicit rejection of *Smith*. D. Currie, *Federal Courts* 197 (3d ed. 1982); M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 67 (1980); Greene, *Hybrid State Law in the Federal Courts*, 83 Harv. L. Rev. 289, 323 (1969); London, "Federal Question" Jurisdiction—A Snare and A Delusion, 57 Mich. L. Rev. 835, 853 (1959). However, in *Moore* federal law was incorporated as an evidentiary standard of care for the imposition of state liability. It did not control all elements of the claim and may not have controlled the dispute. It appears that Justice Holmes' comment in his dissent in *Smith* covered the *Moore* situation: "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 state law to be also a case under the law of the United States . . . ." *Smith*, 255 U.S. at 215.


Furthermore, the *Moore* decision was actually a venue ruling. Venue carried depending on whether the action was one "arising under" the Federal Safety Appliance Act or whether jurisdiction was based on diversity of citizenship. The Supreme Court held that jurisdiction rested on diversity of citizenship grounds. 191 U.S. at 211; see Hart and Wechsler, *supra* note 19, at 887. Thus, *Smith* continues to be a major jurisdictional doctrine.
reasoned that the plaintiff's pleading demonstrated that resolution of the controversy depended on a decision of federal law. The demonstration of a need for a decision under federal law was sufficient to confer jurisdiction on the federal court, despite the niceties of the rules of pleading.

The assertion that federal preemption of state law is a sufficient basis for federal question jurisdiction finds itself between the seemingly contradictory well-pleaded complaint rule and the Smith rationale. Certainly, federal preemption may mean that the right to relief depends on a construction of federal law within Smith. On the other hand, federal preemption is raised generally by the defendant or the declaratory plaintiff as an avenue for avoiding the asserted liability under state law. Under the well-pleaded complaint approach, however, it is anticipatory pleading.

In Gully v. First National Bank, Justice Cardozo applied the proper pleading rule in a case removed from state to federal court. A federal district court could assert jurisdiction over a removed state court action only if the case could have been brought originally in federal court. As in Mottley, the Supreme Court looked to the plaintiff's complaint and assessed its "true" character as federal or state. To a large extent, the assessment was based on Justice Holmes' "creation" test in American Well Works Co. v. Layne & Bowler Co. This test calls for a "kaleidoscopic" search for the body of law which created the plaintiff's alleged right of action. The search is limited to the allegations in the complaint that describe the plaintiff's cause of action. The Supreme Court did not sanction resort to improperly pleaded allegations anticipating defenses or replying to probable defenses as suitable for this jurisdictional inquiry. If the properly pleaded right of action was created by state law, removal was improper because the case did not "arise under" federal law.

The Federal Declaratory Judgment Act posed some difficulty for the well-pleaded complaint rule. The notion that the plaintiff, acting aggressively by seeking court action, should be able to control what forum hears


The present scheme of removal can be traced to the Judiciary Act amendments of 1887. Removal jurisdiction, under the general removal provisions, is related directly to original jurisdiction. HART & WECHSLER, supra note 19, at 1193.


Gully, 299 U.S. at 117. One may view Gully as an attempt to refine the Holmes' creation test. Even though the technical cause of action was created by state law, its "essence" may be based in federal law. However, Gully actually applied to the cases where state law has created the cause of action but there is a need to construe a substantial matter of federal law. Smith, 255 U.S. 180 (1921). Justice Cardozo was attempting to use the American Well Works test by analogy to the situation involving state causes of action. Thus, the creation test is appropriate to determine the cases included within "arising under" jurisdiction but not the cases to be ruled outside district court jurisdiction. See supra note 5. See also T.B. Harms Co. v. Eliacu, 339 F.2d 823, 827 (2d Cir. 1964).

299 U.S. at 113.

the dispute is a significant underpinning of the well-pleaded complaint rule. With the declaratory judgment device, the less aggressive disputant is often the initiator seeking to forestall a more traditional action threatened by the more aggressive disputant.

In the traditional action, the plaintiff is the aggressor in the sense that he initiates the legal proceedings to obtain affirmative relief. The plaintiff is seeking damages allegedly due to the defendant's past conduct or is seeking to restrain conduct threatening irreparable harm. The plaintiff is asserting that the defendant has committed, or is about to commit, a wrong against him and that affirmative relief is warranted. The aggressive action of bringing the case to the court for coercive relief supports the plaintiff's claim to the right to control what law governs the dispute, and more specifically, what forum will decide the dispute. The relief the plaintiff seeks is coercive because it is based on the claim that the defendant is injuring the plaintiff. The assumption in these cases is that the courts exist to remedy actual wrongs. The courts are established to protect the party asserting that a wrong has been committed and that an injury has resulted.

On the other hand, the plaintiff who brings the declaratory judgment action is often anticipating legal action by another party, and is seeking a judicial resolution of the disputed issue as a defensive action. The declaratory judgment device allows the "defending" disputant to have a judicial declaration on the matter without waiting until damages are incurred or until irreparable injury is imminent. The declaratory plaintiff merely needs to show that some legal interest is in jeopardy due to the uncertainty of conflicting claims. By its very nature, the device is anticipatory in that it attempts to avoid the necessity for more traditional coercive remedies.

Despite the reversal of the parties' roles, the Supreme Court in Skelly Oil Co. v. Phillips Petroleum Co. applied the proper-pleading approach and held that federal question jurisdiction depends on which disputant initiates the declaratory judgment action. If the declaratory judgment plaintiff is seeking judicial resolution based on a federal defense to an alleged state-created right asserted by the declaratory defendant, federal jurisdiction is lacking. If the declaratory plaintiff is seeking resolution based on a federal claim, and the declaratory defendant is relying on a defense based on state law, the federal court would have jurisdiction. The Court reasoned that jurisdiction must be determined from the well-pleaded allegations in the plaintiff's complaint. The defending declara-

32 See supra note 21.
33 E. Borchard, Declaratory Judgments 25 (1934).
34 Id.
36 Id. at 672.
tory plaintiff, although pleading properly for purposes of the Declaratory Judgment Act, is not pleading properly under common law rules predating the declaratory judgment device. Under Skelly Oil, the defensive nature of the declaratory plaintiffs' assertion deprives the federal district courts of jurisdiction.\(^{37}\)

III. Federal Preemption and the "Aggressor as Master" Rationale

A. Introduction

The federal courts have deemed Gully\(^{38}\) and Skelly Oil\(^{39}\) controlling in federal preemption cases. The jurisdictional issue has been addressed both under 28 U.S.C. § 1331 for cases initiated in federal district court and under 28 U.S.C. § 1441(b) for cases removed from state court to federal district court.

In both instances, the principles of Gully, Skelly Oil and the dictum in Public Service Commission v. Wycoff\(^{40}\) have expanded the well-pleaded complaint rule to an unfortunate extent. The "aggressor as master" rationale of the well-pleaded complaint rule has controlled the result, taking the courts far from the simple phrase "arising under." The result has been a highly technical, very unpredictable, effectively discretionary jurisdictional doctrine. A close look at each of these cases will demonstrate that Gully has been applied improperly, that Skelly Oil should be rejected, and that the Wycoff dictum was unfortunate. Nevertheless, these three Supreme Court decisions continue to dictate to the lower federal courts that, in most situations, a dispute which may be governed by preemptive federal substantive law is not within the jurisdiction of the district courts. The conclusion reached under this well-pleaded complaint approach has varied, based on the relief requested by the plaintiff in both original federal actions and in removed actions. The relief requested is the talisman for characterizing the action as aggressive or defensive in nature.

The "aggressor as master" rationale of the well-pleaded complaint rule has been particularly significant in declaratory judgment actions and removal actions. In the former, a "nonaggressor" is able to initiate the court action. In removal actions, the defendant is able to change the aggressive plaintiff's choice of forum by exercising the right to remove granted by Congress. These procedural devices allow the defending party to select the forum, and the courts have restricted the jurisdictional inquiry to the aggressor's initial pleading. In the declaratory relief cases the courts have

\(^{37}\) Trautman, supra note 15, at 463.

\(^{38}\) 299 U.S. 109 (1936).

\(^{39}\) 399 U.S. 667 (1956).

\(^{40}\) 344 U.S. 237 (1952); see supra note 22.
created a hypothetical aggressor and shifted the jurisdictional analysis to that party's potential claim. This restricted inquiry is based on *Gully, Skelly Oil and Wycoff*.

**B. Misdirection of Gully, Skelly Oil and Wycoff**

Although it was not a federal declaratory judgment action, *Gully* is cited as authority for rejecting jurisdiction where a declaratory plaintiff asserts federal preemption. On the one hand, *Gully* supports the proposition that federal law must be an essential element of a plaintiff's claim. On the other hand, it restricts the jurisdictional inquiry to the allegations constituting plaintiff's cause of action, removing from consideration allegations anticipating or replying to probable defenses. Thus, *Gully* contains both an emphasis upon the essential nature of the claim and an

---

41 299 U.S. at 113. Courts and commentators have noted the apparent paradox of insisting on finding the "basic" and "necessary" dispute and yet limiting the inquiry to the complaint. American Invs.-Co Countryside, Inc. v. Riverdale Bank, 596 F.2d 211, 216 n.8 (7th Cir. 1979); see 13 WRIGHT, MILLER & COOPER, *supra* note 6, § 3562, at 411. The major thrust of *Gully*, however, is determining whether the dispute involves a federal issue that is merely "lurking in the background." 299 U.S. at 117.

The *Gully* decision may be criticized on another point. A close reading of the decision indicates judicial distaste for the removal statute. It described the state court action as follows: "A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states." 299 U.S. at 117 (emphasis added). This description points out that an underlying purpose of *Gully* was to limit removal. The *Gully* court fashioned a narrow view of federal question jurisdiction to limit the extinguishment of state court jurisdiction.

Of course, the existence of federal question jurisdiction under 28 U.S.C. § 1331 or its predecessor, did not extinguish state court jurisdiction. Generally, state courts of general jurisdiction (see *supra* note 5), are available to hear the same claims that are presentable to federal district courts. The presence of federal jurisdiction does not alter this system of concurrent jurisdiction.

It is 28 U.S.C. § 1441 (1982) that allows for removal from the jurisdictions of a state court to the jurisdiction of a federal court. This removal extinguishes state court jurisdiction but only over the particular case that is removed. It does not alter the "right" of the state courts to hear claims of the type presented in the removed case.

If this concern that extinguishment of state court jurisdiction should be avoided is the basis of *Gully*, it is faulty analysis indeed. In effect, the Court has interpreted the § 1331 "arising under" phrase for determining whether a case may have been brought originally in federal district court, based on the extinguishment caused by its reference in the removal provision of 28 U.S.C. § 1441(b). To the contrary, removal is a right conditioned on federal jurisdiction. Federal jurisdiction should not be determined because removal has been granted by Congress. The determination of federal jurisdiction under 28 U.S.C. § 1331 should be made, even in a removal case, as if the right of removal did not exist. In other words, the right of removal should not be determinative of the definition of original federal question jurisdiction. Rather, the existence of original federal question jurisdiction is determinative of the right of removal. Arguably, however, that is exactly what the Supreme Court did in *Gully*. Furthermore, it has continued that approach in *Franchise Tax Bd. See 463 U.S. at 13-14, 20-21.

42 299 U.S. at 112.
emphasis on proper pleading.

Subsequent federal courts have relied on the latter ground to deny jurisdiction in declaratory judgment actions asserting federal preemption of state law. The assumption has been that a defensive claim is plead improperly and cannot be the basis of federal jurisdiction. These courts have erroneously assumed that the proper pleading approach in Gully indicates that Gully was based on the "aggressor as master" rationale of the well-pleaded complaint rule.

Although Gully did not involve the Declaratory Judgment Act, Justice Cardozo saw the possibility that the plaintiff's cause of action could be based on a federal immunity as well as a federal right. The Gully opinion states that a federal right or immunity must be an essential element of the asserted claim.48 Nevertheless, subsequent cases have not distinguished a right from an immunity in this context.49 An immunity is defensive by definition. One has an immunity from something in contrast to having a right to something or to do something.

Prior to the adoption of the Declaratory Judgment Act, a plaintiff could seek injunctive relief on the basis of a federal immunity against threatened actions cognizable under state law.45 Gully would not deny jurisdiction. The declaratory judgment device merely permits declaratory relief before the occurrence of conduct justifying traditional injunctive relief.46

The rejection of a defensive claim is based on the "aggressor as master" rationale.47 Gully should not be interpreted as being based on this rationale of the well-pleaded complaint rule.48 A party defending a claim may assert that federal law preempts the state law relied on by the other disputant. This defending party may be asserting a federal immunity from a liability created by state law. If the state liability has been preempted by federal law the claimed immunity may mean that the defending disputant prevails. If the defending disputant files a declaratory judgment action alleging the federal immunity and asserting that the dispute is controlled by federal law, federal law is an essential ingredient of the case. Gully would not require a holding to the contrary. Although it is relied on for the proposition that a defense cannot be the basis of federal jurisdiction,

43 Id.

44 The Second Circuit in Stone & Webster, 690 F.2d at 328, recognized this distinction.

45 The Federal Declaratory Judgment Act was enacted in 1934. JAMES & HAZARD, supra note 5, at § 1.10.

46 See BORCHARD, supra note 33, at 25. Of course, to a certain extent declaratory relief was available as an equitable remedy prior to the adoption of declaratory judgment statutes. DOBBS, supra note 5, at 26. However, such relief was usually part of more coercive equitable remedies. Id.

