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INTRODUCTION TO CERTAIN MEMBERS OF THE FEDERAL QUESTION FAMILY†

WILLIAM B. AYCOCK*

"[A] page of history is worth a volume of logic."
Justice Holmes in *New York Trust Co. v. Eisner*¹

I. INTRODUCTION

Federal question jurisdiction in its original and appellate form involves cases *arising* under the Constitution, laws, and treaties of the United States. When compared to other classes of federal jurisdiction—such as diversity of citizenship, admiralty, and the United States as a party—federal question jurisdiction may be regarded as an entity, but when considered alone, federal question jurisdiction does not lend itself to a unitary approach. All federal questions do not “arise” the same way. Thus there is no uniform test for invoking all federal question jurisdiction. Federal questions, appropriately, can be treated as a family. Like other families there are differences between, as well as similarities among, its various members. The most complex member of this family is the “general federal question” jurisdiction arising under the Act of 1875.² However, long before this Act was passed, Congress fathered

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¹ 256 U.S. 345, 349 (1921) (tax case). “The history of the federal courts is woven into the history of the times. The factors in our national life which came in with reconstruction are the same factors which increased the business of the federal courts, enlarged their jurisdiction, modified and expanded their structure.” F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 59 (1927).

² Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 *now* 28 U.S.C. § 1331(a) (1964). 1 W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE & PROCEDURE* § 22 (Wright ed. 1960); ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* § 1311 & Commentary at 169-87 (1969); C. WRIGHT, *LAW OF FEDERAL COURTS* ch. 3 (2d ed. 1970); Williard, *When Does a Case “Arise” under Federal Laws?*, 45 AM. L. REV. 373 (1911); Forrester, *The Nature of a “Federal Question,”* 16 TUL. L. REV. 362 (1942); Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639 (1942); Forrester, *Federal Question Jurisdiction and Section 5*, 16 TUL. L. REV. 263 (1942); Note, *Proposed Revision of Federal Question Jurisdiction*, 40 ILL. L. REV. 387 (1945); Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17 (1947); Fraser, *Some Problems in Federal Question Jurisdiction*, 49 MICH. L. REV. 73 (1950); Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157 (1953); London, *“Federal Question” Jurisdiction—A Snare and a Delusion*, 57

several other members of the federal question family. Among them are federal questions decided in a state court subject to appellate review by the United States Supreme Court, special federal question jurisdiction to enforce federally-created rights, federal charter jurisdiction, special federal question jurisdiction providing for removal of cases by federal officers from the state courts to the federal courts, and the Civil Rights Act of 1871. Each of these selected members of the family will be discussed before considering the Act of 1875.

All members of the family treated herein can trace their ancestry through some act of Congress to the first clause in article III, section 2 of the United States Constitution which 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. (Emphasis added.)

This clause enables Congress to confer original jurisdiction on federal courts below the Supreme Court³ and, when coupled with the Supremacy Clause,⁴ authorizes Congress to confer federal question jurisdiction on the state courts. Further, article III, section 2, clause 2 enables Congress to provide for appellate jurisdiction of federal questions decided by state courts as well as those which originate in the lower federal courts. In the Judiciary Act of 1789, Congress conferred exclusive⁵ jurisdiction on the lower federal courts over federal *criminal* offenses, but those courts were not given jurisdiction to try civil cases "arising" under the Constitution, laws, or treaties of the United States.⁶

MICH. L. REV. 835 (1959); Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890 (1967).

³ The original jurisdiction of the Supreme Court is set forth in article III, § 2, cl. 2 of the Constitution: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." The original jurisdiction of the Supreme Court cannot be enlarged or restricted by Congress. However, Congress may provide for the district courts to share this jurisdiction with the Supreme Court. For example: 28 U.S.C. §§ 1345-1346 (1964).

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

⁵ Act of Sept. 24, 1789, ch. 20, §§ 3, 9, 11, 1 Stat. 73, 76, 79.

⁶ Lower federal courts in the exercise of diversity jurisdiction conferred on them

Federal Questions in State Courts

Although Congress in the Judiciary Act of 1789 did not expressly confer federal question jurisdiction on the state courts, it was clearly contemplated that such jurisdiction would be exercised: Justice Story observed that the Supremacy Clause was an indication that the framers of the Constitution contemplated that cases "within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction."⁷

Congress in section 25 of the Judiciary Act of 1789⁸ provided for appellate review by the United States Supreme Court of state court decisions holding some federal act or treaty invalid or upholding the validity of a state act against a claim based on the Constitution, treaties, or laws of the United States. Subsequent legislation⁹ has broadened the scope of section 25 by authorizing review by certiorari whether a state court decides for or against the federal claim. The current statute is as follows:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

by the Judiciary Act of 1789 may decide federal questions involving the validity of state statutes. *Collet v. Collet*, 2 U.S. (2 Dall.) 294 (1792). Warren, *Earliest Cases of Judicial Review of State Legislation by Federal Courts*, 32 YALE L.J. 15 (1922).

⁷ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340 (1816).

⁸ Act of September 24, 1789, ch. 20, § 25, 1 Stat. 85.

And be it further enacted, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, (d) [sic] or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the *decision is against* the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error (Emphasis added)

In asserting authority of the Supreme Court to have the final word in federal question cases originating in the state courts, Justice Story said: "[T]he whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 331 (1816).

⁹ Act of December 23, 1914, ch. 2, 38 Stat. 790; Act of February 5, 1867, ch. 28, § 2, 14 Stat. 386.

(1) By appeal where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.¹⁰

In 1821 Chief Justice Marshall writing for the Court in the case of *Cohens v. Virginia*¹¹—which had come to the Court on a writ of error to a judgment rendered by the Court of Hustings for the borough of Norfolk, Virginia—stated:

A case in law or equity consists of the right of one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the constitution in the 25th section of the judiciary act; and we perceive no reasons to depart from that construction.¹²

No particular form of words or phrases is essential to raise the federal question in the state courts. If the "record" as a whole shows either expressly or by clear intent that the question was raised, the federal claim is to be regarded as having been adequately presented.¹³ Whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, and the Supreme Court is not bound by the decision of the state courts.¹⁴ And when the highest court of a state passes on the federal question, there can be no doubt as to its proper presentation in the state court.¹⁵ In order for the Supreme Court to review a federal question arising in a state court, the question must

¹⁰ 28 U.S.C. § 1257 (1964).

