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Federal Jurisdiction over Preemption Claims: A Post-*Franchise Tax Board* Analysis

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Notes

Federal Jurisdiction over Preemption Claims: A Post-Franchise Tax Board Analysis†

I. Introduction

As Congress uses the commerce power to regulate areas of the economy previously controlled by the states,¹ federal statutes conflict with state law with increasing frequency.² When such conflicts occur,

† The author wishes to express his gratitude to Professor Charles Alan Wright for his kind assistance throughout the preparation of this piece.

1. U.S. CONST. art. I, § 8, provides that “[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States” Congressional power to regulate commerce has not always been as extensive as it is now. In *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), the Court held that the Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-7 (1982)), could not be applied constitutionally to prohibit monopolies in manufacture. The rationale of this decision was that manufacture (as opposed to transport and sale across state lines) was not “commerce” within the meaning of the Constitution. Later cases broadened the scope of regulable commerce to include any activity bearing a “close and substantial relation to interstate commerce.” *The Shreveport Rate Case*, 234 U.S. 342, 355 (1914) (allowing federal regulation of wholly intrastate railroad routes). This rule, however, still prohibited congressional regulation of many local economic enterprises under the commerce clause. *See, e.g.*, *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down congressional prohibition of interstate commerce in goods produced with child labor).

This distinction between local and national economic enterprises gave way entirely after the Great Depression. The complete demise of restrictions on congressional exercise of the commerce power occurred in *Wickard v. Filburn*, 317 U.S. 111 (1942), in which the Court held that the Secretary of Agriculture, acting under the Agricultural Adjustment Act, could impose a statutory marketing penalty on a farmer for growing excess wheat. Growing wheat “on a small farm in Montgomery County, Ohio” was held to be an act of interstate commerce. 317 U.S. at 112.

Congress has responded by basing many statutes on the commerce power, including the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6 (1982). *Daniel v. Paul*, 395 U.S. 298 (1969), demonstrated the boundless reach of congressional power under that statute. In that case, a private club near Little Rock, Arkansas placed newspaper advertisements aimed at an audience known to include interstate travelers. The Court held that in placing these advertisements, the club had engaged in interstate commerce. *Id.* at 304. As an alternative ground of decision, the Court found that the club’s sales of hot dogs and soft drinks could be presumed to be sales of food moving in interstate commerce. *Id.* at 305. For a general discussion of the modern scope of the commerce power, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 5-4 to -8 (1978).

2. Perhaps the most notable of these preemptive federal statutes is the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976). One recent statute producing a great amount of preemption litigation is the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified in scattered sections of 29 U.S.C.). *See, e.g.*, *Shaw v. Delta Air Lines, Inc.*, 103 S. Ct. 2890 (1983); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 103 S. Ct. 2841 (1983); *Stone & Webster Eng’g Corp. v. Ilesley*, 690 F.2d 323 (2d Cir. 1982), *aff’d mem. sub nom. Arcudi v. Stone & Webster Eng’g Corp.*, 103 S. Ct. 3564 (1983); *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal. 1978), *aff’d*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

federal law "preempts"³ the state law under the supremacy clause of the United States Constitution.⁴ Litigants who foresee a preemption issue often seek a declaratory judgment of preemption or nonpreemption in order to clarify their rights and duties.⁵ This Note addresses the scope of federal question jurisdiction over declaratory judgment actions in which preemption is the only federal question raised.

The issue of federal jurisdiction is important both for its ramifications for our federal system and because of its effect on the litigation strategy and outcome of particular cases. In general, the party relying on state law tries to maintain the action in state court, where the preemption claim is unlikely to be sympathetically received.⁶ The party asserting preemption, on the other hand, attempts to bring the action in federal court under the Federal Declaratory Judgment Act (FDJA)⁷ or

3. For the purposes of this Note, the term "preempt" refers to the effect of the federal constitution and federal statutes on conflicting state statutes, constitutional provisions, and common law. Any state law inconsistent with an element of federal law is preempted under the supremacy clause of the U.S. Constitution. *See infra* note 4.

4. "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2.

5. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 103 S. Ct. 2890 (1983); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 103 S. Ct. 2841 (1983); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

6. Chief Justice Marshall foresaw the problem of state court bias against federal claims when he stated:

[W]ords obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal Courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another [state] tribunal, into which he is forced against his will.

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 822-23 (1824). The gravity of this problem is evident from the case law interpreting important federal statutes, in which federal courts frequently overrule state courts' restrictive applications of federal law. *See, e.g., Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982) (reversing a California Supreme Court decision that refused to apply regulations promulgated by the Federal Home Loan Bank Board under the Home Owners' Loan Act of 1933); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (reversing a California court's acceptance of jurisdiction over a labor dispute governed by the National Labor Relations Act); *New York Cent. R.R. v. Winfield*, 244 U.S. 147 (1917) (reversing a New York Court of Appeals decision granting a workers' compensation award under terms which contravened the Federal Employers' Liability Act); *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal. 1978) (refusing to enforce a California divorce decree issued contrary to the terms of the Employee Retirement Income Security Act of 1974), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

7. 28 U.S.C. § 2201 (1982). This Note assumes that the same jurisdictional boundaries apply whether the complaint seeks an injunction, a declaratory judgment, or both. Support exists in the case law for several positions.

The Ninth Circuit, in *Southern Pac. Transp. Co. v. Public Util. Comm'n*, 716 F.2d 1285 (9th Cir. 1983), found that the jurisdictional requirements were stricter for complaints seeking declaratory judgments than for complaints seeking injunctions. Under the Ninth Circuit's view, joinder of a claim for an injunction to a claim seeking only a declaratory judgment would alter the jurisdictional result. This view was based on *Shaw v. Delta Air Lines, Inc.*, 103 S. Ct. 2890 (1983). In that case, the Court noted that it was "beyond dispute" that federal courts could enjoin state officials in preemption cases. *Id.* at 2899 n.14; *see infra* notes 83-85 and accompanying text. The

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to remove the action to federal court if he is a state court defendant.

Declaratory judgment actions raising a federal preemption issue fall into five categories:

(1) A private party sues a state for a declaration that state law has been preempted.⁸

(2) A state sues a private party for a declaration that state law has not been preempted.⁹

(3) A state sues a private party for a declaration that state law has been preempted.¹⁰

(4) A private party sues a state for a declaration that state law has not been preempted.¹¹

(5) A private party sues another private party for a declaration of preemption or nonpreemption.¹²

In Part II, this Note surveys the early Supreme Court decisions establishing the basic rules for federal question jurisdiction in FDJA actions. In Part III, it examines the application of these rules to cases falling in the first four patterns above—cases between states and private parties. In Part IV, this Note examines the application of these rules to the fifth type—suits involving only private parties. The traditional view is that *Louisville & Nashville Railroad Co. v. Mottley*,¹³ as applied to FDJA actions in *Skelly Oil Co. v. Phillips Petroleum Co.*,¹⁴

Ninth Circuit took this as an implied rejection of federal jurisdiction to issue declaratory judgments in the same cases. 716 F.2d at 1288.

In a concurring opinion, Judge Sneed questioned this conclusion. He argued that insofar as jurisdiction is based on 28 U.S.C. § 1331 (1982) (providing jurisdiction for cases arising under federal law), the jurisdictional issue should be entirely unaffected by the nature of the relief sought. 716 F.2d at 1291. The language of the Federal Declaratory Judgment Act itself supports this conclusion: “[A]ny court . . . may declare the rights . . . of any . . . party . . . whether or not further relief is or could be sought.” 28 U.S.C. § 2201 (1982) (emphasis added).

A third solution was presented in *Board of Elec. Light Comm’rs v. McCarren*, 563 F. Supp. 374 (D. Vt. 1982), *aff’d*, 725 F.2d 176 (2d Cir. 1983). This court concluded that a complaint seeking only a declaratory judgment would be judged by the same standard as one seeking an injunction only if it is “relatively certain [that] coercive litigation [in federal court] will eventually result.” *Id.* at 376 n.1. While this view contains the same error as the Ninth Circuit view—considering the nature of the relief sought in deciding the jurisdictional issue—it is, as a practical matter, indistinguishable from the “no difference” view taken in the text. Any time there is a sufficient controversy to trigger federal jurisdiction in the first place, a trial court should be “relatively certain” that coercive litigation is soon to follow. Thus, the *McCarren* view would bar relatively few suits for declaratory judgments that would be accepted if injunctive relief were sought.

8. See *infra* subpart III(A).

9. See *infra* subpart III(B).

10. See *infra* subpart III(C).

11. See *infra* subpart III(D).

12. See *infra* Part IV. These two kinds of actions are grouped under one heading, since they seem to be analytically identical. See *infra* note 156.

13. 211 U.S. 149 (1908).

14. 339 U.S. 667 (1950).

precludes the exercise of federal jurisdiction in suits between private parties.¹⁵ This Note argues that, despite the practical and theoretical difficulties of this rule, the principle of *stare decisis* favors its continued application.

II. Development of Federal Question Jurisdiction in FDJA Actions

A preemption claim can be raised in three ways. First, the claim can arise as a defense to an action based on state law.¹⁶ Second, a party can raise a preemption claim in an action for an injunction against the enforcement of a state law.¹⁷ Finally, the preemption claim can be raised in an action for a declaratory judgment regarding the validity of a state law.¹⁸ Because most of the current federal jurisdiction issues have arisen in the context of declaratory judgment actions, this Note focuses on the FDJA. An understanding of these issues requires a discussion of the historical development of the well-pleaded complaint rule and the doctrine of *Ex parte Young*.

A. "Arising Under" and the Well-Pleaded Complaint Rule

1. *The Early Development of Federal Question Jurisdiction.*—Article III of the Constitution extends the judicial power of the United States to cases and controversies "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority."¹⁹ The Supreme Court's first important construction of this language²⁰ appeared in *Osborn v. Bank of the United States*,²¹ which is understood²² to hold that the constitutional grant of federal question jurisdiction extends to any case containing an "ingredient" of federal law.²³ The *Osborn* case might have opened the fed-

15. See, e.g., C. WRIGHT, A. MILLER & E. COOPER, 13 FEDERAL PRACTICE AND PROCEDURE § 3562, at 413 (1975).

16. E.g., *New York Cent. R.R. v. Winfield*, 244 U.S. 147 (1917) (upholding the defendant's claim that the New York workers' compensation statute was preempted by federal law).

17. E.g., *Ex parte Young*, 209 U.S. 123 (1908) (granting an injunction against a state statute setting railroad rates).

18. E.g., *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 103 S. Ct. 2841 (1983) (seeking declaration as to validity of state tax law).

19. U.S. CONST. art. III, § 2.

20. The constitutional language is distinct from similar language now appearing in 28 U.S.C. § 1331 (1982). See *infra* notes 26-30 and accompanying text.

