ARTICLES

Whose Law Is It, Anyway? A Reconsideration of Federal Question Jurisdiction Over Cases of Mixed State and Federal Law

LINDA R. HIRSHMAN*

INTRODUCTION

Cases in which federal and state law elements are mixed ("hybrid cases") present very difficult subject matter jurisdiction problems for the federal courts.[1] The nature of lawmaking in a federal system means that such cases are inevitable; experience has shown that they are not uncommon.[2] Determinations about hybrid cases are important, because they mark the limits

---

* Associate Professor of Law, Illinois Institute of Technology, Chicago-Kent College of Law. A.B. 1966, Cornell University; J.D. 1969, University of Chicago. Professor Hirshman represented the Respondent, Local Division 1285, Amalgamated Transit Union, in *Jackson Transit Auth. v. Local Div. 1285, A.T.U.*, 457 U.S. 15 (1982), discussed *infra* notes 237-51 and accompanying text. I would like to thank my colleague, Professor Linda Silberman, N.Y.U. Law School, for her suggestions and Jamie Freveletti, student at I.I.T. Chicago-Kent College of Law, for her research assistance.

1. The phrase "hybrid cases" comes from Ronald Greene's *Hybrid State Law in the Federal Courts*, 83 HARV. L. REV. 289 (1969). Such cases arise, according to Greene, when

> our two legal systems . . . borrow from one another, simply as a matter of convenience. Thus federal law often adopts state standards, and, although much less frequently, the states sometimes borrow federal standards, even in situations in which the supremacy clause would not so require. For example, the state may make tortious what is already forbidden by a federal regulatory statute, or private parties may attempt to harmonize their state contractual obligations with their rights and obligations under federal law. In each situtation, the state has created a kind of "hybrid, a combination of state and federal law."

Id. at 291.

Greene accurately foresaw that such a case would pose complex problems of original federal question jurisdiction but sidestepped them, because of the solution he foresaw in the implication of a pure federal claim. *Id.* at 291 n.14, 324-25.

2. Greene, *supra* note 1, at 289-91. Professor Hart explained the phenomenon in Hart, *Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 495-98 (1954):

> The federal law which governs the exercise of state authority is obviously interstitial law, assuming existence of, and depending for its impact upon, the underlying bodies of state law. What is less obvious is that the same thing is true of what has been called the law of affirmative federal governance. As will be emphasized later, Congress rarely enacts a complete and self-sufficient body of federal law. The federal statutes are full of references, both explicit and implicit, to the law

of the exercise of original federal question jurisdiction under 28 U.S.C. § 1331, and federal adjudication of whole categories of litigation depends upon where that line is drawn.[3] Finally, hybrid cases are interesting, because they require the legal system to answer the very fundamental structural question of what the elements of a "case" are and to understand how hybrid cases fit within the language and policy of section 1331.[4]

Two sorts of hybrid cases pose particularly significant problems in the exercise of federal question jurisdiction. First, there are cases in which federal law prescribes a standard of behavior but fails to provide an element of the claim, such as a remedy for the plaintiff, which is instead provided by state law.[5] An example of this sort of case in the context of federal question jurisdiction is *Moore v. Chesapeake & Ohio Railway.*[6] In *Moore,* the federal statute prescribed safety standards for railroads expressly enforceable by interstate employees but did not authorize enforcement by the plaintiff, an employee whose work was strictly intrastate. The second sort of cases are those in which Congress has provided a substantive standard, and the remedy

---

> of some state. As a result, legal problems repeatedly fail to come wrapped up in neat packages marked "all-federal" or "all-state." It is necessary to dissect the elements of the problems and identify those which depend upon state law and those which depend upon federal. When mixed problems of this kind arise in state court litigation the state court must necessarily decide the federal questions, and *vice versa.*

Id. at 498.

See also Friendly, *In Praise of Erie—and of the New Federal Common Law,* 39 N.Y.U. L. REV. 383 (1964); Wechsler, *The Political Safeguards of Federalism, The Role of the States in the Composition and Selection of the National Government,* 54 COLUM. L. REV. 543 (1954); Note, *The Federal Common Law,* 82 HARV. L. REV. 1512 (1969); Note, *Implying Civil Remedies From Federal Regulatory Statutes,* 77 HARV. L. REV. 285 (1963).

3. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1982).

4. Although the Constitution allots the creation and jurisdiction of lower federal courts to Congress, the importance of those courts in the federal system has long been recognized. In its landmark study of the subject in 1969, the American Law Institute endorsed federal question jurisdiction "to protect litigants relying on federal law from the danger that state courts will not properly apply that law, either through misunderstanding or lack of sympathy." ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 4 (1969) [hereinafter cited as ALI STUDY]. In his comprehensive contemporaneous study, David Currie expanded on the subject:

> Federal judges have relative expertise in dealing with federal law; uniform interpretation is promoted by federal jurisdiction; state courts may be hostile to federal law. Supreme Court review of state courts, limited by narrow review of facts, the debilitating possibilities of delay, and the necessity of deferring to adequate state grounds of decision, cannot do the whole job.

Currie, *The Federal Courts and the American Law Institute, (Parts I & II),* 36 U. CHI. L. REV. 1, 268 (1969).

5. *See infra* notes 72-83 and accompanying text. *See also* Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law,* 115 U. PA. L. REV. 890, 897-99 (1967); Field, *The Uncertain Nature of Federal Jurisdiction,* 22 WM. & MAR. L. REV. 683, 684-87 (1981); Greene, *supra* note 1, at 296-309; Mishkin, *The Federal "Question" in the District Courts,* 53 COLUM. L. REV. 157, 165-68 (1953).

6. 291 U.S. 205 (1934). *See infra* notes 74-83 and accompanying text.

is inherent in the statute, such as where Congress has established a legal relationship normally enforceable in private court actions, but where Congress has not specified that the private actions will be brought to federal court. An example of this second sort of case is *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union,*[7] where the federal statute mandated the making and contents of an agreement, traditionally enforceable by an action in contract, but did not specify that such contract actions be cognizable in the federal courts.

In the *Moore* hybrid, Congress has explicitly provided all the elements of a federal case save one—the plaintiff's role in the enforcement scheme. Accordingly, the courts must look to state law to supply the missing element. In the *Jackson Transit* hybrid, Congress supplies all the case elements, but the enforcement elements are implicit in its use of a legal relationship like a contract, rather than explicit. Accordingly, courts must look to the common law of contracts—normally the province of the states—to supply the enforcement *implications* of Congress' scheme. As an analytic matter, looking to state law to supply words of enforcement is quite close to looking to state law to supply the legal implications of Congress' own words. Thus, the two sorts of cases are very close on the continuum regarding what Congress must do to create the elements of a case for federal jurisdictional purposes.

The first sort of hybrid case has elicited a substantial amount of commentary, directed mostly to determining when the role of the federal standard is sufficiently substantial to qualify the case for federal jurisdiction.[8] Most of the commentary has concluded that such a problem is not susceptible to principled analysis and, therefore, is also not susceptible to objective decisionmaking.[9] This traditional theory has been interpreted to require federal jurisdiction if the complaint discloses a need for a federal court to determine the meaning or application of federal law.[10] Commentators have suggested that the federal law proposition must be "direct"[11] or, at least, "substantial."[12] The decision regarding substantiality is "pragmatic" and includes such considerations as the caseload of the federal courts and the need for

7. 457 U.S. 15 (1982).

8. Cohen, *supra* note 5, at 896-903; Currie, *supra* note 4, at 276-79. Field, *supra* note 5, at 687-90; Greene, *supra* note 1, at 324; Hornstein, *Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis,* 56 IND. L. REV. 563, 565-75 (1981); London, *"Federal Question" Jurisdiction—A Snare and a Delusion,* 57 MICH. L. REV. 835, 836-41 (1959); Mishkin, *supra* note 5, at 163-72; Note, *The Outer Limits of "Arising Under,"* 54 N.Y.U. L. REV. 978, 990-95 (1979); ALI STUDY, *supra* note 4, at 70-71.

9. Cohen, *supra* note 5, at 891-92; Currie, *supra* note 4, at 297; Field, *supra* note 5, at 693; Greene, *supra* note I, at 294; Note, *supra* note 8, at 980-81 and n.15. This theory will be referred to hereafter as the traditional theory of jurisdiction.

10. See Judge Friendly's oft-cited opinion in *T.B. Harms v. Eliscu,* 339 F.2d 823 (2d Cir. 1964), *cert. denied,* 381 U.S. 915 (1965).

11. Cohen, *supra* note 5, at 896.

12. Note, *supra* note 8, at 979.

a knowledgable or sympathetic forum.[13] Under this flexible standard, the federal courts have been basically acting on their intuition in making these jurisdictional decisions.[14]

Little has been said about the second hybrid type. As set forth below, the few such cases to reach the Supreme Court on jurisdictional grounds were sustained under section 1331 without much analysis.[15] One commentator did pick up the problem, in analyzing the jurisdictional problems of actions under the federal Trust Indenture Act, which establishes a private relationship like the statute in *Jackson Transit.*[16] Although he accurately perceived the problem as a matter of federal jurisdiction, rather than as an implied private claim, the commentator proposed, foreshadowing the test later suggested by Justice Powell, that the jurisdiction question be answered by an inquiry into congressional intent.[17]

The recent conservative direction of the Burger Supreme Court has thickened the plot somewhat. As has often been remarked, the Court's commitment to reducing the business of the federal courts has been one of its most salient characteristics.[18] This undertaking bears on the problem of hybrid cases in two ways. The Supreme Court has greatly restricted the federal courts from implying from federal standards the other elements of a case such as a private claim for relief as a matter of federal substantive law.[19] As a result, there are fewer "pure federal claims,"[20] and the federal courts confront more hybrid cases, in which state law provides the source of some of the claim. In addition, when confronted with the original source of federal court business—the defining jurisdictional statutes—the Court has indicated a

---

13. Cohen, *supra* note 5, at 916.

14. Powers v. South Cent. United Food & Commercial Workers Unions, 719 F.2d 760 (5th Cir. 1983); First Fed. Sav. & Loan Ass'n v. Brown, 707 F.2d 1217 (11th Cir. 1983); Illinois Cent. Gulf R. Co. v. Pargas, Inc., 706 F.2d 633 (5th Cir. 1983); Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983); Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968); McFaddin Express, Inc. v. Adley Corp., 346 F.2d 424 (2d Cir. 1965), *cert. denied,* 382 U.S. 1026 (1966); Sweeney v. Abramovitz, 449 F. Supp. 213 (D. Conn. 1978).

15. *See infra* note 22 and accompanying text.

16. 15 U.S.C. §§ 77aaa-77bbb. Dropkin, *Implied Liability Under the Trust Indenture Act: Trends and Prospects,* 52 TUL. L. REV. 299 (1978).

17. This article is largely directed at rebutting this suggestion. *See infra* notes 253-311 and accompanying text.

18. Sager, *The Supreme Court 1980 Term,* 95 HARV. L. REV. 17 (1981). Stewart & Sunstein, *Public Programs and Private Rights,* 95 HARV. L. REV. 1193, 1302 (1982).

19. *See infra* notes 149-61 and accompanying text. *See also* Pillai, *Negative Implication: The Demise of Private Rights of Action in the Federal Courts,* 47 U. CIN. L. REV. 1 (1978); Note, *Implied Private Rights of Action and Section 1983: Congressional Intent Through a Glass Darkly,* 23 B.C.L. REV. 1439 (1982) [hereinafter cited as Note, *Congressional Intent*]; Note, *The Implication of a Private Right of Action Against Coercion Under the Federal Employers Liability Act,* 32 CASE W. RES. L. REV. 992 (1982) [hereinafter cited as Note, *Implication of a Private Right*].

20. Greene, *supra* note 1, at 298.

strong inclination to restrict their scope directly.[21] Accordingly, the federal courts will confront more hybrid cases, but one may anticipate that they will draw the jurisdictional lines so as to entertain fewer of them.

Because the courts are restricted from transforming hybrid cases into pure federal cases by implying elements of federal law, the courts must confront directly whether to exercise jurisdiction over both kinds of hybrid cases. Under the traditional theory, very few of the cases like *Moore,* with a state-created claim for relief, were maintained in federal court. However, the traditional theory rested on the assumption that some such cases could be maintained if the federal standard were important enough. Under the traditional theory, cases like *Jackson Transit,* in which Congress uses a private legal mechanism to insert federal norms into the system, did generally qualify for federal jurisdiction, although the decisions contain little analysis.[22]

In several statements in opinions touching on issues of federal question jurisdiction, some Justices have recently suggested a new theoretical approach to dealing with these cases, and at least one court of appeals has picked up this approach and made it the basis for a troubling decision.[23] The new analysis borrows heavily from the Court's most successful business-restricting mechanism—the extremely tight-fisted approach to implied private rights of action[24]—and proposes to answer the jurisdiction question by searching for congressional intent to create federal law or to exercise federal jurisdiction in each case. The problem with this new approach is that, like the traditional theory, it does not attempt to put the area in order based on a principled analysis of the structural elements of a case.

This article shows how traditional jurisdiction theory allows the exercise of federal jurisdiction over certain hybrid cases that neither the language nor the policy of the governing jurisdictional statutes would support. The article further shows how the Supreme Court rulings reducing the implication of private rights of action under federal law have undercut any remaining vitality of the overinclusive traditional standard. However, the article rebuts the suggestion that the courts should replace the traditional analysis with the procedures created to determine whether to imply a private action from a federal statute; i.e., by searching for congressional intent to create federal jurisdiction in each substantive statutory enactment. Finally, the article sug-

---

21. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978); Aldinger v. Howard, 427 U.S. 1 (1976); Zahn v. International Paper Co., 414 U.S. 291 (1973); *cf.*, Verlinden v. Central Bank of Nigeria, 647 F.2d 320 (1981), *rev'd,* 103 S. Ct. 1962 (1983).

22. Norfolk & W. R.R. Co. v. Nemitz, 404 U.S. 37 (1971); Machinists v. Central Airlines, 372 U.S. 682 (1963); American Surety Co. v. Shulz, 237 U.S. 159 (1915).

23. *See infra* notes 184-215 and accompanying text.

24. Cannon v. University of Chicago, 441 U.S. 677, 731 (Powell, J., dissenting); Zeffiro First Pa. Bank, 623 F.2d 290 (3d Cir. 1980), *cert. denied,* 456 U.S. 1005 (1982). *See infra* notes 174-252 and accompanying text.

gests that, instead of trying to force jurisdiction questions into the implied action mold, the courts may make sensible judgments about both what is necessary and what is sufficient to support federal jurisdiction by returning to the standard, set forth by Justice Holmes seventy-five years ago, of "the law that creates the cause of action."

I. THE BACKGROUND

In order to understand how the traditional theory evolved to its unsatisfactory state, it is necessary to examine the history of federal question jurisdiction. This section of the article focuses particularly on the cases involving the inevitable admixture of state and federal law and shows the persistence of inconsistent lines of precedent, which maintain the possibility of a broad exercise of jurisdiction, although courts have generally refused to apply it in particular cases. This section also sets forth the present Supreme Court's severe restriction of private actions implied from federal statutes and shows how this latter development greatly accelerated the need for a new jurisdictional theory.

The primary authority for all federal court jurisdiction is, of course, article III of the Constitution. Article III, section 2 provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ."[25]

In a pair of early cases involving the Bank of the United States, the Supreme Court confronted the scope of article III.[26] In *Osborn v. Bank of the United States,* a statute creating the Bank of the United States and defining its various powers provided affirmatively that the Bank could sue or be sued in the United States courts.[27] The Bank of the United States sued Ohio in federal court to stop the state from levying a tax on it, and the Ohio defendants contended that the Bank Act extended the power of the federal courts beyond the limits of article III.[28] In the companion case, *Bank of the United States v. Planters' Bank,*[29] the federal Bank sued a Georgia bank for payment on promissory notes the Georgia bank had issued, and defendant made the same jurisdictional contentions.[30]

The substantive opinion on jurisdiction appears in *Osborn.* There, the Court ruled that the judicial power of the federal courts under article III

25. U.S. CONST. art. III, § 2.
26. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); Bank of the United States v. Planters' Bank, 22 U.S. (9 Wheat.) 904 (1824).
27. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 817 (1824).
28. *Id.* at 759.
29. 22 U.S. (9 Wheat.) 904 (1824).
30. *Id.* at 905.

was coextensive with the legislative powers of article I.[31] Accordingly, the Court concluded, for the exercise of federal judicial power, article III simply required the presence of a federal question in the case.[32] The federal question in *Osborn,* the Court continued, was amply presented by the Bank's assertion, as a part of its claim, of its powers to sue or be sued under its federal statutory charter of incorporation.[33]

In deciding that the Bank's charter of incorporation was a sufficient federal element, Justice Marshall rejected several related arguments that have continued to trouble commentators and judges to the present day. He rejected the contentions that the federal source of the Bank's existence was too remote from the actual dispute between the parties,[34] that the bank charter was not likely to be controverted,[35] and finally, therefore, that the real dispute would likely be over propositions of state law.[36]

The Court thus held that any federal element which, if controverted, could defeat plaintiff's claim, sufficed to qualify the case as one "arising under" article III. Any other ruling, the Court held, would exclude cases based on speculation as to defendant's tactical decision regarding what to contest.[37] Moreover, requiring that the federal claim be the determinative one would exclude almost all cases, because there is almost no case of pure federal law.[38]

The Bank's substantive case in *Osborn* was one for an injunction against the enforcement of Ohio law taxing the Bank on the grounds that it violated the U.S. Constitution.[39] Article III would clearly provide authority for the Bank to bring that suit.[40] *Planters' Bank* presented a purer jurisdictional problem than *Osborn* did, because *Planters' Bank* was a state law contract case. However, the Court drew no distinction between *Planters' Bank* and *Osborn* and simply rejected the defendant's constitutional attack on the Bank's jurisdictional statute in *Planters' Bank* on the strength of its opinion

---

31. *Osborn,* 22 U.S. at 821.
32. *Id.* at 822.
33. *Id.* at 823-24.
34. *Id.* at 824-25.
35. *Id.* at 826-28.
36. *Id.* at 854-55.
37. *Id.* at 857.
38. *Id.* at 858. Justice Marshall may have been exaggerating. He saw potential non-federal issues as, for example, "whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims." *Id.* at 820.