¹¹ 19 U.S. 120, 6 Wheat. 264 (1821).

¹² *Id.* at 170, 6 Wheat. at 379.

¹³ New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

¹⁴ Street v. New York, 394 U.S. 576 (1969).

¹⁵ Raley v. Ohio, 360 U.S. 423 (1959).

have been the basis of a final judgment by the highest court of the state authorized under state law to hear the case.

The federal questions decided in state courts constitute an important member of the federal question family. Although the focus of this article is on how and when federal questions arise in the federal courts, constant reference will be made by way of comparison to federal question jurisdiction exercised by the state courts.¹⁶

II. SPECIAL FEDERAL QUESTION JURISDICTION—FEDERALLY-CREATED CAUSES OF ACTION

If Congress creates a cause of action, the plaintiff's claim arises under a federal law; thus Congress can vest jurisdiction in the federal courts to litigate that claim. In the words of Chief Justice Marshall, "the judicial power of every well-constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws."¹⁷ Further, under the Supremacy Clause, Congress may confer jurisdiction on the state courts to enforce federal rights.¹⁸ In allocating jurisdiction over federally-created causes of action, Congress has exercised its option in a variety of ways. In some instances jurisdiction is vested in the

¹⁶ For a more detailed treatment of Supreme Court review of state court decisions, see R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* ch. 3 (4th ed. 1969); C. WRIGHT, *LAW OF FEDERAL COURTS* § 107 (2d ed. 1970). Alexander Hamilton suggested the possibility that inferior federal courts should be given authority to review state court decisions on federal questions. *THE FEDERALIST* No. 82. The Habeas Corpus Act of 1867 authorizes a federal district judge to issue the writ when a person is held by a state in violation of the supreme law of the land. 28 U.S.C. § 2241(c) (3) (1964). In passing on the Habeas Corpus Act of 1867, the Supreme Court has stated:

[A]s the judicial power of the nation extends to all cases arising under the Constitution, the laws and treaties of the United States; as the privilege of the writ of habeas corpus cannot be suspended unless when in cases of rebellion or invasion the public safety may require it; and as Congress has power to pass all laws necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States or in any department or officer thereof; no doubt can exist as to the power of Congress thus to enlarge the jurisdiction of the courts of the Union and of their justices and judges. That the petitioner is held under the authority of a State cannot affect the question of the power or jurisdiction of the Circuit Court to inquire into the cause of his commitment, and to discharge him if he be restrained of his liberty in violation of the Constitution.

Ex parte Royall, 117 U.S. 241, 249 (1886).

¹⁷ *Cohens v. Virginia*, 19 U.S. 120, 172, 6 Wheat. 264, 384 (1821).

¹⁸ *Testa v. Katt*, 330 U.S. 386 (1947).

federal courts *exclusive*¹⁹ of state courts, but typically jurisdiction is vested concurrently²⁰ in the federal and state courts. Where concurrent jurisdiction is conferred, Congress may preclude removal from the state court to the federal court,²¹ or it may require a jurisdictional amount for removal²² where none is required for original jurisdiction in the federal courts.

The Court has construed broadly the powers of Congress to create federal causes of action and to provide jurisdiction in the federal courts to enforce these rights. However, with rare exception,²³ the Court has insisted that Congress express clearly its intent to do so. When the language of Congress is equivocal, the Court is not inclined to construe it to create a cause of action or to confer federal question jurisdiction on the federal courts. To illustrate, in 1872²⁴ Congress enacted a mining law in which it authorized an adverse suit in a "court of competent jurisdiction." This Act further provided that the right of possession could be determined "by local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." In *Shoshone Mining Co. v. Rutter*,²⁵ the Court considered whether Congress *intended* by this language to vest jurisdiction in the federal courts to litigate these adverse suits. The Court held that Congress did *not so intend* and pointed out:

A statute authorizing an action to establish a right is very different from one which creates a right to be established. An action brought under the one may involve no controversy as to the scope and effect of the statute, while in the other case it necessarily involves such a con-

¹⁹ *E.g.*, "[A]ll matters and proceedings in bankruptcy" (but not including plenary actions by or against the representative of an estate, usually the trustee), 28 U.S.C. § 1334 (1964); cases arising under the patent and copyright laws, 28 U.S.C. § 1338 (1964).

²⁰ *E.g.*, Actions on "bond[s] executed under any law of the United States," 28 U.S.C. § 1352 (1964); The Federal Employers Liability Act (rights of action for injury or death of railway employees), 45 U.S.C. §§ 51-60 (1964); the Jones Act (rights of action for injury or death of seamen), 46 U.S.C. § 688 (1964).

²¹ *E.g.*, The Federal Employers Liability Act, 28 U.S.C. § 1445(a) (1964).

²² *E.g.*, suits against common carriers to recover damages for delay, loss, or injury to shipments must exceed \$3,000, 28 U.S.C. § 1445(b) (1964).

²³ Discussed pp. 12-17 *infra*.

²⁴ Act of May 10, 1872, REV. STAT. § 2326, at 429 (1875). Article IV, § 3, cl. 2 of the Constitution gives Congress power to dispose of and make all needful rules and resolutions respecting the territory or other property belonging to the United States.

²⁵ 177 U.S. 505 (1900).

troversy, for the thing to be decided is the extent of the right given by the statute.²⁶

The Court further held that Congress did not create any new jurisdictional grant by employing the words "court of competent jurisdiction." Since there was no basis for federal jurisdiction under any other statute,²⁷ plaintiff's only recourse was to go to a state court.

Congress began early creating federal causes of action and conferring jurisdiction on the federal courts to enforce federally-created rights. This process, of course, goes on. The patent law was among the first products of the process, and a brief examination of it will reveal how and when a case arises under a *special* act which both creates the cause of action and provides for federal jurisdiction.²⁸

Patents

The Constitution provides that the Congress shall have power :

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.²⁹

In 1790³⁰ Congress passed "An Act to promote the progress of useful Arts" in which provision was made for a patentee to sue for damages for infringement. This Act was repealed when a broader statute was enacted in 1793.³¹ The new statute provided that a patentee could

²⁶ *Id.* at 510. See Judge Amidon's discussion in *McGoon v. Northern Pac. Ry.*, 204 F. 998 (D.N.D. 1913).