21. 22 U.S. (9 Wheat.) 738 (1824) (Marshall, C.J.).

22. See, e.g., J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN & J. WICKER, 1 MOORE'S FEDERAL PRACTICE ¶ 0.62[2.--1] (1984) [hereinafter cited as J. MOORE]; M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 54-56 (1980); 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 15, § 3562, at 399.

23. Chief Justice Marshall's explanation demonstrates the breadth of this construction. He posed a hypothetical situation in which the Bank sued on a contractual claim. The only federal issues in such a case would have been (a) whether Congress had the right to incorporate a bank

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eral courts to a flood of cases, because almost any case raising issues of more than local interest contains an “ingredient” of federal law. For most of the nineteenth century, however, there was no statutory grant of general federal question jurisdiction implementing the constitutional grant.²⁴ Thus, the federal courts were effectively closed to all litigants except those whose causes of action fell within the narrow limits of particular federal statutes.²⁵

In 1875, however, Congress granted to the federal courts “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”²⁶ The language of the statute, which closely follows the language of article III,²⁷ suggests that Congress intended to bestow the full measure of this constitutional jurisdictional power upon the federal courts.²⁸ For better or worse,²⁹ however, the statutory grant has been more narrowly construed.³⁰

2. *The Well-Pleaded Complaint Rule and Mottley.*—The most important limitation on the statutory grant of jurisdiction is the “well-pleaded complaint” rule. This rule was announced in *Gold-Washing & Water Co. v. Keyes*,³¹ the first Supreme Court decision to construe the Act of 1875.³² In describing the requirement that an action “arise under” federal law, the Court held that the federal issue “must in some form appear upon the record, by a statement of facts, ‘in legal and logi-

with the right to sue in federal court, and (b) whether Congress had exercised that right. Marshall, over a strong dissent by Justice Johnson, 22 U.S. (9 Wheat.) at 871 (Johnson, J. dissenting), maintained that federal question jurisdiction would have existed even over such a case. 22 U.S. (9 Wheat.) at 823-24. A case with the facts of this hypothetical was decided on the same day as *Osborn*. Needless to say, Marshall’s “prediction” of the result was accurate. *Bank of the United States v. Planters’ Bank*, 22 U.S. (9 Wheat.) 904 (1824).

24. Congress had briefly granted such jurisdiction as part of the judicial legislation passed at the end of the Adams administration. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89. The Jefferson administration quickly repealed this legislation. Act of March 8, 1802, ch. 8, 2 Stat. 132.

25. *Osborn* falls into this category. The Court held that the statute incorporating the Bank was intended to grant to the Bank all the power to sue that Congress could confer under the Constitution. 22 U.S. (9 Wheat.) at 818.

26. Act of March 3, 1875, ch. 137, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (1982)). The statute, as enacted in 1875, also required a jurisdictional amount of \$500. *Id.* This amount was increased through the years, finally to \$10,000. Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415. In 1980, it was abolished entirely. Act of Dec. 1, 1980, Pub. L. No. 96-486, 94 Stat. 2369 (codified at 28 U.S.C. § 1331 (1982)).

27. See *supra* notes 19-23 and accompanying text.

28. See, e.g., C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 17 (4th ed. 1983).

29. Good reasons may exist for the restrictive construction of the statutory grant. See, e.g., *id.*; Cohen, *The Broken Compass: The Requirement that a Case Arise “Directly” Under Federal Law*, 115 U. PA. L. REV. 890, 891 (1967).

30. For a recent affirmation of this proposition, see *Verlinden B.V. v. Central Bank of Nigeria*, 103 S. Ct. 1962, 1972 (1983) (noting that “Article III ‘arising under’ jurisdiction is broader than federal question jurisdiction under § 1331”).

31. 96 U.S. 199 (1877).

32. See I J. MOORE, *supra* note 22, ¶ 0.62[2.—2]; C. WRIGHT, *supra* note 28, § 18, at 98 & n.2.

cal form,' such as is required in good pleading."³³ To determine the proper form of pleading, the practitioner was directed to *Chitty on Pleadings*.³⁴

The well-pleaded complaint rule appears in its best-known form in *Louisville & Nashville Railroad Co. v. Mottley*.³⁵ The Court held that a federal court cannot take jurisdiction of a case as one "arising under"³⁶ federal law if the federal issue will be raised only as a defense to the opposing party's state-law claim.³⁷ Thus, the plaintiffs' contract suit did not arise under federal law, even though the only issue in controversy—whether the Hepburn Act³⁸ constitutionally preempted state contract law—was a federal issue. The result in *Mottley* follows naturally from the well-pleaded complaint rule. Just as the gratuitous pleading of a federal issue will not cause a case to arise under federal law,³⁹ neither will speculative statements of anticipated defenses aid in the quest for federal jurisdiction.⁴⁰

33. 96 U.S. at 203.

34. *Id.* It is not clear to what edition of Chitty's work the Court was referring. A convenient American edition available at the time was J. CHITTY, A TREATISE ON THE PARTIES TO ACTIONS, FORMS OF ACTIONS, AND ON PLEADING (4th Am. ed. Philadelphia 1825).

35. 211 U.S. 149 (1908). The Mottleys filed suit in federal court seeking specific performance of a contract with the defendant railroad. The railroad had granted the Mottleys lifetime free passes in settlement of a personal injury claim and had honored the passes for over 35 years before the suit arose. In their complaint, the Mottleys claimed that the railroad had refused to honor the passes because of a federal statute, the Hepburn Act, ch. 3591, § 1, 34 Stat. 584, 584 (1906) (codified at 49 U.S.C. § 1(7) (1976)), declaring the passes illegal. The Mottleys argued first that the Act did not invalidate their passes, and second that if it did, it constituted an unconstitutional deprivation of property without due process of law. The Supreme Court, raising the jurisdictional issue on its own motion, dismissed the case without reaching the merits. 211 U.S. at 152.

36. For the remainder of this Note, the words "arising under" refer to the statutory grant. All of the situations discussed within the Note involve sufficient "ingredients" of federal law to come within the constitutional grant.

37. The Mottleys' constitutional claim, admittedly based on federal law, complicates the issue. Since this claim was raised as a defense to the Hepburn Act, which in turn was the railroad's defense to the Mottleys' contract claim, rather than as an affirmative ground for complaint, it had no place in a well-pleaded complaint. Its proper place was in a well-pleaded replication. See 1 J. CHITTY, *supra* note 34, at 243, 565-642 (discussing the function of replications in common law pleading).

38. Ch. 3591, § 1, 34 Stat. 584, 584 (1906) (codified at 49 U.S.C. § 1(7) (1976)).

39. See *Joy v. City of St. Louis*, 201 U.S. 332 (1906) (Peckham, J.) (holding that an action in ejectment, seeking to recover land held under a grant from the United States, does not arise under federal law since the alleged source of title is not a necessary element of an action in ejectment).

40. The effect of the well-pleaded complaint rule in preemption cases is complicated. *Mottley* presented a situation in which the plaintiff sued under state contract law and the defendant relied on preemption as a defense. In this situation, the Court understandably treated preemption as a defense to a state-law claim. This result is not quite so understandable in declaratory judgment actions, in which the *Mottley* rule has been applied to bar suits presenting preemption claims raised by plaintiffs. See, e.g., *First Fed. Sav. & Loan Ass'n v. Brown*, 707 F.2d 1217 (11th Cir. 1983) (no jurisdiction over suits by savings and loan associations alleging preemption of state law governing due-on-sale clauses); *Armstrong v. Armstrong*, 696 F.2d 1237 (9th Cir.) (no jurisdiction over suit to declare divorce decree unenforceable in light of conflicting federal law), *cert. denied*, 104 S. Ct. 337 (1983); *Alton Box Bd. Co. v. Esprit De Corp.*, 682 F.2d 1267, 1274 (9th Cir. 1982) (no jurisdiction over suit alleging preemption of state antitrust law); *First Fed. Sav. & Loan Ass'n*

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B. The Federal Declaratory Judgment Act

In 1934, Congress passed the Federal Declaratory Judgment Act,⁴¹ which authorized the federal courts to issue declaratory judgments in cases “of actual controversy.”⁴² The language of the statute indicates that Congress intended for federal courts to exercise jurisdiction over controversies without regard for technical common-law rules that previously would have barred judicial cognizance of the claim: “[A]ny court of the United States . . . may declare the rights and legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought.*”⁴³

The courts have interpreted this language to justify abandoning rules of pleading in determining *when* and *by whom* controversies can be brought in federal court. An insurance company, for example, could sue to declare a policy invalid before the insured sued on the policy.⁴⁴ Similarly, an alleged patent infringer was not forced to hold his affairs in abeyance awaiting a suit by the patent holder, but could sue immediately for a declaration that the patent was invalid.⁴⁵

The courts also might have found that the FDJA abolished the use of pleading rules in determining *which* controversies could be brought in federal court.⁴⁶ Under this interpretation, the *Mottley* well-pleaded

v. Anderson, 681 F.2d 528 (8th Cir. 1982) (no jurisdiction over suits by savings and loan associations alleging preemption of state laws governing due-on-sale clauses).

These cases should be compared with the line of cases beginning with *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). Under the rule established by that case, a suit might arise under federal law if “vindication of a right under state law necessarily turned on some construction of federal law.” *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 103 S. Ct. 2841, 2846 (1983). The Court in *Franchise Tax Board* approved this line of cases and rejected the rule that “[a] suit arises under the law that creates the cause of action,” established by Justice Holmes in *American Well Works v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). 103 S. Ct. at 2846; *see infra* note 151. While the *Kansas City Title & Trust Co.* doctrine has rarely been applied, at least one recent case has applied it to assert jurisdiction over a preemption claim raised by the plaintiff in a contract suit. *Noble v. Arabian Am. Oil Co.*, No. 83-1218-MA (D. Mass. Dec. 28, 1983) (claiming that defendant had withheld money from plaintiff’s paycheck in violation of the Internal Revenue Code).

41. Ch. 512, 48 Stat. 955 (1934) (codified as amended at 28 U.S.C. § 2201 (1982)).

42. *Id.* Article III defines the federal judicial power in terms of “cases” and “controversies.” The Court has noted that the FDJA “manifestly has regard to” article III. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937).

43. 28 U.S.C. § 2201 (1982) (emphasis added).

44. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937).

45. *E. Edelmann & Co. v. Triple-A Specialty Co.*, 88 F.2d 852, 854 (7th Cir.) (“It is of no moment . . . that the suit is brought by the alleged infringer instead of by the owner.”), *cert. denied*, 300 U.S. 680 (1937). The *Edelmann* case has recently taken on increased significance. *See infra* notes 93-94 and accompanying text.