The Supreme Court has held since Osborn that where such questions are sufficiently close to the effectuation of a federal statute, they are governed by federal common law. *See infra* notes 259-75 and accompanying text.

39. *Osborn,* 22 U.S. at 866-70.
40. "The Judicial Power shall extend to all cases, in Law and Equity, *arising under this Constitution,* the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. CONST. art. III, § 2 (emphasis added).

in *Osborn*.[41] Accordingly, Congress' extension of article III jurisdiction cannot be explained away as arising under the Constitution, like *Osborn*. Jurisdiction over the U.S. Bank's contract claim against the Georgia bank can rest only on Justice Marshall's expansive analysis that the federal courts may exercise jurisdiction over the case under article III because the Bank's power to sue originated in a federal charter.

While probably reaching the right result in *Osborn* by exercising federal jurisdiction, the Court's opinion generated an immediate floodgate response.[42] Beginning with Justice Johnson's dissent, commentators and judges envisioned floods of federal litigation involving every relationship of every entity whose existence was attributable to a federal act,[43] or in which an overheated imagination could conjure up a possible federal dispute.[44]

Since *Osborn* was based on a specific provision in the Bank Act, which the Court read as jurisdictional, the courts did not confront its full implications until fifty years later when Congress passed the first statute creating general federal question jurisdiction in the federal courts.[45] The Act reproduced *verbatim* the operative language of article III.[46]

There is respectable scholarly work to the effect that Congress did not intend to vary the meaning of the constitutional language, which survives essentially unchanged as 28 U.S.C. § 1331 today.[47] Nonetheless, beginning

---

41. *Planters' Bank,* 22 U.S. at 905.

42. There is a school of thought that the Court need not have decided *Osborn* on federal question grounds; rather, that article III authorized Congress to create "protective jurisdiction" to protect federal interest in the Bank. *See, e.g.,* Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts,* 30 UCLA L. REV. 542, 547 (1983).

43. *Osborn,* 22 U.S. at 874-76 (Johnson, J., dissenting).

44. Goldberg-Ambrose, *supra* note 32, at 547-50; Mishkin, *supra* note 5, at 187-88.

45. Act of March 3, 1875, § 1, 18 Stat. 470.

46. The language read:

> [T]he circuit courts of the United States shall have original cognizance . . . of all suits . . . where the matter in dispute exceeds . . . five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy . . . between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects; and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States . . . .

Id.

47. *See supra* note 3.

Professor Forrester has traced the evolution of the 1875 Act and concluded that "by repeating the words of the Constitution the Congress intended that the statutory words should have the same interpretation and meaning as the words in the Constitution." Forrester, *Federal Question Jurisdiction and Section 5,* 18 TUL. L. REV. 263, 265 (1943).

Professors Chadbourn and Levin, however, have argued that section 5 of the Act of 1875 provided relief from the expansive construction of the language of section 1. Chadbourn & Levin, *Original Jurisdiction of Federal Questions,* 90 U. PA. L. REV. 639, 649-50 (1942).

with *Gold-Washing & Water Co. v. Keyes*,[48] where the Court refused to exercise federal jurisdiction over enforcement of a mining title derived from the United States, the courts have construed the statute substantially more narrowly than they have construed article III.[49]

From the time Justice Johnson dissented in *Osborn* to the present, the key unacceptable aspect of *Osborn* has been the remoteness of the federal element from the dispute.[50] Indeed, it is a long distance from a federal statute incorporating an entity to suits over that entity's every contract or other act.[51] Of course, remoteness also implicates the other concerns motivating Justice Johnson's dissent: doubt that the federal element will be disputed and thus will require resolution, and the prospect that plaintiff, therefore, can prevail without invoking the federal element.

Accordingly, after distinguishing *Osborn* as a constitutional decision, the courts have attempted to establish tests for proximity of federal law to the dispute in order to define the scope of the general jurisdictional statute. It was this effort that led to the theoretical quagmire into which so many have disappeared.[52]

---

48. 96 U.S. 199 (1878). The Court in *Gold-Washing* did not articulate its reasons very satisfactorily. The case arose when the plaintiff sued defendant in state court for nuisance because defendant's mining operations were polluting waters running onto his farmland. Defendant removed, claiming that it owned the lands pursuant to title derived from federal law and that its right under that title to operate in the offending fashion derived from the provisions of federal statute establishing the title. *Id.* at 202-03. The Court held that defendant had not presented facts sufficient to show that its claim "necessarily depends upon the construction of the statutes." *Id.* at 203. Apparently, the Court was saying that the intervening title caused the statute to be too remote from the dispute to support jurisdiction unless the petitioner could show that a statutory, rather than a title-created, right was at issue. This is clearly a narrowing of the holding in *Planters' Bank*.

49. *See* FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT 65, 69 (1928); Chadbourn & Levin, *supra* note 47; Forrester, *supra* note 47, at 280-86.

50. Justice Frankfurter expressed its unacceptability as follows:

> [W]e would not be justified in perpetuating a principle that permits assertion of original federal jurisdiction on the remote possibility of presentation of a federal question. Indeed, Congress, by largely withdrawing the jurisdiction that the Pacific R[ailroad] Removal Cases rccognized, and this Court, by refusing to perpetuate it under general grants of jurisdiction, have already done much to recognize the changed atmosphere.

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 482 (1957) (citation omitted).

51. As Justice Cardozo expressed it, in finding against jurisdiction in a case involving a federal defense:

> [C]ountless 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 . . . 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). *See infra* notes 99-105 and accompanying text.

52. *See* sources cited *supra* note 8. Professor Currie summarizes the intransigent nature

Two restrictions on statutory federal question jurisdiction have evolved. The one of least interest to this inquiry is the "well-pleaded complaint" rule set forth in *Louisville & Nashville Railroad v. Mottley*.[53] There, the Court refused to find jurisdiction over plaintiffs' claim that their free railroad passes were allowable under the federal Interstate Commerce Act. The Court characterized the plaintiffs' "claim" as merely one for enforcement of its agreement with the railroad.[54] Finding that whether federal law allowed the railroad to contract entered the case solely as a defense, the Court held that, under the statute,[55] federal "arising under" jurisdiction could rest only on the well-pleaded elements of plaintiff's complaint and not on an anticipation of defendant's federal defense under the Interstate Commerce Act.

Although there are good policy reasons for the exercise of federal removal jurisdiction when the defense poses a real federal issue,[56] they have not been accepted by the federal courts. Under the present statutory and case law, the court must eliminate extraneous matter from the complaint and determine whether the remaining elements of plaintiff's well-pleaded complaint meet the test for federal jurisdiction.[57]

The well-pleaded complaint rule does not address the limits of jurisdiction where federal law supplies some, but not all, elements of the plaintiff's affirmative claim, and it is this second restriction on federal question jurisdiction to which this article will now turn. The line of cases addressing this problem originates in Justice Holmes' opinion in *American Well Works v. Layne & Bowler Co.*[58] *American Well Works* was an action for trade libel, a creature of Arkansas common law.[59] Plaintiff began its suit in Arkansas state court, claiming that defendants had libelled it by asserting that plaintiff was infringing defendants' patent and by threatening to sue plaintiff's customers.[60] Defendants removed, contending that plaintiff's case involved a question of federal patent law, because, if defendants' statements regarding

---

of the problem under the traditional theory with particular brevity and eloquence. *See* Currie, *supra* note 4, at 276-77.

53. 211 U.S. 149 (1908).

54. *Id.* at 152.

55. *Id.*

56. Cohen, *supra* note 5, at 895; Currie, *supra* note 8, at 270; Field, *supra* note 5, at 689; Hornstein, *supra* note 8, at 605.

57. In her recent overview of federal jurisdiction, Professor Field suggests that the well-pleaded complaint rule means that the test for federal jurisdiction must be broader than the test set forth, *infra* notes 58-65 and accompanying text, requiring a federal cause of action. This is so, because, as Field expressed it, "the cause of action under which a suit is brought is *always* properly part of the complaint; accordingly, if the cause of action had to be federal, the well-pleaded complaint rule would be superfluous." Field, *supra* note 8, at 689. Field is correct. To the extent that the well-pleaded complaint rule continues to play a role in jurisdictional decisionmaking, it reflects the survival of the open-ended traditional theory.

58. 241 U.S. 257 (1916).

59. *Id.* at 258-59.

60. *Id.*

plaintiff's infringements were true, plaintiff would lose.[61] The Supreme Court ruled that the case should have been remanded back to state court.[62]

In so ruling, Justice Holmes opined that "[w]hat makes defendants' act a wrong is its manifest tendency to injure the plaintiff's business . . . . [W]hether it is a wrong or not depends on the law of the state where the act is done, not upon the patent law . . . . *A suit arises under the law that creates the cause of action.*" [63]

The actual ruling in *American Well Works* is a rather narrow one; under the facts, a trade-libel plaintiff need not plead and prove that the defendant's statement was false; rather, defendant's truth is a defense. Accordingly, the federal patent law question arguably enters the case as a defense, and the decision may thus rest on the well-pleaded complaint rule set forth above.[64] However, the opinion is a much broader one, and the federal cause of action concept warrants further attention.[65]

Holmes' simple formulation was substantially weakened by the Court's ruling in the next major jurisdictional case, *Smith v. Kansas City Title & Trust Co.*[66] *Smith* presented the not-uncommon situation of a state taking a federal legal concept and giving it force and effect in the state system. The *Smith* plaintiff alleged that the United States Constitution prohibited Congress from legislating the issuance of federal farm loan bonds.[67] Under Missouri law, a local bank may only invest in, *inter alia,* legal obligations of the United States.[68] A Missouri shareholder sued to enforce this Missouri prohibition on the bank directors, seeking to prevent them from investing in the bonds.[69] Over Holmes' vigorous dissent, the Supreme Court sustained federal jurisdiction. Holmes said:

> But it seems to me that a suit cannot be said to arise under any other law than that which creates the cause of action. It may be enough that the law relied upon creates a part of the cause of action, although not the whole, as held in *Osborn v. Bank of United States,* 9 Wheat. 738, 819-823, which, perhaps, is all that is meant by the less guarded expressions in *Cohens v. Virginia,* 6 Wheat. 264, 379. I am content to assume this to be so, although the *Osborn Case* has been criticized and regretted. But the law must create at least a part of the cause of action by its own force, for it is the suit, not a question in the suit, that must arise under the law of the United States. The mere adoption by a state law of a United States law as a criterion or test, when the law of the United

---

61. *Id.* at 259-60.
62. *Id.* at 260.
63. *Id.* (emphasis added).
64. *See supra* notes 53-57 and accompanying text.
65. Cohen, *supra* note 5, at 897; Field, *supra* note 5, at 687; Note, *supra* note 8, at 982. *See infra* text accompanying note 312.
66. 255 U.S. 180 (1921).
67. *Id.* at 198.
68. *Id.*
69. *Id.*

> States has no force proprio vigore, does not cause a case under the state law to be also a case under the law of the United States, and so it has been decided by this court again and again.[70]

Much of the rest of academic and judicial writing on the subject of arising under jurisdiction has been an unsuccessful attempt to integrate *Smith* and *American Well Works.*

One way to attempt integration is to treat *Smith* as a sport. Several cases involving widely varying fact situations and "direct" and "disputed" federal claims similar to *Smith* have come to the Supreme Court, but, as the discussion of the decisions since *Smith* will illustrate, the Court has never directly ruled the same way again.[71]

The Court had its first opportunity to apply the *Smith* analysis in *Pan American Petroleum Corp. v. Superior Court.*[72] There, the plaintiff sought to enforce a contract for gas that provided for a refund of all rates paid above the rate filed with the Federal Power Commission. The defendant sought a ruling that the action "arose under" the federal Natural Gas Act enforceable exclusively in federal court. The Supreme Court rejected the contention. Equating the jurisdictional provisions of the Natural Gas Act with the general "arising under" jurisdiction of the federal courts, Justice Frankfurter ruled for a unanimous Court that "the suits are thus based upon claims of right arising under state, not federal law."[73]

The Court's clearest pronouncement on the *Smith* approach to jurisdiction appears in *Moore v. Chesapeake & Ohio Railway.*[74] There, a plaintiff sought to enforce the Kentucky Employers' Liability Act. The Kentucky act defined the employer's liability to include violation of the safety standards set forth in a federal employee safety law, the Federal Safety Appliance Act.[75] Although brought as a diversity suit, the litigation gave rise to a venue question that caused the Court to confront whether the action also "arose under" the FSAA. The Court held that it did not:

> Questions arising in actions in state courts to recover for injuries sustained by employees in intrastate commerce and relating to the scope or construction of the Federal Safety Appliance Acts are, of course, federal questions which may appropriately be reviewed in this Court. But it does

---

70. *Id.* at 214-15 (Holmes, J., dissenting).

71. *See* Flournoy v. Weiner, 321 U.S. 253 (1944). When the Supreme Court had occasion recently to restate the general principles underlying federal question jurisdiction, it reiterated the holding in *Smith:* "We have often held that a case 'arose under' federal law where the 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). However, despite the Court's assertion, it could come up with only one other authority for the continued validity of *Smith,* Hopkins v. Walker, 244 U.S. 480 (1917). *Hopkins,* of course, predates *Smith* by four years.

72. 366 U.S. 656 (1961).

73. *Id.* at 663.

74. 291 U.S. 205 (1934).

75. *Id.* at 212.

> not follow that a suit brought under the state statute which defines liability to employees who are injured while engaged in intrastate commerce, and brings within the purview of the statute a breach of the duty imposed by the federal statute, should be regarded as a suit arising under the laws of the United States and cognizable in the federal court in the absence of diversity of citizenship. The Federal Safety Appliance Acts, while prescribing absolute duties, and thus creating correlative rights in favor of injured employees, did not attempt to lay down rules governing actions for enforcing these rights.[76]

Technically, *Moore* also fails to meet the well-pleaded complaint test, because, under Kentucky law, the federal law supplied not an element of plaintiff's claim, but negated certain of defendant's defenses.[77] However, as one commentator has pointed out "although *Moore* is sustainable on this narrow ground, the opinion makes nothing of the point."[78]

The plaintiff in *Skelly Oil Co. v. Phillips Petroleum Co.*[79] tried to get around the problem by casting its action in terms of a declaratory judgment. The litigants were parties to a contract conditioned on the Federal Power Commission issuing a certificate of public convenience and necessity. The F.P.C. issued a certificate, but it was conditional. Defendant then notified plaintiff that it was excused from its obligations under the contract, because it lacked the necessary certification. Plaintiff brought suit in federal district court for a declaratory judgment that the F.P.C. had issued such a certificate as contemplated by the federal act and by the contract.

The Supreme Court held that there was no federal subject matter jurisdiction. It held, first, that the availability of a declaratory judgment action could not expand the subject matter jurisdiction of the federal courts.[80] Accordingly, the Court held, it would have to examine whether the plaintiff's coercive action—for enforcement of contract—arose under federal law. The Court then held that an action to enforce a contract that became effective only if federal law were satisfied did not arise under federal law.[81] The Court went on to conclude that the plaintiff's contention actually arose not as a part of its affirmative contract claim, but as a reply to defendant's defense of a failure to comply with a condition subsequent in the contract.[82] However the opinion in *Skelly,* like *Moore,* is broader than this;[83] moreover, *Pan*

---

76. *Id.* at 214-15 (citations omitted).
77. *Id.* at 212-13.
78. Greene, *supra* note 1, at 324 n.147.
79. 339 U.S. 667 (1950).
80. *Id.* at 673-74.
81. *Id.* at 678.
82. *Id.* at 672.
83. The *Skelly* Court said: "If Phillips sought damages from petitioners or specific performance of their contracts, it could not bring suit in the United States District Court on the theory that it was asserting a federal right. And for the simple reason that such a suit would 'arise' under the State law governing the contracts." *Id.* at 672.

American is just the plaintiff's coercive action contemplated in *Skelly,* and it, too, failed to meet the standards for federal jurisdiction.

One source in support of *Smith*'s continued validity is Justice Frankfurter's dissent in *Flournoy v. Wiener.*[84] *Flournoy* was a brief opinion dismissing a direct appeal from a Louisiana Supreme Court decision voiding a state tax law.[85] Since the state tax law incorporated and relied upon the federal tax law for the disputed provision, Justice Frankfurter viewed the lower court decision as raising a federal question suitable for Supreme Court review.

In disputing the Court's conclusion that "[i]t is not the federal but the state statute which imposes the tax on appellees,"[86] Justice Frankfurter relied upon *Smith* and *Standard Oil v. Johnson.*[87] Because *Flournoy* is a case about the scope of Supreme Court review of a federal question in a state court decision, Justice Frankfurter correctly invokes *Smith.* Although the distinctions between Supreme Court review and original federal question jurisdiction are not entirely clear, as set forth below, Supreme Court appellate review of federal legal questions in state court decisions under article III, at issue in *Flournoy,* can extend well beyond the original "arising under" jurisdiction of the federal courts in *Smith.*[88] Thus, if a state statute incorporating a reference to legality under federal law were grounds for federal question jurisdiction based on *Smith, a fortiori,* the majority in *Flournoy* is wrong. Rather than proving the continued validity of *Smith,* as Justice Frankfurter asserts, the result in *Flournoy* emphasizes *Smith*'s isolation.