47 See supra notes 21 and 22.

48 Professor Trautman has reduced the Gully analysis to five separate statements. See Trautman, supra note 15, at 459. Two of the five deal with proper pleading; the other three focus on the essence of the controversy. Id.
such reliance is misplaced. Actually, the essence of the *Gully* opinion is that federal jurisdiction depends on whether the “essential nature” of the dispute is federal. The proper-pleading language merely reflects the current notions for determining jurisdiction from the initial pleading.49

Justice Cardozo explained that the right or immunity must be the heart of the matter so that if given one construction it will be defeated and given another, it will prevail.50 In the situation where federal law clearly provides a duty other than the one relied on by the plaintiff, if federal law controls, the federal immunity will prevail; if the federal law does not control, the alleged federal immunity will fail. This is exactly what the declaratory plaintiff is claiming.

On the other hand, applying federal law may not mean that the disputant asserting the federal immunity will prevail on the merits. Federal law may allow for plaintiff’s claim in the same manner as state law. However, that question, as well as the question of which party prevails, is premature. These questions require an interpretation of the preeminent federal law. Certainly Justice Cardozo was not suggesting that federal jurisdiction could be decided until the merits were determined.51 The *Gully* language merely means that based on the pleadings, federal law would be the basis for determining the merits. At that stage, with one party asserting state law and the other relying on federal law, the choice of law would appear to be outcome-determinative.52

---

49 See *Mottley*, 211 U.S. 149 (1908).

50 299 U.S. at 112. This approach was similar to Chief Justice Marshall’s explanation in Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738 (1824).

51 This suggestion is contrary to common law pleading requirements that dilatory pleas and pleas in abatement be presented early in the proceeding. In fact, there is case authority that the failure to object to jurisdiction by a plea in abatement constituted waiver. See DOBBS, *supra* note 5, at 511-12. Professor Dobbs states that Morris v. Gilmer, 129 U.S. 315 (1889), took the position in dictum that prior to the Judiciary Act of 1875 subject matter jurisdiction could be waived. *Id.* In *Morris*, the Court stated that under the Judiciary Act of 1879 the issue of citizenship could only “be made by a plea in abatement, when the pleadings properly averred the citizenship of the parties.” 129 U.S. at 326. The 1875 Act, however, imposed a duty upon the court to dismiss “if it appears at any time after it is brought and before it is finally disposed of that it does not really and substantially involve a controversy of which it [the court] may properly take cognizance.” *Id.*

As discussed in *supra* note 20, there is a strong policy favoring the earliest possible determination of jurisdiction. This has been referred to as the first rule of jurisdiction.

52 This supposition depends on which party raises the issue. The point is that jurisdiction cannot be made to depend on which party may prevail on the merits. A determination of which party should prevail on the preemption question may be relevant. Certainly, a frivolous assertion that federal law has preempted state law would not be sufficient for jurisdictional purposes just as frivolous assertion of a federal claim would not be sufficient. See *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *Newburyport Water Co. v. Newburyport*, 195 U.S. 561, 579 (1904). The “substantial federal question” doctrine has not gone unquestioned. See *Bell v. Hood*, 327 U.S. 678, 683 (1946); *Rosado v. Wyman*, 397 U.S. 397, 404 (1970). Nevertheless, an assertion of preemption “so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit” would not be
There is another reason why Gully should not be used to reject federal question jurisdiction where federal preemption is asserted defensively by a declaratory plaintiff. As indicated, it is the proper pleading aspect of Gully that has resulted in the denial of jurisdiction. However, the Gully pleading pronouncements were made in the context of discovering whether the claimant asserted a right which was federal or state in nature. Gully refined the Holmes' "creation" test, preferring to determine jurisdiction by discovering the "essential nature" of the claim rather than by what source created the claim. Even Gully did not attempt to consider whether a claim created by state law could, nevertheless, be within the original jurisdiction of the federal district courts.

The primary function of the well-pleaded complaint rule has been to limit the number of state law claims that a federal district court may hear in non-diversity cases. Proper pleading rules are the vehicle used to determine whether the federal issue is at the forefront of the case, or whether the right to relief requires a construction of federal law. Gully did not attempt to make such a determination. It did not apply the well-pleaded complaint rule to determine whether the state-created right to relief required a construction of the federal issue. In Gully, Justice Cardozo used proper pleading rules to restrict the inquiry into the "essential nature" of the plaintiff's cause of action, so that it could be characterized as a creature either of state or federal law. Even if one accepts, for purposes of argument, that the underlying claim is a creature of state law and not a federal defensive claim, the Gully tests would not apply to the further inquiry about the need to construe federal law. Gully did not address the issue that the Supreme Court recognized in Kansas City Title & Trust Co. If the plaintiff's claim is state created but the granting of declaratory relief necessitates construing whether federal law provides plaintiff with immunity, there is no need to determine the essential nature of the claim. Rather, the judicial inquiry is whether the interpretation of federal law is essential to granting the relief requested, despite it being essentially a state claim. Therefore, the Gully pleading requirements should not be used to restrict a defensive assertion of the federal immunity issue.

It is Skelly Oil that applied the well-pleaded complaint rule to the declaratory judgment situation. Justice Frankfurter was concerned that allowing federal jurisdiction on the basis of an anticipated defense derived from federal law would "unduly swell the volume of litigation" in the federal courts. He saw the declaratory judgment action asserting a


39 299 U.S. at 112.
41 299 U.S. at 113.
43 Id. at 673. This speculation concerning the effect on the court docket helped to make the
defense based on federal law as allowing "artful pleading" to control federal court jurisdiction. The pleading was termed "artful" because it contradicted the "aggressor as master" rationale of the well-pleaded complaint rule. In fact, the "defending" declaratory plaintiff does not manufacture a federal right based on artful pleading; he pleads as permit-

the well-pleaded complaint rule an amorphous definition of the outer limits of statutory federal question jurisdiction. The declaratory remedy certainly permitted actions that could not have been brought previously. See supra note 46. However, the declaratory remedy may have short-circuited more extensive litigation involving complicated damage or equitable issues. Although the number of cases may have increased, the total court time may have been reduced. On the other hand, declaratory plaintiffs often seek a coercive remedy in addition to demanding a declaratory judgment. See Fed. R. Civ. P. 57.

The central point, however, is that federal question jurisdiction should not be a function of ad hoc judicial speculations as to future court congestion. To the extent that courts are true to the "arising under" requirement, congressional actions regulate the volume of federal court litigation. The court's function is to handle litigation in an expeditious manner. The use of a discretionary doctrine to limit access to the court system results in the consumption of more court time on that procedural issue.

339 U.S. at 673-74. Of course, the argument has been made that Skelly Oil really did not present a difficult case. In fact, that case involved a contract dispute in which the alleged breach was the Federal Power Commission's conditional issuance of a certificate of public convenience and necessity for the construction and operation of a pipeline. The contract for the sale of gas allowed the sellers to terminate if the certificate was not issued. The right to terminate was dependent upon whether the conditional issuance constituted a failure to secure the certificate within the meaning of the contract. The pipeline company and Phillips brought their civil action seeking a declaration that the certificate had been issued within the meaning of the Natural Gas Act and the contracts prior to the attempted termination.

The underlying dispute was based on the contract. The right being asserted was based on the contract. Federal law was involved only because it was referred to in the contract. The case was an easy one under American Well Works, 241 U.S. 257 (1916). The claim was a creature of the contract between the parties. The claim was not a creature of the Natural Gas Act.

Such an approach, however, assumes that the "creation" test is an exclusive test. In fact, the Smith v. Kansas City Title & Trust doctrine co-exists with it. The well-pleaded complaint rule functions most often in the Smith type of case. Therefore, Justice Frankfurter, referred to as "the most ardent proponent" of the Holmes' "creation" test, Franchise Tax Bd., 463 U.S. at 9, was undoubtedly concerned about whether the Federal Declaratory Judgment Act "created" a new cause of action. If the Act created a federal cause of action, federal jurisdiction would be available. Also, the Act would have extended federal question jurisdiction beyond the previous confines of a well-pleaded complaint for coercive relief.

Thus, the Skelly Oil Court looked at the underlying dispute as if the action had been for coercive relief. In that manner, it concluded that the "essence" of the claim was rooted in state law. Phillips Petroleum's assertion that a certificate had issued "within the meaning of said Natural Gas Act," 339 U.S. at 667, would have been "injected into the case only in anticipation of a defense . . . ." Id.

The well-pleaded complaint rule would not permit the assertion of federal jurisdiction merely because "an anticipated defense derived from federal law." Id. Therefore, proper pleading under the Declaratory Judgment Act did not constitute the pleading of a federally-created cause of action and did not convert a federal defense into an essential element of a claim for which declaratory relief was now available.
ted by the declaratory judgment device and Federal Rule of Civil Procedure 8(a).69

Nevertheless, Justice Frankfurter used the *Skelly Oil* case to "clarify" the view that the Declaratory Judgment Act was procedural only and did not expand the jurisdiction of the federal courts. He carefully defined jurisdiction to refer to "the kinds of issues which give right of entrance to federal courts."60 This definition was intended to distinguish it from jurisdiction to grant certain types of relief or remedies. The Court held that the declaratory judgment device could not change the nature of the claim merely because the allegations upon which it is based artfully plead a defense derived from federal law.

Chief Justice Vinson, joined by Justice Burton, dissenting, doubted that there was "a federal question here at all."61 The declaratory plaintiffs in *Skelly Oil* were attempting to have a federal court decide whether the conditional issuance of a Federal Power Commission certificate constituted "issuance" sufficient to eliminate the right to terminate the contract. That question depended on whether the FPC issued the certificate within the meaning of the contract between the parties and not necessarily on whether the document was issued as a matter of federal law.

The majority, however, discovered a federal question, but based the denial of jurisdiction on the "aggressor as master" rationale of the well-pleaded complaint rule, distinguishing between a federal claim and a federal defense. Pleading a declaratory judgment action defensively was considered artfully attempting to gain federal jurisdiction. Pleading a declaratory action defensively was an attempt to expand federal court jurisdiction to cover allegations traditionally not cognizable in the complaint. This artful pleading language in *Skelly Oil* has resulted in denial...

---

66 FED. R. CIV. P. 8(a)(2) requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Obviously, declaratory relief may be all that the pleader desires.


61 Id. at 679. The *Skelly Oil* situation is one step further from federal jurisdiction than Moore v. Chesapeake & Ry. Co., 291 U.S. 205 (1934), where state law had referenced federal safety standards. In *Skelly Oil*, private parties referenced a federal certificate in the contract as an event pivotal to performance. In neither situation does the federal law have "force proprio vigore." See Smith, 255 U.S. at 215 (1921) (Holmes, J., dissenting).

*Skelly Oil* is relied upon for determining subject matter jurisdiction based on the more aggressive disputant's hypothetical complaint for coercive relief. If the threatening aggressive disputant had won the race to the courthouse, the court would have had to determine whether he would have asserted a state or a federal claim. See La Chemise Lacoste v. Alligator Co., Inc., 506 F.2d 339, 345-46 (3d Cir. 1974), where the court attempted to apply this approach. Of course, *Skelly Oil* did not recommend this approach specifically. See Hornstein, supra note 14, at 602-03 n. 218, 608 n. 237. *Skelly Oil* only rejected jurisdiction. Actually, it is *Wycoff* which recommended this approach. See supra note 22. Thus, *Wycoff* effectively expanded the jurisdictional inquiry from the actual complaint to the aggressive disputant's cause of action where *Skelly Oil* would simply reject jurisdiction.
of federal jurisdiction in the federal preemption situation.\(^{63}\)

Judicial decisions treat *Skelly Oil* as a logical extension of *Gully*. Undeniably, *Gully* directed the jurisdictional inquiry to the plaintiff's complaint as had *Mottley* before it.\(^{63}\) However, *Gully* expressly permitted the claim to be based on a federal immunity. The important factor in those cases was that the federal immunity be the essence of the plaintiff's claim; that it not be incidental. Yet, the Supreme Court in *Skelly Oil*, in its eagerness to end any hint that the Declaratory Judgment Act had expanded the jurisdiction of the federal courts, misapplied the well-pleaded complaint rule and made a federal claim/federal defense distinction not required by *Gully*. The jurisdictional issue now turned on whether the declaratory complaint was aggressive or non-aggressive. *Gully* was not needed to reach that conclusion, but merely used to substantiate the view that federal jurisdiction was not available in every action that involved federal questions.\(^{64}\) Moreover, the *Skelly Oil* Court interpreted the "aggressor as master" rationale of the well-pleaded complaint rule as defining the inflexible outer limits of statutory "arising under" jurisdiction. A change in procedural law allowing judicial relief to the "non-aggressor" did not change the jurisdictional boundary line. Unless the federal issue was pleaded aggressively as determined prior to the Federal Declaratory Judgment Act, it was an unwanted trespasser.