46. The words of the statute—“whether or not further relief . . . could be sought”—could reasonably support an interpretation that allowed federal courts to take jurisdiction over any dispute that raised federal issues. The syllogism would be as follows: Before the FDJA, there were many cases over which federal jurisdiction did not exist because of rules of pleading that limited the types of issues that federal courts could consider in any particular case; the FDJA eliminated

complaint rule would not apply in FDJA actions. Courts would ignore the rules of pleading and exercise federal jurisdiction over any FDJA action requiring determination of an issue of federal law, regardless of which party raised the issue. The only two limitations on federal question jurisdiction would then be the requirement of "actual controversy"⁴⁷ and the *Osborn* requirement⁴⁸ that such cases involve at least an "ingredient" of federal law.

In *Skelly Oil Co. v. Phillips Petroleum Co.*,⁴⁹ however, the Court, focusing on the "current of jurisdictional legislation since the Act of March 3, 1875,"⁵⁰ held that the effect of the FDJA was procedural only.⁵¹ Thus, *Skelly Oil* requires courts in FDJA actions to look to underlying jurisdictional law, including the well-pleaded complaint rule as defined in *Mottley*.⁵² As a result, a federal court can exercise jurisdiction over an FDJA action only if it could do so in the absence of the FDJA.⁵³

Applying the *Skelly Oil* rule to the facts of *Mottley*⁵⁴—a contract dispute between private parties—illustrates the rule's effect in FDJA actions. Absent the FDJA, the only coercive action⁵⁵ that could have presented this controversy would have been the action brought in the

these requirements by directing the court to decide the case without reference to the availability of any relief within the federal court's jurisdiction; thus, the federal court now has jurisdiction without regard to these rules, including the well-pleaded complaint rule.

47. *See supra* text accompanying note 42. In addition, the Constitution limits the jurisdiction of federal courts to "cases" and "controversies." U.S. CONST. art. III, § 2.

48. *See supra* notes 20-23 and accompanying text.

49. 339 U.S. 667 (1950) (Frankfurter, J.).

50. *Id.* at 673. Justice Frankfurter was referring primarily to the Act of March 3, 1887, ch. 373, 24 Stat. 522, which had been interpreted by the Court in *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894), to bar removal to federal court of suits in which the only federal issue was a defense.

51. 339 U.S. at 671-72 (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)).

52. Although *Skelly Oil* made it clear that the well-pleaded complaint rule was merged into the jurisdictional law applicable in FDJA actions, this result is somewhat anomalous. The well-pleaded complaint rule was fashioned to deal only with coercive actions and was uniquely suited to the nineteenth century style of pleading. *See supra* notes 31-34 and accompanying text. The rule is difficult to apply to the modern FDJA action for two reasons. First, after the merger of law and equity, most pleading distinctions have lost practical relevance. It is difficult to justify resurrection of these rules for use by a generation of lawyers untrained in their arcane technicalities. *See, e.g.*, C. WRIGHT, *supra* note 28, § 18, at 101-02. Second, by its very nature, the declaratory judgment is available to either party involved in a controversy. When either party can bring suit, it is senseless to adopt formalistic rules that, without regard to the case under consideration, label one party "plaintiff" and the other "defendant."

53. Some courts have construed the FDJA still more narrowly, refusing to hear some FDJA actions that would be cognizable in federal court if further relief were sought. *See supra* note 7.

54. *See supra* note 35.

55. A coercive action is an action seeking any relief other than a declaratory judgment. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 103 S. Ct. 2841, 2851 (1983).

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Mottley case itself,⁵⁶ in which the well-pleaded complaint rule barred federal question jurisdiction. If the railroad company had brought suit in federal court for a declaration that the Mottleys' pass was invalid, the court would not have been able to hear the case. Thus, under the rule of *Skelly Oil* an FDJA suit might not "arise under" federal law even though the claimant relies exclusively on federal law.

C. *Ex parte Young* and Preemption Cases

Under *Ex parte Young*,⁵⁷ federal courts have equitable jurisdiction to enjoin state officials from enforcing unconstitutional statutes.⁵⁸ The effect of *Ex parte Young* on the eleventh amendment has received ample attention⁵⁹ and will not be discussed here. For the purposes of this Note, another point is important—the decision's implications for the well-pleaded complaint rule.⁶⁰ To bring *Ex parte Young* into line with the rule, one must assume that the preemption claim in that case actually appeared in proper form on the face of the complaint.

If this assumption is correct, then one can harmonize *Ex parte Young* and *Mottley* by classifying the preemption claim in the former as "offensive" and that in the latter as "defensive."⁶¹ The plaintiff in *Ex parte Young* relied on a federal right, while the plaintiff in *Mottley* merely anticipated a federal defense.⁶² This simple distinction becomes

56. Neither party could have sued for an injunction because there was no "irreparable injury." See 3 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1338 (1st ed. 1887).

57. 209 U.S. 123 (1908) (Peckham, J.) (allowing federal jurisdiction, despite the eleventh amendment, in an action for an injunction against the Attorney General of Minnesota to restrain enforcement of state railroad rates).

58. This leaves aside the difficulties in application raised by such statutes as the Anti-Injunction Act, 28 U.S.C. § 2283 (1982), the Tax Injunction Act, *id.* § 1341, and the Three-Judge Court Act, *id.* § 2284.

59. See, e.g., 1 J. MOORE, *supra* note 22, ¶¶ 0.60[2.—2], 0.65[2.—1]; M. REDISH, *supra* note 22, at 152-59; 17 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 15, §§ 4231-4233.

60. The Court's treatment of the jurisdictional issue consisted of a reference to *Osborn* followed by the assertion that the case "does not extend, in truth, the jurisdiction of the courts over the subject matter." 209 U.S. at 167. The Court's discussion of *Osborn* served only to establish that the case was within the constitutional grant of jurisdiction, which was not the difficult problem, because any "ingredient" of federal law will cause a case to arise under federal law for purposes of the Constitution. See *supra* notes 19-23 and accompanying text. It is not, however, immediately clear that the preemption claims in *Ex parte Young*, which were raised as a defense to a threatened state action, properly appeared on the face of the plaintiff's well-pleaded complaint.

61. Thus, the line of cases following *Ex parte Young* presents a series of offensive preemption claims. See, e.g., *Shaw v. Delta Air Lines, Inc.*, 103 S. Ct. 2890 (1983). The line of cases following *Mottley* and rejecting jurisdiction presents "defensive" preemption claims. See, e.g., *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

62. This labeling of the parties in preemption cases leads to a general characterization, with the conspicuous exception of *Ex parte Young*'s progeny, of preemption claims raised in FDJA actions as defensive. Although the FDJA provides a procedural remedy whereby preemption is easily raised by a plaintiff, the effect of *Skelly Oil* has been to prevent such cases from being heard in federal court. See cases cited *supra* note 40.

complicated when applied in FDJA actions, however, because under *Skelly Oil* the federal court will not have jurisdiction if the preemption claim is classified as defensive.⁶³ The problem arises in determining which claims are defensive, since the labels "plaintiff" and "defendant" are not as helpful in an FDJA action as they are in a coercive action.⁶⁴ The courts have generally classified FDJA plaintiffs' claims of preemption as defensive when the defendant is a private party⁶⁵ and as offensive when the defendant is a state.⁶⁶

III. Preemption Cases Between a State and a Private Party

The most obvious setting for a preemption dispute is a lawsuit between a private party and a state. Such a suit could arise in four situations. First, a private party could sue a state for a declaration of preemption. Second, a state could sue a private party for a declaration of nonpreemption. Third, a state could sue a private party for a declaration of preemption. Finally, a state could raise a defense of preemption against an action by a private party.

A. *Action by a Private Party Against a State for a Declaration of Preemption*

The first type of preemption case, an action by a private party against a state for a declaration of preemption, is the most obvious fact pattern. This type of case is analogous to *Ex parte Young*: the private party is seeking to assert a constitutional or statutory claim against the state. In theory, these cases should be treated as offensive preemption cases over which a federal court may properly exercise jurisdiction. The courts, however, have not always reached that result.

In *Public Service Commission v. Wycoff Co.*,⁶⁷ a company sought a declaratory judgment that a Utah regulatory commission could not constitutionally interfere with commerce traveling along routes approved by the Interstate Commerce Commission. The Court held that it lacked jurisdiction because the dispute had not yet ripened into an "actual controversy."⁶⁸ Had there been an actual controversy, the plaintiff could have brought an *Ex parte Young*-type action in federal

63. See *supra* notes 49-53 and accompanying text.

64. See *supra* note 52.

65. See cases cited *supra* note 40 and accompanying text. Even the Court admits that it is difficult to justify this result other than for "reasons involving perhaps more history than logic." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 103 S. Ct. 2841, 2843 (1983).

66. See *infra* notes 83-85 and accompanying text.

67. 344 U.S. 237 (1952).

68. *Id.* at 241-48; see U.S. CONST. art. III, § 2; 28 U.S.C. § 2201 (1982).

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court for an injunction against the state.⁶⁹ The Court suggested, however, that even if there had been an actual controversy, and even though it would have had jurisdiction over an action for an injunction,⁷⁰ it would not have had jurisdiction over the FDJA action. The Court stated:

Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action.⁷¹

The Court, apparently thinking of *Mottley*, thus characterized the preemption claim in *Wycoff* as defensive, although the case was factually much like *Ex parte Young* because the plaintiff rather than the defendant was relying on federal law.

Some courts interpreted the *Wycoff* dictum as an authoritative statement that a preemption claim alone would not suffice to cause an FDJA suit to arise under federal law.⁷² This conclusion assumes that *Ex parte Young* jurisdiction is not available even over offensive preemption claims under the FDJA.⁷³ Other courts, however, refused to follow the *Wycoff* dictum and instead expanded the *Ex parte Young* doctrine to include actions against a state for declaratory judgments of preemption.⁷⁴ These courts have added *Ex parte Young* to the body of underlying federal law that establishes the jurisdictional limits of the

69. Just as in *Ex parte Young*, a state official would have been attempting to enforce an unconstitutional statute against a private party. See *supra* notes 57-58 and accompanying text.

70. The Court did not discuss the possibility of injunctive relief. There is, however, little doubt that if there had been an actual controversy, *Ex parte Young* would have applied to these facts. See *supra* note 69.

71. 344 U.S. at 248.

72. See, e.g., *Home Fed. Sav. & Loan Ass'n v. Insurance Dep't*, 571 F.2d 423, 427 (8th Cir. 1978); *Allegheny Airlines, Inc. v. Pennsylvania Pub. Util. Comm'n*, 465 F.2d 237, 241 (3d Cir. 1972).