Regarding *Standard Oil,* Justice Frankfurter's dissenting opinion elides the fundamental point: *Standard Oil* was not an original federal question case, but a petition for certiorari from the California Supreme Court.[89] In *Standard Oil* the California tax law exempted "fedcral installations" from state taxation.[90] Accordingly, the U.S. Supreme Court was deciding not whether the plaintiff's case arose under federal law, but rather whether the state court's interpretation of the phrase "federal installation" in the state

---

Accordingly, the opinion in *Skelly* must be read to mean that a state-created contract action that depends on a federal standard of behavior would not satisfy section 1331.

84. 321 U.S. 253, 263 (1944) (Frankfurter, J., dissenting). Justices Roberts and Jackson joined the dissent.

Although at least one commentator has cited Frankfurter's *Flournoy* dissent as authority for the continued validity of *Smith* (*see* Note, *supra* note 8, at 1002-03), as set forth in the text, Justice Frankfurter's opinion actually demonstrates *Smith*'s disavowal.

See also Justice Brennan's recent decision for the Court in Franchise Tax Bd. v. Construction Laborers Vacation Trust, 103 S. Ct. 2841 (1983), discussed *infra* notes 312-28 and accompanying text.

85. *Flournoy,* 321 U.S. at 254.

86. *Id.* at 260.

87. 316 U.S. 481 (1942).

88. *See infra* notes 312-43 and accompanying text.

89. *Standard Oil,* 316 U.S. at 483.

90. *Id.* at 482.

statute was a federal decision or one resting on independent state grounds.[91] Thus, like *Flournoy, Standard Oil* is an interpretation of the more liberal standards of article III.

Accordingly, if the expansive federal question analysis of *Smith* were right, the decision in *Standard Oil* would *a fortiori* be correct. More importantly, however, *Standard Oil* can stand without *Smith.* Despite Justice Frankfurter's canny drafting in *Flournoy*, suggesting that the *Standard Oil* Court applied the reasoning of *Smith,*[92] *Smith* is nowhere mentioned in *Standard Oil.*

As this review reflects, cases involving a mixture of state and federal law have always made it very difficult for the courts to decide when a ease is federal enough to be said to "arise under" federal law. The almost simultaneous decisions in *Smith* and *American Well Works* set up a situation where two incompatible approaches to the problem enjoyed equal precedential status. The actual decisions following *Smith* and *American Well Works* adhered to the more restrictive standard of *American Well Works.* However, occasional opinions reiterating in a talismanic way *Smith*'s validity perpetuated the analytic confusion and allowed the Court to avoid confronting how the *Smith* approach is fundamentally incompatible with other federalism concerns.

Academic commentators have not been any more successful than the Court in integrating *Smith.* In his seminal article on federal question jurisdiction, Professor Mishkin essentially ducks the question of how *Smith* fits into any principled theory of federal question jurisdiction. After setting forth his standard—that plaintiff's claim "must be founded 'directly' upon national law"[93]—he addresses *Smith* in the most indirect way:

> Under this criterion, a demand for judicial relief allegedly authorized by local law will be insufficient, even though that rule depends for its vitality upon explicit authorization by, or incorporation into, national law. For example, a state tax claim against a national bank, which could be valid only if it qualified for the explicit Congressional waiver of immunity, would nonetheless have to be litigated initially in a state court. State law created the cause of action. *Per contra, where federal law has inserted itself into the texture of state law, a claim founded on the national legislation could be brought into a federal forum.* Thus, if Congress declared certain bonds, which it had authorized and wished to promote, to be permissible investments for all fiduciaries, an action by a trustee for a judgment declaring that his purchase of those securities is legal would be founded "directly" upon the national law. And this would be so despite the fact that without state-imposed limits on fiduciary investments, the problem would not exist.[94]

---

91. *Id.* at 483.

92. Of *Standard Oil,* Justice Frankfurter wrote: "We unanimously applied the reasoning of [*Smith*]." *Flournoy*, 321 U.S. at 271-72.

93. Mishkin, *supra* note 5, at 165.

94. *Id.* at 165-66.

Mishkin's sole authority for this statement is to *"Cf. Smith."* [95] Since *Smith* is an injunction suit to prohibit violation of the Missouri limits on fiduciaries and not a suit for a declaratory judgment under a preemptive federal statute, Mishkin's reference is unclear. He does not attempt to reconcile *Smith* with his formulation for jurisdiction—that federal law must "establish [plaintiff's] substantive right to a remedy."[96] Moreover, in discussing *Skelly* a few pages later, he sets forth another standard difficult to reconcile with *Smith:*

> It seems clear that the only significance of national law was that the parties to a local contract had chosen to limit the power of termination by the occurrence of an event authorized by that law. It was state law under which the contract was made and would be enforced, and which permitted the selection of an event—presumably almost any event—as the measure of the consensually arrived at power of termination.[97]

Similarly, in *Smith,* the significance of the national law was that "the [Missouri legislature] had chosen to limit the power of [investment] by the occurrence of an event authorized by the law."[98]

Writing some years later, Professor Cohen was more forthright, essentially acknowledging that *Smith* is objectively irreconcilable with both *American Well Works* and the cases decided after *Smith.*[99] Cohen correctly concluded that *Smith* required a test for jurisdiction much more liberal than Holmes would have required. In response, Cohen argued that the Holmes standard was too narrow.[100] Cohen's problem was that he could not discern any standard which would allow the federal courts to entertain *Smith,* without opening the floodgates to other cases, many of which the courts had already turned away.[101]

Cohen's ultimate solution is a real tribute to the federal judiciary. Unwilling to relinquish *Smith* and unable to articulate an objective standard of federal jurisdiction to define the cases he wishes to include, he proposed what he calls a "pragmatic" solution to allow the exercise of jurisdiction over cases lawyers feel intuitively to be federal:

> A novel claim of mixed federal and state law ought to qualify as "arising under" federal law only if it exhibits those features which justify the need for federal trial court jurisdiction of federal question cases. A case that requires expertise in the construction of the federal law involved in the case, and a sympathetic forum for the trial of factual issues related to the existence of a claimed federal right, ought to fall within federal jurisdiction. On the other hand, a federal court should not be compelled

---

95. *Id.* at 166.
96. *Id.* at 165.
97. *Id.* at 183.
98. *Id.* at 166.
99. Cohen, *supra* note 5, at 898.
100. *Id.* at 903.
101. *Id.* at 906-07.

> to accept federal question jurisdiction over a class of suits which typically neither involves actual contested issues of federal law nor requires the protective jurisdiction of a sympathetic federal trial forum.[102]

Applying his own test, he finds the existing cases to be properly decided; more important, he predicts that use of his pragmatic factors will lead to certainty in deciding future cases.[103] The American Law Institute, writing two years later, found no such certainty.[104] All they were able to propose was to leave the basic arising under language intact, to "preserve the existing body of law."[105]

The *Outer Limits of Arising Under,* a law student note, is the most recent comprehensive look at the area.[106] Like the ALI study, *Outer Limits* does not discuss whether Cohen's pragmatic test worked to predict the Court's behavior in the years since 1967 or to protect the federalism values Cohen articulated. *Outer Limits* rejects Cohen's position because a "vague, intuitive 'federal interests' test is an escape, not an answer."[107] As it further points out, the operative jurisdictional statutes do not speak in terms of pragmatic need, but of objective factors. Based on these overarching concerns, *Outer Limits* correctly expresses the need for a reliable standard or set of standards.

Outer Limits proposes what it calls a "principled" alternative to the existing amorphous jurisdictional tests. It would reduce the requirement for federal jurisdiction to a federal element in the case that is "substantial."[108] To determine substantiality, the note writer proposes that, in each case, one must ask whether the federal proposition is "logically central" to the dispute and thus likely to enter into the actual controversy at trial in some way.[109] Since this formula is not exactly unambiguous, the writer proffers an example of the proposed theory in action—a malicious prosecution action, *Sweeney v. Abramovitz.*[110] In *Sweeney,* a plaintiff sued a policeman for breach of the federal Civil Rights Act.[111] After the federal plaintiff lost, the policeman sued the plaintiff under state malicious prosecution law. The state defendant removed, and plaintiff's remand was denied.[112]

In a short opinion by the very able district judge,[113] the court resurrected *Smith* and held that "a proposition of federal law is a pivotal ingredient of

---

102. *Id.* at 906.
103. *Id.* at 908.
104. ALI STUDY, *supra* note 4.
105. *Id.* at 69-74.
106. Note, *supra* note 8.
107. *Id.* at 980.
108. *Id.* at 1004.
109. *Id.* at 1005.
110. 449 F. Supp. 213, 214 (D. Conn. 1978).
111. *Id.*
112. *Id.* at 214-16.
113. Then District Judge Newman now sits on the U.S. Court of Appeals for the Second Circuit.

plaintiff's claim."[114] The *Outer Limits* note argues that Sweeney's allegation of lack of probable cause to believe in a section 1983 claim shows that a federal proposition—what facts might a civil rights plaintiff reasonably believe constitute a violation of section 1983—will probably be central to the state plaintiff's claim.[115]

The problem with *Outer Limits* is that it simply proves too much. Although the *Sweeney* example is an appealling one, a federal question is equally logically central to every action where a state statute, constitution, or common law claim incorporates reference to a federal standard.

The district judge cites no persuasive authority for his ruling,[116] and the opinion clearly reflects his outcome orientation:

> If the question of what constitutes probable cause to bring a § 1983 action is determined according to state law, there is a possibility that the standard will be set so high in some state courts as to permit malicious prosecution suits to be brought in response to legitimate § 1983 actions. It is of course possible that § 1983 actions, like any other judicial process, may be abused. But determining the standards for a malicious prosecution action requires the delicate balancing of the legitimate interests of public officials to be free from unfounded § 1983 suits against the necessity of preserving plaintiffs' ability to vindicate their federal rights undeterred by fear of being subjected to unfounded malicious prosecution suits. Such a balancing may itself be a federal question sufficient to invoke § 1331 jurisdiction.[117]

Surely, such problems ought to be considered by Congress, for instance, as a problem of federal protective jurisdiction and not allowed to unbalance the structure of federal question jurisdiction.[118]

Thus, the academic commentators, in their concern for having the words of a federal statute construed by a sympathetic federal judiciary, failed to

---

114. *Sweeney,* 449 F. Supp. at 214-16 (quoting McFaddin Express, Inc. v. Adley Corp., 346 F.2d 424, 426 (2d Cir. 1965), *cert. denied,* 382 U.S. 1026 (1966)).

115. Note, *supra* note 8, at 1006.

116. Judge Newman cites to several Second Circuit cases, none of which actually found jurisdiction based on *Smith:* Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968); McFaddin Express, Inc. v. Adley Corp., 346 F.2d 424 (2d Cir. 1965), *cert. denied,* 382 U.S. 1026 (1966); T.B. Harms v. Eliscu, 339 F.2d 823 (2d Cir. 1964), *cert. denied,* 381 U.S. 915 (1965). In *Harms* and *McFaddin,* the court found no jurisdiction. In *Ivy,* jurisdiction was based on a finding that the plaintiff was enforcing federal common law.

The court's only other authority is a series of declaratory judgment cases to declare the rights of parties under federal patent law. As set forth in the text *infra* at notes 308-11, both the facts of these cases and the unique role of the declaratory procedure essentially isolates them from the rest of the body of jurisdictional law.

117. *Sweeney,* 449 F. Supp. at 216.

118. Congress has already provided separately for an analogous kind of jurisdiction by allowing removal of cases against persons who cannot vindicate their "equal civil rights." 28 U.S.C. § 1443 (1982). Judge Newman properly found that section 1983 did not qualify as an equal rights law for the purposes of section 1443 under the facts in *Sweeney. Id.* at 214. That Congress had already addressed a piece of the problem presented by *Sweeney* in an explicit jurisdictional statute should have made the Court extremely reluctant to find the issue covered by section 1331.

see how such an open-ended standard would produce the unacceptable result of allowing state law to catapult otherwise unqualified plaintiffs into the federal courts.

Although traditional federal question analysis failed to produce a principled basis for understanding or predicting the area, for a long time the question lay largely dormant. Hybrid cases were not numerous,[119] nor, when they occurred, was their disposition perceived as threatening to the substantive federalism interests involved. This was so, because the jurisdictional problem of when a litigant may bring to federal court a claim drawing on state, as well as federal, law does not arise if federal courts will imply from an incomplete federal statute the elements of a claim not explicitly supplied.[120]

Some courts, however, did anticipate the problem as it ultimately developed.[121] For example, as set forth above, the federal statute in *Moore* established a federal standard for railroad safety but provided explicitly for enforcement only by interstate employees.[122] One avenue to federal jurisdiction in *Moore* was to imply a claim for intrastate employees from the Act. However, in *Moore,* the Supreme Court refused to do so,[123] and in so ruling the Court walked away from an earlier decision, *Texas v. Rigsby,*[124] which had implied a federal case in the FSAA claim of an intrastate employee.[125]

The issue surfaced most graphically in the Supreme Court opinion, and Justice Brennan's dissent, in *Wheeldin v. Wheeler.*[126] The plaintiff there claimed that he had been damaged by defendant's service on him of a subpoena to appear before the House Un-American Activities Committee. According to plaintiff's complaint, the defendant, an investigator for HUAC, had obtained signed, blank subpoenas without committee authorization and had served him, resulting in the loss of his job.[127] Plaintiff claimed Wheeler lacked authority to subpoena him and also attacked the constitutionality of Congress' authorization to the Committee to do so. By the time the case reached the Supreme Court only plaintiff's claim for money damages remained.[128]

---

119. Greene, *supra* note 1, at 322.

120. The implication of a private enforcement remedy for a federal statutory standard avoids the problem of which court has jurisdiction of the *Moore* type of hybrid, where, absent implication, only state law could supply the remedy. It also avoids the problem of whether a federal court has jurisdiction when Congress uses a private mechanism for imposing federal norms as in *Jackson Transit* by ignoring Congress' remedial mechanism and creating an independent federal remedy by implication.

121. Cohen, *supra* note 5, at 911; Greene, *supra* note 1, at 297.

122. *See supra* note 74 and accompanying text.

123. Moore v. Chesapeake & Ohio Ry., 291 U.S. 205, 215 (1934).

124. 241 U.S. 33 (1916).

125. *Moore,* 291 U.S. at 215 n.6.

126. 373 U.S. 647 (1963).

127. *Id.* at 648.

128. *Id.* at 648-49.

In the majority opinion, Justice Douglas treated the plaintiff's constitutional claim on the merits, finding federal jurisdiction over the claim in the briefest paragraph.[129] On the merits, he ruled that the service of the subpoena simply did not amount to an unreasonable search or seizure.[130]

Justice Douglas then addressed plaintiff's claims for damages for defendant's failure to comply with the federal statute authorizing HUAC to issue subpoenas. First, he addressed plaintiff's request that the Court create a federal common law action on his behalf. There, he simply relied on the generally tight-fisted approach the Court had taken to creating federal common law[131] and denied the request.

On the proposal to imply an action for abuse from the statute authorizing subpoenas, Justice Douglas presented several arguments supporting denial. First, he distinguished federal statutes that created an affirmative duty, as in the duty of fair representation cases,[132] from the subpoena statute, which merely grants authority to act, concluding that implication of actions to enforce affirmative duties does not support implication of a damage action for conduct beyond the statutory grant.[133]

Justice Douglas noted that suits for damages against federal officers for abuse of power were generally governed by local substantive law, with the federal permission entering only as the agents' defense. Finally, he anticipated future developments by noting that Congress had considered the problem of actions against federal officers acting under color of law and had not provided for such an express action.[134] Under the circumstances, he concluded, "It is not for us to fill any hiatus Congress has left in this area."[135]

Justice Brennan, joined by Chief Justice Warren and Justice Black, dissented. The dissent is almost a catalogue of all the hybrid possibilities inherent in the case. Thus, because the majority opinion is exceedingly cursory and because it implicitly rejects all of Justice Brennan's arguments, the opinion indicates an early inclination toward the Court's present conservative approach. On the other hand, as is set forth below,[136] *Wheeldin* was in some

---

129. *Id.* at 649.

130. *Id.* at 649-50.

131. Justice Douglas relied on Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956) (no federal common law for determining good faith purchases of federal paper). *Wheeldin*, 373 U.S. at 651.

132. Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944).

In the duty of fair representation cases, the Court had established a private action for employees against their unions derived from the federal statutory right of exclusive union representation. *See infra* notes 145-58 and accompanying text.

133. *Wheeldin*, 373 U.S. at 651.

134. *Id.* at 652.

135. *Id.* at 657.

136. *See infra* notes 143-48 and accompanying text.

sense an isolated decision, since the Supreme Court thereafter embarked on fourteen years of generosity, at least toward implied private actions for enforcement of federal statutes.