The Court failed to recognize that the well-pleaded complaint rule was a vehicle for determining the nature of the claim. Since defensive allegations were proper to obtain declaratory relief, they should not be off limits to the jurisdictional inquiry.\(^{65}\)

Two years after *Skelly Oil*, the Supreme Court further muddied the jurisdictional waters in *Public Service Commission v. Wycoff Co., Inc.* The Wycoff Company sought declaratory relief alleging that the Utah commission was interfering with the conduct of interstate commerce and imposing an undue burden on interstate commerce. The Supreme Court held that the dispute had not matured to the point of a concrete controversy. At the end of the opinion, Justice Jackson discussed, *obiter dictum*, federal question jurisdiction in declaratory judgment actions. He stated that many declaratory judgment actions reverse the realistic positions of the parties: the defending party is declaratory plaintiff and the aggressive party is declaratory defendant.\(^{67}\) To maintain the rationale that the "aggressor" should control the choice of forum, Justice Jackson explained that federal question jurisdiction should be based on the nature

\(^{63}\) For example, both *Alton Box* and *First Federal* refer to this "artful pleading" concept. See *supra* note 9.

\(^{64}\) See *supra* note 16 and accompanying text.

\(^{65}\) See *supra* note 59 and accompanying text.

\(^{66}\) 344 U.S. at 237 (1952). See *supra* note 22.

\(^{67}\) 344 U.S. at 248.
of the threatened action and not the defense asserted by the declaratory plaintiff. If the claim threatened by the declaratory defendant does not involve a claim under federal law, "it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim."68

Although Skelly Oil had rejected jurisdiction where the declaratory plaintiff's claim was defensive, the Court had not explained its reasoning in terms of the "aggressor as master" rationale. Justice Jackson clarified this point in Wycoff, which extended the jurisdictional inquiry by shifting it from the defensive declaratory claim to the nature of the claim threatened by the actual aggressive disputant. Since Wycoff Company's declaratory complaint was assumed to be asserting a federal defense, federal jurisdiction was doubtful. Because the declaratory plaintiff is not the aggressor, it could not control jurisdiction; the aggressor's claim controlled the jurisdictional issue.69

Justice Jackson's doubt remained even if the declaratory complaint asserted "a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action."70 Thus, Wycoff altered the judicial search in Gully to focus on the true nature of the asserted right. Not only must the court look for a federal right, it must also assess whether that right is "in the nature of a defense." The right's posture as defensive or offensive has become more important than its nature as federal or state.

As in Skelly Oil, the Wycoff majority was troubled by the apparent fact that a declaratory judgment action may allow for federal jurisdiction where it would not otherwise exist. Its dictum compounded the error of Skelly Oil regarding the function of the well-pleaded complaint rule. The well-pleaded complaint rule was not viewed as a test for determining jurisdiction which should be reassessed in light of modifications to the rules of pleading. Instead, it was regarded as a rule setting the outer limits of federal jurisdiction.71 Thus, the Wycoff dictum has been a basis for refus-

---

68 Id.
69 The notion that the plaintiff is the master of his claim and therefore should control the selection of the forum was altered to conform with the declaratory judgment remedy. The aggressive disputant, although not the declaratory plaintiff, is the new captain of the litigation ship. See supra note 22.
70 344 U.S. at 248.
71 The Supreme Court, in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937), ruled that the Declaratory Judgment Act was "procedural only." It did not enlarge the scope of judicial power granted by the Constitution to the federal courts, see Trautman, supra note 15, at 464. The problem with this analysis is the hazy boundary that constitutes the existing scope of federal jurisdiction. Common law pleading rules had been applied under the well-pleaded complaint rule as a technique for determining the true nature of the action. See Haworth, 300 U.S. at 244. They did not establish a constitutional scope of federal jurisdiction. In Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), Chief Justice Marshall established the constitutional scope of federal jurisdiction with the "federal ingre-
ing federal jurisdiction in cases where a declaratory plaintiff asserts federal preemption as a basis for jurisdiction. The assumption is that to do otherwise would allow the declaratory judgment device to expand federal jurisdiction.

Justice Douglas, dissenting in Wycoff, addressed the jurisdictional issue as well as the justiciability question. He viewed the Utah commission’s action as an attempt to stop Wycoff from conducting interstate commerce. “That is an attempt to regulate in a field pre-empted by the Congress under the Motor Carrier Act.” This fact alone was sufficient to make this a case “arising under” the laws of the United States within the meaning of 28 U.S.C. § 1331. The dissent recognized that, as a matter of policy, federal jurisdiction should be exercised to protect the federal right. The defensive or offensive posture of the issue should not be determinative.

The Declaratory Judgment Act authorizes the plaintiff to present a defensive claim or immunity for resolution by a federal court. The dissent in Wycoff correctly considered the declaratory complaint to be asserting rights in an area preempted by Congress. It considered this fact sufficient for jurisdiction. Certainly, to the extent the Wycoff Company had a claim

dient” test. In fact, the well-pleaded complaint rule is not applicable to the article III inquiry. Verlinden, 461 U.S. 480 (1983). However, Justice Frankfurter in Skelly Oil not only reverted to the pleading rules but erroneously treated them as defining the outer limits of federal jurisdiction. See Trautman, supra note 15, at 465-66. A major premise in Justice Frankfurter’s opinion in Skelly Oil was that the declaratory judgment device would cause a flood of litigation in the federal courts. 339 U.S. at 673. See supra note 57.

3 344 U.S. at 252 (Douglas, J., dissenting)(citations omitted). In Thurston Motor Lines, Inc. v. Jordon K. Rand, LTD., 460 U.S. 533 (1983), the Supreme Court recently found federal question jurisdiction in an action brought by a common carrier seeking to recover freight charges for an interstate shipment regulated by the Interstate Commerce Act (59 U.S.C. § 10741(a)). The Court did not say specifically that Congress had preempted state regulation, as the dissent argued in Wycoff. Rather, it stated that the carrier’s claim is “of necessity, predicated on the tariff....” 460 U.S. at 533. This “necessity” exists since federal law preempted the carrier's state law claim.

The Ninth Circuit had rejected jurisdiction since the shipping contract was regulated by state law and the tariff rate would be a defense to any attempt to collect a larger amount. See 682 F.2d 811 (9th Cir. 1982). The Supreme Court reversed, holding that “it is the character of the action and not the defense which determines whether there is federal question jurisdiction.” 406 U.S. at 535. The Court relied on Wycoff and Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974). Although the Supreme Court did not hold that federal law preempted state law, it determined that the character of the action was federal because federal law controlled the claim. Unfortunately, the Court continued to dilute a coherent jurisdictional analysis based on what law governs the dispute with reliance on whether that law is raised defensively or offensively as a matter of pleading. As a result, the opinion provides little guidance to the analysis of the federal question jurisdiction in the preemption context. The Court appears not to notice the confusion in the lower courts.

3 344 U.S. at 253. Such a policy is consistent with the concept of protective jurisdiction espoused by Professor Mishkin. See supra note 5. However, it is not the reason that federal jurisdiction exists.

See Borchard, supra note 33, at 17-19.
for declaratory relief, it was based on a federal immunity. It plead its claim in terms of undue burden on interstate commerce under the Commerce Clause. Federal preemption of the area provided it with an opportunity to have immunity from conflicting state regulation. Under Gully, federal jurisdiction should be proper in that situation. If the district court determined that Congress had preempted the area, as the dissent argues, the Wycoff Company would prevail because Utah would not have the power to regulate. If the district court did not find preemption, then Utah would prevail if the regulation did not otherwise violate the Commerce Clause. This is precisely the type of situation where application of the Gully tests means that federal immunity is the essence of the case.75

The legacy of Gully, Skelly Oil and Wycoff is the dominance of the “aggressor as master” rationale of the well-pleaded complaint rule. The impact of these cases is greatest in declaratory judgment actions and removals based on federal question jurisdiction. In both instances the aggressor's choice of forum has not controlled. In the former, the non-aggressor has won the race to the courthouse by filing an action for declaratory relief; in the latter, the non-aggressor, as the defendant, has removed the action from state to federal court. However, the federal courts have not allowed these devices to alter the “aggressor as master” approach. In both instances, the jurisdictional inquiry is limited to the aggressor's initial pleading or potential pleading.

This reliance on the “aggressor as master” rationale reflects an outmoded view of litigation. It is a “trial by combat” approach. It conflicts with current notions that judicial determination is merely one tier in a dispute resolution system. A dispute is a continuum. Judicial action should mean that other resolution techniques have been exhausted without success. In the face of ever-increasing caseloads, court rhetoric supports dispute resolution by means short of litigation. Nevertheless, the federal courts, following the lead of the Supreme Court, have endorsed jurisdictional doctrine which favors the disputant who initiates judicial action. Conversely, the disputant who initiates the last tier should not receive favored treatment. This initiator should not be able to control the choice of forum where significant legal issues are involved. Litigation should not be viewed as a forum where the offended pugilist chooses the method of combat. Yet, this is precisely the rationale supporting the Court's jurisdictional doctrine.

C. Federal Declaratory Judgments: Recent Application of Jurisdictional Doctrine

Many original federal court actions asserting preemption have been for declaratory relief. If the declaratory plaintiff seeks a decree in federal

75 See supra note 52 for a discussion on this point.
court that a particular federal law preempts the state law relied upon by the declaratory defendant, federal jurisdiction will be denied. The well-pleaded complaint rule prevents such a defense from being the basis for federal question jurisdiction. 76

However, there are two types of declaratory actions where federal jurisdiction has been sustained. If the declaratory plaintiff also seeks injunctive or other coercive relief, the federal courts will accept jurisdiction. 77 Also, if the plaintiff is subject to conflicting state and federal regulations so that an action for injunctive relief could have been brought, federal jurisdiction exists. 78 In both of these situations the courts avoid the confines of the Wycoff "aggressor as master" rationale by classifying the declaratory plaintiff as the aggressor. The coercive relief demanded, or potentially demanded, is the basis for this classification.

Recent circuit court decisions illustrate these differing approaches. The first type of case which is controlled by Skelly Oil and the Wycoff dictum may be exemplified by City National Bank v. Edmisten, 79 Michigan Savings & Loan League v. Francis, 80 and First Federal Savings & Loan v. Detroit Bond. 81 In Edmisten, the declaratory plaintiffs were banks seeking a declaratory judgment that an annual membership fee for bank credit card holders would not violate state usury laws. In Francis, the plaintiffs were a group of federally chartered savings and loan associations seeking a declaratory judgment that they were exempt from a state anti-redlining statute. In Detroit Bond, the plaintiffs were federal savings and loan associations seeking a declaratory judgment that they were exempt from state limitations on the enforcement of mortgage due-on-sale clauses. In each case, the essence of the declaration sought was that federal law preempted the state law asserted by the declaratory defendant.

All three courts applied the well-pleaded complaint rule under the "aggressor as master" rationale explained in Wycoff. They stated that the plaintiff was "seeking a declaration that it has a good defense to a

76 See supra note 9; First Fed. Sav. & Loan Ass'n v. Detroit Bond & Mortgage Inv. Co. 687 F.2d 143 (6th Cir. 1982); Lawrence County v. State of South Dakota, 668 F.2d 27 (8th Cir. 1982); Michigan Sav. & Loan League v. Francis, 683 F.2d 957 (6th Cir. 1982).
77 See, e.g., Stone & Webster, 690 F.2d 323 (2d Cir. 1982).
The Supreme Court formally endorsed this view in Franchise Tax Bd., 463 U.S. at 20 n.20, on the theory that the Declaratory Judgment Act did not extend federal court jurisdiction because the court would have had jurisdiction over the cases as actions for injunctive relief. In effect, the declaratory plaintiff can be characterized as an aggressor.
This separate doctrine distinguishes the scope of jurisdiction in original actions from that in the removal situation. See Greenwald, 591 F.2d at 423 n. 8.
79 681 F.2d 942 (4th Cir. 1982).
80 683 F.2d 957 (6th Cir. 1982).
81 687 F.2d 143 (6th Cir. 1982).
threatened action . . ." 82 Federal preemption was viewed as a defense "to fend off anticipated state law challenges . . .." 83 The result in each case was a dismissal for lack of jurisdiction. 84

It is interesting to note that the plaintiffs in these three declaratory judgment actions did not appreciate the effect of their demand for relief on the jurisdictional issue. If they had demanded injunctive relief or other coercive relief in addition to declaratory relief, jurisdiction may have been sustained under the exceptions noted above. 85 In fact, in Edmisten, the plaintiffs originally sought injunctive relief but dropped this request in an amended complaint. 86 This is not surprising in light of the maze of current jurisdictional doctrine.

An example of federal question jurisdiction demanding additional coercive relief is Stone & Webster Engineering Corp. v. Ilsley, 87 decided by Second Circuit. Stone & Webster, an employer, brought an action for a declaratory judgment stating that the Employee Retirement Income Security Act of 1974 preempted a state statute requiring an employer to provide insurance benefits for a former employee receiving workers' compensation. The district court found jurisdiction and granted summary judgment for the employer. On appeal, the Second Circuit reviewed the jurisdictional issue.