73. Judge Posner, realizing this, has noted that the *Wycoff* "dictum, read broadly, would overrule *Ex parte Young* and every case that has ever followed it. If not wrong, such a reading would still be an inappropriate flight of fancy for an inferior federal court to take." *Illinois v. General Elec. Co.*, 683 F.2d 206, 211 (7th Cir. 1982).

74. *Stone & Webster Eng'g Corp. v. Ilsley*, 690 F.2d 323, 327 (2d Cir. 1982) (suit alleging preemption by ERISA), *aff'd mem. sub nom. Arcudi v. Stone & Webster Eng'g Corp.*, 103 S. Ct. 3564 (1983); *Illinois v. General Elec. Co.*, 683 F.2d 206 (7th Cir. 1982) (suit alleging that state statute violated commerce clause).

FDJA, accepting jurisdiction over suits brought by private parties against states for both declaratory judgments and injunctions.

Justice Brennan's opinion for the Court in *Steffel v. Thompson*⁷⁵ provides the most detailed justification for this rejection of *Wycoff*. In his view, the FDJA was a response to *Ex parte Young*, which had introduced a serious, although arguably necessary, disturbance into the federal system.⁷⁶ The FDJA helped to calm the disturbance by providing for a more respectful treatment of state sovereignty. While Justice Brennan's reading of the legislative history is open to question,⁷⁷ he identified an important concern of federalism.⁷⁸ The FDJA stabilizes the federal system by enabling the federal judiciary to pass on the constitutionality of state laws without issuing direct commands to state officials. A declaratory judgment is much less harmful to the state official's public image than an injunction, but still protects the private citizen's federal rights. In order to maximize the FDJA's stabilizing effect, Justice Brennan argued, federal courts must have jurisdiction over those FDJA actions in which the plaintiff could have sought redress through an *Ex parte Young*-type action for an injunction.⁷⁹

A second reason to reject the *Wycoff* dictum is its inconsistency with the language of the FDJA. The statute expressly makes the jurisdictional question independent of the relief sought.⁸⁰ If the federal court would have jurisdiction over the controversy in a suit for an injunction, it should also have jurisdiction over a suit seeking only a declaratory judgment.⁸¹ It is hardly sensible to hold that a federal court has jurisdiction to grant the *less* intrusive remedy only when the plaintiff adds a count seeking the *more* intrusive remedy.

Although various commentators noted the inconsistency between *Wycoff* and *Ex parte Young*,⁸² the Supreme Court did not address the

75. 415 U.S. 452 (1974). The main issue in *Steffel* was the applicability of "Our Federalism," see *Younger v. Harris*, 401 U.S. 37, 44 (1970), in situations in which prosecutions are threatened, but not yet pending.

76. 415 U.S. at 465-66.

77. The legislative history relied on by Justice Brennan shows concern for the individual forced to risk criminal punishment in order to test the constitutionality of the statute. It does not, however, speak to the allocation of judicial power between state and federal courts. S. REP. NO. 1005, 73d Cong., 2d Sess. (1934); H.R. REP. NO. 1264, 73d Cong., 2d Sess. (1934).

78. Concerns of federalism should carry great weight in preemption cases, in which a federal judge is asked to nullify a state law. In such situations, the federal system benefits from "less intrusive" remedies. *Steffel*, 415 U.S. at 469. This portion of the opinion refers the reader to a lengthy exegesis on the topic in *Perez v. Ledesma*, 401 U.S. 82, 111-15 (1971) (Brennan, J., concurring in part and dissenting in part).

79. 415 U.S. at 471.

80. 28 U.S.C. § 2201 (1982) ("[A]ny court . . . may declare the rights . . . of any . . . party . . . whether or not further relief is or could be sought.")

81. See *supra* note 7.

82. See Note, *Federal Jurisdiction over Declaratory Suits Challenging State Action*, 79

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issue until 1983, when it decided *Shaw v. Delta Air Lines, Inc.*⁸³ Justice Blackmun, writing for a unanimous Court, stated that “[i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights.”⁸⁴ Justice Blackmun emphasized that the suit in *Shaw* was an offensive preemption claim, noting that the plaintiffs sought “injunctions against enforcement of state laws they claim *are* preempted.”⁸⁵ Although Justice Blackmun did not specifically discuss declaratory judgments, the analysis in *Shaw* is contrary to the *Wycoff* dictum because it focuses on the offensive or defensive nature of the preemption claim rather than the nature of the hypothetical coercive action upon which the declaratory judgment action is based.⁸⁶ Unless a distinction is drawn between an action for an injunction and an action for a declaratory judgment,⁸⁷ a federal court should have jurisdiction over an FDJA suit in which a private party asserts an offensive preemption claim against a state.

B. Action by a State Against a Private Party for a Declaration of Nonpreemption.

The second type of preemption case, an action by a state against a private party for a declaration of nonpreemption, presents an entirely different situation. The plaintiff is a state seeking to ensure the validity of its laws, rather than a private party seeking to vindicate federal rights. Because the plaintiff is a state and the claim is defensive in nature, *Ex parte Young* is inapplicable. Indeed, the *Skelly Oil* rule⁸⁸

COLUM. L. REV. 983 (1979); Note, *The Expanded Federal Question: On the “Independent Viability” of Declaratory Claims*, 57 NOTRE DAME LAW. 809 (1982); *United Airlines, Inc. v. Division of Indus. Safety*, 454 U.S. 944, 949 (1983) (White, J., dissenting from denial of certiorari) (recognizing a conflict in the circuits on the availability of original federal jurisdiction in preemption cases); *Kerr-McGee Chem. Corp. v. Illinois*, 103 S. Ct. 469, 470-71 (1982) (White, J., dissenting from denial of certiorari) (recognizing a conflict in the circuits on the availability of federal jurisdiction in preemption cases).

83. 103 S. Ct. 2890 (1983).

84. *Id.* at 2899 n.14 (citing *Ex parte Young*).

85. *Id.* (emphasis in original).

86. In another case decided on the same day as *Shaw*, *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 103 S. Ct. 2841, 2850 n.14 (1983), the Court cited *Wycoff* without disapproval. That statement was dictum, however, and Justice Blackmun distinguished *Franchise Tax Board* from *Shaw* as a case that involved a claim that a state law was *not* preempted. 103 S. Ct. at 2899 n.14. In any event, *Franchise Tax Board* is distinguishable from *Shaw*. See *infra* note 102. But see *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1180 (5th Cir. 1984) (approving the *Wycoff* dictum even after *Shaw* and *Franchise Tax Board*).

87. See *supra* note 7. It is unlikely that a distinction will be drawn between an action for an injunction and an action for a declaratory judgment. See, e.g., *Board of Elec. Light Comm'rs v. McCarren*, 563 F. Supp. 374, 376 n.1 (D. Vt. 1982), *aff'd*, 725 F.2d 176 (2d Cir. 1983). But see *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 685 F.2d 1088 (9th Cir. 1982) (finding no jurisdiction in a suit for a declaration of preemption against a state official).

88. See *supra* notes 49-56 and accompanying text.

could have been applied to deny jurisdiction in these cases because the claim would not appear on the face of a well-pleaded complaint. Instead, the courts have employed a more complex analysis.

Franchise Tax Board v. Construction Laborers Vacation Trust,⁸⁹ “the most important decision on the scope of federal-question jurisdiction in at least a quarter century,”⁹⁰ considered jurisdiction over an action by a state against a private party for a declaration of non-preemption after the suit was removed to federal court. In a suit by the State of California for a declaration that its tax levy on the defendant trust was not preempted by the Employee Retirement Income Security Act (ERISA),⁹¹ the Court refused to find the *Skelly Oil* well-pleaded complaint rule controlling, even though the preemption issue could arise only as a defense to a claim for taxes by California.⁹² Citing the Seventh Circuit decision in *E. Edelmann & Co. v. Triple-A Specialty Co.*,⁹³ Justice Brennan noted: “[F]ederal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.”⁹⁴ ERISA gave Construction Laborers Vacation Trust a right to sue.⁹⁵ Because a coercive action by one party would have arisen under federal law, application of the *Edelmann* rule would appear to produce a holding that jurisdiction was proper.⁹⁶

89. 103 S. Ct. 2841 (1983).

90. C. McCORMICK, J. CHADBOURN & C. WRIGHT, CASES AND MATERIALS ON FEDERAL COURTS iii (7th ed. Supp. 1983).

91. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified in scattered sections of 29 U.S.C.); see *supra* notes 2, 6.

92. 103 S. Ct. at 2852. For discussion of *Skelly Oil*, see *supra* notes 49-56 and accompanying text.

93. 88 F.2d 852 (7th Cir.), *cert. denied*, 300 U.S. 680 (1937). The court in *Edelmann* allowed an alleged patent infringer to seek a declaratory judgment as to the scope and validity of the patent. The rationale, as adopted in *Franchise Tax Board*, is that in a hypothetical coercive action by the patent holder, the federal question would appear on the face of the complaint. This is enough to satisfy the spirit of the well-pleaded complaint rule, even in an action brought by the patent infringer, who does not rely on federal law.

94. 103 S. Ct. at 2851.

95. 29 U.S.C. § 1132(a)(3) (1982). Whether that right could have been exercised in this case is doubtful. It seems likely that the Tax Injunction Act, 28 U.S.C. § 1341 (1982), would have barred a suit under the FDJA. See *California v. Grace Brethren Church*, 457 U.S. 393 (1982) (O'Connor, J.) (upholding application of Tax Injunction Act to FDJA actions). As to the rights of a party not specifically granted a right to sue by ERISA, one court has looked to whether the party's “interests were considered and protected by Congress when ERISA was enacted.” If so, the party has standing to raise ERISA in a preemption suit under the jurisdictional rule of *Ex parte Young*. *Stone & Webster Eng'g Corp. v. Ilsley*, 690 F.2d 323, 326 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Eng'g Corp.*, 103 S. Ct. 3564 (1983).

96. The Tax Injunction Act clouds the application of *Edelmann*. See *supra* note 95. It is an open question whether a cause of action barred by the Tax Injunction Act is a sufficient basis under the *Edelmann* doctrine to grant “arising under” jurisdiction to a suit by the opposing party. Although this Note assumes that jurisdiction would be proper, that assumption is open to ques-

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But just as he chose not to apply *Skelly Oil*, Justice Brennan did not base his conclusion on *Edelmann*. Putting aside these readily available compasses,⁹⁷ he forged instead into uncharted waters. Citing Justice Cardozo's mystical⁹⁸ opinion in *Gully v. First National Bank*,⁹⁹ Justice Brennan set his course by the federalism concerns that he found implicit in the holdings of *Gully* and *Skelly Oil*:¹⁰⁰ “[C]onsiderations 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.”¹⁰¹ In light of these considerations, Justice Brennan found that the case did not arise under federal law.¹⁰²

tion. Analysis of the *Franchise Tax Board* facts reveals the true complexity of the situation. California filed suit in state court; it did not voluntarily submit to the jurisdiction of the federal court. The Tax Injunction Act reflects a concrete congressional judgment that a state should not be forced to justify its tax policies to federal judges. See *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943). This policy should be applicable whether the defendant in the tax suit seeks an injunction in a separate action or attempts to remove the action to federal court.