Justice Brennan brushed aside the fourth amendment claims. Instead, he characterized the complaint as "the notion of a tort of malicious abuse of federal process by a federal officer."[137] The tort, Brennan admitted, was a claim only actionable under state common law where the operative acts occurred. Therefore, Justice Brennan first suggested that the tort claim might be entertained as a simple state claim pendent to plaintiff's nonfrivolous claim for violation of his fourth amendment rights.[138]

Second, Justice Brennan suggested that plaintiff's state law tort claim might be entertained as a *Smith* claim incorporating an inherent federal right, i.e., the classic hybrid case.[139] Noting the scholarly suggestion that *Smith* was a sterile detour, he reiterated its continuing validity, distinguishing ensuing decisions as involving remote or collateral federal issues.[140]

Justice Brennan next proposed that the Court might imply a federal action from the federal standards. In so proposing, he set forth the old liberal standard for such implication:

> Implied rights of action are not contingent upon statutory language which affirmatively indicates that they are intended. On the contrary, they are implied unless the legislation evidences a contrary intention. Increasingly, the tendency in the federal courts has been to infer private rights of action from federal statutes unless to do so would defeat manifest congressional purpose.[141]

Finally, Brennan suggested that the Court might have formulated federal common law to define the claims against federal officers.[142] In sum, *Wheeldin* is a veritable encyclopedia of the possibilities of expanding federal subject matter jurisdiction over hybrid cases. That six Justices rejected Brennan's views illustrates the gap between traditional jurisdiction theory as it then existed and the real problems the Court was beginning to face as private enforcement of federal law heated up.

At this point, the problem was as follows. Under Justice Holmes' test of "the law that creates the cause of action," courts and commentators feared that cases necessitating the construction of federal standards would be excluded from federal court, creating an undesirably underinclusive jurisdictional test. However, the holding in *Smith* produced an overinclusive precedent for state legislatures or even private parties to create relationships enforceable

---

137. *Wheeldin,* 373 U.S. at 660-61.
138. *Id.* at 655.
139. *Id.* at 659.
140. *Id.*
141. *Id.* at 661-62 (citations omitted).
142. *Id.* at 663.

by the federal courts in the absence of any indication that the federal legislature intended or even desired such a result.

Courts and commentators trying to establish a responsible middle ground between these two positions proposed that federal jurisdiction extend to suits if they fit the court's intuition regarding the need for federal court "expertise" and "sympathy." The traditional theory thus avoided the critical exercises of defining the elements of a claim, identifying their origins in the federal or state systems, and deciding which court system should be adjudicating the disputes based on the language of the jurisdictional authority and the policy supporting it.

The problem did not manifest itself immediately. As set forth above, *Wheeldin* and *Moore* were somewhat rare.[143] Writing in the *Harvard Law Review* in 1969, Ronald Greene could safely assert:

> Notwithstanding its jurisprudential allure, *Moore* has not proved to be a germinal precedent. *The trend lately has been away from the creation of hybrid state law remedies, as in Moore, and toward the development of that purer strain, the implied federal cause of action.* In the field of air transportation, at least one district court has followed the F.S.A.A. precedents and has remitted complainants to state law remedies, but the Second Circuit has opted for an implied federal cause of action. In the important field of securities regulation, the Supreme Court has held that a federal right of action for injured private parties is to be implied under the proxy rules authorized by the Securities Exchange Act of 1934, a holding which probably applies to other private actions which have been implied under the Act. Although it is possible that hybrid state law claims could coexist in some of these settings with implied federal remedies, grants of exclusive jurisdiction to the federal courts (especially under the Securities Exchange Act) would cause some difficulty, and in any event the survival of hybrid claims would be of little practical significance. A party wishing to guarantee access to the Supreme Court could simply sue in a federal district court on the implied federal claim, or, if a grant of exclusive federal jurisdiction is no bar, join such a claim in a state court action.[144]

---

143. The issue of federal jurisdiction over hybrids did sporadically surface in the courts, occasionally meeting its Doppelganger, the federally implied private right of action, but rarely generating an analytical confrontation. A marvelous example of the phenomenon is a pair of cases, McFaddin v. Adley (I), 346 F.2d 424 (2d Cir. 1965), and McFaddin v. Adley (II), 363 F.2d 546 (2d Cir. 1965), *cert. denied,* 382 U.S. 1026 (1965). *McFaddin (I),* involved actions approved pursuant to the Interstate Commerce Act. 346 F.2d at 425. In *McFaddin (I),* the Court of Appeals for the Second Circuit ruled that plaintiff's action was but a common law contract action not entitled to federal jurisdiction. However, the Court suggested that plaintiff might succeed in obtaining federal jurisdiction by restating its action as one for enforcement of the statute itself. 346 F.2d at 427. Plaintiff refiled, contending that defendant breached the federal statute, which forbade mergers except upon the approved, contracted-for conditions. Wrong again, the Second Circuit held, this time ruling that Congress had not intended the statute to be enforced by private action, but only by the Interstate Commerce Commission. 363 F.2d at 546.

144. Greene, *supra* note 1, at 298 (emphasis added).

For some time before and six years after Greene wrote, the federal courts continued down this path. They enforced the federal securities laws in private suits for damages,[145] allowed the beneficiaries of federal spending programs to bring injunction suits to enforce the statutory limitations on grant recipients,[146] and implied private damage suits for breach of the federal labor laws.[147]

Although the Court was somewhat inarticulate, it is probably fair to say that the judicial creation of private claims not expressed by Congress rests on one of two possible grounds. The Court thought that, where Congress was silent, it was free to exercise its inherent equitable powers to create remedies for violation of legal rights. In the alternative, the Court felt it was just fulfilling the unexpressed will of Congress.[148]

The ensuing development in the law of implied private actions could be read as a movement away from the first ground and toward the second, coupled with an increasingly high standard for establishing legislative intent. The Court began to limit the implication of such actions in its decision in *Cort v. Ash*[149] in 1975. Beginning with *Cort,* the Court implied private enforcement of federal statutes only if certain structural indicia were present to prove that such enforcement was appropriate. *Cort* was a civil action for damages for alleged violation of the federal Election Campaign Act.[150] The act provided explicitly for enforcement by the Justice Department and the Federal Election Commission.[151] In ruling that the plaintiff could not state a private damage claim, the Court established a four-part test for implication:

---

145. Rondeau v. Monisee Paper Corp., 422 U.S. 49 (1975) (Supreme Court assumed target corporation had private right of action for injunctive relief); Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6 (1971) (private rights of action exist under rule 10b-5); J.I. Case v. Boark, 377 U.S. 426 (1964) (holding that private rights of action could be maintained for violation of section 14(a) of the Securities Exchange Act of 1934); Dan River, Inc. v. Unitex Ltd., 624 F.2d 1216 (4th Cir. 1980) (target corporation had standing to seek equitable relief under Williams Act); GAF Corp. v. Milstein, 453 F.2d 709 (2d Cir. 1971) (issuing corporation has standing under section 13(d) but not for injunctive relief under section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5).

146. Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968).

147. Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944); Vaca v. Sipes, 386 U.S. 171 (1967).

148. The *Borak* Court referred to both justifications for implication. First, it held: "While [§ 14(a)] makes no special reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result." J.I. Case v. Borak, 377 U.S. 426, 432 (1964). Next, the Court said: "We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *Id.* at 433.

149. 422 U.S. 66 (1975).

150. Federal Election Campaign Act, 18 U.S.C. § 610 (1970 & Supp. III) (repealed 1976).

151. The Commission may request the Attorney General to "institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order." 2 U.S.C. § 437a(a)(7).

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[152]

The first two parts of the *Cort* test are explicitly directed to ascertaining legislative intent. The last two may also afford guidance to Congress' will, or they may indicate the decision where Congress is, as is often the case, silent.[153] Regardless of the Court's intent in *Cort,* only four years later, in *Transamerica Mortgage Advisors, Inc. v. Lewis (TAMA),*[154] the Court explicitly stated the primary role of legislative intent.

TAMA was a suit for enforcement of the federal Investment Advisors Act.[155] In refusing to imply plaintiff's claim to enforce the act, the Court for the first time explicitly discarded the last two prongs of the structural *Cort* test and relied solely on the absence of evidence of congressional intent that the statute support a private damage suit. The Court held:

> [T]he Act here involved concededly was intended to protect the victims of the fraudulent practices it prohibited. But the mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of aetion for damages on their behalf . . . . *The dispositive question remains whether Congress intended to create any such remedy. Having answered that question in the negative, our inquiry is at an end.*[156]

After *TAMA,* the Court reiterated several times its refusal to imply any element of a claim beyond the all but expressed mandate of Congress.[157]

---

152. *Cort,* 422 U.S. at 78 (citations omitted).

153. The lower courts did not interpret the *Cort* test as being one of limitation and went on implying private enforcement. *See* Riggle v. California, 577 F.2d 579 (9th Cir. 1978) (Rivers & Harbors Appropriations Act); Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978), *rev'd,* 442 U.S. 397 (1975) (section 504 of Rehabilitation Act of 1973); Wilson v. First Houston Inv. Corp., 566 F.2d 1235 (5th Cir. 1978), *vacated and remanded,* 444 U.S. 959 (1979) (section 206 of Investment Advisors Act of 1950); Association of Data Processing Serv. Org. Inc. v. Federal Home Loan Bank Bd., 568 F.2d 478 (6th Cir. 1977) (section 11(e) of Federal Home Loan Bank Act); Abrahamson v. Fleschner, 568 F.2d 862 (2d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978) (section 296 of Investment Advisors Act of 1940).

154. 444 U.S. 11 (1979) [hereinafter cited as *TAMA*].

155. 15 U.S.C. § 80(b) (1940).

156. *TAMA,* 444 U.S. at 24 (emphasis added). The legislative history of the Investment Advisors Act contained strong evidence of an affirmative legislative decision *not* to allow private damage suits. *Id.* at 24. Even under *Cort,* the Court would not be free to ignore a plain expression of congressional refusal to provide a remedy. Accordingly, it was not necessary for the Court to go as far as it did in *TAMA* and require affirmative expression of legislative intent.

157. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Northwest Airlines, Inc. v. Transport Workers Union of Am., 451 U.S. 77 (1981); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981).

Although the strict legislative intent position occasionally wavers,[158] the present posture of the Court means that the "pure federal strain" is essentially extinct.

Once the Supreme Court began greatly contracting implied private rights of action, the question of what court should hear the remaining actions resurfaced. As *Cort v. Ash* illustrates, when a private litigant seeks to enforce the substantive prohibitions of a federal statute in a private suit for damages in federal court, the court may ask whether it can imply this enforcement mechanism from the silence of Congress. If the federal court finds that it cannot imply a private enforcement element from the federal statute, state law may supply the missing element. This would occur, for instance, where state corporation law authorizes private plaintiffs to sue for corporate violations of law, state or federal.[159] An action to enforce that state corporation law presents the jurisdictional question squarely.

The traditional theory clearly contemplates federal jurisdiction over some of these cases in which state law supplies an element of enforcement. Traditional theory would thus allow state legislatures or common law to create the elements missing from Congress' acts.[160] Since almost every hybrid case reflects a failure by Congress to commit itself to private enforcement of its acts, allowing the federal courts to entertain as federal a suit where only state law authorizes private enforcement would be allowing the states to create private actions to enforce federal statutes where Congress would not do so. Thus, not only is the traditional theory unprincipled and, accordingly,

---

158. In Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982), for instance, the Court in a 5 to 4 decision sustained implication of a private claim to enforce the federal Commodity Exchange Act. However, that decision rested on the existence of an implied private remedy before Congress reenacted the law in the form before the Court. Thus, the Court had only to find that Congress had not intended to take the action away.

159. *See, e.g.*, Miller v. American Tel. & Tel. Co., 507 F.2d 759 (3d Cir. 1974). There, the court held that acts allegedly in violation of the federal election campaign law amounted to violation of the corporation law of New York, which makes corporate officers liable for losses resulting from "illegal acts or acts against public policy." *Id.* at 763.

160. The extension of federal jurisdiction over hybrid cases under the pragmatic theory always rested on a disregard of the source of the elements of justiciability, standing, and statement of a claim, which have attracted so much attention from the current Supreme Court. An illustration appears in Cohen's discussion of *Smith*. Cohen, *supra* note 5, at 898-99. In *Smith*, the federal element was whether the bond act was constitutional. Cohen had noted that the state-authorized plaintiff challenging the constitutionality of an act of Congress faced a serious standing problem. He contented himself with noting further, however, that the question of jurisdiction is "prior" to such issues as standing. As the impact on the jurisdiction issue of the Court's private action decisions reflects, such a question cannot be so lightly dismissed. Assuming that the plaintiff lacks standing to enforce the federal act directly, a motion to dismiss the federal claim on standing grounds would leave the plaintiff clothed only in his state-created claim over which jurisdiction is pendent, at most. Under normal doctrines of pendent jurisdiction, dismissal of the state claim from federal court would follow. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). If *Smith* could be thus easily dispensed with by a technical failure to move for dismissal in the correct order, a lot of academic and judicial ink has been wasted. Indeed, although the jurisdictional question is technically prior to the standing problem, if the plaintiff's standing were sufficiently dubious, the Court should even have dismissed the federal claim on jurisdictional grounds as frivolous, insubstantial, or made solely to acquire jurisdiction. Bell v. Hood, 327 U.S. 678, 682 (1946).

inadequately predictive, but also it is potentially overinclusive, extending beyond the policy behind federal question jurisdiction, to protect litigants whom Congress did not authorize in a private action to "rely on federal law."[161] Of course, the absence of principled standards also establishes a situation of potential underinclusiveness, where the judiciary may undervalue the "federalness" of a claim that should, on objective criteria, be entitled to federal jurisdiction.

The remainder of this article will suggest an alternative to the traditional theory and indicate how the new theory would avoid the problems of unpredictability, overinclusiveness, and underinclusiveness.

II. THE PROBLEM: A BROKEN COMPASS THROUGH A FOREST OF HYBRID PLANTS

A. The Flora

In the private action cases, the Supreme Court found the claims of successive plaintiffs to be inadequate. In so doing, the holdings, if not the opinions, constitute a guide to the essential elements of a federal claim. In *Cort v. Ash,* the Court found that a private plaintiff could not state a claim for the relief of damages under the federal law.[162] In *National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)*[163] the Court found that no private party could state a claim to enforce the federal law at all—only public enforcement through the attorney general was available.[164] In *Piper v. Chris-Craft Industries,*[165] the Court found that the particular private plaintiff (the tender offeror in a securities dispute) could not state a claim for any relief at all for violation of the federal law governing tender offers.[166] In *Pennhurst State School & Hospital v. Halderman,*[167] the Court held that no one could enforce the particular provisions of the federal aid-to-the-handicapped law; they were simply precatory.[168]

These cases reveal that the elements of plaintiff's claim may be divided roughly as follows. The body of law plaintiff invokes must (1) establish the substance of rights[169] and (2) provide for enforcement of the rights[170] (3) in

161. Currie, *supra* note 4, at 278.
162. Cort v. Ash, 422 U.S. 66, 82-85 (1975).
163. 414 U.S. 453 (1974) [hereinafter cited as *Amtrak*].
164. *Id.* at 464-65.
165. 430 U.S. 1 (1977).
166. *Id.* at 45.
167. 451 U.S. 1 (1981).
168. *Id.* at 31-32.
169. In each hybrid case addressed here, the federal statute does create a substantive standard of behavior. When, on at least one occasion, Congress created federal jurisdiction but not a federal substantive standard, the Court confronted a very difficult jurisdictional problem, which it ultimately resolved by creating a body of federal common law to govern the area. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).
170. *Pennhurst,* 451 U.S. 1.

a private suit[171] (4) at the instance of this plaintiff[172] (5) with the remedy plaintiff seeks against defendant[173] (6) in a specific court. If federal law fails to establish any of elements (1) through (5), but state law fills the gap, a hybrid situation results. Whether the sixth element is satisfied is, of course, the ultimate question addressed here.

In an opinion dissenting from the decision in *Cannon v. University of Chicago,*[174] Justice Powell first made explicit the problems in extending federal question jurisdiction to cases where some of the elements of plaintiff's claim are not federal. In *Cannon,* the Court had implied a private right to enforce Title IX of the Education Act of 1972, which imposed certain conditions on the recipients of federal education money.[175] Justice Powell's analysis started with the majority's citation to *International Association of Machinists v. Central Airlines*[176] to support its implication of Cannon's claim. The federal statute in *Machinists* had required airlines and their unions to agree to binding arbitration of certain disputes.[177] There, the Supreme Court had held that the union's enforcement of an arbitration award emerging from the federally mandated agreement to arbitrate arose under federal law for jurisdictional purposes.[178] As Justice Powell accurately noted, the *Machinists* Court assumed it was dealing with a private action to enforce the agreement "and the only issue was whether this already existing private cause of action could be brought in federal court."[179] Accordingly, Justice Powell noted: "Although as a practical matter this result entails many of the same problems involved in the implication of a private cause of action, . . . at least analytically the problems are quite different."[180]

A few pages later,[181] Justice Powell describes the similarities in the problems:

> Because a private action implied from a federal statute has as an element the violation of the statute the action universally has been considered to present a federal question over which a federal court has jurisdiction under 28 U.S.C. § 1331. Thus, when a federal court implies a private action from a statute, it necessarily expands the scope of its federal-question jurisdiction.
>
> It is instructive to compare decisions implying private causes of action to those cases that have found nonfederal causes of action cognizable by a federal court under § 1331. E.g., *Smith v. Kansas City Title &*

171. *Amtrak,* 414 U.S. 453.
172. *Piper,* 430 U.S. 1.
173. *Cort,* 422 U.S. 66. *See also TAMA,* 444 U.S. 11 (1979), and *supra* notes 155-58 and accompanying text.
174. 441 U.S. 677 (1979).
175. Education Act of 1972, 29 U.S.C. §§ 1681-1686 (1972).
176. 372 U.S. 682 (1963).
177. *Id.* at 683.
178. *Id.* at 690-91.
179. *Cannon,* 441 U.S. at 734 n.5 (Powell, J., dissenting).
180. *Id.* at 734-35.
181. *Id.* at 746 n.17.