²⁷ There was no diversity of citizenship. See pp. 30-31 *infra* for a discussion of this case showing that there was no jurisdiction under the Act of 1875.

²⁸ Currently a jurisdictional statute may be broad enough to include many acts of Congress: 28 U.S.C. § 1337 (1964) ("The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."); 28 U.S.C. § 1338(a) (1964) ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.").

²⁹ U.S. Const. art. I, § 8, cl. 8.

³⁰ Act of April 10, 1790, ch. 7, 1 Stat. 109.

³¹ Act of February 21, 1793, ch. 11, § 5, 1 Stat. 318.

And be it further enacted, That if any person shall make, devise and use, or sell the thing so invented, the exclusive right of which shall, as aforesaid, have been secured to any person by patent, without the consent of the patentee, his executors, administrators or assigns, first obtained in writing, every person so offending, shall forfeit and pay to the patentee, a sum, that shall be at least equal to three times the price, for which the patentee has usually sold or licensed to other persons, the use of the said invention;

sue for infringement and recover treble damages "in the circuit court of the United States, or any other court having competent jurisdiction." The latter clause meant state courts;³² and, thus, at this time there was concurrent jurisdiction in the federal and state courts of patent infringement suits. Subsequent patent laws eliminated the words "or any other court having competent jurisdiction,"³³ and in 1870 Congress expressly provided for *exclusive* federal jurisdiction of "all cases arising under the patent-right or copyright laws of the United States."³⁴ This provision for exclusive jurisdiction remains in effect.³⁵ Congress from the beginning created a federal cause of action for patent infringement and provided specifically for federal jurisdiction.

The current patent statute provides that a patentee shall have a remedy by civil action for "infringement" of his patent.³⁶ Remedies specified in this statute include damages and injunctive relief.³⁷ In a civil action for infringement a patentee can invoke the jurisdiction of the federal courts by making a good faith allegation of infringement in his complaint. Such civil action *arises* under the patent laws.³⁸ Congress also has provided that the district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined

which may be recovered in an action on the case founded on this act, in the circuit court of the United States, or any other court having competent jurisdiction.

³² *Claffin v. Houseman*, 93 U.S. 130, 140 (1876).

³³ Act of July 8, 1870, ch. 230, § 55, 16 Stat. 206; Act of July 4, 1836, ch. 359, § 17, 5 Stat. 124; Act of February 15, 1819, ch. 19, 3 Stat. 481; Act of April 17, 1800, ch. 25, § 3, 2 Stat. 38.

³⁴ Act of July 8, 1870, REV. STAT. § 711, at 135 (1875).

Thus, the first patent law for securing to inventors their discoveries and inventions, which was passed in 1793, [sic] gave treble damages for an infringement, to be recovered in an action on the cases founded on the statute in the Circuit Court of the United States, "or any other court having competent jurisdiction,"—meaning, of course, the State courts. The subsequent acts on the same subject were couched in such terms with regard to the jurisdiction of the circuit courts as to imply that it was exclusive of the State courts; and now it is expressly made so.

Claffin v. Houseman, 93 U.S. 130, 139-40 (1876).

³⁵ 28 U.S.C. § 1338 (1964).

³⁶ 35 U.S.C. § 281 (1964).

³⁷ 35 U.S.C. § 283 (1964).

³⁸ [A] federal district court is held to have jurisdiction of a suit by a patentee for an injunction against infringement and for profits and damages, even though, in anticipation of a defense of a license or authority to use the patent, the complainant includes in his bill averments intended to defeat such a defense. If these averments do not defeat such defense, the patentee will lose his case on the merits, but the court's jurisdiction under the patent laws is not ousted.

Luckett v. Delpart, Inc., 270 U.S. 496, 510 (1926).

with a "substantial and related claim" under the patent, copyright, or trade-mark laws.³⁹

A suit cannot arise under the patent law by way of the answer to the complaint. On the other hand, if the plaintiff alleges a claim arising under the patent laws, jurisdiction is not defeated by defendant's plea denying the merits of plaintiff's claim.⁴⁰ Likewise, the federal court does not lose jurisdiction to decide plaintiff's claim where the defendant does not question the validity of the patent and the defense is based exclusively on the contention that the defendant has not violated the rights of the plaintiff.⁴¹

The foregoing rules work well for a patentee who has a good faith claim for infringement. But what about an alleged infringer who desires to prove that he was innocent of the accusation? In the absence of diversity of citizenship, an alleged infringer could not get into the federal courts prior to the Declaratory Judgment Act of 1934 because his suit did not arise under the patent laws.⁴² This hiatus has apparently been closed inasmuch as alleged infringers have been permitted by some lower federal courts to utilize the declaratory judgment device to sue for a declaration of non-infringement or invalidity of the patent as well as for an injunction against wrongful charges of infringement. The complaint of the alleged infringer, according to these courts, presents a controversy as to the validity of a patent and, therefore, arises under the patent laws.⁴³

A patentee does not have an open door to litigate in the federal courts all matters involving his patent. His civil action will arise under the patent law only where he alleges a cause of action which Congress has created or where the allegations in his complaint indicate that a construction of the patent laws will be involved in the litigation.⁴⁴ A suit

³⁹ 28 U.S.C. § 1338(b) (1964). This provision stems from *Hurn v. Oursler*, 289 U.S. 238 (1933). 1 J. MOORE, *FEDERAL PRACTICE* ¶ 0.60, at 658 (2d ed. 1964).

⁴⁰ *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22 (1913).

⁴¹ *Id.*; *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1834) (dictum). 1 J. MOORE, *FEDERAL PRACTICE* ¶ 0.60, at 634 (2d ed. 1964).

⁴² *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916).

⁴³ *E. Edelman & Co. v. Triple-A Specialty Co.*, 88 F.2d 852 (7th Cir. 1937). The Supreme Court has passed on the merits of actions for declaratory judgment involving invalidity or non-infringement without question as to jurisdiction. *Jungerson v. Ostby & Barton Co.*, 325 U.S. 560 (1949); *Edward Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947). See also *Jewell Ridge Coal Corp. v. Local 6167, UMW*, 325 U.S. 161 (1945) (employer sought declaratory judgment that he was not liable to employees under the Fair Labor Standards Act.).