97. The metaphor is Justice Cardozo's:

Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

Gully v. First Nat'l Bank, 299 U.S. 109, 118 (1936).

98. “Cardozo’s opinion lapses into an opaque mysticism which . . . is as impenetrable as when the opinion was written.” Cohen, *supra* note 29, at 905.

99. 299 U.S. 109 (1936).

100. *Franchise Tax Board*, 103 S. Ct. at 2853.

101. *Id.* at 2852 n.22. This statement is somewhat confusing; Justice Brennan had earlier noted that the test for determining whether the district court can accept removal of such a case is whether the court could have exercised jurisdiction over it as an original action. *Id.* at 2851 n.18. Yet his emphasis on the fact that the state in *Franchise Tax Board* brought the action in state court suggests that the result might have been different if the state had filed its original action in federal court. Justice Brennan did not resolve this apparent inconsistency.

In an earlier dissenting opinion in *Trainor v. Hernandez*, 431 U.S. 434 (1977) (holding that *Younger* abstention was proper in a suit challenging an attachment proceeding because the state was a party to such a proceeding), Justice Brennan expressed a different view:

The Court relies on the State’s fortuitous presence as a plaintiff The Court’s reliance on the presence of the State here may suggest that it might view differently an attachment under the same Act at the instance of a private party, but no reason is advanced why the State as plaintiff should enjoy such an advantage in its own courts over the ordinary citizen plaintiff. Under any analysis, it seems to me that this solicitousness for the State[] . . . is hardly compelled by the great principles of federalism, comity and mutual respect between federal and state courts

Id. at 455 (Brennan, J., dissenting).

102. *Franchise Tax Board* and *Shaw v. Delta Air Lines, Inc.*, 103 S. Ct. 2890 (1983), see *supra* notes 83-86, were decided on the same day, but reached seemingly contradictory results. In *Franchise Tax Board*, the Court found a lack of federal jurisdiction in a suit by a state against private parties for a declaration of nonpreemption. In *Shaw*, the Court found jurisdiction in a suit by private parties against a state for a declaration of preemption. There are two possible distinctions between the cases.

One approach would treat the claim in *Shaw* as the assertion of a preemption claim by the

Though the mode of analysis in *Franchise Tax Board* raised interesting questions, the outcome was not unusual. Lower courts had occasionally reached identical results¹⁰³ through a straightforward application of *Skelly Oil*; the preemption claim represented only a defensive federal issue, which the lower courts found insufficient to create federal question jurisdiction.¹⁰⁴ These courts rarely applied the *Edelmann* rule.¹⁰⁵ *Franchise Tax Board* confirms these lower court results—an action filed by a state cannot be removed to federal court because of a defense of preemption—while applying a more sophisticated analysis.

plaintiff and the claim in *Franchise Tax Board* as the assertion of a federal claim by the defendant. This distinction ignores the *Edelmann* rule, which was cited by the Court in *Franchise Tax Board*. 103 S. Ct. at 2851 n.19. If *Edelmann* applies to a preemption case, it is irrelevant which party is asserting the preemption claim; all that matters is that one of the parties can assert a federal claim.

A more logical approach would view *Franchise Tax Board* as an exception to the *Edelmann* rule: a state plaintiff cannot be forced into federal court on the basis of the *Edelmann* rule because of "considerations of comity." Thus, the *Edelmann* rule would apply to *Shaw*, in which the state was the defendant, but would have no effect in *Franchise Tax Board*, in which the state was the plaintiff.

The difference between these two approaches can be illustrated by considering a state-law action against a state agency that asserts a preemption defense. If the first approach is applied, the suit could not be brought in federal court because the plaintiff is not asserting a federal claim. If the second approach is applied, the suit could be brought in federal court because the state agency is not the plaintiff.

103. See, e.g., *Illinois v. Archer Daniels Midland Co.*, 704 F.2d 935 (7th Cir. 1983) (Posner, J.); *Illinois v. General Elec. Co.*, 683 F.2d 206 (7th Cir. 1982) (Posner, J.) (remanding the action brought by the state, but upholding jurisdiction over the previously filed FDJA action by the individual). Judge Posner has recently expressed his views on federal jurisdiction at some length. Posner, *Toward an Economic Theory of Federal Jurisdiction*, 6 HARV. J.L. & PUB. POL'Y 41 (1983).

104. The state usually will not plead the allegedly preemptive federal statute in its complaint. See, e.g., *Illinois v. General Elec. Co.*, 683 F.2d 206, 208 (7th Cir. 1982). After all, the state does not want to be in federal court litigating the constitutionality of its laws; it wants to enforce those laws. Lower courts have had little difficulty remanding actions to state courts in cases in which the enforcement action complaint failed to mention the federal statute on its face, even though federal question jurisdiction clearly would have existed over the controversy in a suit brought by a private party. See, e.g., *id.*; cf. *Trent Realty Assocs. v. First Fed. Sav. & Loan Ass'n*, 657 F.2d 29, 34 (3d Cir. 1981) (dismissing a suit between private parties, but reserving the question of probable result had the plaintiff mentioned the federal law on the face of its complaint). *Franchise Tax Board* was unusual because the state joined a claim for a declaratory judgment to its enforcement action, mentioning the allegedly preemptive federal statute.

105. Some courts at least recognized the *Edelmann* rule in differing fact situations. In *Wisconsin v. Baker*, 698 F.2d 1323 (7th Cir. 1983), the state of Wisconsin sought a declaration that an Indian tribe had no federal right to restrict access to navigable waters. The court, citing *Edelmann*, upheld federal jurisdiction, stating that it saw "no jurisdictional basis for distinguishing a declaratory suit by an alleged patent infringer from the case at bar." *Id.* at 1329. In *Serio v. Liss*, 300 F.2d 386, 389 n.4 (3d Cir. 1961), a labor union's business agent sought a declaration that the Landrum-Griffin Act, 29 U.S.C. § 504 (1982), gave him the right to continue in office. The court, in upholding federal jurisdiction, treated *Edelmann* as an exception to the narrowly construed *Gully* requirement that a federal right be an essential element of plaintiff's cause of action.

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C. Action by a State Against a Private Party for a Declaration of Preemption

The third type of preemption case, an action by a state for a declaration that federal law preempts state law, presents the converse of *Franchise Tax Board*—the state, rather than the private party, relies on preemption. Although cases of this type are unusual, they have arisen.¹⁰⁶ Comparing this type of case to the *Franchise Tax Board* situation illuminates the factors that a court should consider in deciding whether federal question jurisdiction is appropriate in preemption cases of this type.

The most important distinction between preemption claims *against* a state and preemption claims *by* a state is that the considerations of comity that led the Court to refuse jurisdiction in *Franchise Tax Board* are not present in the latter. When a state files suit in federal court seeking a declaration of preemption, there is every reason for the court to accept jurisdiction. Federal law is the basis of the plaintiff's complaint, just as it is in *Ex parte Young*-type cases, in which federal jurisdiction exists.¹⁰⁷ Moreover, the state has voluntarily submitted itself to the federal judicial power. Thus, principles of comity should not bar jurisdiction when the state brings itself into federal court.

The result should not be different if the state has filed suit in its own courts and the defendant seeks to remove to federal court. The state, relying on federal law to preempt its own law, should not be allowed to object to federal jurisdiction. In these cases, the state is not forced to defend its local law before an intrusive federal tribunal, which was the concern of the Court in *Franchise Tax Board*.¹⁰⁸ Instead, the state will learn from the federal court's definitive interpretation of the federal law the exact boundaries within which its own rules are valid. In addition, the federal law will receive uniform interpretation. No cogent argument against federal jurisdiction is present, therefore, when a private party seeks to remove to federal court a preemption suit brought by a state.¹⁰⁹

106. *E.g.*, *City of Saginaw v. Service Employees Int'l Union, Local 446-M*, 720 F.2d 459 (6th Cir. 1983) (suit by municipality for declaration that the Comprehensive Employment Training Act, 29 U.S.C. §§ 801-992 (1982), preempted various clauses of a collective bargaining agreement).

107. *See supra* subpart II(C).

108. *See supra* notes 95-96, 100-01 and accompanying text.

109. If the suit is one over which federal courts would have original jurisdiction, it is also one over which they have removal jurisdiction. 28 U.S.C. § 1441 (1982). Therefore, the jurisdictional result in suits filed in state courts and removed to federal courts follows necessarily from the result in those originally filed in federal courts.

D. Action by a Private Party Against a State in Which the State Raises a Defense of Preemption

In the fourth type of preemption case, a private citizen goes to court seeking redress against the state government, only to find that the state claims that its own law is preempted by federal law. As pointed out above,¹¹⁰ the state has no cogent objection to federal jurisdiction. Yet these cases differ from the third type¹¹¹ in two important ways.

First, the plaintiff does not rely on federal law. Indeed, the preemption claim raised by the state might easily be classified as defensive.¹¹² The well-pleaded complaint rule of *Mottley* and *Skelly Oil*¹¹³ argues strongly against finding jurisdiction in such a situation. On the other hand, the *Edelmann* rule states that whenever the defendant's suit would arise under federal law, as is true in this case, the bar of the well-pleaded complaint rule may be avoided.¹¹⁴

Second, the private citizen who initiates a lawsuit in state court may argue that *Franchise Tax Board* should be extended to protect a private party's right to a resolution of his claim in state court.¹¹⁵ But *Franchise Tax Board* should not control such a case. The relationship between a state and the federal government is much more sensitive than that between a private party and the federal government.¹¹⁶ The lingering attributes of state sovereignty that make federal courts so cog-

110. See *supra* subpart III(C).

111. The cases discussed in subpart III(C) presented the same controversy in the opposite procedural context—the state filed suit first in those cases.

112. See *supra* notes 61-66 and accompanying text.

113. See *supra* notes 31-40, 49-53 and accompanying text.

114. Of course, *Edelmann* presented an entirely different factual setting: the plaintiff attempted to bring a declaratory judgment action in federal court on the basis of the defendant's ability to bring a coercive action under federal law. See *supra* notes 93-96 and accompanying text. In this fourth type of case, however, the plaintiff attempts to establish federal jurisdiction on the basis of the defendant's ability to bring a declaratory judgment action under federal law. This difference does not affect the jurisdictional result. Under *Skelly Oil*, the jurisdictional boundaries for coercive actions and for declaratory judgment actions are coextensive. See *supra* notes 7, 49-53 and accompanying text. Thus, it is immaterial that the plaintiff is seeking to establish jurisdiction on the basis of the defendant's ability to bring a declaratory judgment action rather than a coercive action. Moreover, because Justice Brennan's opinion in *Franchise Tax Board* indicates that *Edelmann* is not limited to its facts, 103 S. Ct. 2851 n.19, *Edelmann* should not be interpreted narrowly.