> *Trust Co.*, 255 U.S. 180 (1921). Where a court decidcs both that federal-law elements are present in a state-law cause of action, and that these elements predominate to the point that the action can be said to present a "federal question" cognizable in federal court, the net effect is the same as implication of a private action directly from the constitutional or statutory source of the federal-law elements. To the extent an expansive interpretation of § 1331 permits federal courts to assume control over disputes which Congress did not consign to the federal judicial process, it is subject to the same criticisms of judicial implication of private actions discussed in the text.[182]

As both the opinion of the Court and Justice Brennan's dissent in *Wheeldin v. Wheeler* illustrate,[183] the Court had previously treated the implication of a private claim as separate from the jurisdictional analysis. Whether a federal question is cognizable requires interpretation of the jurisdictional statute, regardless of whether that analysis is based on the traditional quantum of federalism theory as set forth above, or on the more principled theory proposed below. Whether to imply a private action from a particular substantive statute is an inquiry directed at the act in question, reduced, as set forth above, to the legislative intent in passing the particular act itself.

As formulated in *Cannon,* Justice Powell's position appropriately begins to address the problem of whether state law can supply the elements of a plaintiff's federal claim, a problem which earlier judges and commentators, applying traditional standards, had simply overlooked. As far as the *Smith* type of case is concerned, the traditional commitment that some case with a state law private enforcement mechanism, like the hybrid cases of the *Moore* type, can command federal question jurisdiction is simply inconsistent with the Court's decisions not to extend federal private enforcement beyond the express will of Congress. The question is the right one, but Justice Powell's solution is both wrong and dangerous. The Powell formulation is particularly problematical, as is set forth below, when applied to hybrid cases of the second, or *Jackson Transit,* type.

In *Zeffiro v. First Pennsylvania Banking & Trust Co.*,[184] decided a year after Justice Powell opined in *Cannon,* the Court of Appeals for the Third Circuit pursued his suggestions. *Zeffiro* was an action to enforce a trust indenture.[185] Trust indentures are subject to the federal Trust Indenture Act, one of the pieces of securities legislation that came out of the New Deal.[186] Rather than allow a regulatory agency to supervise the area, the act actually mandates the terms that a trust indenture must contain, including the pro-

182. *Id.* (citations omitted).
183. 373 U.S. 647, 653 (1963).
184. 623 F.2d 290 (3d Cir. 1980), *cert. denied,* 456 U.S. 1005 (1983).
185. *Id.* at 292.
186. Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa-77bbb (1982).

vision that the plaintiffs in *Zeffiro* were seeking to enforce.[187] Thus, *Zeffiro* looks a lot like a case of the *Jackson Transit* type—where Congress has established a legal relationship normally enforceable in a private suit.

The defendant moved to dismiss for lack of federal subject matter jurisdiction.[188] Not surprisingly, the *Zeffiro* plaintiffs invoked *Machinists.*[189] Plaintiffs argued that the Trust Indenture Act mandates the offeror to include specific terms in the indenture, just as the federal law in *Machinists* mandated the parties to agree to arbitrate. They asserted that the action to enforce those federally mandated contract terms, unassailably a private action, arose under federal law with jurisdiction under section 1331.[190]

The Third Circuit rejected this contention.[191] Instead, the court held, *Machinists* had "implicitly" been overruled in *Cannon,* because the *Cannon* Court had listed *Machinists* among its implied right of action authorities.[192] The court concluded from this that, henceforth, *Machinists* was to be limited, like the other private action cases, to the *Cort* standards.[193] In support of its holding, the court quoted from Justice Powell's dissent in *Cannon* that the effect of a liberal interpretation of section 1331 was the same as liberal implication of private actions and concluded that it must therefore turn to the *Cort* analysis.[194]

The Third Circuit opinion graphically illustrates the Procrustean nature of attempting to fit a case over the Trust Indenture Act, a statute effectuated by federally created private relationships, into the mold of *Cort.* The first *Cort* question is whether the statute was enacted for the benefit of plaintiff's class. The court had no trouble with the inquiry, because both the act itself and its legislative history expressly state that the act is to benefit the interests of investors.[195]

The second *Cort* question is whether there is any indication of legislative intent to create or deny "such a remedy." In *Cort,* "such a remedy" refers back to the Supreme Court's description of the problem the four-pronged test seeks to answer: should the Court imply "a *private* remedy."[196] The Third Circuit characterized the question as whether the statute creates an "implied *federal* cause of action."[197] This is a critically different question, and the Third Circuit answered it quite differently. First, the court asked whether there was any legislative history regarding private enforcement of

187. *Zeffiro,* 623 F.2d at 293.
188. *Id.* at 292.
189. *Id.* at 296.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* at 296-97.
196. *Cort,* 422 U.S. 66, 78 (1975).
197. *Zeffiro,* 623 F.2d at 294 (emphasis that of author).

the Trust Indenture Act. Not surprisingly, considering that Congress deliberately chose to accomplish its end by dictating the terms of a private contract, the court of appeals easily found legislative history that Congress intended the rights it created to be privately enforced: "[T]he *legislative history* unequivocally advances the premise that the *bondholders may bring a suit for breach* of the indenture provisions."[198]

The court went on to note that: "However, it does not specify the proper forum."[199] Accordingly, the court felt obliged to inquire whether, when Congress created a privately enforceable relationship by statute, it intended actions to enforce its mandate to be brought in the federal courts.

As the court of appeals' opinion acknowledged, the Supreme Court had already addressed this question in *TAMA*.[200] *TAMA* is chiefly noteworthy for setting forth the new restrictive principles for implying private damage suits from federal statutes. The second aspect of *TAMA*, which is of interest here, arose because the statute there involved a statutory provision allowing investment advisors' clients to "rescind" their contracts.[201] Although the statute spoke of the right to rescind, it was silent regarding the jurisdiction of actions to enforce rescission; nor did the act speak of damages or other remedies to accompany rescission.[202] In ruling on these issues, the Supreme Court acknowledged that, when Congress used a common law term like "rescission" creating legal rights between private parties, it also created a private right of action to enforce the rights.[203] The only question remaining, the Court noted, was a jurisdictional one.[204] The Court easily decided the jurisdictional question in *TAMA*, holding that congressionally created private actions certainly belonged in federal court; remitting the enforcement of federal law to state court would be, in the Court's words, "anomalous."[205] The Court did not even inquire into whether Congress "intended" jurisdiction or if the Court had to "imply" it. Once the private suit existed, jurisdiction followed.

The *Zeffiro* court apparently missed this aspect of *TAMA*. It held that:

> From the above discussion there can be little question that the Trust Indenture Act allows for suits by debenture holders against the trustee for breach of the indenture. First Pennsylvania argues that such suits are limited to state, not federal, court. Under the holding of *Transamerica*, absent some indication that Congress intended to limit the litigation of the federally-created right to state court, the right is enforceable in federal court. We fail to find any such indication. To the contrary, the legislative history indicates that Congress sought to nationalize the

198. *Id.* at 298 (emphasis added).
199. *Id.*
200. *TAMA*, 444 U.S. at 18.
201. *Id.* at 19 (quoting Mills v. Electric Auto-Lite, 396 U.S. 375, 388 (1970)).
202. *Id.* at 19-20.
203. *Id.* at 19.
204. *Id.* at 19 n.9.
205. *Id.*

> issues of concern in the Act. There is no indication whatsoever in any portion of the legislative history that Congress sought to restrict suits under the Act to state court.[206]

However, instead of ending the analysis with this conclusion, as the *TAMA* Court did, the court of appeals held that this structure merely satisfied the second *Cort* test, which it again misrepresented as asking whether Congress intended to create a "federal cause of action."[207] The court then proceeded to do exactly what the Supreme Court had refused to do in *TAMA*—it subjected plaintiff's claim to the gauntlet of the remaining two *Cort* tests: (1) whether a *private* remedy is consistent with the legislative scheme, and (2) whether the subject matter is one traditionally relegated to state law such that it would be inappropriate to infer a cause of action based solely on federal law.[208] Like its treatment of the second *Cort* test, the court of appeals again misrepresented the third *Cort* test as whether a *"federal"* remedy is consistent with the legislative scheme.[209]

Ultimately, the court of appeals did find that the Trust Indenture Act met the remaining *Cort* tests. In discussing the reformulated third test, the court noted that Congress sought to attack a national problem in a uniform way and that it would be strange indeed if this federal law were to be subject to the vagaries of the laws of the fifty states.[210] Moreover, the court noted, the law provided for no federal regulatory enforcement; thus, absent federal court enforcement there would be no federal enforcement of these federal rights at all.[211] On the subject of traditional state governance, the court relied heavily on the federal source of the provisions in the trust indentures to conclude that their "interpretation" would not be a matter of traditional state law.[212]

The point here, however, is not that the Trust Indenture Act satisfies the *Cort* tests, but rather that it should not be subjected to them at all. As *TAMA* illustrates, once it is decided that Congress mandated substantive rights and created a private cause of action for their enforcement, the *Cort* inquiry ends.[213] In *TAMA,* the Court had read Congress' use of the term "rescission" to encompass a private action to rescind the contract. However, as the dissenters in *TAMA* argued, common law rescission also should have carried with it an implied private remedy of contract damages.[214] Yet, the Court refused to recognize that application of the statutory term and has never confronted the consequences of that part of the *TAMA* opinion. The

206. *Zeffiro,* 623 F.2d at 298-99 (footnotes omitted).
207. *Id.* at 299.
208. *Id.* at 299-300.
209. *Id.* at 299.
210. *Id.*
211. *Id.* at 299-300.
212. *Id.* at 301.
213. *TAMA,* 444 U.S. at 24.
214. *TAMA,* 444 U.S. at 30, 31 (White, J., dissenting).

defendants petitioned for certiorari in *Zeffiro*. The Supreme Court held the petition until it decided in favor of implication in *Merrill Lynch v. Curran*[215] and then denied it.[216]

Shortly after *TAMA*, in a series of cases involving the Davis-Bacon Act,[217] the Supreme Court had another opportunity to decide how to handle cases over federally mandated private relationships. The Davis-Bacon Act provides that federal construction contracts shall provide for payment to construction workers of the construction wages prevailing in their area. The cases arose out of a dispute between a consortium of universities that built a nuclear accelerator under contract with the Atomic Energy Commission and certain of their employees. The employees contended that they were performing work covered by the prevailing wage requirements of the Davis-Bacon Act and not being paid the required wages. They brought two actions.

The first, *McDaniel v. University of Chicago*,[218] arose before *Cort v. Ash*. There, the employees claimed, and defendant did not deny, that defendant's contract with the AEC contained the prevailing wage stipulations required by the act.[219] Referring to the readiness of the Supreme Court to make "effective the Congressional purpose"[220] under the pre-*Cort* law, the Court of Appeals for the Seventh Circuit had no trouble implying a private "right of action under the contractual provisions required by [the Act]."[221] The court characterized plaintiffs' complaint as one "to enforce defendant's contractual commitment"[222] but characterized plaintiffs' "cause of action" as "under the Davis-Bacon Act."[223] The court noted federal jurisdiction under 28 U.S.C. § 1331,[224] but said nothing about any "arising under" problem. That term the Supreme Court decided *Cort v. Ash*. It then granted certiorari in *McDaniel*, but vacated and remanded the case for reconsideration in light of *Cort* and another private action case, *Securities Investors Protective Corp. v. Barbour*.[225]

The court of appeals reaffirmed the decision.[226] On remand, the court was slightly clearer about the difference between the employees' claims as third party beneficiaries of the contract between defendant and the United States to pay the prevailing wage and the claim to be enforcing the statutory

215. 456 U.S. 353 (1982).
216. *Zeffiro*, 623 F.2d 290 (3d Cir. 1980), *cert. denied*, 456 U.S. 1005 (1982).
217. Davis-Bacon Act § 1, 40 U.S.C. § 276a (1982).
218. McDaniel v. Univ. of Chicago (I), 512 F.2d 583 (7th Cir. 1975), *vacated and remanded*, 423 U.S. 810 (1975), *aff'd on remand, McDaniel (II)*, 548 F.2d 689 (1977), *cert. denied*, 434 U.S. 1033 (1978).
219. *McDaniel (I)*, 512 F.2d at 584.
220. *Id.* at 586-87.
221. *Id.* at 587.
222. *Id.* at 588.
223. *Id.*
224. *Id.* at 589.
225. 421 U.S. 412 (1975).
226. McDaniel v. Univ. of Chicago (II), 548 F.2d 689 (7th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978).

mandate that workers be paid the wage. The court focused on the statutory mandate and simply ran the act through the *Cort v. Ash* four-part test, concluding that a private enforcement remedy for the statute must be implied.[227] In passing, however, the court indicated that the action under the contract, standing alone, would not be cognizable in federal court.[228] The Supreme Court denied certiorari.[229] Almost immediately thereafter, the Court of Appeals for the Fifth Circuit disagreed with the Seventh Circuit and ruled that the same type of action did not arise under the Davis-Bacon Act.[230] The unsuccessful employees did not petition for certiorari.

In the next round of litigation, *Universities Research Association v. Coutu,*[231] the universities defended their Davis-Bacon Act position on the ground that their contract with the United States contained no commitment to pay the prevailing wage; rather, it merely acknowledged that any such work would be contracted out.[232] In response, the employees contended that the employer used them for Davis-Bacon work and underpaid them and that the Federal Government did nothing to effectuate the act.[233] The issue was thus squarely joined: absent a contract, can a private employee bring a suit for back wages to enforce the statutory mandate that a contractor with the United States doing Davis-Bacon Act work must provide for payment of the prevailing wage? The Supreme Court said no. Applying the formalist analysis fully developed in *TAMA,* the Court easily found that, in requiring contracts to include the prevailing wage, the act showed that Congress intended no more than a directive to the federal funding agency and that the existing express private remedies[234] precluded any implication of further private actions.[235]

Although noting the conflict between the Fifth and Seventh Circuits, a unanimous Supreme Court distinguished the Seventh Circuit decision in favor of a private claim on the grounds that the defendant in that case had actually concluded a contract with the United States for the prevailing wage. The Court noted, however, that "some of our reasoning arguably applies to the question whether the Act creates *any* implied right of action."[236]

Another view of the Seventh Circuit's decision to imply a private action in *McDaniel,* and one which distinguishes it determinatively from the Supreme Court decision in *Coutu,* is that the question before the Seventh Circuit was not whether a private action should be implied from the Davis-

227. *Id.* at 695.
228. "[T]his status as a third party beneficiary might well support an action for breach of contract in state court, or in federal court if *diversity jurisdiction were satisfied.*" *McDaniel (II),* 548 F.2d at 693 n.2 (1977) (emphasis added).
229. *See supra* note 218.
230. United States *ex rel.* Glynn v. Capeletti Bros., 621 F.2d 1309 (5th Cir. 1980).
231. 450 U.S. 754 (1981).
232. *Id.* at 764-65.
233. *Id.* at 767-68.
234. *Id.* at 770.
235. *Id.* at 783-84.
236. *Id.* at 769 n.19.

Bacon Act. Instead, the Seventh Circuit case again posed the question whether, when Congress chooses to use a traditional privately enforceable legal mechanism to effectuate a federal mandate, an action to enforce the mandate "arises under" federal law and thus belongs in federal court.

The Supreme Court came closest to addressing the question directly in *Jackson Trsnsit Authority v. Local Division 1285, Amalgamated Transit Union,*[237] decided in the term after *Coutu. Jackson Transit* sought to invoke federal jurisdiction over a suit to enforce contracts which Congress required as a condition of the receipt of federal funds. At the outset, the Supreme Court characterized the inquiry as follows:

> While the Court of Appeals treated this as a private right of action case, it does not fit comfortably in that mold. Indeed, since [the Act] contemplates protective arrangements between grant recipients and unions as well as subsequent collective bargaining agreements between those parties, . . . it is reasonable to conclude that Congress expected the § 13(c) agreement and the collective bargaining agrcement, like ordinary contracts, to be enforceable by private suit upon a breach.[238]

The Court then continued, however, to make an inquiry very much like the one suggested by Justice Powell: "The issue, then, is not whether Congress intended the union to be able to bring contract actions for breaches of the two contracts, but whether Congress intended such contract actions to set forth federal, rather than state, claims."[239]

In so ruling, the Court rejected the plaintiff's contention that, once congressional "contemplation" of enforcement by private suit is established, federal private enforcement follows by operation of section 1331 alone. The Court disposed of plaintiff's precedents as establishing only that "suits to enforce contracts contemplated by federal statutes may set forth federal claims and that private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes. But [such precedents] do not dictate the result in this case."[240] Moreover, although the Court denied that the inquiry was governed by the implied private action precedents,[241] its inquiry certainly resembled that mandated in the decision not to imply a damage action in *TAMA:*

> Whenever we determine the scope of rights and remedies under a federal statute, the critical factor is the congressional intent behind the particular provision at issue. Thus, if Congress intended that § 13(c) agreements and collective bargaining agreements be "creations of federal law," and that the rights and duties contained in those contracts be federal in nature, then the union's suit states federal claims. Otherwise, the union's complaint presents only state law claims.[242]

---

237. 457 U.S. 15 (1982).
238. *Id.* at 20-21 (citation omitted).
239. *Id.* at 21.
240. *Id.* at 22.
241. *Id.*
242. *Id.* at 22-23 (citations omitted).