⁴⁴ *Wilson v. Sandford*, 51 U.S. (10 How.) 99 (1850). See *De Sylva v. Ballen-*

for recovery of royalties under a contract, license, or assignment; for damages for breach of covenants; for specific performance; or for forfeiture of a license is not a suit arising under the patent laws.⁴⁵ Pursuant to article I, section 8, clause 8 of the Constitution, Congress, no doubt, could create a federal cause of action on contracts involving patents, but it has not done so.⁴⁶ Likewise, Congress could provide for federal jurisdiction to enforce such contracts as it has done in section 301 of the Labor Management Relations Act⁴⁷ for collective bargaining agreements, but it has not done so. Consequently, in the absence of diversity, a patentee must bring his common law contract actions involving his patent in the state courts.

In *Pratt v. Paris Gas Light & Coke Co.*,⁴⁸ patentee instituted suit in a state court in assumpsit to recover an agreed sum which defendant had promised to pay for the use of the patent. Defendant had ceased using plaintiff's patent because he had been informed that the plaintiff's patent was an infringement of a prior patent issued to a third person. The Court held that it was permissible for defendant to introduce evidence in the state court to show that the plaintiff's patent was an infringement of a prior patent. The Court said:

The state court has jurisdiction both of the parties and the subject-matter as set forth in the declaration, and it could not be ousted of such jurisdiction by the fact that, incidentally to one of these defences, the defendant claimed the invalidity of a certain patent. To hold that

time, 351 U.S. 570 (1956) (Copyright Act). If it should appear that the plaintiff was not relying upon the patent law for his alleged rights or if the claim of right were frivolous, the case might be dismissed. *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22 (1913) (dictum).

⁴⁵ *Wilson v. Sandford*, 51 U.S. (10 How.) 99 (1850). Other examples include the following: Injury to business involving slander of a patent is not a suit arising under the patent laws. *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916); "The complaint that the assessment of these taxes was illegal because in effect levied on patents or patent rights, did not involve the construction, or the validity, or the infringement of the patents referred to, or any other question under the patent laws. This was not, therefore, a suit 'arising under the patent laws' and the Circuit Court had no jurisdiction on that ground." *Holt v. Indiana Mfg. Co.*, 176 U.S. 68, 71 (1900).

⁴⁶ Now the dispute in this case does not arise under any act of Congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of Congress providing for regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles.

Wilson v. Sandford, 51 U.S. (10 How.) 99, 101-02 (1850).

⁴⁷ 29 U.S.C. § 185 (1964).

⁴⁸ 168 U.S. 255 (1897). *Noted*, 31 COLUM. L. REV. 461 (1931).

it has no right to introduce evidence upon this subject is to do it a wrong and deny it a remedy. Section 711 does not deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of *cases* arising under those laws. There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals.⁴⁹

In *Lear, Inc. v. Adkins*⁵⁰ the Court overruled its own doctrine which estopped a patent licensee from questioning the validity of a patent when he was being sued for royalties. As a result of this decision, the number of patent "questions" decided in state courts may increase.

In 1894 the Court construed⁵¹ the general removal statute, as amended in 1887-1888, to preclude removal from state to federal court when federal questions were first raised by the defendant. Further, if a plaintiff-patentee should allege a civil action arising under the patent laws in his complaint filed in the state court, a defendant cannot remove. The federal court will dismiss the removed action because the derivative jurisdiction⁵² doctrine dictates that a federal court cannot acquire jurisdiction from a state court on removal unless the state court had jurisdiction: Since civil actions arising under the patent laws are *exclusive* to the federal courts, the state courts have no jurisdiction. Application of the derivative jurisdiction doctrine in this situation has no redeeming feature, and the Court should follow its own example in *Lear, Inc. v. Adkins*⁵³ and discard it.⁵⁴

⁴⁹ 168 U.S. at 259.

⁵⁰ 395 U.S. 653 (1969). *Noted*, 48 N.C.L. REV. 391 (1970).

⁵¹ *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894). Discussed pp. 32-33 *infra*.

⁵² *General Inv. Co. v. Lake Shore & Mich. S.R.R.*, 260 U.S. 261 (1922) (anti-trust laws). In *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916), the trial court applied the derivative doctrine and dismissed the case. The Supreme Court reversed because the case did not arise under the patent laws and should have been remanded to the state court.

⁵³ 395 U.S. 653 (1969).

⁵⁴ The American Law Institute proposes to abolish the derivative jurisdiction doctrine in those instances in which the federal courts have exclusive jurisdiction. *ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* § 1312(d), at 27 (1969).

III. SPECIAL FEDERAL QUESTION JURISDICTION— FEDERAL CHARTERS

A unique member of the federal question family is the federal charter jurisdiction. Cases arising under federal charters (acts of Congress creating a corporation) illustrate the high water mark reached by the Court in finding federal question jurisdiction. As will subsequently be pointed out, Congress first acquiesced; then endorsed; and, finally, curtailed this jurisdiction. After Congress curtailed federal charter jurisdiction, the Court observed that it had been "less exacting"⁵⁵ in the charter cases than it had been in other areas. However, the jurisdictional theory developed by the Court for these cases has never been overruled either by the Court or Congress.

When Congress chartered the first national bank, it authorized this bank "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever." In the *Bank of the United States v. Deveaux*,⁵⁶ the Court held that Congress did not intend this language to confer jurisdiction on the federal courts; rather, it established the capacity of the bank to sue or be sued. The Court referred to the fact that Congress in the patent law had provided *expressly* that a patentee could sue in the "Circuit Court" of the United States.