Although the Second Circuit noted that federal question jurisdiction could be based on a declaratory action asserting a federal immunity, its decision was based on a different ground. 88 Rather, the court found the "historical test in Mottley" satisfied due to the presence of a claim for injunctive relief. 89 The plaintiff's request for injunctive relief, in addition to declaratory relief, enabled the court to classify the plaintiff as an aggressor. Since the declaratory claim was not defensive, the assertion of federal preemption supported jurisdiction. The Wycoff dictum, which shifted the jurisdictional inquiry to the nature of the declaratory defen-

---

82 Edmisten, 681 F.2d at 945.
83 Detroit Bond, 687 F.2d at 144.
84 Edmisten, 681 F.2d 942 (4th Cir. 1982), provides an excellent example of the application of the Wycoff doctrine basing jurisdiction on the character of the true aggressor's threatened action. The court stated: "If the Attorney General of North Carolina had threatened action under § 86 [federal law] . . . , this declaratory judgment action would . . . arise under federal law. But the Attorney General has threatened to charge plaintiffs with a violation of state usury laws . . . Therefore, § 86 . . . does not provide a basis for federal jurisdiction." Id. at 946.

The court did not discuss how it determined the nature of the threatened action. Presumably, the state attorney general could have threatened application of federal law as well as state law.

85 See supra notes 77 and 78.
86 681 F.2d at 944 n. 3.
87 690 F.2d 323 (1982).
88 Id. at 328.
89 Id. at 327.
A demand for injunctive relief is the other area where jurisdiction has been sustained for a declaratory judgment action asserting federal pre-emption. This type of case is also distinguishable from the Wycoff dictum. Wycoff and Skelly Oil generally apply to a non-aggressor’s action for declaratory judgment. If the declaratory plaintiff would have brought an action for injunctive relief, the federal court would have had jurisdiction. Therefore, accepting jurisdiction over the action for declaratory relief is not an expansion of federal jurisdiction as it existed prior to the Federal Declaratory Judgment Act.

This exception to Wycoff and Skelly Oil is often stated in justiciability terms. This is unnecessarily confusing and may very well camouflage the jurisdictional doctrine.

Conference of Federal Savings & Loan Associations v. Stein91 is an example of this doctrine. The Ninth Circuit distinguished Wycoff on the following basis:

There, the majority concluded that there was no proof of any threatened or probable act by the state commission which might cause the irreparable injury essential to equitable relief or which could serve to create the actual controversy necessary for declaratory judgment jurisdiction. Here, an actual conflict exists created by the conflicting positions taken by appellant and the Bank Board.92

Thus, the Wycoff dictum only applies when the declaratory plaintiff could not have otherwise obtained federal jurisdiction by seeking more coercive relief. An actual conflict in substantive law requirements, with

---

90 In the district court, the State of Connecticut had argued that Stone & Webster did not have standing to institute the action under ERISA, 29 U.S.C. § 1132(e)(1) (1982). Stone & Webster argued that even where the preemptive federal law provides no right to relief, the doctrine of preemption nevertheless provides “arising under” jurisdiction. The district court accepted that argument. The Second Circuit stated that Stone & Webster had standing because it was “an employer whose interests were considered and protected by Congress” and was “directly affected by the Connecticut statute . . . .” 690 F.2d at 326. Thus, the fact that ERISA did not grant the employer a right to relief did not mean it lacked standing.

In Franchise Tax Bd., 463 U.S. 1, (1983), the Supreme Court took a different approach in considering removal jurisdiction. The Court used the lack of relief in ERISA as a basis for rejecting jurisdiction. Whether the Supreme Court’s use of a standing analysis in that context negates the Second Circuit’s conclusion is unclear. The better reasoning is that the lack of a provision for relief in the federal statute merely means that federal jurisdiction cannot be based on that section of federal law. It should not be determinative of whether the case “arises under” federal law within the meaning of 28 U.S.C. § 1331. Nevertheless, the Supreme Court in Franchise Tax Bd. uses the absence of an explicit federal cause of action to substantiate its decision to reject removal jurisdiction. 463 U.S. at 24-26.

91 604 F.2d 1256 (9th Cir. 1979), aff’d mem. 445 U.S. 921 (1980).

92 604 F.2d at 1259.
threatened enforcement and irreparable harm, provides federal jurisdiction over the declaratory judgment action. The declaratory plaintiff is legitimately an aggressor with the corresponding right to be master of the forum.

The Supreme Court affirmed *Stein* without addressing the jurisdictional question. However, in *Franchise Tax Board v. Construction Laborers Vacation Trust*, the Court acknowledged this separate doctrine as an exception to *Wycoff* and *Skelly Oil*. The cases establishing this doctrine are *Lake Carriers Association v. MacMullan*; *Rath Packing Co. v. Becker*; and *First Federal Savings & Loan Association v. Greenwald*. Each court found federal jurisdiction over a declaratory judgment action which asserted federal preemption from the existence of a justiciable controversy due to conflicting state and federal regulatory requirements. The approach limits *Wycoff* and *Skelly Oil* to a declaratory judgment action which would not be "justiciable" for equitable relief. As stated in *Greenwald*, "[t]he matter of preemption and related federal issues were the focal point of the declaratory judgment suit, hence federal question jurisdiction existed in that case under any analysis." The existence of an actual conflict between the state and federal regulations is sufficient for injunctive relief to be granted. Accordingly, the constraints of *Wycoff* are avoided.

The line between the *Greenwald* cases and the cases covered by *Wycoff* is not often recognized. Furthermore, even when both injunctive relief and declaratory relief are requested, the courts and the parties fail to recognize that *Wycoff* is not applicable. *Stone & Webster* is the exceptional case that acknowledges the "aggressor as master" rationale as the basis of *Wycoff*.

In *Alton Box Board Co. v. Esprit De Corp*, manufacturers of corrugated containers filed an action seeking both an injunction precluding the prosecution of a state court action and a declaratory judgment that the

---

94 463 U.S. at 20, n. 20.
97 591 F.2d 417 (1st Cir. 1977).
98 Id. at 423.
99 Id. at 423 n. 8.
100 The court, in finding federal jurisdiction, may be suggesting that the declaratory claim has "independent viability." See Note, *The Expanded Federal Question: On the "Independent Viability" of Declaratory Claims*, 57 NOTRE DAME LAW. 809, 817 (1982). However, it is important to understand that this "viability" is based on the court's conclusion that coercive equitable relief could have been sought. Thus, it is not the declaratory claim itself but the court's assessment of the nature of the threatened activity that provides for federal jurisdiction.
101 682 F. 2d 1267 (9th Cir. 1982).
state court action was preempted by federal law. Since the state court action was already in process the demand implicated the Anti-Injunction Act. However, the circuit court also addressed the issue of federal question jurisdiction. It rejected jurisdiction on the basis of *Wycoff* and *Skelly Oil*, stating: "A claim does not arise under federal law within the meaning of section 1331 to establish an immunity or defense which would preclude the declaratory judgment defendant from successfully litigating against the declaratory judgment plaintiff a claim arising under state law."  

The *Alton Box* court, however, recognized the *Stein* exception to *Wycoff*. It found that exception inapplicable because there was no "actual conflict" in substantive law requirements. In other words, the dispute was not justiciable for injunctive relief.  

*First Federal Savings & Loan Association v. Anderson* involved two similar actions concerning declaratory relief and coercive relief. The plaintiffs, federally chartered savings and loan associations, sought foreclosure of a mortgage for violation of a due-on-sale clause. The plaintiffs amended their complaint and also sought a declaratory judgment that federal law preempts state law regarding due-on-sale clauses. In the second action, the plaintiffs sought a declaratory judgment that federal law "exclusively governs" its mortgage acceleration clauses, and also sought to initiate foreclosure. In both cases, the coercive relief of foreclosure was undoubtedly the primary relief requested although it depended on a finding of preemption. This finding does not necessarily result in a declaratory judgment.  

Despite the requests for coercive relief, the Eighth Circuit in *Anderson* did not discuss the exceptions to *Wycoff*. It found *Wycoff* controlling and the "assertion of federal preemption as a defense to a state law claim . . . ."  

One may argue that the *Greenwald* line of cases did not apply in *Anderson* because there was no conflict between federal and state substantive law requirements. However, the Supreme Court later held that there was such a conflict. In any event, the *Anderson* court was aware of *Stein* but did not recognize it as representative of a separate jurisdic-

---

103 682 F.2d at 1274.
104 Id. at n. 11. The court saw *Rath Packing* and *Stein* as a possible exception to the *Wycoff* rule. Id.
105 681 F.2d 528 (8th Cir. 1982).
106 Id. at 531.
107 The court could conclude as a matter of law that federal law preempted state law, and base the foreclosure on the preemptive federal law. Fed R. Civ. P. 52.
108 681 F.2d at 533.
tional doctrine and as an exception to Wycoff. The justiciability language effectively disguises the jurisdictional nature of this line of cases. The request for foreclosure in Anderson should have brought it within this exception to Wycoff.

The camouflage of justiciability is exemplified in Michigan Savings & Loan League v. Francis in which the Sixth Circuit rejected federal preemption as a ground for federal question jurisdiction in a declaratory judgment action brought to void a state anti-redlining law. Chief Judge Edwards dissented on the basis of Stein. The dissent did not elaborate except to note that Stein was quite "similar to our instant appeal." The majority, however, dealt with Stein by asserting that reliance on that case to support jurisdiction "reflects either a misreading of Stein or a lack of appreciation of the holding in Wycoff." The court noted that Stein referred to Wycoff in terms of justiciability of declaratory judgment actions. In a curious footnote, it quoted from Wycoff the important conclusion that since the action could not be "entertained as one for injunction ... [it] should not be continued as one for a declaratory judgment." Therefore, the court viewed Stein as "procedurally inapplicable" because "[j]usticiability presupposes subject matter jurisdiction." The majority did not view Stein as representative of a separate Supreme Court jurisdictional doctrine. It did not understand that a finding of justiciability in this context signalled a threat of irreparable harm sufficient for equitable relief. Such justiciability meant that the case would be within the jurisdiction of the federal district courts without regard to the Federal Declaratory Judgment Act. Justiciability, in the sense of a controversy cognizable in equity, does not presuppose jurisdiction but indicates that the availability of declaratory relief did not bring a case before the court which it otherwise could not have entertained.

The requisite threat of irreparable harm is linked to an "actual conflict" between the state and federal regulations, and impending enforcement. As the Tenth Circuit has noted, the Stein and Greenwald cases apply "where state regulations directly conflict with federal regulations . . . ."

110 681 F.2d at 534 n. 9.
111 Id. The court noted that parenthetically Stein "concerns analogous federal regulation and although the court labels the issue as 'federal question' jurisdiction, it analyzes the issue as a problem of justiciability . . . ." Id.
112 683 F.2d 957 (6th Cir. 1982).
113 Id. at 962-63 (Edwards, J., dissenting).
114 Id.
115 Id. at 961.
116 Id. at 962 n. 10.
117 Id. at 962.
119 Madsen v.Prudential Fed. Savings & Loan Ass'n, 635 F.2d 797, 804 (10th Cir. 1980).
Nevertheless, it is not difficult to understand how justiciability considerations hide the jurisdictional doctrine. Justiciability denotes a controversy that is real, and not concocted to obtain an advisory opinion. The Declaratory Judgment Act requires such a “case or controversy,” as does article III of the Constitution. However, the Supreme Court in Skelly Oil and Wycoff related justiciability to the relief sought. In other words, there was an actual controversy if equitable relief was sought. The equitable language appears because there could be an actual dispute warranting equitable relief against threatened acts even before damages were inflicted. If a dispute cognizable under the Declaratory Judgment Act could be heard without a threat of irreparable harm, the Act would have expanded the jurisdiction of the federal courts.

Of course, the error of Skelly Oil and Wycoff is that justiciability should not be determined by any specific type of relief that may be available. Justiciability is a constitutional concept requiring an actual dispute between the parties that a court may resolve. Changing the nature of the relief available does not change the subject matter jurisdiction requirement that the dispute “arise under” federal law. Just as the boundaries of federal question jurisdiction were not surveyed by the well-pleaded complaint rule, they were also not defined by the relief available at any particular point in time to remedy an actual dispute.

Nevertheless, federal declaratory judgment actions asserting federal preemption may or may not be within federal court jurisdiction. Wycoff and Skelly Oil are not immutable. Where the declaratory plaintiff also seeks injunctive relief, he may be classified as an aggressor and escape the confines of Wycoff. If the declaratory plaintiff can show the probability of irreparable harm, he may be classified as an aggressor because he could have obtained injunctive relief. This is the existing jurisdictional doctrine in declaratory judgment actions asserting federal preemption.

An action for declaratory relief alone is treated as if it does not present a justiciable controversy. Of course, there must be a justiciable controversy before the court can grant a declaratory judgment. However, following Wycoff and Skelly Oil, the federal courts have interpreted justiciability as meaning what it did prior to the Federal Declaratory Judgment Act. These decisions have enabled some federal declaratory actions asserting federal preemption to escape the Skelly Oil and Wycoff jurisdictional limits on declaratory judgment actions.

Unfortunately, there has not been a move to reject Skelly Oil and

---


192 See supra note 120.

193 See supra note 121.
Wycoff as unnecessarily complicating the jurisdictional issue. Certainly where federal preemption of state substantive law is asserted, the case should "arise under" the source of that governing substantive law. The present approach unnecessarily complicates this threshold inquiry, making it unpredictable. The decision for practitioners is an impossible one. Furthermore, as practitioners understand these doctrines, it will negate the utility of the Federal Declaratory Judgment Act. Requesting such relief only means a jurisdictional problem.