The language of the statute, the Court found, was "not conclusive."[243] However, the Court continued, the legislative history of the statute "is conclusive":[244]

> Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers. Section 13(c) would not supersede state law, it would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations. Congress intended that § 13(c) would be an important tool to protect the collective bargaining rights of transit workers, by ensuring that state law preserved their rights before federal aid could be used to convert private companies into public entities. See 109 Cong. Rec. 5673 (1963) (remarks of Senator Morse) (if city proposed to reject collective bargaining, it would be ineligible for federal aid). But Congress designed § 13(c) as a means to accommodate state law to collective bargaining, not as a means to substitute a federal law of collective bargaining for state labor law.[245]

In essence, the Court found that, in this particular statute, Congress chose the unusual, but not unprecedented, device of enticing a change in state law rather than laying its mandate directly on the relationship between the parties themselves.[246] Accordingly, the Court concluded, as a matter of statutory interpretation, that the federal franchise ended where the state law began, and any effort to enforce the private outcome that ensued from the change in state law was a creation of state law not cognizable in the federal courts.[247]

Justice Powell, along with Justice O'Connor, concurred separately in *Jackson Transit.*[248] The narrow but important disagreement between Justice Powell and the Court illustrates Justice Powell's position. In *Jackson Transit,* the Court acknowledged the existence of legal rights between the private parties, but concluded that Congress had intended to affect the parties' legal rights through the vehicle of state law rather than federal law. The legislative history was plentiful and, as the Court saw it, reflected a strong and consistent congressional intent (for reasons largely peculiar to the subject matter of the legislation)[249] to withhold the aegis of federal law from the private

243. *Id.* at 23.
244. *Id.* at 24.
245. *Id.* at 27-28.
246. *See* Hart, *supra* note 2, at 525-39.
247. *Jackson Transit,* 457 U.S. at 29.
248. *Id.* at 29 (Powell, J., concurring).
249. Section 13(c) of the Federal Urban Transportation Act, 49 U.S.C. §1609(c), at issue in *Jackson Transit,* was directed at the problem of transferring employees formerly covered by the federal National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982), to public employment. The NLRA explicitly excludes such employees from coverage. 29 U.S.C. § 152(2). Despite many attempts, organized labor has never succeeded in getting a public-employee labor relation statute through Congress. Most states have now passed statutes addressing the subject in whole or in part. *See, e.g.,* State Employer-Employee Relations Act, 10.3 CAL. GOV'T CODE §§ 3512-3524 (West 1983); State Employee Relations Act, 1975 Conn. Acts 318 (Reg. Sess.); Public Employee Relations Act, 1982 Hawaii Sess. Laws 89-1; Public Labor Relations Act, 1983 Ill. Laws 1012 (effective July 1, 1984); Public Employment Relations Act, IOWA CODE § 20 (1978).

relationships. Accordingly, the *Jackson Transit* Court could say, as it did, that it was addressing the ancestry of the private action that existed,[250] not whether to add a private action to the existing federal scheme. Since the Court found that Congress had explicitly disclaimed parenthood of such private action as did exist, the Court did not have to decide what it would do where Congress was less instructive.

Justice Powell desired to address his issue; his concurring opinion exists solely to announce the standards to guide the courts where strong indications of legislative intent are absent. According to Justice Powell, the restrictive part of the decision in *TAMA*—refusing to imply private actions—provides the answer.[251] Under these standards, as Justice Powell asserted, no strong indication of Congress' intent to defer to state law is required. To the contrary, Justice Powell would establish the presumption that, "in the absence of an unambiguous expression of Congressional intent,"[252] private legal relationships created by Congress are to be governed by state law and excluded from federal court.

Justice Powell assumes that, if Congress wished to place the mandate of federal law behind the private legal relationships it addressed, it would do so explicitly. Thus, in situations where the federal law bears directly on the private relationship and the statute and history are silent or ambiguous regarding whether the private relationship is to be governed by federal law enforceable in federal court, Justice Powell's theory would establish a rule of no implication of federal governance.

Thus, after the decisions from *Cort* to *TAMA* established that the federal courts should not create remedies in the absence of unambiguous direction from Congress, the overinclusiveness of the traditional standard became apparent. Assuming the continued viability of the Court's private action decisions, the argument for the extension of jurisdiction over *Moore*-type hybrids, where Congress has not created the plaintiff's claim, should be laid to rest.

Near, if not next, to the *Moore*-type hybrids on the continuum are the cases, like *Jackson Transit* and *Zeffiro,* where Congress has used a private mechanism to effectuate federal law. Under Justice Powell's theory, the same concerns for the limited franchise of the federal courts should again dictate a withholding of federal jurisdiction.

B. Powell's Path

In essence, Justice Powell wants to answer the traditional inquiry into what "federal" cases are by the same techniques the Court has applied to its private action inquiry. As set forth above, this avenue of analysis is

250. *Jackson Transit,* 457 U.S. at 21.
251. *Id.* at 30 (Powell, J., concurring).
252. *Id.*

relevant to cases like *Smith,*[253] but it is fatally flawed as a means of understanding federal question jurisdiction, in general, and of applying federal question jurisdiction to the private vehicle cases like *Zeffiro,* in particular.

Regardless of its propriety, one thing is immediately apparent: the requirement that Congress unambiguously manifest its intent will operate to exclude cases from the federal system. This is exactly the effect of *TAMA.* Under *Cort* the Court merely asked for any indication of congressional intent to imply or deny a private remedy. Since *TAMA,* the Court has required an affirmative and unambiguous indication of Congress' intent to create a remedy in each case. Since legislative history is rarely one-sided and unambiguous, after *TAMA,* the implication of private remedies dropped radically.[254]

Although Justice Powell commingles the questions, there are actually several matters at issue when Congress uses a private mechanism for insertion of federal standards into the world: (1) Is the private behavior required a matter of federal or state substantive law? (2) If federal law, is it enforceable in the courts of the federal system or only in the courts of the state? (3) If state law, is it subject to federal preemption where it conflicts with the statutory mandate?

Absent unambiguous expression of the will of Congress, Justice Powell would answer the first question by presuming that state substantive law governs the private behavior. It is, of course, possible to construe Congress' intent that way. The unarticulated premise of this position is that, by choosing the vehicle of a contract, a traditional creature of state common law, Congress must have been intending it to be treated under state law.

However, every avenue of analysis rebuts this construction. First, this writer has searched the precedents without finding a single case in which substantive actions explicitly mandated by Congress are assumed not to be federal substantive law.[255] In his seminal work on the relationship between federal and state law,[256] Henry Hart noted "the body of federal law directly governing private activity springs mainly from a statutory base."[257] Professor Hart later characterizes these as "federally created rights."[258]

Perhaps because of this basic assumption that, insofar as Congress is explicit, it creates federal substantive law, few courts actually articulate this

253. *See supra* notes 92-105 and notes 160-61 and accompanying text.

254. Pillai, *supra* note 19, at 37-38; Note, *Congressional Intent, supra* note 19, at 1447; Note, *Implication of a Private Right, supra* note 19, at 1011-13.

255. Even where the federal courts confront an ambiguous or incomplete federal statute, they treat the decision of whether to adopt state law standards as the rule of decision as an exercise of federal court competence. *See* Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision,* 105 U. PA. L. REV. 797, 803-05 and cases cited n.5 (1957); *See also* Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test,* 43 U. CHI. L. REV. 823 nn.3-5 (1976).

256. Hart, *supra* note 2.

257. *Id.* at 497.

258. *Id.* at 498.

premise, even in the cases where the question is arguably debatable. Addressing the problem of how to fill lacunae in Congress' scheme, the Court in *Clearfield Trust Co. v. United States*[259] came as close as it ever has. There, the Court had to decide whether to apply state law or to create federal law to determine the duties of a payor to give notice of forgery of a check issued by the Treasurer of the United States. In setting forth the ground rules for its decision, the Court outlined the fundamental position that rights and duties created by federal statute are federal.

> We agree with the Circuit Court of Appeals that the rule of *Erie R. Co. v. Tompkins* does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays it debts, it is exercising a constitutional function or power. This check was issued for services performed under the Federal Emergency Relief Act of 1935. The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. *The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources.*[260]

In two other instances when the Court has had occasion to consider the role of state law in filling congressional interstices, it has excluded at the outset the instances where Congress has expressed itself affirmatively. *Deitrick v. Greaney* [261] and *D'Oench, Duhme & Co. v. FDIC*[262] both involved determinations of the "extent and nature of the legal consequences" of a federal statutory command.[263] In *Deitrick,* the Court had to decide whether a bank was estopped to assert as a defense its own official's violation of federal banking law. The Court noted:

> [I]t is the federal statute which condemns as unlawful respondent's acts. The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination are nevertheless to be derived from it and the federal policy which it has adopted. We have recently held that the judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Bank Act involves decision of a federal, not a state question.[264]

The Court held that federal substantive law must also govern the estoppel question, which was not addressed directly by Congress.[265]

D'Oench, Duhme, also involving a dispute over liability for commercial paper, turned on an estoppel question even more remote from the federal

259. 318 U.S. 363 (1943).
260. *Id.* at 366 (citations omitted) (emphasis added). One paragraph later, the Court again characterized its decision as *choosing the "applicable federal rule." Id.* at 367 (emphasis added).
261. 309 U.S. 190 (1940).
262. 315 U.S. 447 (1942).
263. *Deitrick,* 309 U.S. at 200.
264. *Id.* at 200-01 (citations omitted).
265. *Id.*

statute than *Deitrick.* In *D'Oench, Duhme,* the wrongdoer seeking to raise the estoppel did not act for the purpose of violating the federal banking laws, but the passage of the federal law subsequent to his act caused such a violation to occur. Relying chiefly on *Deitrick,* the Court nonetheless decided to apply federal substantive law to the estoppel question.[266]

Justice Jackson's concurrence is the most interesting part of *D'Oench, Duhme.* Justice Jackson thought the choice of law to apply to the estoppel question deserved a more thorough treatment than the majority did. In answering, he expressed somewhat more explicitly the reach of federal substantive law. He began, properly, with the Rules of Decision Act mandate that state law apply except where the laws of Congress otherwise require or provide.[267] Here again, Justice Jackson expressed the only relevant proposition: a choice of law question arises, he opined, only because "no federal statute purports to define the Corporation's rights as a holder of the note in suit or the liability of the maker thereof."[268] Significantly, even in opting for the adoption of state substantive law in *Board of County Commissioners v. United States,*[269] Justice Frankfurter began by stating that "[T]he issue is uncontrolled by any formal expression of the will of Congress."[270]

That a federal statutory source of the command amounts to federal substantive law is most graphically illustrated in *Sola Electric Co. v. Jefferson Co.*[271] *Sola* was originally a diversity case for breach of a license under a patent.[272] The Seventh Circuit Court of Appeals ruled that the defendant's acceptance of a license estopped it from denying the validity of the patent.[273] The Supreme Court reversed. Holding that when an issue addressed by federal law arose in a diversity case, federal law still governed, the Court said:

> It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie R. Co. v. Tompkins,* 304 U.S. 64. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which

266. *D'Oench, Duhme,* 315 U.S. at 459.
267. Rules of Decision Act, 28 U.S.C. § 1652 (1982).
268. *D'Oench, Duhme,* 315 U.S. at 468.
269. 308 U.S. 343 (1939).
270. *Id.* at 349.
271. 317 U.S. 173 (1942).
272. *Id.* at 173-74.
273. Jefferson Elec. Co. v. Sola Elec. Co., 125 F.2d 322, *rev'd,* 317 U.S. 173 (1942).

> it has adopted. To the federal statute and policy, conflicting state law and policy must yield.[274]

The Court then ruled that local doctrines of estoppel could not be applied to thwart the prohibitions of the federal antitrust laws.[275] Accordingly, at a minimum, the explicit, affirmative commands of federal statutes are federal substantive law.

Generally, the federal statutes at issue mandate that the parties make explicit arrangements, usually embodied in a contract, with each other.[276] They also sometimes require a party to make a commitment to the United States.[277] One might argue, accordingly, that the mandate of federal law extends only to making the federally mandated private arrangement, not to abiding by it. Under this scenario, state law would dictate whether parties to federally mandated commitments must generally abide by them and what they mean.

This contention is largely inconsistent with *Sola, Deitrick,* and *D'Oench, Duhme.* In each of those cases, a state law defense of estoppel was raised to defeat completely the command of a federal statute. Although acknowledging that state substantive law might play a role where Congress had left open the "extent and legal consequences" of its commands, the Court ruled in each case that the general enforceability of the federal command was a federal matter.

As Professor Hart notes, many of the federally mandated private arrangements or commitments to the United States are embodied as a condition of the receipt of federal funds.[278] In a separate line of cases, the Supreme Court has also held that such commitments are not merely concluded, but are also binding and enforceable as a matter of federal law.[279] Just recently in *Pennhurst State School & Hospital v. Halderman,* the Court reiterated:

> [O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. Unlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: *in return for federal funds, the States agree to comply with federally imposed conditions.*[280]

Both *King v. Smith*[281] and *Rosado v. Wyman*[282] did hold the states liable to abide by the substantive terms of the grant agreements required by federal law. The matter of remedy was disputed: in *King,* the Court struck down

---

274. *Sola,* 317 U.S. at 176 (citation omitted).
275. *Id.*
276. Davis-Bacon Act, 40 U.S.C. § 276a(a) (1982); Railway Labor Act, 45 U.S.C. §§ 151a-152.
277. Social Security Act of 1935, 42 U.S.C. § 602 (1982).
278. Hart, *supra* note 2, at 497.
279. Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968); *see also* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981).
280. *Pennhurst,* 451 U.S. 1, 17 (1981) (citations omitted) (emphasis added).
281. 392 U.S. 309 (1968).
282. 397 U.S. 397 (1970).

the nonconforming provision of state law; in *Rosado,* the Court instructed the trial court to allow the state to choose between changing its nonconforming practice and foregoing further federal funds.[283] In both cases, however, the federal nature of enforceability was assumed.

In addition to lacking precedent, the presumption that Congress intends the legal relationships it creates to be governed by state law subjects the federal legal norms to being overwhelmed by hostile or inconsistent doctrines of state law. For example, in *Jackson Transit,* the Supreme Court noted from the extensive legislative history that Congress did not intend to create a federal law of public employee collective bargaining and concluded from this that Congress also did not intend such mandate as it explicitly expressed on the subject to amount to federal substantive law. First, it is not at all clear that the Court's premise supports its conclusion. There is a big difference between establishing a federal labor law for all public employees and imposing, as a condition of federal funds that the applicant is free to forgo, the discrete, enumerated protections of the law in *Jackson Transit.*[284] Second, even if the Court were correct in *Jackson Transit,* Justice Powell is attempting to erect a general presumption against federal law based on the legislative history of the law at issue in *Jackson Transit,* which may well be *sui generis.*[285]

Certainly, the consequences that flowed from *Jackson Transit* should prevent it from being extended to where Congress has less clearly manifested its deference to state law. One such development surfaced immediately. The statute in *Jackson Transit* required federal transit grant recipients to make contracts to continue the employees' collective bargaining rights.[286] One common right is binding arbitration of labor disputes.[287] Yet many states have doctrines of common law that make arbitration revocable at will.[288] When, after *Jackson Transit,* the employees of the Metropolitan Atlanta Rapid Transit Authority sought to compel their employer to arbitrate, as the contract contemplated by the federal act required, the state courts held that state law made the contract unenforceable; thus, Congress' will was completely thwarted.[289] Therefore, in answer to the first question raised in

283. *Id.* at 421-22.

284. As set forth above, *supra* text accompanying notes 237-49, the federal law at issue in *Jackson Transit* was designed to preserve for the employees of transit systems transferred to the public sector through the agency of federal funds certain collective bargaining relationships they had enjoyed in the private sector and to ensure them protective allowances should the federally funded changes lead to their discharge or layoff. 49 U.S.C. § 1609(c) (1982).

285. *Jackson Transit,* 457 U.S. at 29.

286. *See supra* note 284.

287. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 693 (1960).

288. F. ELKOURI & E.A. ELKOURI, HOW ARBITRATION WORKS 35-41 (3d ed. 1960).

289. Local Div. 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Auth., 251 Ga. 15, 303 S.E.2d 1, *cert. granted,* 104 S. Ct. 1263 (1983), *rev'd and remanded for reconsideration in light of* Southland v. Keating, 104 S. Ct. 27 (1984).

this section, commentary, case law, and common sense all support the view that private behavior required by Congress is federal substantive law.

Again, as the Court found in *Jackson Transit,* Congress may, of course, choose an alternative answer and deliberately provide that the private relationships it addresses are to be governed by or subordinated to any state law, regardless of its consistency with the federal scheme. The Court elided the Georgia situation in *Jackson Transit* by noting that, independent of the private relationship, the federal government had certain remedies, such as funding cut-off, to enforce its will.[290] However, such remedies are extremely clumsy and do not really justify *presuming* that Congress was so weak-willed as to require private behavior, but to subject it simultaneously to the risk of nullification.

In sum, both case law and common sense dictate that, absent compelling contrary evidence, Congress' mandate must be treated as federal substantive law at some level. Accordingly, congressionally created private relationships for the effectuation of federal standards should be treated as federal substantive law.

Beyond cavil, Congress' use of a private mechanism may give rise to legal questions not easily answerable by reference to the federal statute. As *Deitrick* and its progeny illustrate, when Congress legislates in an area but does not address particular substantive issues, the courts must decide whether to choose federal common law or to choose to allow the substantive law of the fifty states to apply. Thus, for example, in a suit to enforce a federally mandated private agreement, the court might be required to interpret the contract language, to decide whether a third party could enforce the agreement as third party beneficiary, or to decide whether a particular remedy is available for breach. The act of adopting state law, however, remains an act of federal lawmaking.[291]

The Supreme Court has set forth, in a number of cases, the standards for deciding whether to adopt state substantive law. In *United States v. Little Lake Misere Land Co.,*[292] the Court summarized the standard:

> The Court in the past has been careful to state that, even assuming in general terms the appropriateness of "borrowing" state law, specific aberrant or hostile state rules do not provide appropriate standards for federal law. In *De Sylva v. Ballentine,* Mr. Justice Harlan's opinion for the Court took pains to caution that the Court's holding "does not mean that a State would be entitled to use the word'children' in a way entirely strange to those familiar with its ordinary usage . . . ." In *RFC v. Beavery Count,* the Court concluded that "the congressional purpose can best be accomplished by application of settled state rules as to what constitutes 'real property' "—but again the Court foresaw that its approach would be acceptable only "so long as it is plain, as it is here, that the

290. *Jackson Transit,* 457 U.S. at 27-28.
291. Mishkin, *supra* note 256, at 803; Comment, *supra* note 255, at 830-33.
292. 412 U.S. 580 (1973).