In 1816 a bill was introduced in Congress to establish a second national bank. This bill proposed that the new bank could "sue and be sued, plead and be impleaded, answer and be answered, defend or be defended, in all courts and places whatsoever."⁵⁷ This provision was changed by Congress to read in "all state courts having competent jurisdiction, and in any circuit court of the United States."⁵⁸ In the famous case of *Osborn v. Bank of the United States*,⁵⁹ the initial question before the Court was whether the language in the act of incorporation of this bank conferred jurisdiction on the circuit courts. Chief Justice Marshall noted the difference in the language used by Congress in the act of incorporation before the Court and that used in the act incorporating the predecessor bank which the Court had construed in *Bank of the United States v. Deveaux*,⁶⁰ and he concluded that Congress by

⁵⁵ *Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936).

⁵⁶ 9 U.S. (5 Cranch) 61 (1809).

⁵⁷ 29 ANNALS OF CONG. 499 (1816).

⁵⁸ Act of April 10, 1816, ch. 44, § 7, 3 Stat. 269 (emphasis added).

⁵⁹ 22 U.S. (9 Wheat.) 738 (1824).

⁶⁰ 9 U.S. (5 Cranch) 61 (1809).

specifically designating the Circuit Courts intended to confer jurisdiction on them. The second question was whether Congress had the authority under article III of the Constitution to do what the Court said Congress intended to do. This question was answered in the affirmative. Thus the Court decided two federal questions. Clearly, then, the *Osborn* case was one "arising" under the laws and Constitution of the United States. But the case is famous because Chief Justice Marshall went on to develop a theory that would open the doors for federal corporations to bring suits in the federal courts to litigate any judicial question. He reasoned that the charter of a federal corporation, a law of the United States, forms an "ingredient"⁶¹ in every case brought by or against a federal corporation. Thus every case brought by a federal corporation is a case "arising" under the law creating it, and, regardless of the nature of the litigation, there is original jurisdiction in the federal courts to decide it. In a companion case, *The Bank of the United States v. Planter's Bank of Georgia*,⁶² this "ingredient" theory was applied to permit the Bank of the United States to sue a state bank in the federal court on a promissory note.

In 1863 Congress provided for the establishment of national banking associations, and section 59 of the resulting Act stated:

That suits, actions, and proceedings by and against any association under this act may be had in any circuit, district, or territorial court

⁶¹ *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 824-25 (1824): But the question respecting the right to make a particular contract or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The question which the case involves, then, must determine its character, whether those questions be made in the cause or not.

The appellants say, that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is compelled, in every case, to show its validity. The case arises emphatically under the law. The act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter.

⁶² 22 U.S. (9 Wheat.) 904 (1824).

of the United States held within the district in which such association may be established.⁶³

Congress did not repudiate Chief Justice Marshall's "ingredient" test for federal corporations. Rather, by the foregoing legislation, it specifically endorsed it for national banking associations. Subsequently, however, dissatisfaction arose over this broad grant of jurisdiction as to national banks. Citizens complained about having to travel long distances to attend federal courts and about the heavy bills of costs in those courts.⁶⁴ Further, there was great concern in Congress over the fact that the federal courts all over the country were overrun with business, and as one Senator put it: "the small tide of litigation that formerly flowed in Federal channels has swollen into a mighty stream."⁶⁵

⁶³ Act of February 25, 1863, ch. 58, § 59, 12 Stat. 681.

⁶⁴ 13 CONG. REC. 4083 (1882).

⁶⁵ *Id.* at 4084 (1882). Senator Stockslager stated:

Mr. Speaker, there is another reason why some such amendment should be adopted. The Federal courts all over the country are overrun with business. The Supreme Court of the United States is far behind with its work, and gentlemen are earnestly engaged in trying to devise some scheme to relieve these courts. The Senate a few days ago passed a bill which provides for intermediate appellate courts in each judicial circuit in the United States, and provides for the appointment of eighteen new judges. I am unalterably opposed to all such schemes for relief. The proper way to relieve these courts is to reduce their jurisdiction.

In the last twenty years the jurisdiction of the Federal courts has been greatly enlarged, so much so that an eminent judge of one of the United States courts has lately declared that "the small tide of litigation that formerly flowed in Federal channels has swollen into a mighty stream," and "that much, perhaps most of the great litigations of the country are now conducted by United States courts."

This has grown very largely out of the various Congressional enactments incident to the late war, but to some extent out of the desire of the Republican party to concentrate power and patronage in the Federal Government. I think the masses of the people of all parties and in all sections of the country are anxious to get back to the old order of things which existed before the war, when they could try all of their causes except the very few which constituted "the small tide of litigation" above referred to in their own courts, near their homes, where they could be tried by a jury of the hundred, in accordance with the ancient meaning of the trial by jury, and not be taken hundreds of miles from their homes at ruinous expense to be tried by a jury of strangers.

This amendment is a step in the right direction. Let us follow it up and give to the State courts jurisdiction in many of the cases where it is now so injuriously exercised by the Federal courts and there will be no need of an increase of the number of Federal judges. The State courts are amply able to transact all of the business which might very properly be transferred to them; and certainly it would be much more satisfactory to the people,

The result was legislation in 1882 taking from national banking associations the right to go into federal courts on the mere basis of incorporation by Congress; henceforth, such banks were to be treated the same as state banks.⁶⁶ In 1887 Congress provided that national banks were to be deemed citizens of the states in which they were respectively located.⁶⁷ However, federal jurisdiction was provided without regard to diversity in suits by the United States against any national banking association, in any "civil action to wind up the affairs of any such association, and [in] any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency. . . ."⁶⁸

In 1933 Congress provided that "all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking, . . . shall be deemed to arise under the laws of the United States."⁶⁹ Further, Congress authorized the district courts to exercise original and removal jurisdiction in these civil actions.

The legislation in 1882 which restricted jurisdiction over national banks did not apply to Federal Reserve Banks. Jurisdiction based on the "ingredient" theory continued for the Federal Reserve Banks until it was swept away by the Act of 1925.⁷⁰ However, Congress in 1933⁷¹ restored this jurisdiction for the Federal Reserve Banks, and it continues in effect.

Other federal corporations have undergone an experience somewhat similar to that of the national banks. In 1868 Congress provided that federal corporations, other than national banking associations, could remove

who at last must support this expensive system, which they deem in many cases not only unnecessary but absolutely oppressive.

The reason for the jurisdiction, if any ever existed, has now happily passed away; and I believe every true patriot will be glad to see a return to the old order of things. I hope this amendment or that of my friend from Georgia [Mr. HAMMOND] will be adopted and that we will supplement it with other similar acts until the United States courts and the Supreme Court of the United States will both be relieved from "the mighty stream of litigation" which is now pouring into them.