On the other hand, *Franchise Tax Board* demonstrates that the *Edelmann* rule is not all-inclusive. Considerations of comity limit its reach. Compare *Franchise Tax Board* (no jurisdiction over a suit by a state for a declaration of nonpreemption), with *Ex parte Young* (jurisdiction over a suit against a state for an injunction based on preemption). These suits presented the same type of controversy, but only the suit initiated by the private party was found to arise under federal law.

115. *Franchise Tax Board* barred removal by a private defendant of a state's tax levy brought in state court. See *supra* subpart III(B).

116. This is reflected in the Court's recent trend toward abstention in a great variety of cases involving various aspects of state sovereignty. For a brief treatment of these various abstention doctrines, see C. WRIGHT, *supra* note 28, §§ 52-52A.

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nizant of comity with the state judicial systems do not protect a private citizen from the federal judicial power. The citizen has no compelling argument against federal jurisdiction.¹¹⁷

Thus, the federal system's interest in uniform interpretation of its laws, as manifested in the *Edelmann* rule,¹¹⁸ might favor federal jurisdiction in these cases; the *Franchise Tax Board* "considerations of comity"¹¹⁹ are not present.

IV. Preemption Cases Between Private Parties

The final type of preemption case, a suit for declaration of preemption or nonpreemption by one private party against another private party, raises different issues than the types discussed in Part III. Because no state is involved, considerations of comity do not arise. Instead, these cases are governed by traditional jurisdictional principles, including the well-pleaded complaint rule. Under *Skelly Oil*, the private party plaintiff's assertion of preemption is not sufficient to establish jurisdiction; the test is whether either party could have brought an action arising under federal law.¹²⁰ Although this holding has inspired widespread criticism,¹²¹ it has retained its basic vitality.¹²²

Two recent developments in the construction of the "arising under" language, however, may signal a major change in the *Skelly Oil* rule. First, the Court's recent application of the *Ex parte Young* doctrine to FDJA actions between a private party and a state¹²³ may provide a means of undercutting *Skelly Oil* in actions between private parties. The implicit characterization of the preemption claim as offensive¹²⁴ in *Shaw v. Delta Air Lines, Inc.*¹²⁵ casts doubt upon the continu-

117. This is a rather ironic application of *Franchise Tax Board*. That decision used considerations of comity and federalism to restrict federal original jurisdiction. This application uses those same policies to accept federal jurisdiction. Such an approach might be questionable in light of the general conception of federal courts as courts of limited jurisdiction. Because this is an area in which the federal courts have not yet defined a result, however, such considerations should be applied to settle the difficult question.

118. See *supra* notes 93-94 and accompanying text.

119. See *supra* notes 97-101 and accompanying text.

120. See *supra* notes 49-56 and accompanying text.

121. In *Franchise Tax Board*, Justice Brennan recognized that the weight of authority disapproves of the widespread application of *Skelly Oil*. 103 S. Ct. at 2851 n.17. See, e.g., AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1311, at 170-71 (1969); C. WRIGHT, *supra* note 28, § 18, at 101-02; Cohen, *supra* note 29, at 894 n.26; Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 184 (1953).

122. See *Franchise Tax Board*, 103 S. Ct. at 2851 n.17 ("At this point, any adjustments in the system that has evolved under the *Skelly Oil* rule must come from Congress.").

123. See *supra* subpart III(A).

124. See *supra* notes 83-85 and accompanying text.

125. 103 S. Ct. 2890, 2899 n.14 (1983).

ing validity of the *Mottley* characterization of preemption claims as defensive in all suits between private parties.¹²⁶ Second, the mode of analysis in *Franchise Tax Board* may signal a change in the Court's perception of the purpose of the "arising under" requirement in determining the bounds of federal question jurisdiction.

A. *Application of Ex parte Young to Action Between Private Parties for a Declaratory Judgment of Preemption or Nonpreemption*

The problem Justice Peckham faced in *Ex parte Young* was simple enough: the eleventh amendment bars suits against states.¹²⁷ Peckham had to explain how, despite this express prohibition, suits could lie against a state attorney general to enjoin enforcement of a state statute. His explanation was beguilingly lucid: "If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer . . . is in that case stripped of his official . . . character and is subjected in his person to the consequences of his individual conduct."¹²⁸ This conclusion seems to have been based on the supremacy clause.¹²⁹ Any act by an official that violates the Constitution cannot be deemed to be an act of a state; only weighty and convincing proof could convince a court that a state had purposefully acted in a way barred by the supremacy clause of the Constitution. The unconstitutional action must be attributed to the individual, stripped of the mantle of state authority.¹³⁰

The reasoning in *Ex parte Young* is peculiarly applicable to private preemption cases. Having found the defendant in *Ex parte Young* to be merely a private citizen, the Court had no qualms about making the suit cognizable by a federal court of original jurisdiction. Yet federal courts have refused to accept jurisdiction in similar cases in which the defendant was private in fact rather than in fiction.¹³¹ The three principal arguments in support of this limitation are examined below.

1. *Ex parte Young Jurisdiction Is Necessary Only in Suits Against States.*—In support of the limitation of *Ex parte Young*-type jurisdiction to cases against states, one might argue that an injunction against the enforcement of a preempted law should be available only in suits

126. See *supra* notes 61-62 and accompanying text.

127. U.S. CONST. amend. XI.

128. 209 U.S. at 159-60.

129. See *supra* notes 3-4 and accompanying text.

130. "[T]he use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity." 209 U.S. at 159.

131. See cases cited *supra* note 40.

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against states. Only a state, the argument goes, poses enough of a threat to private rights to warrant such a drastic remedy. If any concern for federalism justifies *Ex parte Young*, it is the fear that state courts will unduly favor state law and not pay due respect to federal law.¹³² This fear is particularly acute when the state is a party. In the nineteenth century, this was certainly a valid concern. Because of the doctrine of sovereign immunity, most states would not have been subject to suit in their own courts.¹³³ Thus, the federal court was the only available forum. While sovereign immunity has a much narrower reach now than it once had,¹³⁴ states still enjoy a considerable advantage in their own courts.¹³⁵ The presence of a state on one side of a case, coupled with any local prejudice against federal law, might alter the balance further to the disfavor of the federal claimant. But powerful private parties can invade the federal rights implicated in preemption cases just as harmfully and irreparably¹³⁶ as any state.¹³⁷ A private party in some cases will enter the courtroom wielding financial, political, or even intellectual power equal to or greater than that of the state.¹³⁸ The party claiming preemption in such a case is just as much in need of a federal forum as was the plaintiff in *Ex parte Young*.

2. *The Fourteenth Amendment as the Basis for Ex parte Young.*—Justice Peckham could have based his opinion in *Ex parte Young* on the theory that the fourteenth amendment constituted a pro tanto repeal of the eleventh amendment.¹³⁹ Suits against states alleging violations of the fourteenth amendment would then be within the federal judicial power despite the eleventh amendment. Peckham rejected this argument in *Ex parte Young*, however, preferring instead a resolution

132. In *Ex parte Young* itself, the plaintiff claimed that the statute had been drafted with high penalties in order to make it extremely risky to test the law in the state courts. 209 U.S. at 144-45.

133. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §§ 131-132 (4th ed. 1971).

134. *Id.*

135. See cases cited *supra* note 6.

136. One of the basic elements of an action seeking injunctive relief is an injury irreparable by legal remedy. See 3 J. POMEROY, *supra* note 56, § 1338 (noting that injunctive relief is confined to "those cases in which the legal remedy is not full and adequate"). In *Ex parte Young*, the legal remedy was inadequate because, as a practical matter, it prevented the courts from ruling on the constitutionality of the statute. See *supra* note 132.

137. One can easily imagine a company town in which the company pays a significant portion of the entire tax payments of the community. The company would enter the courtroom with immense political power, coupled with representation more effective than that available to most government entities. Such a party could have just as much of an overawing influence upon the trial court as a state.

138. See *supra* note 137.

139. Since the fourteenth amendment was ratified later than the eleventh, it could logically be construed to overrule the eleventh whenever the two amendments are inconsistent. See C. WRIGHT, *supra* note 28, § 48, at 289; Note, *Sovereign Immunity in Suits to Enjoin the Enforcement of Unconstitutional Legislation*, 50 HARV. L. REV. 956, 961 (1937).

that allowed both amendments to continue "in full force."¹⁴⁰

The adoption of the "repeal" argument would solve the problem of distinguishing between offensive preemption claims—*Ex parte Young*-type cases—and defensive preemption claims in which jurisdiction is barred under the rules of *Mottley* and *Skelly Oil*.¹⁴¹ The holding of *Ex parte Young* would apply in full force to fourteenth amendment claims against states, but federal jurisdiction would be unavailable in suits between private parties because no private party can engage in state action so as to violate the fourteenth amendment.¹⁴² The well-pleaded complaint rule would hold undisputed sway over the field of private preemption cases, barring them from federal adjudication.

This approach, however, has a major defect. Because it would use the fourteenth amendment to evade the eleventh, the only challenges to state action that the federal courts could hear would be those challenges based on the fourteenth amendment, as opposed to the commerce clause, the privileges and immunities clause, and other constitutional provisions contained in the original document.¹⁴³

The effect of this limitation is difficult to assess. Lawyers, seeing the fourteenth amendment as their only way into federal court, might attempt to phrase all of their constitutional claims in fourteenth amendment terms. The Court had little difficulty reading the Bill of Rights into the fourteenth amendment;¹⁴⁴ it might read the remainder

140. 209 U.S. at 150. Although Justice Peckham purported to give full effect to both the eleventh and fourteenth amendments, he imposed significant limits on the former. Justice Marshall considered the effect of the fourteenth amendment on the eleventh an open question as recently as 1974. Edelman v. Jordan, 415 U.S. 651, 694 n.2 (1974) (Marshall, J., dissenting).

While the Court has never accepted the idea that the fourteenth amendment, of its own force, repeals part of the eleventh amendment, it has recognized that congressional power under § 5 of the fourteenth amendment may work a partial repeal. See, e.g., Hutto v. Finney, 437 U.S. 678, 693-94 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

141. See *supra* notes 35-40, 49-53 and accompanying text.

142. Of course, the Court has construed "state action" quite broadly in its zeal to effectuate the policies of the fourteenth amendment. See, e.g., Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (finding a privately owned restaurant located in a state-owned parking garage to be acting as a state for purposes of the fourteenth amendment); Shelley v. Kraemer, 334 U.S. 1 (1948) (finding state action in state court's enforcement of racially biased covenants).