In the face of awkward and illogical results, there are few reasons to support the existing doctrine. Jurisdiction of the federal district courts should not be based on how the so-called "aggressor" describes the case in its pleading. 124

IV. FEDERAL PREEMPTION AND REMOVAL JURISDICTION

A. Introduction

As with declaratory judgment actions, a variety of situations exist, each having different jurisdictional results when the federal courts decide whether removal from state court to federal court is proper. A defendant may remove an action from state court to federal district court if the action could have been brought originally in federal court. 125 Thus, removal jurisdiction is linked to original "arising under" jurisdiction under § 1331.

In the removal cases, as with declaratory actions, federal question jurisdiction has been denied because the assertion of federal preemption was made by the defendant and not the plaintiff. 126 In other words, the federal question must be an essential element of the plaintiff's cause of action. On the other hand, jurisdiction has been sustained where federal law has preempted the state cause of action. 127 This type of preemption is distinguishable from the preemption of the controlling substantive law. 128

124 The Supreme Court takes the position that this type of analysis is too well established to be discarded, even with its obvious infirmities. Cf. Franchise Tax Bd., 463 U.S. 1 (1983). Chief Justice Burger's plea for help with congested dockets at the Supreme Court level is applicable here: "We can no longer tolerate the vacuous notion that we can get along with the present structure [doctrine] because we have always done it that way." Burger, Annual Report on the State of the Judiciary, 60 A.B.A.J. 442, 445 (1983).
127 Lafferty v. Solar Turbines Int'l, 666 F.2d 408 (9th Cir. 1982); Fristoe v. Reynolds Metals Co., 615 F.2d 1209 (9th Cir. 1980); Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 376 F.2d 337, 339-40 (6th Cir. 1967), aff'd, 390 U.S. 557 (1968).
128 Federal law may preempt the rules of decision and govern liability between the parties.
Federal jurisdiction also has been sustained where the alleged state claim is actually a federal claim.129

A separate category of cases involves the removal of state declaratory judgment actions asserting federal preemption of state law. The Supreme Court's recent decision in Franchise Tax Board dealt with this type of situation. A critical analysis of this decision will follow a discussion of removal of state actions for coercive relief.

B. Removal of State Actions for Coercive Relief

Despite § 1441(b)'s incorporation of the "arising under" language found in § 1331, the courts have taken the position that the removal jurisdiction of § 1441(b) should be construed narrowly and against removal.130 The courts base this view on a purported congressional policy reducing the removal jurisdiction of the federal courts.131 The Supreme Court has fostered this view by holding, in almost every Supreme Court removal decision, that removal was not warranted.132 Unfortunately, the Court has taken this view by narrowly construing the § 1331 language regarding original jurisdiction without assessing congressional intent to reduce or expand original jurisdiction.133

The Greenwald case, discussed previously as an exception to Wycoff in declaratory judgment actions, involved a second action that had been removed from state court.134 The dispute was between a state commissioner of banks and a federally chartered savings and loan association. The bank commissioner filed a civil action in state court seeking to require the savings and loan to pay interest on certain tax escrow accounts as provided by state law. The commissioner's complaint alleged that the state statute was not preempted by federal law, specifically, the Real Estate Settlement Procedures Act of 1974. The savings and loan association removed the case to federal district court pursuant to 28 U.S.C. § 1441(b). After removal, the savings and loan counterclaimed for declaratory relief alleging that federal law superseded the state law. The savings and loan also filed a separate action for the same declaratory relief in the federal district court.

While the First Circuit Court of Appeals upheld jurisdiction in the federal declaratory judgment action, it viewed removal jurisdiction as un-

129 Id. at 13. This category applies where the plaintiff has attempted to conceal the federal issue to avoid removal. See supra note 21.
131 Kerr-McGee, 677 F.2d at 576.
132 See id. for cases cited at 576 n. 8.
133 See infra note 212 and accompanying text.
134 591 F.2d 417 (1st Cir. 1979).
clear and refused to resolve that question because "the district court clearly had jurisdiction over the associations' separate declaratory judgment action . . . ." Thus, the two cases in Greenwald involved precisely the same issue and involved federal statutes containing the same language. Yet, in one, federal jurisdiction was doubtful while in the other it was clear.

Unlike the jurisdictional doctrine in federal declaratory judgment actions, the type of relief requested by the plaintiff in the removal action has not been determinative. Rather, the jurisdictional issue turns on the extent of federal preemption asserted or whether the asserted state claim is actually a federal claim.

1. Federal Preemption: The Claim or Defense Dilemma

Recently, in Kerr-McGee Chemical Corp. v. Williams, the Supreme Court turned down the opportunity to clarify the issue of whether a claim of federal preemption could invoke the federal question jurisdiction of the district court. Kerr-McGee maintained a disposal site used in the production of compounds derived from radioactive natural ores. In April, 1980, the State of Illinois filed an action against Kerr-McGee in Illinois state court alleging that the site violated the Illinois Environmental Protection Act and other state statutes pertaining to the disposal of hazardous wastes. Kerr-McGee removed the case to federal district court. The district court denied the state's motion for remand finding that the federal regulatory scheme under the Atomic Energy Act had preempted state regulation of radioactive waste disposal. The district court reasoned that the state's action necessarily involved an interpretation of federal law. The district court then dismissed the action based on federal law.

The Seventh Circuit reversed. It noted that the Supreme Court had never faced this jurisdictional issue directly. Nevertheless, it characterized federal preemption as a defense and relied on Gully for the proposition that federal question jurisdiction cannot be based on a defense. The court saw no reason for treating federal preemption any different than other federal defenses. Kerr-McGee petitioned the Supreme Court for a writ of certiorari.

In a rare dissent from the denial of certiorari, Justices White and Marshall argued that the Supreme Court should resolve the question of fed-

---

136 Id. at 423.
137 Of course, the relief requested may be relevant to the determination of whether the claim has been preempted. Franchise Tax Bd., 463 U.S. 1 (1983).
138 677 F.2d 571 (7th Cir. 1982), cert. denied, 459 U.S. 1049 (1982).
139 Id.
140 677 F.2d at 577.
141 Id.
eral question jurisdiction based on federal preemption. The dissenters asserted that the Seventh Circuit decision in Kerr-McGee was in conflict with the Second Circuit decision in North American Phillips Corp. v. Emery Air Freight Corp. Justice Blackmun, in an even rarer opinion supporting denial of certiorari, denied that the two decisions were in conflict.

North American Phillips was another removal case where federal preemption had not been previously determined. The case involved a claim by Norelco against Emery for lost cargo. After removal, Emery raised three defenses based on its federal tariffs. Norelco replied that the tariff was not controlling and that the common law of contracts governed Emery's liability. The Second Circuit raised the jurisdictional issue sua sponte and upheld jurisdiction.

Like the Seventh Circuit in Kerr-McGee, the Second Circuit relied on the Supreme Court's 1936 decision in Gully. However, the court read Gully as deciding the issue of whether federal law was a pivotal determination for resolution of the conflict. It also noted that the plaintiff's failure to plead federal law was not decisive. Since the substance of the claim was loss of goods in interstate transportation by a common carrier, and since federal law preempted the field to the exclusion of state law, the Second Circuit upheld the district court's federal question jurisdiction.

Federal preemption of state law was the key to finding federal question jurisdiction in North American Phillips; federal preemption of state law was insufficient to sustain federal question jurisdiction in Kerr-McGee. Both decisions relied on Gully. The different result is traceable to the Seventh Circuit's characterization of federal preemption as a defense to the state claim. This characterization necessarily converts the jurisdictional determination into a pleading decision based on the well-pleaded complaint rationale. The Second Circuit, however, did not characterize federal preemption as a defense. It used federal preemption to reveal the true character of the action. Even though the plaintiff did not plead federal law, the substance of the claim was based on a federal statute which precluded conflicting state law.

It is significant that both courts were following Justice Cardozo's reasoning in Gully and yet each reached a different result. The Second Circuit read Gully as turning on whether a construction of federal law is determinative of the dispute. If the true nature of the right to be estab-

144 459 U.S. at 1050-51.
145 579 F.2d 229 (2d Cir. 1978).
146 459 U.S. at 1049.
147 In other words, the Supreme Court did not determine that the federal law preempted state law in this context. See Detroit Bond, 687 F.2d at 146, where the dissent viewed it as "ridiculous" to deny jurisdiction because the Supreme Court had determined that federal law preempted state law.
148 677 F.2d at 577.
lished is federal, then there is federal jurisdiction. The Seventh Circuit, on the other hand, focused on the language in *Gully* stating that jurisdiction cannot be based on anticipatory pleading: the court assumed that federal preemption was in that category and therefore it did not consider the applicability of the *Gully* reference to a federal immunity as sufficient for federal jurisdiction. Rather, the court ignored the insistence in *Gully* that it should look to the "basic," "necessary," and "essential" issue in controversy and not the "collateral" or "merely possible."¹⁴⁶

Neither the Second Circuit nor the Seventh Circuit felt bound by the plaintiff's characterization of the action. However, the Seventh Circuit required, as a prerequisite to going behind the face of the complaint, a finding that the plaintiff had artfully drafted the pleading with intent to defeat federal jurisdiction.¹⁴⁷ This restrictive approach leaves the jurisdictional issue to the *very* artful drafter. If the drafter is clever enough not to reveal any intention to defeat federal jurisdiction, then he can defeat federal jurisdiction. If he is not so artful, and an intent to avoid federal jurisdiction is detected, then federal jurisdiction is not defeated. Federal question jurisdiction then depends on whether the artful drafter is artful enough to conceal the fact that he is being artful. However, federal jurisdiction should not depend on such speculative and superficial grounds.

The opinions denying certiorari did not clarify the distinction between *North American Phillips* and *Kerr-McGee* other than to recite that preemption was a claim in one and a defense in the other. Yet, as indicated, the difference in analysis is a result of differing views of the decision in *Gully*. The Supreme Court has not acknowledged these varied interpretations of *Gully*, although it provided some clarification in the *Franchise Tax Board* decision.¹⁴⁸ In that case, the state tax board had levied on funds held by a trust operating under a benefit plan covered by the Employee Retirement Income Security Act of 1974. The argument for removal jurisdiction, characterized by the Supreme Court as the "best argument," was based on *Avco Corp. v. Aero Lodge No. 735, Int'l Assn. of Machinists*.¹⁴⁹

In *Avco*, the Court of Appeals for the Sixth Circuit recognized that federal preemption removes the state power and converts the claim as alleged from one based in state law to one based in federal law. *Avco* Corporation had sought a state court injunction against the union to enjoin it from striking. The case was removed to federal district court where the court dissolved the temporary injunction and denied a motion to remand to state court. On appeal, the issue was whether removal was proper. The

---

¹⁴⁶ See *supra* note 48 and accompanying text.
¹⁴⁷ 677 F.2d at 577.
Sixth Circuit rejected the company's argument that its action in state court was based solely on a state created right. It noted that federal law under section 301 of the Labor Management Relations Act preemptively applied to actions under that section. Thus,

all rights and claims arising from a collective bargaining agreement in an industry affecting interstate commerce arise under Federal law. State law does not exist as an independent source of private rights to enforce collective bargaining contracts . . . . The force of Federal preemption in this area of labor law cannot be avoided by failing to mention Section 301 in the complaint.

The Supreme Court, in a short opinion by Justice Douglas, affirmed the Sixth Circuit. It noted that an action under section 301 was controlled by federal substantive law. Since federal substantive law controlled the action under the collective bargaining agreement, it was an action arising under the laws of the United States and removable under 28 U.S.C. § 1441(b).

Although the Supreme Court in Avco did not discuss how federal pre-

---

150 The company asserted that its action was founded on a breach of contract arising under state law. The Sixth Circuit rejected this contention because the case involved the violation of a no-strike provision in a collective bargaining agreement. The court did not rule on the basis of exclusive federal jurisdiction because it noted that, "[h]ad the action remained in the State Court, the State Court, under the doctrine of Lincoln Mills and Lucas Flour, was bound to apply Federal and not State law." 376 F.2d at 340. Although federal preemption removed state law as a "source of private rights" it did not remove state court jurisdiction. Also, it provided a basis for removal to federal court.

The Sixth Circuit in Avco also discussed the distinction between jurisdiction in the remedial sense and jurisdiction over the subject matter. Id. at 341-42. Referring to § 4 of the Norris-La Guardia Act which denied the power to grant injunctive relief, the court stated: "The loss of the power to grant certain equitable remedies does not mean Federal Courts have lost jurisdiction over the subject matter or parties." Id. at 341.

152 Id. at 340.

153 Id. at 560. The Seventh Circuit in Kerr-McGee, refused to follow Avco, asserting that it had been criticized by the Supreme Court in Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 244-45 (1970). 677 F.2d at 577 n. 10. However, the Boys Markets court did not question the jurisdiction analysis in Avco. The problem addressed in Boys Markets was the combined effect of Avco (allowing for removal to federal court) and Sinclair Refining Co. v. Atkinson, 370 U.S. 95 (1962) (holding that the anti-injunction provisions of the Norris-La Guardia Act precluded a federal court from enjoining a strike). The defending union could remove the state court proceeding to federal court under Avco and thereby preclude an injunction against its strike even though it violated a no-strike clause. The Supreme Court had decided in Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), that Congress did not intend to disturb the pre-existing jurisdiction of the state courts. Rather, § 301(a) "was to supplement, and not to encroach upon, the pre-existing jurisdiction of the state courts." 398 U.S. at 245. The entire thrust of the Boys Markets opinion was to re-examine Sinclair due to the resulting intrusion upon the jurisdiction of the state courts. The jurisdictional analysis in Avco was not questioned.
emtion was raised in the action, federal law was being asserted defensively by the union to avoid the company's attempt to enjoin the strike. While the company wanted the dispute to be resolved by reference to state law, the union wanted federal law to control and, accordingly, it sought removal in order to have the federal judiciary construe the federal law. Federal preemption of collective bargaining agreement disputes was the basis for the union's argument that federal law should decide whether the company had a right to an injunction. In other words, the union was hopeful that federal law would provide it with a defense to the company's breach of contract claim. Federal preemption did not constitute that defense; it merely was the vehicle by which federal law would control over the presumably conflicting state law. The company's failure to mention federal law in its pleading of the case did not change the fact that federal law controlled this type of dispute. On the other hand, if the court had applied the well-pleaded complaint rule, federal jurisdiction would have been lacking.