> state rules do not effect a discrimination against the Government, or patently run counter to the terms of the Act."[293]

More recently, in *Miree v. DeKalb,*[294] a diversity suit by private plaintiffs seeking to enforce a grant contract with the United States, the Court again deferred to state law to resolve whether plaintiffs could claim third party beneficiary status. Since the opinion explicitly acknowledges that plaintiff made no effort to cast his diversity suit as a congressionally authorized private action for enforcement of federal norms, the Court did not consider the arguments of interest here.[295] Although Justice Rehnquist relied heavily on the notion that "no substantial rights or duties of the United States"[296] hinged on the answer, he did acknowledge that "there has been no showing that state [third party beneficiary] law is inadequate to achieve any federal interest."[297]

Miree suggests the third alternative answer to the question set forth above—that Congress intends its private mechanism for insertion of federal norms to be governed by state substantive law, subject only to operation of the supremacy clause when state law conflicts with the explicit federal mandate.

This alternative is also unacceptable. First, unlike *Miree,* most private mechanism cases involve enforcement of an explicit congressional rule regarding what the private relationship should entail. As set forth above, such precedents as exist support the assumption that explicit congressional commands constitute federal law.[298] Although all federal law enjoys the protection of the supremacy clause,[299] the availability of a supremacy argument has not thus far been considered a justification for assuming the governance of state law.

A host of practical arguments also weigh against this construction. When Congress has spoken in no uncertain terms to require behavior, application of state law to Congress' commands would be meaningless. Where state law is inconsistent with or hostile to federal law, the supremacy clause would mandate a federal rule. If state law must thus be basically consistent with the federal law, to assume that Congress was invoking state law to effectuate

---

293. *Id.* at 595-96 (citations omitted). Although *Little Lake Misere,* like most of the federal adoption of state law cases, is a suit against the United States, in an oft-cited decision, DeSylva v. Ballentine, 351 U.S. 570 (1956), the Court did apply the same analysis to a case between two private parties. There, as the *Little Lake Misere* opinion reflects, in an action to enforce the copyright law, the Court looked to the state inheritance laws to determine the scope of the federal statutory term "children."

294. 433 U.S. 25 (1977).

295. *Id.* at 33-34.

296. *Id.* at 31.

297. *Id.* at 32 (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 71 (1966)).

298. *See supra* notes 255-75 and accompanying text.

299. "[The Supreme Court's] primary function is to determine whether, under the circumstances . . . [the state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (holding a state law requiring alien registration preempted by national policies governing aliens).

its will would do no more than to throw federal substantive norms into the state courts. Moreover, even a cursory examination of the area reveals that, by and large, in requiring these private mechanisms, Congress was changing the legal norms to assert a federal interest contrary to or unsupported by the existing body of state law.[300] This fact indicates that such cases should be the last—rather than the first—place to presume that Congress is entrusting its will to the uncertain mercies of local courts.

The last possibility is that, absent formal expression of legislative intent to provide federal jurisdiction, the private suits are to be brought to the state courts, but the state courts are charged with enforcing them as federal substantive law. Since Justice Powell does not separate substance from jurisdiction, it is possible to read his opinions as expressing this position.[301]

Regardless of one's opinion of the utility of this analysis, there are insurmountable problems in applying it to the exercise of federal question jurisdiction. First, it fails entirely to take into account the existence of the federal question statute. In section 1331, Congress explicitly set forth that it desired to exercise federal jurisdiction over cases arising under federal laws. Under Justice Powell's formulation, requiring that each statute provide explicitly for federal jurisdiction over any related actions would amend section 1331 to read as follows:

> Congress hereby provides that the federal courts have jurisdiction over cases when Congress provides they do.

The refusal to recognize the general jurisdictional mandate of section 1331 is particularly troubling, since, in enacting substantive statutes in the century since the passage of the general jurisdictional statute, Congress has only sporadically expressed its jurisdictional intent on a statute-by-statute basis. Indeed, most statute-specific expressions of federal jurisdiction create not general federal question jurisdiction but rather create exclusive federal jurisdiction.[302]

By contrast, federal statutes intended to be enforced by private court suits

---

300. Even in *Jackson Transit,* the legislative history reveals that the statute was enacted to remedy doctrines of state law hostile to collective bargaining. *Jackson Transit,* 457 U.S. at 19. The Federal Trust Indenture Act was enacted explicitly to overcome the failure of local common law to protect the bondholders. Dropkin, *supra* note 16, at 303-05.

301. For example, *Smith,* which Justice Powell cites as analogous, involved a question of federal substantive law—whether the Bond Act was constitutional—although the state provided the plaintiff with his remedy. Yet Justice Powell seems to indicate that *Smith* should have been left to the state courts to decide. As set forth above, *see supra* notes 160-61 and accompanying text, this is probably a correct treatment of *Smith.* The error lies in applying Justice Powell's understanding of *Smith* to the cases like *Zeffiro.* Be that as it may, Justice Powell's willingness to relegate questions of federal substantive law to state court indicates that this—rather than construing the private arrangements as state law—may be what he had in mind.

302. *See, e.g.,* Federal Water Pollution Control Act §§ 309(b), 505(a), 33 U.S.C. §§ 1319(b), 1365(a) (1982); Marine Protection, Research, and Sanctuaries Act of 1972 § 105, 33 U.S.C. § 1415 (1982); Federal Tort Claims Act § 410, 28 U.S.C. §1346(b) (1982).

often expressly provided for such private enforcement actions.[303] Indeed, it was the presence of these express provisions for private suits that the Court invoked to justify its refusal to imply such actions: "[When] Congress wished to provide a private damages remedy, it knew how to do so . . . ."[304] Accordingly, the scarcity of separate, explicit jurisdictional provisions strongly suggests that Congress thought it could rely on section 1331—the general jurisdictional statute—to express its intent regarding jurisdictional questions about any federal statute. By ignoring the general statute and searching for evidence of specific congressional intent to establish federal jurisdiction in each case, Justice Powell would thus guarantee that the courts will fail to find it.

Moreover, when Congress wished to exclude actions it created from the general jurisdictional provisions of the federal courts, it generally said so explicitly.[305] In the rare cases where the Supreme Court has found such an exclusion, it has acknowledged that it creates an anomaly. For example, the federal courts have long construed the Federal Arbitration Act[306] to create federal law that does not give rise to federal jurisdiction.[307] The Court's reliance on the explicit statutory language and its characterization of the exclusion of jurisdiction over Arbitration Act cases as "an anomaly" buttresses the conclusion that, absent such explicit language, where federal law "establishes and regulates a duty," section 1331 applies routinely.

---

303. *See, e.g.*, Natural Gas Act § 22, 15 U.S.C. § 717u (1982); Securities Exchange Act of 1934 § 27, 15 U.S.C. § 78aa (1982); Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 211(a), 85 Stat. 744 (1971) (expired Apr. 30, 1973); Civil Rights Act, tit. VII § 706(f), 42 U.S.C. § 2000e-5(f).

304. Touche Ross & Co. v. Reddington, 442 U.S. 560, 572 (1979).

305. Federal Declaratory Judgment Act, 28 U.S.C. § 2201 (1982); Federal Removal Statute, 28 U.S.C. § 1441 (1982); Postal Service Act, 39 U.S.C. §§401, 410 (1982).

306. 9 U.S.C. §§ 1-14 (1982).

307. In Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 103 S. Ct. 927 (1983), the Court described the arrangement as follows:

> The Arbitration Act is something of an anomaly in the field of federal court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 (1976 ed. Supp. IV) or otherwise. Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue. *E.g., Commercial Metals Co. v. Balfour, Guthrie & Co.*, 577 F.2d 264, 268-69 (CA5 1978), and cases cited.

Id. at 942 n.32. Like *Cone*, Commercial Metals Co. v. Balfour, Guthrie & Co., 577 F.2d 264 (5th Cir. 1974), and the cases cited therein all rest on the explicit language of the Arbitration Act. At least since 1933, the federal courts have refused to find federal jurisdiction in the face of that clear statement of congressional will. Krauss Bros. Lumber Co. v. Louis Bossert & Sons, Inc., 62 F.2d 1004 (2d Cir. 1933). The lower federal courts have simultaneously held that the Arbitration Act is affirmative federal substantive law, preemptive of state law and binding on them in diversity suits, even under the rule of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), which, of course, requires federal courts to apply state law in diversity cases. *See, e.g.*, Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960).

The Declaratory Judgment Act[308] poses a similar problem for "arising under" jurisdiction. By providing a party seeking to enforce a federal substantive right with a private federal claim for the relief—a declaration of rights—the act turns what would otherwise be a nonjurisdictional federal defense into an affirmative federal claim. With substantive federal law providing the standard of behavior and the Declaratory Judgment Act the remedy, the elements of a federal claim are satisfied. Thus, even under Holmes' analysis, the elements of section 1331 jurisdiction should be satisfied.

As set forth above, in *Skelly,*[309] the Supreme Court refused to allow this development. In so ruling, the Court applied, without articulating very clearly, the *Jackson Transit* analysis. Confronted with a claim which, including the declaratory judgment element, satisfied all elements of federal jurisdiction, the Court examined the Declaratory Judgment Act and its legislative history and found that Congress had clearly manifested an affirmative intent to *exclude* from federal court claims whose relief element is supplied solely by the Declaratory Judgment Act.[310] Thus, only a plaintiff whose complaint would satisfy the elements of section 1331 jurisdiction independent of the declaratory judgment remedy may sue. This limitation of federal jurisdiction, too, rests firmly on the affirmative expression of Congress' will.[311]

Last term in Southland v. Keating, 104 S. Ct. 852 (1984), the Court held explicitly that the Arbitration Act is binding federal substantive law, governing the state courts, as well as federal tribunals. The Court reiterated its holding in *Cone* that, because of the peculiar language of the act, it does not carry with it the traditional concomitant federal question jurisdiction. *Id.* at 856-57.

308. 28 U.S.C. §§ 2201-2202 (1982).

309. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).

310. *Id.* at 670-71.

311. *Skelly* was probably the easiest case, because all the plaintiff sought to prove was that federal law, incorporated by the parties into their common law contract as a justification for breach, was satisfied. The plaintiff in *Skelly* was never trying to enforce affirmative federal law independent of the private parties' decision to agree to a federal contract defense.

The impact of *Skelly* is somewhat muted by a line of affirmative cases for a declaration that federal law prevails over inconsistent state rules. The standard pattern is that the state seeks to impose on the declaratory plaintiff a state rule inconsistent with a federal law addressing the same subject. The supremacy clause of the U.S. Constitution, of course, gives the federal law supremacy over such state regulation. Before the Declaratory Judgment Act, requirements of ripeness meant that the objects of such regulation were required to suffer the impact of the state law on them before they could invoke the federal mandate. They were then reduced to using a federal defense, which under *Mottley,* 211 U.S. 149, does not support jurisdiction. Since the Declaratory Judgment Act satisfies the ripeness requirement, the courts have been confronted with actions for declaration of a federal immunity under the federal statute. First Fed. Sav. & Loan Ass'n v. Greenwald, 591 F.2d 417 (1st Cir. 1979); Conference of Fed. Sav. & Loan v. Stein, 604 F.2d 1256 (9th Cir. 1979). There is Supreme Court dicta, followed by several circuits, to the effect that the plaintiff's only genuine case must await the state prosecution, and thus, the preemption claim can never be anything but a defense. Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237 (1952). Other circuits have characterized plaintiff's case as the affirmative enforcement of rights under the supremacy clause, which ripens whenever the collision between the two bodies of law crystallizes. Rath Packing Co. v. Becker, 530 F.2d

In sum, Justice Powell would throw out the baby with the bath water. He correctly perceived that the traditional theory of federal question jurisdiction would admit to federal court cases where Congress has definitively determined not to empower the plaintiff to enforce federal law through the courts. He properly concluded that the traditional readiness to extend jurisdiction to cases where a proposition of federal law is "directly" at issue, regardless of the source of the action, is inconsistent with the Court's recent development of stringent new standards for implying private claims. Accordingly, cases like *Smith,* where a federal standard is not accompanied by a federal claim for enforcement, will not qualify for federal jurisdiction.

When confronted with the next level of cases—where Congress establishes a federal standard and a private claim but does not specify that the claims will be governed by federal law enforceable in federal court—Justice Powell's error lies in proposing to substitute the private right of action analysis for the discarded traditional theory. As set forth above, to assume in such cases that Congress legislates in terms of state substantive law unless it explicitly expresses its intent to create federal law is contrary to precedent, counterintuitive and impractical. To assume that Congress does not intend federal jurisdiction to apply to private claims it creates to enforce federal substantive law is similarly contrary to the statutory language, precedent, and the policies that underlie federal question jurisdiction.

III. An Alternative Approach to Federal Question Jurisdiction

This development greatly highlights the need for a reliable, predictive standard for delineating a federal case—one that is neither overinclusive like the traditional theory, nor destructively hostile to federal interests like Justice Powell's test.

Justice Holmes' opinion in *American Well Works* and his dissent in *Smith* provide the best solution to the problem. In an imperfect world, Holmes' standard of "the law that creates the cause of action" satisfies the policy of obtaining sympathetic tribunals to protect the interests of the federal government and provides an essential measure of stability to the analysis.

The failure to give serious consideration to Justice Holmes' position is probably due to scholars' erroneous perception that the standard is merely useful to exclude cases from jurisdiction; put another way, Justice Holmes has been perceived as telling what is necessary for federal jurisdiction. It is true that Justice Holmes' standard would avoid the problem of sweeping into federal court those cases where Congress established a federal standard but failed to provide one or more of the elements of a private claim. This

1295 (9th Cir. 1975), *cert. denied,* 430 U.S. 954 (1976); Braniff Int'l Inc. v. Florida Pub. Serv. Comm'n, 576 F.2d 1100 (5th Cir. 1978).

Under this latter analysis, the hypothetical claim for coercive relief would be a federal cause of action; thus, the declaratory judgment action would stand.

is so because, as set forth above, elements (1) through (5) are all required before a court may conclude that the legislature has created a cause of action. Thus, the Holmes standard takes care of Justice Powell's most cogent criticism of the traditional theory.

However, the Holmes standard does not suffer from the defects of Justice Powell's proposal to extend private action analysis to the questions presented by the private vehicle cases like *Zeffiro*. Under the Holmes standard, if Congress indicates its intent to govern a relationship giving rise to a dispute, the policy reasons behind federal jurisdiction dictate that the disputants should have access to a federal tribunal for resolution of their disagreement about their relationship.

Congress indicates its intent to govern that relationship by passing laws unmistakably directed at the disputants. Congress indicates its intent to have their relationship governed by the judiciary, rather than some other branch of the Federal Government, by using the vocabulary of private litigation, including the vocabulary of remedies, even if, in legislating each time, Congress did not explicitly state that the private relationship it was creating was to be governed by federal substantive law enforced in the federal courts. Under Justice Holmes' formulation, the courts must then conclude that Congress has "created a cause of action," and that suffices for federal jurisdiction. All of the elements ((1) through (5)) of the cause are of federal origin. As for the sixth element, it is supplied by section 1331.

Although not involving a private mechanism, the recent Supreme Court decision in *Franchise Tax Board v. Construction Laborers Vacation Trust (FTB),*[312] illustrates the poverty of both the traditional and the Powell theories and how the simple, predictive Holmes formulation would function to produce right results. In *FTB,* the California tax authorities sought to collect state taxes by levying against an employer benefit fund.[313] The fund would not pay, contending that the federal Employment Retirement Income Security Act of 1974 (ERISA)[314] precluded it from doing so. The California Franchise Tax Board filed an action in state court with two (self-styled) "causes of action": (1) to compel the fund to pay its arrearages, and (2) for declaratory judgment of the parties' rights in face of the fund's contention that ERISA governed its obligations and forbade it to pay.[315]

The fund successfully removed the case to federal court, where it lost on its substantive claims.[316] When the court of appeals reversed on the merits, the state appealed, contending, *inter alia,* that the district court had lacked jurisdiction.[317]

312. 103 S. Ct. 2841 (1983) [hereinafter cited as *FTB*].
313. *Id.* at 2843.
314. 29 U.S.C. §§ 1001-1461 (1982).
315. *FTB,* 103 S. Ct. at 2844-45.
316. *Id.* at 2845.
317. *Id.*

At the outset of the opinion, Justice Brennan summarized his understanding of such jurisdiction:

> The most familiar definition of the statutory "arising under" limitation is Justice Holmes' statement, "A suit arises under the law that creates the cause of action." However, it is well settled that Justice Holmes' test is more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction. We have often held that a case "arose under" federal law where the vindication of a right under state law necessarily turned on some construction of federal law, and even the most ardent proponent of the Holmes test has admitted that it has been rejected as an exclusionary principle.[318]

Justice Brennan thus adopts uncritically the traditional position, including the continued viability of *Smith.* As the paucity of Justice Brennan's authority reflects, it is not even remotely true that the Court has "often" held a case to arise under federal law in the *Smith* situation. As set forth above, Justice Brennan's citation to the dissenting opinion in *Flournoy* is both inapposite and grossly misleading.[319] Unlike his opening summary, Justice Brennan's actual decision in *FTB* actually tracks more closely the analysis set forth herein. Insofar as it incorporates the traditional approach, *FTB* illustrates its poverty, rather than its utility.