⁶⁶ Act of July 12, 1882, ch. 290, § 4, 22 Stat. 163.

⁶⁷ Act of March 3, 1887, ch. 373, § 4, 24 Stat. 554. Congress by enacting this statute endorsed the corporate fiction doctrine developed by the Court in *Marshall v. Baltimore & O.R.R.*, 57 U.S. (16 How.) 314 (1853).

⁶⁸ 28 U.S.C. § 1348 (1964).

⁶⁹ 12 U.S.C. § 632 (1964).

⁷⁰ 28 U.S.C. § 1349 (1964).

⁷¹ 28 U.S.C. § 1348 (1964).

cases from the state courts to the federal courts on the basis of a *defense* arising under the Constitution and laws of the United States.⁷² In 1885 in the *Pacific Removal Cases*⁷³ the Court interpreted the removal provisions of the Act of 1875 broadly by applying the "ingredient" theory to permit railroads chartered by Congress to remove ordinary tort actions. Thirty years later Congress took away the federal charter jurisdiction of railroads.⁷⁴ Finally, in 1925 Congress provided:

The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock.⁷⁵

Today the "ingredient" theory is applied to federal reserve banks, to federal corporations when the civil action arises out of transactions involving international or foreign banking, to corporations in which the United States owns more than one half the stock,⁷⁶ and in very limited situations involving national banking associations.

Justice Cardozo observed that the "doctrine of the charter cases was to be treated as exceptional, though within their special field there was no thought to disturb them."⁷⁷ The exceptional feature of the federal charter cases was that simply by virtue of the act of incorporation these corporations could sue on any common law cause of action they might have on the theory that a federal question was presented when the act of

⁷² Act of July 27, 1868, ch. 255, § 2, 15 Stat. 227.

⁷³ 115 U.S. 1 (1885). The Court set forth the rationale of the opinion as follows:

We are of opinion that corporations of the United States, created by and organized under acts of Congress like the plaintiffs in error in these cases, are entitled as such to remove into the Circuit Courts of the United States suits brought against them in the State courts, under and by virtue of the act of March 3, 1875, on the ground that such suits are suits "arising under the laws of the United States." We do not propose to go into a lengthy argument on the subject; we think that the question has been substantially decided long ago by this court. The exhaustive argument of Chief Justice Marshall in the case of *Osborn v. Bank of the United States*, 9 Wheat. 738, 817-28, delivered more than sixty years ago, and always acquiesced in, renders any further discussion unnecessary to show that a suit by or against a corporation of the United States is a suit arising under the laws of the United States.

Id. at 11. Mr. Justice Frankfurter referred to this case as an "unfortunate decision." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 n.51 (1959). Yet, Congress let it stand for thirty years.

⁷⁴ Act of January 28, 1915, ch. 22, § 5, 38 Stat. 804.

⁷⁵ 28 U.S.C. § 1349 (1964).

⁷⁶ *Federal Intermediate Credit Bank v. Mitchell*, 277 U.S. 213 (1928) (United States owned all the stock).

⁷⁷ *Gully v. First Nat'l Bank*, 299 U.S. 109, 114 (1936).

incorporation was pleaded. This "ingredient" theory has not been extended by the Court to special acts creating a federal cause of action. As previously indicated, a patentee cannot sue in the federal courts to enforce a contract of assignment on the basis of a federal question. The patent law does not so provide. On the other hand, under the "ingredient" theory Congress has the *power* under the Constitution to create a federal cause of action on contracts of assignment. As long as a patentee in good faith alleges a cause of action within the scope of the patent law, federal jurisdiction attaches and remains even though only facts are litigated. In this respect, the patent law is similar to the federal charter cases. And, likewise, in both the patent and charter cases it is rare that the Court will be called upon actually to interpret the words of the statute. On the other hand, federal questions in a state court subject to review by the Supreme Court of the United States always must involve the construction of the Constitution, a law, or a treaty of the United States.

IV. SPECIAL FEDERAL QUESTION JURISDICTION—REMOVAL BY FEDERAL OFFICERS

Congress has not passed a general statute making federal officers liable for acts committed "under color," but in violation, of their federal authority.⁷⁸ However, as early as 1815,⁷⁹ Congress provided that federal customs officials could *remove* from the state courts civil or criminal suits filed *against* them for acts resulting from the enforcement of the customs laws. This attempt to protect customs officers from interference by hostile state courts was repeated in later enactments and then extended to revenue officers.⁸⁰ Finally, in 1948 a statute was enacted to cover all federal officers:

⁷⁸ *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963). (The Court held that it would not fill the "hiatus" Congress has left in this area.) Congress made state officers liable in 1871. 42 U.S.C. § 1983 (1964). This statute is discussed in the next section pp. 20-23 *infra*.

⁷⁹ Act of February 4, 1815, ch. 31, § 8, 3 Stat. 198.

⁸⁰ *Willingham v. Morgan*, 395 U.S. 402, 405-06 (1969) briefly outlines the history of these statutes:

The federal officer removal statute has had a long history. See H.M. Hart & H. Wechsler, *The Federal Courts and the Federal System* 1147-1150 (1953). The first such removal provision was included in an 1815 customs statute. Act of February 4, 1815, § 8, 3 Stat. 198. It was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular. It allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act done "under colour" of the statute. Obviously, the removal provision was

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the Courts of the United States, for any act under color of office or in the performance of his duties.

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.⁸¹

Under article 1, section 8, clause 18, of the Constitution, Congress is authorized "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers. . . ." The constitutional validity of federal-officer-removal statutes rests on the right and power of the United States to secure "the efficient execution of its laws and to prevent interference therewith, due to possible local prejudice. . . ."⁸² Even if state law governs the action, it is, nevertheless, a federal question because "the interpretation of a federal defense makes the case 'arising under' the Constitution or laws of the United States."⁸³ The procedure for removal

an attempt to protect federal officers from interference by hostile state courts. This provision was not, however, permanent; it was by its terms to expire at the end of the war. But other periods of national stress spawned similar enactments. South Carolina's threats of nullification in 1833 led to the passage of the so-called Force Bill, which allowed removal of all suits or prosecutions for acts done under the customs laws. Act of March 2, 1833, § 3, 4 Stat. 633. A new group of removal statutes came with the Civil War, and they were eventually codified into a permanent statute which applied mainly to cases growing out of enforcement of the revenue laws. Rev. Stat. § 643 (1874); Judicial Code of 1911, § 33, 36 Stat. 1097. Finally, Congress extended the statute to cover all federal officers when it passed the current provision as part of the Judicial Code of 1948.