2. Determining the Extent of Federal Preemption

The Franchise Tax Board court explained Avco as a separate jurisdictional doctrine in the federal preemption context and as an exception to the "master as aggressor" rationale of the well-pleaded complaint rule. It explained that in Avco, "the necessary ground of decision was that the preemptive force of Section 301 was so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" Therefore, even though state law provided a cause of action, section 301 displaced it and made the cause of action "purely a creature of federal law." Therefore, the Court explained, "Avco stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." The Avco doctrine may distinguish North American Phillips

1 4 The fact situation in Avco emphasizes the elusiveness of the federal claim-federal defense distinction. The Sixth Circuit held that the plaintiff's complaint, although couched in state law language, was a federal claim under preemptive federal law. Of course, federal preemption was being asserted by the defendant. The problem is whether federal preemption converted the state law claim to a federal claim or whether federal preemption of state law was merely a defense.

The better approach is to address the issue on the basis of the nature of federal preemption as a fundamental Supremacy Clause principle. Which party raises the question should not be the determinative issue.

1 4 4 This was the position of the Sixth Circuit. See supra note 150 and accompanying text.

1 4 3 U.S. at 23.

1 4 Id.

1 4 Id. at 23-24.
from Kerr-McGee. In *North American Phillips*, the Second Circuit determined that the plaintiff’s claim had been displaced by federal laws. It premised its conclusion in favor of federal jurisdiction on the determination that the carrier’s federal tariffs “govern not only the nature and extent of its liability, but also the nature and extent of the shipper’s right of recovery.” Accordingly, the Second Circuit reasoned that due to the substance of the allegations, the complaint set “forth a claim arising under federal law.”

There is no indication that the *North American* court actually saw this as a separate jurisdictional doctrine based on a “more powerful” federal preemption. It merely noted that the federal program to establish national equality of rates and services indicated that Congress had occupied the field to the exclusion of state law. Perhaps, that is the specific type of preemption that displaces a state cause of action.

In *Kerr-McGee* the “displacement of state law” argument had been presented to the Seventh Circuit. *Kerr-McGee*, relying on *Avco*, argued that the assertion of federal preemption made the alleged state law claim a federal claim. The Seventh Circuit rejected this argument but agreed that “if state law is preempted by federal law, a plaintiff may seek a remedy in federal court.” However, because federal preemption had been raised by the defendant, it was “merely a defense to state law claims.” Thus, the Seventh Circuit did not attribute significance to the displacing effect of federal preemption. The party asserting preemption was the determining factor.

Perhaps the most significant aspect of *Kerr-McGee* is the finding in a companion case that the Atomic Energy Act did not preempt the state law regulating non-radiation hazards. In other words, preemption did not completely displace state law. Looking at *Kerr-McGee* after *Franchise Tax Board*, the “less powerful” preemption involved could have resulted in the conclusion that the state claim was not displaced by federal law and therefore, “arising under” jurisdiction was lacking. Thus, an assessment of the type of preemption asserted is a precursor of the jurisdictional determination.

In light of the *Franchise Tax Board* clarification, the Second Circuit in *North American Phillips* decided the issues in the proper sequence. It first determined that Congress had completely occupied the field to the exclusion of state law. Secondly, the court found federal jurisdiction as a result of this complete displacement of state law. Perhaps the Seventh

---

158 See supra note 144.
159 579 F.2d at 233.
160 Id. at 234.
161 677 F.2d at 577.
162 Id.
163 Id.
164 Id.
165 Id. at 581.
Circuit in *Kerr-McGee* actually made its determination in that order also, despite the opinion's contrary indication.

As previously implied, it is not clear that finding that "federal law totally occupies the field" is the dispositive answer to the jurisdictional inquiry. A court must determine whether federal law displaces the particular state law cause of action. The *Franchise Tax Board* decision is instructive in this way. There the Court distinguished *Avco* by comparing section 301 of the Labor Management Relations Act (LMRA), construed in *Avco*, to ERISA. The Court noted that ERISA did not preempt "every state cause of action" relating to benefit plans within its coverage. The particular action involved in *Franchise Tax Board* was not a claim "of central concern to the federal statute." Finally, the Court stated: "Furthermore, ERISA does not provide an alternative cause of action in favor of the State to enforce its rights, while Section 301 expressly supplied the plaintiff in *Avco* with a federal cause of action to replace its preempted state contract claim."

Whether a two-prong test was being announced remains unclear. One might conclude that if the federal statute preempted every state cause of action relating to the dispute, *Avco* would control and "arising under" jurisdiction would authorize removal. On the other hand, even if the federal statute does not preempt every state cause of action it may have replaced the particular cause of action being asserted. For example, if the removed action in *Franchise Tax Board* had been a cause of action provided for in section 502(a) of ERISA, even a description in state law terms would not preclude removal to federal court. One difficulty with the Court's comparison is that the *Avco* ruling had the effect of eliminating the employer's claim for injunctive relief altogether. In *Franchise Tax Board*, the Court states that "section 301 expressly supplied the plaintiff in *Avco* a federal cause of action to replace its preempted state contract claim." The court is correct in saying that the employer could proceed under federal common law and assert that the union breached the collec-

166 The Second Circuit in *North Am. Phillips* appears to have based its decision on this implicit expression of preemption. See *supra* note 160 and accompanying text. However, to the extent state law was displaced, the federal tariffs provided an alternative cause of action.

167 This is the *Avco* doctrine as explained by the Supreme Court in *Franchise Tax Bd*. However, *Avco* itself does not deal with the creation of an alternative cause of action. The Sixth Circuit determined that the federal law displaced the state authority. In other words, the federal substantive law controlled the enforcement of a no-strike clause in a collective bargaining agreement. The *Kerr-McGee* court correctly read *Avco* on that point. 677 F.2d at 577 n. 10. However, the Supreme Court has re-explained *Avco* in *Franchise Tax Bd.* to apply to the replacement of a specific cause of action.

168 463 U.S. at 25.
169 *Id.* at 25-26.
170 *Id.* at 26.
171 *Id.*
tive bargaining agreement. However, the federal law did not provide the employer with the claim it desired—a claim for injunctive relief.

The Franchise Tax Board approach uses the phrase "cause of action" without regard to the relief sought. On the other hand, it uses "the relief sought" to compare the causes of action provided in ERISA with the state tax board's cause of action. It states that ERISA may preempt claims by beneficiaries to require the trustees to comply with the provisions of a covered plan. However, ERISA does not preempt a state's action to levy on trust funds. A cause of action for injunctive relief to prevent a violation of the plan is distinguishable from a cause of action to enforce a levy on trust funds. The court acknowledges that ERISA may preempt enforcement of the state's levy on the trust funds. Nevertheless, federal district court jurisdiction is rejected because "an action to enforce the levy is not itself preempted by ERISA." The jurisdictional issue turns on whether the precise type of action pleaded by the plaintiff has been replaced by a separate cause of action set forth in the federal statute. Federal jurisdiction thus becomes dependent on nebulous pleading law definitions of a "cause of action." Additionally, jurisdiction is determined without regard to the fact that federal law may provide the controlling rules of decision.

Moreover, the Franchise Tax Board decision permits federal jurisdiction only if the federal statute replaced the state cause of action. The court did not recognize that the federal statute may have eliminated the state cause of action. In that event, a strong federal policy against a preexisting state claim for relief could not be heard in federal court; this would produce an anomalous result. Perhaps this was an oversight and the particular state cause of action is preempted if it is replaced or eliminated by the federal statute.

Either situation requires a careful comparison of the claims available under the federal statute and those previously cognizable in state law, although this type of inquiry has not been made on a regular basis by the federal courts. Most courts have looked at preemption as either defensive or offensive. If this "more powerful" type of preemption is present, however, federal question jurisdiction is present regardless of which party makes the assertion.

Thus, federal jurisdiction in the federal preemption context is even more complicated than previously believed. The federal district courts must determine not only whether there is preemption but must also identify whether it is a "powerful" preemption that preempts the state cause of action.

This latter criterion depends on the relationship between the disputants under the federal statutory scheme. In other words, in Franchise

---

171 Id. at 26-27 n.30.
172 Id. at 26.
Tax Board, the Court referred to the specific plaintiff involved and the failure of Congress to provide a cause of action for that particular plaintiff. The specific dispute raised by this aggressive plaintiff was not a subject of the federal regulation.

Under such an interpretation, the issue may be resolved by deciding whether the plaintiff is given standing to assert a claim under the federal statute. This issue may be the significance of the Second Circuit's determination in North American Phillips, holding that both the defendant's liability and the plaintiff's "right of recovery" were governed by the federal regulations. Since shipper's right to recover against a carrier was provided for in the federal tariffs, the potential dispute between a shipper and a carrier was a subject of the federal program.

The Supreme Court in Franchise Tax Board contrasted section 502(a) of ERISA and section 301 of the LMRA on this point. However, the comparison also indicates that the aggressive plaintiff need not be specifically designated in the federal statute. Section 502(a) of ERISA designated the potential plaintiffs. Section 301 of the LMRA does not specify a federal cause of action for certain plaintiffs; it provides federal jurisdiction over labor-management contract disputes, including actions by an employer. Accordingly, the test is the broader one of whether the plaintiff's state action comes "within the scope of" the claims enumerated or permitted by the federal statute.

Thus, the Supreme Court uses a "standing" requirement to identify the causes of action that are preempted. In Franchise Tax Board, the specific cause of action enforcing a tax levy could only be brought by or on behalf of a governmental entity. Clearly, ERISA did not attempt to create a federal claim for the enforcement of tax levies. Congress did not designate a state taxing authority as a claimant within the regulatory scheme. Therefore, the Court inescapably concluded that this plaintiff's cause of action to enforce a tax levy was not preempted.

The Court's approach is consistent with its adoration for the "aggressor as master" rationale. Federal jurisdiction is not meant to protect the federal regulatee nor federal regulatory programs. It is available only if the "aggressive" disputant was a contemplated part of the regulatory scheme.

Of course, such a result is not inevitable. A different description of the cause of action results in a different conclusion. The action in Franchise Tax Board was brought to compel a trustee of an ERISA-covered plan to disburse trust funds to a creditor of beneficiaries of the trust. Certainly, the accessibility of trust funds to creditors relates to the central purposes of the trust and ERISA itself—to provide for employees. By focusing on

---

174 579 F.2d at 233.
175 463 U.S. at 24-25.
176 See id. at 25 n. 28.
177 The Supreme Court makes this suggestion in Franchise Tax Bd., id. at 24.
the effect of the relief sought, it is apparent that the plaintiff's claim is within the scope of the ERISA claims and is a dispute contemplated by Congress.

Thus, the judicial interpretation of the state cause of action is crucial. In *Franchise Tax Board*, the Supreme Court chose to define the cause of action by the precise identity of the plaintiff. This narrow construction meant necessarily that the cause of action would not be within the scope of ERISA. The Court may have taken this narrow approach because a state was party plaintiff. The Court was persuaded by comity considerations to allow the state to sue in its own courts.\(^{178}\) Thus, such a narrow interpretation of the cause of action may not preclude a federal district court from hearing an ordinary judgment creditor's attempt to execute on the trust.

The boundary of the *Avco* doctrine could be resolved easily if Congress had preempted every state cause of action conceivably related to the subject matter being regulated. With ERISA, the Court asserts that "Congress did not intend to preempt entirely every state cause of action relating to such plans."\(^{179}\) The Court quotes from the disclaimer language in section 514(b)(2)(A) of ERISA, stating that "[n]othing in this subchapter shall be construed to relieve any person from any law of any State which regulated insurance, banking, or securities."\(^ {180}\) Therefore, room for state claims exists.

This disclaimer provision is hardly persuasive authority for the Court's conclusion. First, the provision says nothing about tax liabilities. One might conclude reasonably that ERISA may relieve one from state tax laws. Second, and more to the point, the provision merely states that ERISA will not relieve a person from liability. The fact that ERISA may prevent the trustees from disbursing trust funds to the tax creditors of an employee-beneficiary, does *not* relieve the employee from the tax liability. The failure of ERISA to relieve persons from "any law of any State which regulates insurance, banking, or securities" says little about the cause of action before the court or the causes of action covered by the Act. The provision addresses only the immunities from state regulation that are *not* provided and it is not an approval of other state claims. The Court would have been on firmer ground by asserting that ERISA does not preempt every state cause of action that may relate to a covered plan in some conceivable way. This obtuse conclusion should be self-evident.