143. One preemption case not arising under the fourteenth amendment is *E & E Hauling, Inc. v. Forest Preserve Dist.*, 613 F.2d 675 (7th Cir. 1980) (exercising jurisdiction over a suit by a private party claiming preemption of a municipal ordinance by the contract clause, U.S. CONST. art. I, § 10, cl. 1). This suit, however, would still be cognizable in federal court, because the eleventh amendment does not bar suits against municipalities and counties. *Lincoln County v. Luning*, 133 U.S. 529 (1890).

144. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (trial by jury); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process to obtain witness); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation with witness); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (assistance of counsel); *Robinson v. California*, 370 U.S. 660 (1962) (cruel and unusual punishment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule); *NAACP v. Alabama*, 357 U.S. 449 (1958) (freedom of association); *Everson v.*

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of the Constitution into the fourteenth amendment to avoid outrageous results. The spectacle of an unconstitutional state statute that was not subject to federal review in any practical fashion might be sufficiently outrageous to provoke a new incorporation debate.

Regardless of the value of such a reading, this discussion is pure speculation. The fourteenth amendment has not been construed as a repeal of any portion of the eleventh amendment.¹⁴⁵ Until such a construction appears, it is more profitable to focus on other justifications for the rules that govern federal question jurisdiction.

3. *A Realistic Approach to Ex parte Young*.—The most convincing argument in support of the limited application of *Ex parte Young* requires a recognition of the circumstances surrounding that case. The decision in *Ex parte Young* was a practical solution to an important constitutional problem.¹⁴⁶ Its purpose can only be frustrated by attempts to apply its result-oriented rationale in a different legal context.¹⁴⁷ For all practical purposes, the decision was a partial repeal of the eleventh amendment by judicial fiat. To the extent that one recognizes the opinion as justification for a predetermined result, one acts unwisely in treating the *Ex parte Young* holding as a widely applicable rule of law.

B. *Application of Franchise Tax Board to Action Between Private Parties for a Declaratory Judgment of Preemption or Nonpreemption*

As discussed above,¹⁴⁸ a realistic examination of *Ex parte Young* precludes its use as a jurisdictional basis in suits between private parties. The rationale of *Franchise Tax Board*, however, supports such

Board of Educ., 330 U.S. 1 (1947) (establishment of religion); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise of religion); *Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech and press); *Chicago, B. & Q.R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (just compensation).

145. *But see* *Edelman v. Jordan*, 415 U.S. 651, 694 n.2 (1974) (Marshall, J., dissenting).

146. In the nineteenth century, most states, under the principle of sovereign immunity, were not subject to suit in their own courts. *See supra* notes 133-34 and accompanying text. When they were not immune, they often drafted statutes in ways that made them immune as a practical matter. The facts of *Ex parte Young* demonstrate the effectiveness of this device. The penalties for violating the statutory rates were so enormous that it was extremely unlikely that a company would violate the rate orders, opening itself to criminal prosecution, in order to test the statute's constitutionality. If the Court had reached the opposite result in *Ex parte Young*, there would have been no practical way for the railroad company to challenge the statute. Of course, Congress could have solved the problem by exercising its powers under § 5 of the fourteenth amendment, *see supra* note 140, but such a solution was not evident to constitutional law scholars of the time. Thus, the Court should not be criticized excessively for stepping in to solve the problem.

147. Professor Redish has articulated similar fears. M. REDISH, *supra* note 22, at 157.

148. *See supra* subpart IV(A)(3).

jurisdiction. In *Franchise Tax Board*,¹⁴⁹ Justice Brennan relied heavily on “considerations of comity”¹⁵⁰ in deciding that a suit by a state for a declaration of nonpreemption does not arise under federal law. In addition to federalism concerns, Justice Brennan emphasized the importance of flexibility in an area of law involving so many complicated issues.¹⁵¹ Citing *Skelly Oil* and *Gully*, he stressed the significance of the “spirit of necessity”¹⁵² in setting jurisdictional bounds. Professor Cohen has argued that such a flexible approach is appropriate for the interpretation of the “arising under” language.¹⁵³ Recognizing that, as Justice Brennan wrote, the language “masks a welter of issues,”¹⁵⁴ Cohen advocates a rule that would allow a federal court to delve into the “pragmatic considerations” of each type of case, determine the relative merits of federal and state adjudication of the claim in question, and thus decide whether the pleading states a cause of action arising under federal law.¹⁵⁵

Application of the *Franchise Tax Board* analysis to preemption suits does not support a distinction between “public” suits, in which a state is a party, and “private” suits, in which the parties are purely private.¹⁵⁶ In many preemption cases, it is certain that federal law governs the matter in dispute, even if only private parties are involved.¹⁵⁷ In

149. See *supra* subpart III(B).

150. 103 S. Ct. at 2852 n.22.

151. *Id.* at 2850-51. In elevating flexibility to such a high position among the values to be weighed in making jurisdictional rules, Justice Brennan necessarily sacrificed predictability. To this end, he expressly rejected the famous formulation of the “arising under” requirement by Justice Holmes in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (“A suit arises under the law that creates the cause of action.”). The Court stated that “Justice Holmes’ test is more useful for describing the vast majority of cases that come within the district courts’ original jurisdiction than it is for describing which cases are beyond district court jurisdiction.” 103 S. Ct. at 2846.

152. 103 S. Ct. at 2853.

153. Cohen, *supra* note 29.

154. 103 S. Ct. at 2846.

155. Cohen, *supra* note 29, at 906.

156. This Note treats preemption suits between private parties as analytically identical regardless of which party is the nominal plaintiff—the party relying on federal law or the party relying on state law. This approach seems appropriate in light of the Court’s citation of *Edelmann* in *Franchise Tax Board*. 103 S. Ct. at 2851 & n.19. In a declaratory judgment action between private parties, the policy considerations that *Franchise Tax Board* looks to—comity and flexibility—are equally present regardless of which party is the nominal plaintiff. *Edelmann* recognizes this and thus avoids what would be a needlessly technical first-to-file rule. In cases involving states, the “considerations of comity” stressed in *Franchise Tax Board* are more pressing, and thus it does seem to matter which party files suit first.

157. This can be said of most of the landmark cases in the area. See, e.g., *Shaw v. Delta Air Lines, Inc.*, 103 S. Ct. 2890 (1983) (dispute over preemptive force of ERISA); *Franchise Tax Board* (dispute over preemptive force of ERISA); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950) (dispute over preemptive force of the Natural Gas Act, ch. 556, 52 Stat. 821 (1938) (codified as amended at 15 U.S.C. § 717 (1982))); *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908) (dispute over preemptive effect of the Hepburn Act).

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these cases, a strong argument can be made that federal jurisdiction should exist in private suits as well as in public suits.

One could argue, for example, that the delicate balance of comity symbolized by the tenth amendment¹⁵⁸ is much less endangered by federal jurisdiction over private suits than by jurisdiction over public suits. A rule that allows a federal district court to take jurisdiction over a suit between private parties seeking a declaration that a state law is preempted—regardless of who raises the preemption issue—might even ease the tension between the state and federal judicial systems. Fewer conflicts would be resolved in proceedings in which a state was forced to justify its own laws to a federal district judge. These issues would be resolved instead in suits between private parties. This private resolution could be viewed as a further step toward the provision of a “less intrusive” means of adjudicating the constitutionality of state statutes.¹⁵⁹ Just as the FDJA soothed the disturbance to state-federal relations that accompanied *Ex parte Young* by allowing individuals to seek the noncoercive remedy of a declaration that the state law was unenforceable,¹⁶⁰ now some of these conflicts could be resolved without any state involvement. There is no great danger that the position of the state would be harmed by such a rule, since the attorney general of the state could intervene to support the local law if it were of substantial importance.¹⁶¹ Justice Brennan’s analysis in *Franchise Tax Board*, therefore, together with a consideration of the purposes of the FDJA, suggests that federal courts should take jurisdiction over private preemption suits.

C. *Stare Decisis, Mottley, and Jurisdiction*

Although the emphasis in *Franchise Tax Board* on pragmatism and flexibility favors expanding federal question jurisdiction to include private FDJA actions, the principle of stare decisis weighs heavily

158. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

159. *Steffel v. Thompson*, 415 U.S. 452, 465-66 (1974); see *supra* notes 75-79 and accompanying text.

160. See *supra* notes 77-79 and accompanying text.

161. The governor and attorney general of the state are notified whenever a district court of three judges is convened “[i]f the action is against a State, or officer or agency thereof.” 28 U.S.C. § 2284(b)(2) (1982). Before 1976, these courts were convened whenever an injunction was sought against a state statute or administrative order on the grounds of unconstitutionality. Act of June 25, 1948, ch. 646, 62 Stat. 968 (codified at 28 U.S.C. § 2281). More recently, however, this procedure has been substantially restricted by the repeal of that section. Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119. For a more lengthy discussion of the three-judge courts, see 17 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 15, §§ 4234-4235. Furthermore, should the state receive notice, it would probably be able to intervene if it chose to do so. See FED. R. CIV. P. 24.

against such an expansion. *Mottley* has been on the books for seventy-five years. *Skelly Oil* applied the *Mottley* rule to the FDJA thirty years ago as a matter of first impression. While the precise ramifications of these doctrines have often been uncertain,¹⁶² the Court has not yet found them sufficiently burdensome to require reversal. This Note concludes that the Court should adhere to the *Mottley* and *Skelly Oil* well-pleaded complaint rule on stare decisis grounds until Congress sees fit to amend the statute that grants general federal question jurisdiction.

1. *Stare Decisis and Reviewable Issues.*—The traditional justification for the stare decisis doctrine is the need for stability in the law. Stability allows private parties to order their affairs based on accurate evaluations of the legal consequences of their activities.¹⁶³ This rationale, however, does not apply in certain contexts. Justice Brandeis pointed out that “stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”¹⁶⁴ He added:

This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, *where correction through legislative action is practically impossible*, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.¹⁶⁵

162. See *supra* Part III.

163. For one expression of this view, see W. DOUGLAS, STARE DECISIS 8 (1949). Professor Landes and Judge Posner have attempted to balance this need for stability against the pressures arising out of social change by analyzing precedent as a capital stock, depreciating over time. Landes & Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976).

164. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932). Some economists maintain that in the absence of market barriers, it matters not at all what the rule of law is, as long as it is certain. The “winners” and “losers” under the rule will sell their advantages to reach the optimum distribution of resources and risks. See, e.g., Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); see also R. POSNER, ECONOMIC ANALYSIS OF LAW § 3.4 (2d ed. 1972) (applying the Coase Theorem to incompatible uses of property).

165. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (emphasis added). A similar view was expressed by Chief Justice Taney:

I . . . am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.

Smith v. Turner (Passenger Cases), 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting); see also *Erie R.R. v. Tompkins*, 304 U.S. 64, 77-78 (1938) (Brandeis, J.) (“If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.”); W. DOUGLAS, *supra* note 163, at 13-14 (discussing the

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For purposes of stare decisis, Brandeis thus divided legal decisions into two types—reviewable and nonreviewable. He drew the line between those decisions that legislatures may, as a practical possibility, overrule, and those for which legislative reversal is all but impossible. The most common type of nonreviewable decision is one involving a constitutional question,¹⁶⁶ which the legislature cannot overrule by statute. Although stare decisis has some force even in constitutional issues,¹⁶⁷ the standard of review for prior constitutional decisions seems to be quite permissive. The Court has rather freely rejected those decisions that it felt were wrong.¹⁶⁸ This nominal respect accorded to nonreviewable issues contrasts with the Court's reluctance to reverse itself on reviewable issues.¹⁶⁹ As the next section of this Note demonstrates, the issue of federal question jurisdiction is best regarded as a reviewable issue upon which the Court should defer to Congress.

Court's application of the principle of stare decisis); Sneed, *The Art of Statutory Interpretation*, 62 TEXAS L. REV. 665, 683 (1983) (recognizing the Court's reluctance to overrule its constructions of statutes). It is important to realize that the defects in the courts' interpretation of § 1331 are not likely to reach constitutional dimensions.

166. At least one nonconstitutional issue has been treated as if it were constitutional—determination of the procedural rules governing the three-judge court statutes. In *Swift & Co. v. Wickham*, 382 U.S. 111 (1965), the Court justified the inapplicability of stare decisis to these issues in part by referring to them as important procedural issues. *Id.* at 116. The decisive reason, however, came later, when Justice Harlan noted that the three-judge court statutes, a response to the antifederalism impact of *Ex parte Young*, are unique in our federal system. *Id.* These statutes can thus appropriately be regarded as a statutory embodiment of the tenth amendment. While that amendment has little force of itself to invalidate legislation, it represents an important structural view that should inform the Court's interpretation of all constitutional issues bearing on the federal system. For a rare case finding Congress to have exceeded the bounds placed on it by the tenth amendment, see *National League of Cities v. Usery*, 426 U.S. 833 (1976) (Rehnquist, J.), which was substantially limited in *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983) (Brennan, J.).

167. In *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)), Justice Brandeis took great pains to point out that *Swift* had not only failed to bring about the affirmative benefits expected, but had actually produced "grave discrimination." 304 U.S. at 74. In *City of New Orleans v. Duke*, 427 U.S. 297 (1976) (overruling *Morey v. Doud*, 354 U.S. 457 (1957)), the Court went out of its way to characterize *Morey* as "the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds." 427 U.S. at 306. Although *Morey* had been out of line with constitutional jurisprudence since *Ferguson v. Skrupa*, 372 U.S. 726 (1963), see L. TRIBE, *supra* note 1, §§ 8-7, 16-2 (describing *Morey* as "unique"), it took nineteen years for it to become obvious that *Morey* was a "sore thumb" that could not be tolerated.

168. See W. DOUGLAS, *supra* note 163, at 32-34 (presenting a list of the Court's overruling decisions).

169. Justice Stevens expressed the rationale for this reluctance as follows:

I am firmly convinced that we have a profound obligation to give recently decided cases the strongest presumption of validity. . . . The presumption is an essential thread in the mantle of protection that the law affords the individual. Citizens must have confidence that the rules on which they rely in ordering their affairs . . . are rules of law and not merely the opinions of a small group of men who temporarily occupy high office. It is the unpopular or beleaguered individual—not the man in power—who has the greatest stake in the integrity of the law.

Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 151, 153-54 (1981) (Stevens, J., concurring).

2. *Congressional Action Versus Judicial Action.*—Since the “arising under” issue is not constitutional,¹⁷⁰ Congress can reverse the Court’s decision by amending section 1331.¹⁷¹ Thus, the major question is whether changes in jurisdictional conventions should be made by the Court or by Congress. This issue should be resolved by examining the practical characteristics of the situation.

Congressional “correction” of the Court’s jurisdictional “errors” is extremely rare. The last major revision of the jurisdictional statutes governing the federal courts was in 1948.¹⁷² Despite the recommendations of the American Law Institute,¹⁷³ Congress has failed to revise the Judicial Code for thirty-five years.¹⁷⁴ Notwithstanding the practical difficulty of congressional repeal of the Court’s jurisdictional decisions—the most important consideration in Brandeis’ view¹⁷⁵—these decisions should still be treated as reviewable issues subject to reversal by Congress rather than the Court. Three reasons support this conclusion.

First, Congress has the power, which it has exercised on occasion, to overrule truly inconvenient jurisdictional decisions of the Court.¹⁷⁶ Because most of the decisions in this area are interpretations of section 1331, Congress has full power to dispose of rules that are no longer useful.¹⁷⁷ It is bound only by the *Osborn* rule,¹⁷⁸ which interpreted article III to extend federal question jurisdiction only to “cases” involv-

170. See *supra* notes 19-30 and accompanying text.

171. 28 U.S.C. § 1331 (1982).

172. Act of June 25, 1948, 62 Stat. 869.

173. AMERICAN LAW INSTITUTE, *supra* note 121 (recommending repudiation of *Skelly Oil’s* historical test).

174. The Supreme Court’s decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), declared the federal bankruptcy court system to be unconstitutional. Yet, it took Congress two years to provide another bankruptcy statute.

175. See *supra* text accompanying notes 164-65.

176. *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941), held that the lower federal courts were prohibited by the Anti-Injunction Act, ch. 231, § 256, 36 Stat. 1162 (1911), from enjoining relitigation in state courts of issues adjudicated in federal courts. Congress added the phrase “to protect or effectuate its judgments” to overrule *Toucey*. Historical and Revision Note to 28 U.S.C. § 2283 (1982). This intent was effectuated in *Amalgamated Clothing Workers of Am. v. Richman Bros. Co.*, 348 U.S. 511, 514 (1955).

Marshall v. Baltimore & O.R.R. Co., 57 U.S. (16 How.) 314 (1853) held that a corporation was a citizen only of the state in which it was incorporated. Congress chose to treat corporations also as citizens of the state of their principal place of business. 28 U.S.C. § 1332(c) (1982). This legislative reversal was upheld in several cases. See, e.g., *Eldridge v. Richfield Oil Corp.*, 247 F. Supp. 407 (C.D. Cal. 1965), *aff’d*, 364 F.2d 909 (9th Cir. 1966), *cert. denied*, 385 U.S. 1020 (1967). Compare *Williams v. United States*, 289 U.S. 553 (1933) (holding the Court of Claims to be a legislative court), with *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (holding the Court of Claims to be a constitutional court after expression of congressional intent in 28 U.S.C. § 171 (1982), with two justices relying on statute); compare *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445 (1804) (holding that citizens of the District of Columbia are not citizens of states for the purpose of diversity), with *National Mut. Ins. Co. v. Tidewater*, 337 U.S. 582 (1949) (upholding congressional intent to the contrary, codified in 28 U.S.C. § 1332(c) (1982)).

177. Since all of these cases present “ingredients” of federal law, they are within the constitu-

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ing an “ingredient” of federal law. Congressional reversal of *Osborn* would require a constitutional amendment and therefore is unlikely.¹⁷⁹

Second, by their very nature, jurisdictional issues are best left to the legislature. They frequently require the kind of arbitrary line-drawing that is distasteful when done by a judge. Judicial decisions deal in distinctions and niceties that must be justified by consistent theoretical arguments. Congress, however, can make these distinctions in any manner that is convenient. Presented with a situation such as federal question jurisdiction, a legislature, unlike a court, does not have to justify its particular choice of lines.

Finally, instability and unpredictability in jurisdictional issues have an adverse effect on judicial economy. The less certain the jurisdictional limitations, the more litigation there will be on those issues, leaving less time for judges to consider substantive issues. Time spent on jurisdictional questions is, from an economic standpoint, pure waste.¹⁸⁰ The expense of a judicial system is justified by its resolution of substantive disputes and its establishment of rules to shape future conduct.¹⁸¹ To the extent that time and legal fees are devoted to non-substantive issues, the system is inefficient.

Justice Brennan recognized that he was discussing an issue ripe for statutory reform, yet unsuited for judicial revision, in his discussion of the meaning of “arising under” in *Franchise Tax Board*:

Commentators have repeatedly proposed that some mechanism be established to permit removal of cases in which a federal defense may be dispositive.

. . . .

It is not beyond the power of Congress to confer a right to a declaratory judgment in a case or controversy arising under federal law—within the meaning of the Constitution or of § 1331—without regard to *Skelly Oil*[]. . . . At this point, any adjustment in the system that has evolved under the *Skelly Oil* rule must come from Congress.

. . . .

. . . [U]ntil Congress informs us otherwise, such a suit is not within the original jurisdiction of the United States district courts.¹⁸²

tional grant. The question is whether they fall within the language of § 1331. See *supra* notes 20-23 and accompanying text.

178. See *supra* notes 20-23 and accompanying text.

179. The process of constitutional amendment is set out in U.S. CONST. art. V.

180. See R. POSNER, *supra* note 164, § 21.1, at 429-30 (arguing that increases in procedural cost must be justified by more accurate results).

181. See *id.* § 19.1, at 401-02.

182. 103 S. Ct. at 2847 n.9, 2851 n.17, 2853.

V. Conclusion

The Court's analysis in *Franchise Tax Board* suggests that it will take a more practical view of the federal question statute's "arising under" requirement than it has in the past. Faced with a complex problem, Justice Brennan gave great weight to "considerations of comity" in reaching his decision. While this analysis offers no support for the distinction between private and public preemption suits, it should not be assumed on the basis of *Franchise Tax Board* that the *Mottley* and *Skelly Oil* well-pleaded complaint rule is dead. Any practical reading of the "arising under" language will necessarily take into account the importance of judicial stability in jurisdictional decisions. Whatever its defects or merits, the rule of *Mottley*, as applied in FDJA actions by *Skelly Oil*, should remain in force until Congress changes it.

Similarly, the Court should continue to analyze new problems just as it did in *Franchise Tax Board*. Faced with preemption claims by states, it should allow the exercise of jurisdiction. Use of the "arising under" language to impress the Court's concerns regarding comity upon the federal jurisdictional statutes should not be condemned as judicial activism or interpretivism. Section 1331 has never been susceptible to a literal reading. As it enters its second century, it is properly treated, as it always has been treated, as a useful tool for balancing local and national interests through definition of the boundaries of the federal jurisdictional power.

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