⁸¹ 28 U.S.C. § 1442(a) (1964). See also 28 U.S.C. § 1442a for removal by members of the armed forces. For discussion of both sections, including procedure for removal, see 1A J. MOORE, *FEDERAL PRACTICE* § 0.164[1]-[3] (2d ed. 1965).

⁸² *Maryland v. Soper*, 270 U.S. 9, 32 (1926); *accord*, *Tennessee v. Davis*, 100 U.S. 257 (1879). See also *State v. Hoskins*, 77 N.C. 530 (1877) (ruling favorably on a removal petition by a federal revenue officer).

⁸³ *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963).

for federal officers is governed by the general removal statute.⁸⁴ The federal officer is not permitted merely to conclude in his petition for removal that he was acting under color of office; instead, he must show

[A] causal connection between what the officer has done under asserted official authority and the state prosecution. It must appear that the prosecution of him, for whatever offense, has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, and he must by direct averment exclude the possibility that it was based on acts or conduct of his not justified by his federal duty. But the statute does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority. It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution.⁸⁵

The Court in *Willingham v. Morgan* recently rejected a narrow interpretation given the 1948 statute by a lower court and held⁸⁶ that the test for removal should be broader, not narrower, than the test for official immunity. The Court said:

The federal officer removal statute is not "narrow" or "limited." . . . At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. One of the primary purposes of the removal statute—as its history clearly demonstrates—was to have such defenses litigated in the federal courts. The position of the court below would have the anomalous result of allowing removal only when the officers had a clearly sustainable defense. The suit would be removed only to be dismissed. Congress certainly meant more than this when it chose the words "under color of . . . office." In fact, one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court. The officer need not win his case before he can have it removed. In cases like this one, Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by narrow, grudging interpretation of § 1442(a)(1).⁸⁷

Congress has thus provided a haven in the federal courts for federal officers being sued or prosecuted in the state courts. By comparison and as

⁸⁴ 28 U.S.C. § 1446 (1964).

⁸⁵ *Maryland v. Soper*, 270 U.S. 9, 33 (1926).

⁸⁶ 395 U.S. 402 (1969).

⁸⁷ *Id.* at 406-07.

previously indicated, the haven provided for federal corporations has been taken away by Congress, for the most part, by a series of statutes during the period 1882-1925.⁸⁸ Clearly, Congress wished to reduce the flood of cases involving federal corporations, and, no doubt, the necessity for a haven so obvious at the time of the *Osborn* case⁸⁹ had dissipated somewhat after the Civil War. As will be subsequently developed, Congress has curtailed removal under the general removal statute;⁹⁰ and, recently, in *City of Greenwood v. Peacock*,⁹¹ the Court adhered to its narrow interpretation of the Civil Rights Removal Statute.⁹² Today, federal officer removal is a favored member of the federal question jurisdiction family.

V. SPECIAL FEDERAL QUESTION JURISDICTION—CIVIL RIGHTS ACT OF APRIL 20, 1871

During the period 1866-1875 five Civil Rights Acts were passed.⁹³ Section 1 of the Act of April 20, 1871⁹⁴ is the "lineal ancestor" of 42 U.S.C. § 1983, a statute of considerable vitality, which provides:

⁸⁸ See text pp. 15-17 *supra*.

⁸⁹ 22 U.S. (9 Wheat.) 738 (1824).

⁹⁰ See text pp. 34-36 *infra*.

⁹¹ 384 U.S. 808 (1966). See *id.* at 833-34 for the impact a broad interpretation of this statute would have on federal courts and on federal-state court relations.

⁹² 28 U.S.C. § 1443 (1964).

⁹³ Act of March 1, 1875, ch. 114, 18 Stat. 335; Act of April 20, 1871, ch. 22, 17 Stat. 13; Act of February 28, 1871, ch. 99, 16 Stat. 433; Act of May 31, 1870, ch. 114, 16 Stat. 140; Act of April 9, 1866, ch. 31, 14 Stat. 27.

⁹⁴ This act, "sometimes called 'the "third force bill,"' was passed by a Congress that had the Klan 'particularly in mind.'" *Monroe v. Pape*, 365 U.S. 167, 174 (1961).

CHAP. XXII.—*An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,⁹⁵ shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The jurisdictional companion of this statute is 28 U.S.C. § 1343(3) :

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person :

....

- (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

One reason the Act of 1871 (*i.e.* 42 U.S.C. § 1983 and 28 U.S.C. § 1343 (3)) has so much vitality today is that, like most special federal question statutes, it does not require any jurisdictional amount; whereas the Act of 1875 providing for general federal question jurisdiction (to be discussed in the following section) has always required a minimum jurisdictional amount.⁹⁶ Obviously many human rights, as distinguished from property rights, are not readily evaluated in monetary terms. The Court has further made the Act of 1871 more attractive than the Act of 1875 by substantially eliminating the requirement that administrative remedies be exhausted before invoking the Act of 1871.⁹⁷

The Act of 1871 applies only to state action and not to federal action. The Court also has ruled that Congress did not intend for this section to permit suits against municipalities.⁹⁸

Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13. Note, *The Civil Rights Act of 1871: Continuing Vitality*, 40 NOTRE DAME LAWYER 70 (1964).

⁹⁵ The words "and laws" in the current statute were added in 1874. REV. STAT. § 1979, at 348 (1875).

⁹⁶ Initially over \$500 and currently in excess of \$10,000 exclusive of interests and costs. 28 U.S.C. § 1331(a) (1964).

⁹⁷ *Damico v. California*, 389 U.S. 416 (1967); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963); Comment, *Exhaustion of State Remedies under the Civil Rights Act*, 68 COLUM. L. REV. 1201 (1968).