The Supreme Court implies that section 301(a) of the LMRA, construed in *Avco*, falls into this category of preempts *all* actions "for violation of contracts between an employer and a labor organization"\(^{181}\)

\(^{178}\) *Id.* at 21 n.22.

\(^{179}\) *Id.* at 25.


\(^{181}\) 463 U.S. at 23.
thereby distinguishing it from ERISA.

Apparently, the Second Circuit in *North American Phillips* used this approach with interstate carriers. First, the court determined that the federal law completely occupied the regulatory field. Second, it determined that the particular claim asserted was a claim provided by the federal statute. Therefore, the claim was a creature of federal law and federal jurisdiction was upheld.

This analysis could explain *Avco*. Federal jurisdiction did not exist in *Avco* because the federal statute provided the employer with an alternative cause of action; rather, jurisdiction existed because the federal law had occupied the field entirely. Accordingly, if the employer had a claim for breach of contract at all, it had to be based on federal law.

However, the Court in *Franchise Tax Board* refers to "an alternative cause of action." Under section 301 of the LMRA causes of action must be for violations of the labor contract. An action "merely relating" to the labor contract would not be sufficient. Thus, the exclusion of state law is limited to the cause of action described. It is not based on a federal preemption "so powerful as to displace entirely any state cause of action . . . ."

In the final analysis, the Court distinguishes the *Avco* interpretation of section 301 of the LMRA on the ground that a state agency filed suit in *Franchise Tax Board* asserting a claim technically unrelated to ERISA, while *Avco* involved precisely the type of dispute being addressed by section 301 of the LMRA. Accordingly, even though the plaintiff in *Franchise Tax Board* specifically asserted federal preemption as an issue, and the plaintiff in *Avco* did not assert a federal issue, federal question jurisdiction existed nonetheless in *Avco* but not in *Franchise Tax Board*.

Thus, a federal statutory scheme that provides for certain types of actions without specifying the potential plaintiffs is a broader base for "arising under" jurisdiction. Congressional attempts to define the type of claim created will be the touchstone. Congress may preempt the specific causes of action it mentions but this will not preempt all other state causes of action related to the subject matter. In addition, Congress will

---

183 See supra note 160 and accompanying text.
184 463 U.S. at 26.
185 Id. at 25 n. 28.
186 Id.
187 Id. at 23.
188 Arguably, the Court is being consistent by basing jurisdiction on the identity of the party asserting federal preemption. Normally, that party, must be the plaintiff. If so, there is removal jurisdiction. However, if that plaintiff happens to be a state seeking to enforce a tax levy, the choice of a state forum must be honored.

If this is the nature of the Court's consistency, it does not assist in the development of a useful and predictable definition of "arising under."
have implicitly determined that only specific causes will be heard in a federal forum while all others will be heard by state courts.

Such a result will occur even though the federal statutory scheme may have expressly preempted the state rules of decision in the dispute. In fact, the decisions as to whether the federal substantive rules do preempt the state rules will be made by the state courts, not the federal courts.

Congressional intent is the hallmark of most preemption decisions, the exception being cases where federal and state law are irreconcilably in conflict. Ironically, on the consequential issue of what court system will be the decision-maker, the Supreme Court, without any assessment of congressional intent, has limited the application of preemption to specific claims that replace state law claims.

The only reason for creating this labyrinth of jurisdictional tests is the clash between the Court's desire to hold to the well-pleaded complaint rule and the patent presence of federal law in the forefront of the case. If the Court would simply recognize that federal jurisdiction should not depend on whether this ultimate issue of federalism is asserted by an aggressor or a non-aggressor, the complications would be minimized. However, the Court has now fashioned a separate jurisdictional doctrine for preemption of the plaintiff's causes of action. In the interest of restricting the inquiry to the aggressor's description of the cause, the Court has turned the judicial inquiry back into a quest for an ill-defined "cause of action." This was the approach in *Hurn v. Oursler* which the court viewed as outmoded after the adoption of the Federal Rules of Civil Procedure.

C. Removal of State Actions for Declaratory Relief

After a discussion of federal question jurisdiction in federal declaratory judgment actions and in removal actions, a third category to be investigated is a combination of both. The issue is presented where the plaintiff files a declaratory judgment action in state court relying on a state declaratory relief law and the defendant removes to federal court. The defendant argues that there is removal jurisdiction because federal law has preempted the plaintiff's state law claim.

The complexities involved in this category of cases may not be unexpected after understanding the variations in both the federal declaratory judgment actions and the removal cases. In the former, the variations depend on the aggressor's threatened claim and on whether coercive relief was requested or could have been requested. In the removal cases, the
variations depend on the extent of federal preemption. A major inquiry in the removed state declaratory judgment action is whether the jurisdictional determination is limited by *Skelly Oil* to the aggressor's complaint or whether the inquiry should shift to the "true" aggressor's threatened claim as explained in *Wycoff*. A third option is that *Skelly Oil* and *Wycoff* should not apply at all and the assessment should be made as if the complaint were for traditional coercive relief.

A discussion of two cases should provide direction: the Third Circuit's opinion in *La Chemise Lacoste v. The Alligator Co., Inc.*, which was the authoritative case on this issue prior to 1983, and the Supreme Court's opinion in *Franchise Tax Board*, where jurisdiction was rejected but on different grounds from those asserted in *LaCoste*.

In *Lacoste*, a French corporation filed an action in Delaware state court seeking both a declaration of its ownership of and right to use a crocodile emblem as a trademark, and an injunction against interference. The defendant removed to federal district court. The defendant argued that there was federal jurisdiction under the *Wycoff* addition to *Skelly Oil* because it had threatened a coercive federal action against Lacoste.

The district court accepted jurisdiction. On appeal, the Third Circuit reversed, holding that *Wycoff* was limited to Federal Declaratory Judgment Act cases. The court saw *Wycoff* as limiting federal jurisdiction based on the functional roles of the disputants. *Wycoff* had shifted the jurisdictional inquiry to the actual aggressor's threatened claim. However, the Third Circuit reasoned that such an approach could not apply in removal cases because only a defendant may remove to federal court. Applying *Wycoff* would allow the "functional plaintiff" the right to remove although actual plaintiffs do not have such a statutory right. Thus, the court refused to look to the threatened claim. Since the court found no federal question in plaintiff's complaint, it directed that the case be remanded to state court.

In *Franchise Tax Board*, a state tax board sought a state declaratory judgment holding that the Federal Employees Retirement Income Security Act of 1974 (ERISA) did not preempt state law and deny the trustees of an ERISA-covered plan authority to honor tax levies on trust funds.

---

101 See * supra* part III, for a discussion of these limitations in the federal declaratory judgment action.
102 506 F.2d 339 (3d Cir. 1974).
104 The declaratory defendant, The Alligator Co., Inc., argued that it had threatened to sue Lacoste under the Lanham Act, 15 U.S.C. § 1051 et seq., to protect its trademark. 506 F.2d at 342. The Third Circuit rejected the argument, in part because the threatened action "was not necessarily federal in nature." *Id.* at 346. However, it premised this conclusion by noting "the absence of a preemptive trademark statute." *Id.* In the context of a preemptive federal statute, the court would have found jurisdiction if it applied *Wycoff*.
105 506 F.2d at 343.
106 *Id.* at n. 4.
The defendants removed the case to federal district court. The United States Supreme Court ruled that the district court lacked jurisdiction and directed that the case be remanded to state court.

However, the Supreme Court did not follow the *Lacoste* approach. The Supreme Court initially noted that *Skelly Oil* was not "directly controlling" because it involved a Federal Declaratory Judgment Act case. Nevertheless, it applied *Skelly Oil* to the state declaratory judgment claim. The Court stated: "Yet while *Skelly Oil* itself is limited to the Federal Declaratory Judgment Act, fidelity to its spirit leads us to extend it to state declaratory judgment actions as well."

Furthermore, unlike the Third Circuit in *Lacoste*, the Supreme Court purportedly applied *Skelly Oil* as amplified by *Wycoff*. The Court stated that the federal courts lack removal jurisdiction "when a federal question is presented by a complaint for a state declaratory judgment, but *Skelly Oil* would bar jurisdiction if the plaintiff had sought a federal declaratory judgment." It opined that federal courts had "consistently" entertained declaratory actions by alleged patent infringers, "on the theory that an infringement suit by the declaratory judgment defendant would raise a federal question." The theory of the *Wycoff* dictum was that the declaratory defendant's threatened claim for coercive relief could establish him as a true aggressor thereby bringing the case within federal court jurisdiction. The Supreme Court apparently approved this approach.

Consistent with *Wycoff*, the Court turned to the trustees' claims. Section 502(a)(3) of ERISA grants the trustees of ERISA-covered plans a cause of action for injunctive relief to protect their rights under ERISA. Such an action is governed exclusively by federal law. Under the *Wycoff* dictum, federal court jurisdiction could be based on that threatened federal action for injunctive relief. Since *Wycoff* was being applied, federal jurisdiction would appear to follow.

However, the Supreme Court stopped the inquiry at this point by stating the following: "If CLVT could have sought an injunction under ERISA against application to it of state regulations that require acts inconsistent with ERISA, does a declaratory judgment suit by the State 'arise under' federal law? We think not." The Court did not reject jurisdiction by refusing to apply *Wycoff* to a state declaratory judgment action as the Third Circuit did in *Lacoste*. Rather, it carved out an exception to *Wycoff* because the action for declaratory relief was brought by a
state. It simply noted that there were "good reasons" why federal courts should not entertain such actions.\textsuperscript{203}

The "good reasons" stated by the Court are not self-evident. First, the opinion stated that the states are not prejudiced by an inability to come to federal court in the face of a threatened federal injunction action.\textsuperscript{204} Second, the Court relied on the grant of jurisdiction in ERISA that designated the potential plaintiffs as an indication that Congress implicitly denied federal jurisdiction over claims brought by other plaintiffs.\textsuperscript{205}

The Court's first "good" reason is a paradox. Obviously, the state is not prejudiced by an "inability to come to federal court for a declaratory judgment." The state has no desire to come to federal court. It wants the Supremacy Clause issue decided in its "home" courts by the judicial arms of its sovereignty. It is the federal regulatee that wants a federal court decision.

The Court's second supporting argument is no more enlightening. The fact that Congress created specific claims for specific categories of plaintiffs does not answer the Court's final inquiry under the Skelly Oil and Wycoff analysis. The Court did not deny that ERISA grants the trustees a claim for coercive relief. Rather, it retreated from the Wycoff amplification of Skelly Oil by focusing on the state declaratory plaintiff's claim and the identity of the plaintiff.

Congressional inclusion or exclusion of the state as a plaintiff under ERISA has little to do with the Court's "we think not" response to the established, and approved, jurisdictional analysis. This inquiry is more relevant to the "creation" test of American Well Works, basing jurisdiction on whether the plaintiff's claim was created by federal law.\textsuperscript{206} Of course, the Court already determined that it was looking at a state claim. Thus, the American Well Works approach is inapplicable unless the Court is implicitly proposing an expanded use of the Holmes' test. In the latter event, the federal nature of the claim would be sufficient for federal jurisdiction even though the plaintiff was a state. Perhaps, the reference to the ERISA claims was to emphasize that the Court's decision was limited to a state action asserting a claim created by state law.

Despite the uncertainty of its explanations, the Court revealed the actual basis of its holding. It acknowledged that the state went "to great lengths to avoid federal-court resolution" of the Supremacy Clause issue.\textsuperscript{207} The Court also noted that such cases will only be heard in federal court where "the defendant has removed the case to federal court."\textsuperscript{208}

\textsuperscript{203} Id. at 21.
\textsuperscript{204} Id.
\textsuperscript{205} Id.
\textsuperscript{206} See supra note 29.
\textsuperscript{207} 463 U.S. at 21 n. 22. This admission is patently contrary to the Court's concern about the state being prejudiced.
\textsuperscript{208} Id.
Then the court stated the following: "Accordingly, it is perhaps appropriate to note that considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." Thus, the actual basis of the decision is comity for the sovereignty of the states and the general jurisdiction of state courts.

The Court effectively ruled that it was not bound to allow federal court jurisdiction even where its own doctrine indicates that jurisdiction exists, thus inferring that jurisdictional doctrine is not mandatory. As previously discussed, there was little concern that "some clear rule demands it" because the Supreme Court has been unable to fashion a clear rule in this area. Accordingly, as a practical matter, the exercise of jurisdiction is discretionary.

It is difficult to speculate on the basis for the Court's holding, other than comity. The Court reasoned that the state tax board's action for declaring the validity of its state law was "sufficiently removed from the spirit of necessity and careful limitation of district court jurisdiction that informed our statutory interpretation in Skelly Oil and Gully . . . ." This reasoning is difficult to unravel. Undoubtedly, both Skelly Oil and Gully saw a need to limit federal court jurisdiction. They stand for the proposition that federal jurisdiction should be limited to cases where federal questions are "essential" or at the "forefront." Perhaps the Court intuitively viewed the tax board's action as one that raised a federal issue only in a peripheral way. However, its own analysis belies this conclusion: "Not only does appellant's request for a declaratory judgment under California law clearly encompass questions governed by ERISA, but appellant's complaint identifies no other questions as a subject of controversy between the parties." No question exists that the federal preemption issue was the essence of the tax board's declaratory judgment claim.