FTB presents a peculiarly troublesome jurisdictional problem, because the only real legal dispute between the parties—whether federal law preempts the California tax laws—is a federal question. However, since California got to the state court first, the fund could raise its federal preemption argument only as a defense, which, under the well-pleaded complaint rule of *Mottley,* would not support federal jurisdiction. On this ground, Justice Brennan easily disposed of the fund's claim to federal jurisdiction over California's affirmative enforcement claim.[320]

The state declaratory judgment action proved more difficult. As Justice Brennan accurately expressed it, "Whereas the question of federal preemption is relevant to appellant's first cause of action only as a potential defense, it is a necessary element of the declaratory judgment claim."[321] Thus plaintiff's state declaratory judgment claim, like *Smith,* "turns on the construction of federal law."[322]

California, of course, invoked *Skelly.*[323] However, Justice Brennan cor-

318. *Id.* at 2846 (citations omitted).
319. *See supra* notes 84-88 and accompanying text.
320. *FTB,* 103 S. Ct. at 2848.
321. *Id.* at 2849.
322. *Id.* at 2850.
323. *Skelly,* 339 U.S. 667 (1950).

rectly noted that, unlike *Skelly,* the defendant's affirmative, coercive suit in *FTB* would be a federal one for an injuction against collection of the tax under ERISA.[324] Certain patent cases had established that such a hypothetical claim satisfied *Skelly.*[325] Thus, defendant really had two claims to federal jurisdiction: (1) that plaintiff's claim qualified under *Smith,* and (2) that as a declaratory defendant with a *bona fide* federal claim, it was entitled to access to federal court under the patent cases. Justice Brennan's handling of these issues is a peculiar admixture of the traditional theory and Justice Powell's proposed formulation.

Although he does not sort them out, the context indicates that Justice Brennan denied the claim based on plaintiff's case first. Quoting from the loose language in *Gully,* he invokes the freedom to make a "common sense accommodation of judgment" regarding federal jurisdiction.[326] First, he asserts that federal jurisdiction should not attach to state declaratory judgment suits because states do not need rapid access to federal court to resolve their disputes with potential federal claimants.[327] Then, he invokes the traditional fuzzy policy considerations nowhere articulated in the jurisdictional statutes:

> [A]s appellant's strategy in this case shows, they [the state] may often be willing to go to great lengths to avoid federal-court resolution of a preemption question. Realistically, there is little prospect that States will flood the federal courts with declaratory judgment actions; most questions will arise, as in this case, because a State has sought a declaration in state court and the defendant has removed the case to federal court. Accordingly, it is perhaps appropriate to note that considerations of comity make us reluctant to snatch cases which a state has brought from the courts of that State, unless some clear rule demands it.[328]

The Holmes standard would produce the same outcome. Instead of turning on elusive "considerations of comity," Justice Holmes' theory would deny jurisdiction on a simple structural basis. In *FTB,* the state's declaratory judgment action would not qualify for federal jurisdiction, because the relief sought—the declaratory remedy—is entirely the creation of state law. Since federal law is not supplying all the elements of plaintiff's claim, federal jurisdiction would not apply.[329]

Justice Brennan's treatment of the plaintiff's second claim to jurisdiction—that the declaratory defendant's federal coercive claim supports jurisdiction—is a similar combination of unjustified overreaching restrained by unprin-

---

324. *FTB,* 103 S. Ct. at 2851-52.
325. *Id.* at 2851 n.19.
326. *Id.* at 2843-45, 2852.
327. *Id.* at 2852.
328. *Id.* at 2852 n.22.
329. As it happens, the principled analysis responds to Justice Brennan's political concerns, as well, since the availability of a state declaratory judgment remedy allows the state to enter—and here, win—the race to the courthouse and thus avoid the federal court resolution of defendant's affirmative claim that it fears.

cipled self-imposed restrictions. As set forth above, Justice Brennan's assumption that federal question jurisdiction may rest on a declaratory defendant's hypothetical federal claim rests on three very shaky bases: (1) some old lower court patent decisions[330] (2) the assertion that it is dicta "consistent with" the Supreme Court's important declaratory judgment decision, *Public Service Commission v. Wycoff*[331] and (3) the "nature of the declaratory remedy itself, which was designed to permit adjudication of either party's claims of right."[332]

Wycoff is certainly not authority for Justice Brennan's claim. In fact, in *Wycoff,* the Court rejected original federal jurisdiction, on the ground that defendant's anticipated coercive suit would not arise under federal law. When the issue of whether a defendant with a hypothetical claim to federal preemption may remove a state enforcement case surfaced recently in a petition for certiorari to review the decision of the Seventh Circuit denying jurisdiction, the issue did not even get four votes for review.[333] However, an unusual exchange of opinions over the denial of certiorari reveals the distance between Justice Brennan's statements in *FTB* and the position of some of his brethren. In his opinion in defense of the denial of certiorari, Justice Blackmun asserted unequivocally that a defendant's hypothetical federal claim—even a claim of preemption—would not support original federal question jurisdiction.[334] Even Justices White and Marshall, dissenting from the denial of review, could only assert that the question was an open one.[335]

Be that as it may, assuming Justice Brennan's premise, he must thus decide whether federal jurisdiction should apply in *FTB.* He denied the claim to jurisdiction, ruling:

> The express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties . . . as to whom Congress presumably determined that a right to enter federal court was necessary to further the statute's purposes. It did not go so far as to provide that any suit against such parties must also be brought in federal court when they themselves did not choose to sue. The situation presented by a State's suit for a declaration of the validity of state law is sufficiently removed from the spirit of necessity and careful limitation of district court jurisdiction that informed our statutory interpretation in *Skelly Oil* and *Gully* to convince us that, until Congress informs us otherwise, such a suit is not within the original jurisdiction of the United States district courts. Accordingly, the same suit brought originally in state courts is not removable either.[336]

---

330. *See FTB,* 103 S. Ct. at 2851 n.19.
331. 344 U.S. 2137 (1952); *FTB,* 103 S. Ct. at 2851 n.19 (citing Public Serv. Comm'n of Utah v. Wycoff, 344 U.S. 2137 (1952)).
332. *FTB,* 103 S. Ct. at 2851 n.19.
333. Kerr McGee Co. v. Illinois, 677 F.2d 571 (7th Cir. 1982), *cert. denied,* 459 U.S. 1049 (1982).
334. *FTB,* 103 S. Ct. at 2853.
335. *Id.*
336. *Id.*

Thus, having asserted that a declaratory judgment suit is cognizable in federal court if the declaratory defendant's hypothetical coercive action would be federal, Justice Brennan adds a whole new requirement—that Congress must also provide expressly that suits *against* such defendants be cognizable in federal court. This requirement of express jurisdictional language is very close to the Powell formulation, and it is similarly erroneous. If ERISA provides all the necessary elements of the declaratory defendant's hypothetical claim, and if Justice Brennan's understanding of the role of defendant's hypothetical claim is correct, it should be unnecessary to examine the statute afresh each time for evidence of Congress' discrete intent to assert jurisdiction. The Powell standard is certainly incompatible with Justice Brennan's primary authority for his assumption that federal jurisdiction may rest on the defendant's hypothetical claim—the patent cases—because the patent laws do not provide explicitly for federal jurisdiction of suits against patent holders either.[337]

The flaw in Justice Brennan's reasoning lies in the original assertion that a defendant's potential coercive federal claim supplied federal jurisdiction over the plaintiff's state declaratory action. Here, plaintiff asserted a claim for the declaration of the validity of its own law; the state of California certainly had no federal coercive action to bring, particularly under ERISA.[338] Construing declaratory judgment law as Justice Brennan would do would make a whole universe of federal law enforceable—at least to the extent of declaratory relief—by a category of plaintiffs never contemplated by Congress. A plaintiff with no private claim to enforce the federal law would simply seek a declaratory judgment in federal court against the parties expressly authorized by Congress to enforce its law. The question is thus not whether, in enacting ERISA, Congress manifested its intent that actions against the funds be cognizable in federal court; the question is whether Congress intended California to be enforcing ERISA at all, even to the extent of calling for defendant's hypothetical federal action. As to that, under the current private right of action theory, the answer is clearly negative.

In the very next part of the opinion, the Court actually ruled that California could not enforce ERISA. The Court was forced to confront the question directly in response to defendant's contention that plaintiff's action must be federal, because ERISA preempts the area and ousts any possible state claim. Accordingly, the reasoning goes, plaintiff's apparent state claim is really an attempt to conceal its only possible claim, which is federal.[339]

In denying this claim, Justice Brennan immediately had recourse to the

337. *Id.* at 2851 n.19.

338. *Id.* at 2855.

339. *Id.* The defendant in *FTB* relied on Avco v. Aero Lodge, 376 F.2d 337 (6th Cir. 1968), *aff'd,* 390 U.S. 557 (1968), holding that the preemptive force of the National Labor Relations Act was so great that an employer's state court action to enforce a labor contract could be governed only by federal law; accordingly the Court allowed defendant to remove. *Id.* at 343.

implied private right of action analysis. After noting that Congress had explicitly listed the private plaintiffs entitled to enforce ERISA in the act, he concluded that the absence of any provision for a suit by California precluded California from enforcing the federal law.[340] Therefore, Justice Brennan stated:

> ERISA does not provide an alternative cause of action in favor of the State to enforce its rights . . . . Therefore, even though the Court of Appeals may well be correct that ERISA precludes enforcement of the State's levy in the circumstances of this case, an action to enforce the levy is not itself preempted by ERISA.[341]

Finally, defendant contended that plaintiff's claim for a declaration of the trustees' power under the trust agreement was a matter which Congress had consigned to the federal courts for federal common-law making.[342] Even there, however, when federal law was clearly to apply to the substance of the dispute, Justice Brennan considered himself bound by the limited list of private plaintiffs authorized by statute as to bring a declaratory judgment suit—a list that did not include state taxing authorities. Thus, although federal law supplied elements (1) through (3) of the plaintiff's claim, it did not provide element (4) authorizing this particular plaintiff to sue.[343] Since federal law failed to provide all of the elements of the cause of action, the Court correctly refused to recast the claim as a federal case.

Justice Brennan's handling of the federal preemption and federal common-law issues demonstrates the functioning of the principled standard to produce an acceptable result through predictable reasoning. Freed of all rhetoric about "snatches" from state courts, by requiring federal law to provide all the elements of a cause of action, the Holmes test leaves the enforcement of federal statutes in the hands to which Congress consigned them. This satisfying process contrasts sharply with the first part of *FTB,* where Justice Brennan asserts an undefined, overinclusive potential jurisdiction, both under *Smith* and the declaratory judgment cases and then is forced to resort to unprincipled, inappropriately stringent restrictions to deal with the case at hand.

Two recent decisions by courts of appeal dealing with the duty of fair representation under the Railway Labor Act also illustrate graphically the desirability of the suggested jurisdictional analysis. In *Graf v. Elgin, Joliet & Eastern Railway Co.,*[344] a railroad employee sued his employer for wrongful discharge and his union for breach of the duty of fair representation. He filed in state court, and the union removed.[345] The district judge dismissed

340. *FTB,* 103 S. Ct. at 2855.
341. *Id.*
342. *Id.*
343. *See supra* note 162 and accompanying text.
344. 697 F.2d 771 (7th Cir. 1983).
345. *Id.* at 774.

the case on the merits.[346] When the plaintiff appealed to the Seventh Circuit, the court raised the question of federal jurisdiction on its own.[347]

Noting that fair representation cases are an amalgam of claims for breach of the collective bargaining agreement and for breach of the federal labor laws—in this case, the Railway Labor Act[348]—the court proceeded to consider the jurisdictional implications of both. First, as to the employee's claim for breach of the agreement, the court noted that, unlike the analogous claim for breach of a collective bargaining agreement under the National Labor Relations Act, Congress has never provided specifically for jurisdiction over railway labor agreements.[349]

The court next considered whether the action arose under the Railway Labor Act, but found that the statute created a duty of fair representation only as to the union, while the employer's violation stemmed from the agreement.[350] The court continued:

> Nor does the fact that an activity is regulated by a federal statute, as collective bargaining in the railroad industry is regulated by the Railway Labor Act, mean that disputes between private parties engaged in that activity arise under the statute. For example, the Supreme Court held recently that section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1609(c), which requires transit authorities to protect the interests of affected workers before the authority may receive federal money, does not authorize a union to sue in federal court for all alleged violations of the protective arrangements or of the collective bargaining agreement embodying those arrangements. *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union.* The Court in *Jackson Transit Authority* did not cite *Andrews;* it distinguished *Central Airlines* by reference to the purpose of the statutory provision involved in that case (and not in this case); and it indicated, as it has in many other recent cases, a reluctance to create a private right of action under a federal statute without direct evidence that Congress desired this result. There is no evidence that the draftsmen of the Railway Labor Act wanted the federal courts to exercise original jurisdiction over contract disputes, as distinct from the very limited review jurisdiction that the Act explicitly gives them over decisions by the arbitral boards.[351]

---

346. *Id.*

347. *Id.*

348. 45 U.S.C. §§ 151-188 (1982).

349. Congress provided for federal jurisdiction to enforce collective bargaining agreements under the NLRA in 29 U.S.C. § 185 (1982). That statute was sustained in Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

350. *Graf,* 697 F.2d at 775. As the *Graf* court noted, the authority for the employee's statutory fair representation claim against the union is one of the earliest examples of the Court's pre-*Cort* willingness to imply private rights of action. Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944). The statute is silent on the subject, and it is unclear whether the present Supreme Court would have reached the same conclusion. However, the Court has not extended *TAMA* so far as to overrule old private action decisions. 697 F.2d at 776 (citations omitted).

351. *Graf,* 697 F.2d at 776 (citations omitted).

The court of appeals ultimately concluded, however, that the contract action belonged in federal court as an exercise of federal common law. The court noted that the action against the employer of necessity involved some of the same legal questions as those in the federal action against the union.[352] It further noted that an earlier case had held that the Railroad Labor Act arbitration remedies extinguished any state common law contract remedies, leaving a complete void in state law as to how the contract should be interpreted.[353]

Accordingly, the court concluded that "since a federal common law of railroad collective bargaining contract interpretation is being applied in workers' suits against unions, it makes sense to apply it also in the worker's suit against his employer."[354] Since the action arose under federal common law, federal jurisdiction followed.

Although reaching the right result, the *Graf* court's reliance on federal common law is certainly questionable. Recently, in *Texas Industries v. Radcliff Materials, Inc.*,[355] Justice Burger proferred an extremely narrow construction of federal common law, essentially limiting it to areas of uniquely federal interests and explicit congressional mandate.[356]

The preferred analysis is reflected in the Sixth Circuit's decision in *Kaschak v. Consolidated Rail Corp.*,[357] another suit against the employer based on a duty of fair representation claim. The court first found that the employer's duty to obey the collective bargaining agreement "lay at the very heart of the statutory scheme."[358] The Railway Labor Act has a peculiar legislative history, and, early on, the Supreme Court had construed the act to be in the nature of a quasi-contract between labor and management.[359] In exercising its jurisdiction, the court did not even pause to contemplate whether the courts of the states, rather than of the Federal Government, should be the forum.

The court did take up in a footnote the suggestion that *Kaschak* was really a case of whether to imply a private action from the federal statute and ruled that, although the private action analysis would produce the same outcome:

> We do not feel, however, that a remedy need be implied in this case; the unique nature of the RLA relieves us from having to go that far.

---

352. *Id.* at 776-77.

353. *Id.* Because the act creates statutory Boards of Arbitration to enforce railway labor agreements, such disputes rarely get into the courts. *Graf* came to court only because the union had allegedly wrongfully failed to pursue the established arbitration procedures for the employees. *Id.* at 778.

354. *Id.* at 777.

355. 451 U.S. 630 (1981).

356. *Id.* at 642-46.

357. 707 F.2d 902 (6th Cir. 1983).

358. *Id.* at 909.

359. Chicago & Northwestern R.R. v. United Transp. Union, 402 U.S. 570 (1971), *motion granted,* 401 U.S. 928 (1971).

> As noted, the RLA is quasi-contractual in nature, creating legally enforceable obligations enforceable by whatever means appropriate. Our inquiry regarding Board jurisdiction only requires that we ask to what extent the statute itself has defined the appropriate means for enforcing a limited class of these obligations. The only question under the RLA is *where* an existing remedy may be enforced.[360]

Kaschak and *Graf* reflect the courts' discomfort with closing their doors to cases where Congress set forth the substantive rule of behavior and created a traditional private enforcement mechanism. Yet *Graf*'s unprincipled leap to the narrow ground of federal common law, because it "makes sense"[361] and because the contrary result would "be peculiar,"[362] compares most unfavorably to the structural analysis in *Kaschak*.

CONCLUSION

In sum, traditional jurisdiction theory, resting on an unreliable ad hoc analysis about the federal quality of each dispute, was always an unprincipled and unsatisfying solution. Moreover, the Supreme Court's recent development of strict construction of implied federal claims has brought to light the inadequacy of the traditional theory to deal with the marginal cases where state law provides an element of the plaintiff's claim. Justice Powell has proposed to throw away all jurisdictional theory and to rest the jurisdictional analysis of the same basis as the private claim cases—a search for congressional intent. This proposal is unsuited for jurisdictional questions and leads to an undesirable underinclusive result. The application of Powell's solution to the cases where Congress imposes federal norms through the vehicle of private legal relationships illustrates its failure.

Instead of searching for jurisdiction theory from the implied action cases, the courts should turn, or return, to the straightforward analysis set forth by Justice Holmes.

---

360. *Kaschak*, 707 F.2d at 909 n.15.
361. *Graf*, 697 F.2d at 777.
362. *Id.*