In the absence of an understandable explanation, the only reasonable conclusion is that the Court's notions of comity were offended by the application of the removal statute in this context. It is an affront to the state to allow such an action to be removed from its courts. Furthermore, the Court prefers that the state courts carry the burden of deciding the federal preemption issue in order to lessen the federal caseload. Accordingly, the Court engaged in mental gymnastics to distinguish this case from cases that could have been brought originally in federal court as "arising under" federal law. Its own analysis under Skelly Oil and Wycoff had to be aborted on comity and "good reason" grounds because the inevitable result was the existence of original jurisdiction.

Furthermore, the Court reveals an aversion for the application of the

209 Id.
210 Id. at 21-22.
211 Id. at 14.
removal statute in this type of case. It appears to have followed the proper relationship between 28 U.S.C. § 1441(b) and 28 U.S.C. § 1331 by denying removal jurisdiction because it found original jurisdiction lacking. However, this is a subterfuge. In actuality, the court rejected original jurisdiction because it did not favor removal jurisdiction.212 This conclusion is apparent from the Court's confession that it was "reluctant to snatch cases" from the state courts.213 The only way cases could be "snatched" is by the defendant's exercise of the congressional right to remove the case. The Court admitted that in the absence of the removal statutes, this type of case would not be decided in the federal courts, despite the federal issues involved.

In reality, the Court is reversing the proper construction of section 1331 as a predicate to deciding removal jurisdiction. Removal jurisdiction is based on original jurisdiction, and not vice versa.

Of course, the Court's deference for the state is consistent with the erstwhile "aggressor as master" rationale. The state, as a sovereign, is entitled to special rights to control its actions. It was the actual aggressor in this dispute seeking to compel the trustees to disburse trust funds. Since the declaratory device was part of a state law claim, the pleading was proper. Therefore, the state's choice of the state forum should control.

Even though the Court eventually did not apply Wycoff, it fails to mention Lacoste. In Lacoste, the Third Circuit held that Wycoff does not apply to a state declaratory judgment action removed to federal court because a "functional plaintiff" cannot remove.214 This approach would have provided a different result. In Franchise Tax Board, the plaintiff asserted a federal question while the plaintiff in Lacoste did not. Thus, the Lacoste approach would have meant federal jurisdiction even without applying Wycoff. Furthermore, the Court effectively rejected the Lacoste approach.216

The fact that the state declaratory judgment action constituted a substantive cause of action presented a difficult problem for the Court.216 The Federal Declaratory Judgment Act was "procedural only." This distinction was important because if the Federal Declaratory Judgment Act did more than provide a remedy, there would be jurisdictional implications under accepted Supreme Court doctrine.

Under American Well Works, if federal law created the cause of action,

212 463 U.S. at 21 n. 22.
213 See supra notes 192-96 and accompanying text.
216 This conclusion is based on the Court's pronounced "holding" that the Shelly Oil analysis applies to state declaratory judgment actions. 463 U.S. at 18-19. The Court then looked to the declaratory defendant's threatened action, as suggested in Wycoff. Id.
216 Id. at 17 n. 16.
it was within "arising under" jurisdiction of the federal courts.\textsuperscript{217} Justice Frankfurter, an ardent supporter of this "creation test," sought to avoid its application to the Federal Declaratory Judgment Act. Therefore, finding that the Act did not create a federal cause of action and thereby provide "arising under" jurisdiction over cases not cognizable previously in the federal courts was essential. Thus, the courts had to look to the underlying claim and characterize it as state or federal by determining its "essence" as directed by Gully. In \textit{Skelly Oil}, the Court found the underlying cause of action to be a creature of state law and denied jurisdiction.

The \textit{Skelly Oil} jurisdictional interpretation was limited to the federal statute. It would not apply to a state declaratory judgment statute. As the Supreme Court in \textit{Franchise Tax Board} noted, the California statute predated the federal Act and was interpreted as providing a substantive claim.\textsuperscript{218}

However, this fact does not present a problem under the \textit{American Well Works} test because the claim for declaratory relief is created by state law. The fact that a state created claim exists is not determinative since the "creation" test is inclusive rather than exclusive.\textsuperscript{219} Federal jurisdiction still exists with a state claim if it is necessary to construe a substantial issue of federal law. Moreover, the Supreme Court acknowledged that the allegation of the lack of preemption was an essential part of the tax board's claim for declaratory relief. Thus, the finding of a substantive cause of action for declaratory relief and a substantial federal element should have meant federal removal jurisdiction. However, the Supreme Court stated that the state cause of action for declaratory relief would be treated as if it were an original action seeking declaratory relief in federal court.\textsuperscript{220} In other words, it would be treated as if it were not a substantive cause of action.

The fact that a state cause of action for declaratory relief exists raises another issue not addressed in \textit{Franchise Tax Board}. A problem would arise if the tax board had commenced its action in federal district court asserting a state claim for declaratory relief based on an essential question of federal preemption. The comity considerations would be absent since the case would not be "snatched" into federal court. There also

\textsuperscript{217} See supra note 58.

\textsuperscript{218} 463 U.S. at 17 n. 16.

\textsuperscript{219} See supra note 58. This point originates with Judge Friendly in \textit{T. B. Harms Co. v. Eliscu}, 339 F.2d 823, 827 (2d Cir. 1964). The Supreme Court in \textit{Franchise Tax Bd.} expressly endorsed this limitation of the \textit{American Well Works} test. 463 U.S. at 8-9. In fact, Justice Brennan asserts that Justice Frankfurter had acknowledged its rejection "as an exclusionary principle." Id. at 9. Interestingly, Justice Frankfurter's concession about the \textit{American Well Works} test was in the context of the appellate jurisdiction of the Supreme Court, not original jurisdiction of the district courts. See \textit{Flournoy v. Wiener}, 321 U.S. 253, 270-72 (1944)(Frankfurter, J., dissenting).

\textsuperscript{220} 463 U.S. at 18.
would not be a problem of expanding federal court jurisdiction by the Federal Declaratory Judgment Act since the plaintiff would be relying on the California statute. Thus, the concern of Skelly Oil and Wycoff would not be present. Accordingly, federal jurisdiction would appear to exist.

Nevertheless, since the Supreme Court in Franchise Tax Board held that the removed state declaratory judgment action should be treated as if it had been an original action in federal court under the Federal Declaratory Judgment Act, a different result in an original action based on the state statute would be anomalous. Thus, the Supreme Court might apply Skelly Oil and deny jurisdiction. These patent inconsistencies demonstrate the discretionary nature of federal jurisdictional doctrine.

The Franchise Tax Board decision was concerned that Skelly Oil could be avoided by the filing and removal of state declaratory judgment actions. However, this concern seems specious since the tax board did not want the case heard in federal court and the trustees did. It would take a collusive effort to arrange to bypass Skelly Oil by the state declaratory action.

The Court would have the same concern with an original federal court action asserting the state declaratory judgment claim. If the Skelly Oil limitations do not apply, the federal courts would have jurisdiction. Thus, the unfortunate Skelly Oil decision, based on a misconception of the well-pleaded complaint rule, is expanded to cover the possible loophole created because the states have a more reasonable view of their declaratory judgment statutes.

In the concluding segment of the Franchise Tax Board opinion, the Supreme Court attempted to justify its jurisdictional doctrine. It stated that its concern was “consistent application of a system of statutes conferring original federal court jurisdiction . . . “221 The manner in which consistency and predictability will result from the Court’s opinion is difficult to see. In its actual holding, the Court stated:

We hold that a suit by state tax authorities both to enforce its levies against funds held in trust pursuant to an ERISA-covered employee benefit plan, and to declare the validity of the levies notwithstanding ERISA, is neither a creature of ERISA itself nor a suit of which the federal courts will take jurisdiction because it turns on a question of federal law.222

Of course, it is the category of cases asserting state claims but requiring interpretation of a substantial question of federal law that need judicial rules that can be applied in a consistent fashion. At the same time, the Court’s holding implies: “This case is not in that category.” Such a holding is hardly informative enough to promote consistency.

221 Id. at 27.
222 Id. at 28 (emphasis added).
In the final analysis, the Court decided the case on comity grounds and "good reasons" that were not articulated. It is unclear whether its holding would extend to non-state plaintiffs. Arguably, the decision is limited to actions by states to enforce tax levies and to declare the validity of state law.

Perhaps the Court was more concerned with clarifying jurisdictional doctrine in general than it was with the rationale for deciding the particular case since it went to great lengths to trace and describe the well-pleaded complaint rule and the Skelly Oil and Wycoff principles relating to declaratory judgments. In dictum, described as ratio decidendi, the Court approved its historical doctrines, without acknowledging the inconsistencies and ambiguities involved in each.\(^\text{223}\)

The significance of the holding in Franchise Tax Board is the rejection of original federal court jurisdiction despite the dictates of its "sacred" jurisdictional dogma. The clear implication is that federal question jurisdiction is discretionary and that federal court discretion should be exercised against jurisdiction.

An underlying basis of the Court's decision is the philosophy expressed in Skelly Oil that the volume of federal court litigation should be limited by a narrow view of jurisdiction. The Court based its approach on "what Skelly Oil called 'the current of jurisdictional legislation since the Act of March 3, 1875; 339 U.S. at 637, with an eye to practicality and necessity.'"\(^\text{224}\) In short, the Court's holding was intended to implement a perceived policy directing a retraction of original federal court jurisdiction. It did little to define the statutory phrase "arising under" federal law.

Furthermore, the Supreme Court's adoption of the Skelly Oil philosophy as a congressional policy reflected by the "current" of jurisdictional legislation is simply in error. The current of congressional legislation is expansive of federal jurisdiction, not retractive. Even the few changes made by the Judicial Code of 1948 "were in the direction of expanding federal jurisdiction."\(^\text{225}\) While earlier amendments to section 1331 had increased the amount in controversy, a 1976 amendment exempted actions against the United States from the $10,000 minimum and a 1980 amendment eliminated the amount in controversy altogether.\(^\text{226}\)

The Civil Rights Act of 1957 included section 1343, which expanded federal court jurisdiction over civil rights actions.\(^\text{227}\) In 1954, Congress deleted the monetary limitation that section 1346(a) imposed on tax refund

\(^{223}\) The Court acknowledged that its approach was more historical than logical, id. at 4, and that it produces "awkward" results. Id. at 12.

\(^{224}\) Id. at 20.

\(^{225}\) J. Moore, J. Lucas, H. Fink, D. Weekstein and J. Wicker, Moore's Federal Practice § 0.61[1], at 644.1 (2d ed. 1984).

\(^{226}\) Id. at 644.2.

actions, thus expanding federal court jurisdiction.\textsuperscript{228} In 1976, Congress enacted the Foreign Sovereign Immunities Act conferring original federal court jurisdiction over actions against foreign sovereigns without regard to the amount in controversy.\textsuperscript{229}

The list of congressional actions expanding original federal court jurisdiction is extensive. It demonstrates beyond doubt that the "current" of legislative policy is not to limit federal court jurisdiction. If such a policy exists, it is the policy of the justices themselves. It is misleading to appropriate language in a 1950 decision characterizing early twentieth century legislation and to assert that it is indicative of congressional policy more than thirty years later. The origin of the policy should not be disguised. If it is judicial, the Court should acknowledge that fact.

In fact, the Court is not blameless for its treatment of Congress throughout the opinion. In its discussion of \textit{Skelly Oil} and its limitations on the application of the Federal Declaratory Judgment Act, the Court noted that Congress has the power to alter \textit{Skelly Oil}, but "has declined to make such a change."\textsuperscript{230} Of course, this is correct. However, since the Supreme Court caused the "awkward" results produced by the \textit{Skelly Oil} decision, it is the Court who should reappraise \textit{Skelly Oil}.

Notwithstanding the Court's uninformative holding and its sacrosanct treatment of \textit{Skelly Oil}, the \textit{Franchise Tax Board} decision provided direction in dictum for federal removal jurisdiction over state declaratory judgment actions. To preserve \textit{Skelly Oil}, the lower federal courts must engage in pleading fictions. Ignoring the actual situation, the courts must treat the removed state declaratory judgment action as if it were a Federal Declaratory Judgment Act claim.

As previously indicated, the necessity for such a fiction demonstrates the weakness of the judicial doctrine. The use of fictions does not command respect for the Court's authority. It complicates this threshold issue which requires consistency. The better approach would be the rejection of \textit{Skelly Oil}.

\section*{V. Conclusion}

Under the auspices of the well-pleaded complaint rule, the Supreme Court has made the threshold issue of federal jurisdiction perplexing and unpredictable. The Court's adoration for the "aggressor as master" rationale of the rule has entrenched jurisdictional doctrine in complexity unbecoming the statutory phrase "arising under" federal law.

The Supreme Court has acknowledged two general situations in which federal district court jurisdiction exists. One is where federal law creates the plaintiff's cause of action. The second is where a cause of action cre-
ated by state law requires the construction of a substantial question of federal law.

The Court has used the well-pleaded complaint rule primarily in the latter category to determine whether the federal issue is essential. It has limited this inquiry to the aggressive party's description of the action due to traditional notions of the court system as a forum for approved combat. As a result, present jurisdictional doctrines are intertwined with superficial, and often speculative, characterizations of disputants as aggressive or non-aggressive.

In the context of modern disputes where parties challenge the source of the controlling regulatory requirements, jurisdiction should be based on what law governs the controversy. If federal law has preemptive force, the dispute "arises under" federal law.