⁹⁸ *Monroe v. Pape*, 365 U.S. 167 (1961) (*City of Chicago*). This does not preclude suits against an official of a city acting under color of office. *Hague v.*

In *Holt v. Indiana*⁹⁹ plaintiff sought to enjoin a state tax assessment on patent rights. He alleged jurisdiction on two grounds: a suit arising under both the patent laws and the Act of 1871. The Court rejected both grounds and stated:

If state legislation impairs the obligation of a contract, or deprives of property without due process of law, or denies the equal protection of the laws, as asserted by counsel in respect of the statutes of Indiana, remedies are found in [the Act of 1875].¹⁰⁰

The Court went on to hold that the plaintiff's action arose under the Act of 1875, but the case was dismissed because the requisite jurisdictional amount¹⁰¹ was not present. Subsequently, the Court has adhered only in part to the exclusions set forth in *Holt*.¹⁰² The alleged denial of equal protection in tax actions is still not considered a civil rights violation, and hence jurisdiction is not proper under the Act of 1871 for these actions.¹⁰³ Suits attacking state legislation impairing the obligation of contracts,¹⁰⁴ as well as these tax suits, are proper under the Act of 1875 if the jurisdictional amount is involved. Otherwise, they must be litigated in the state courts. On the other hand, litigants who prefer the federal courts to the state courts can successfully employ the Act of 1871 and thus avoid the jurisdictional amount requirement of the Act of 1875 in many cases—including those involving reapportionment,¹⁰⁵ the right to attend integrated schools,¹⁰⁶ and the right of residents of a federal enclave to vote¹⁰⁷—involving alleged violation of the equal protection clause of the fourteenth amendment. The Act of 1871 is also available when state action is

CIO, 307 U.S. 496 (1939). Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 (1968). Judge Friendly has said: "Actions against a government official acting 'under color of' statutes and ordinances are what 42 U.S.C. § 1983 [Act of 1871] is mainly about." *Eisen v. Eastman*, 421 F.2d 560, 562-63 (2d Cir. 1969).

⁹⁹ 176 U.S. 68 (1900).

¹⁰⁰ *Id.* at 72. The Court cited the Act of August 13, 1888, ch. 866, 25 Stat. 433, which was a subsequent re-enactment of the Act of 1875 and which is now codified at 28 U.S.C. § 1331(a) (1964).

¹⁰¹ At that time the amount required was in excess of \$2,000.

¹⁰² 176 U.S. 68, 72 (1900).

¹⁰³ *Alterman Transp. Lines v. Public Serv. Comm'n*, 259 F. Supp. 486 (M.D. Tenn. 1966), *aff'd*, 386 U.S. 262 (1967) (per curiam).

¹⁰⁴ See p. 38 *infra*.

¹⁰⁵ *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁰⁶ *McNeese v. Board of Educ.*, 373 U.S. 668 (1963).

¹⁰⁷ *Evans v. Cornman*, 398 U.S. 419 (1970).

alleged to violate the due process clause of the fourteenth amendment¹⁰⁸ or the right to freedom of speech under the first amendment.¹⁰⁹

Mr. Justice Stone in *Hague v. CIO* thought the Act of 1871 applied "whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights."¹¹⁰ This test generally¹¹¹ has been adhered to, thus leaving cases that would otherwise qualify under the Act of 1871 to meet the jurisdictional-amount test of the Act of 1875. If the test is not met, such cases must be litigated in the state courts with possible appellate review by the United States Supreme Court. Notwithstanding the restrictive interpretation given the Act of 1871 by distinguishing personal and property rights, the statute serves to provide a federal forum for important cases which could not qualify under the jurisdictional requirements of the Act of 1875 or any other federal statute.

VI. GENERAL FEDERAL QUESTION JURISDICTION— THE ACT OF 1875

The Act of February 13, 1801¹¹² was a short-lived predecessor of the

¹⁰⁸ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹⁰⁹ *Tenney v. Brandhove*, 341 U.S. 367 (1951).

¹¹⁰ 307 U.S. 496 (1939).

¹¹¹ Judge Friendly in *Eisen v. Eastman*, 421 F.2d 560, 564 (2d Cir. 1969) states:

So far as our research has disclosed, Mr. Justice Stone's definition would encompass all the cases in which the Supreme Court has sustained jurisdiction under 28 U.S.C. § 1343(3), with the possible exception of *King v. Smith*, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968), where the applicability of the Civil Rights Act was neither challenged nor discussed. Moreover, it is quite arguable that *King* came within Justice Stone's formulation on the basis that Alabama's "substitute father" regulation not merely caused economic loss to Mrs. Smith's children, but also infringed their "liberty" to grow up with financial aid for their subsistence and her "liberty" to have Mr. Williams visit her on weekends.

See Laufer, *Hague v. CIO: Mr. Justice Stone's Test of Federal Jurisdiction—A Reappraisal*, 19 BUFFALO L. REV. 547 (1970).

¹¹² Act of February 13, 1801, ch. 4, 2 Stat. 89. It provided jurisdiction in the circuit courts "of all cases in law or equity, arising under the constitution and laws of the United States, and treaties made, under their authority; . . . and also of all actions, or suits, matters or things cognizable by the judicial authority of the United States, under and by virtue of the constitution thereof, where the matter in dispute shall amount to four hundred dollars . . ." As to the jurisdictional amount provision:

Mr. NICHOLAS moved to fill the blank with 500, so as to confine the jurisdiction to debts above \$500. Among other reasons assigned by him, he stated that the estate of Lord Fairfax, with the quit rents due thereon, had been confiscated during the Revolution by the State of Virginia; notwithstanding the confiscation, the heirs of Lord Fairfax had sold all their

Act of 1875. It was repealed in 1802.¹¹³ Congress in the Act of 1875 provided for original jurisdiction in the circuit courts, concurrent with state courts, and for *removal* thereto from the state courts:

[O]f all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority. . . .¹¹⁴

The similarity of the language of the Act of 1875 (as well as 28 U.S.C. § 1331(a) which is the current¹¹⁵ version of that Act) to that of the first clause in Article III, Section 2 of the Constitution¹¹⁶ is apparent. In 1824, in *Osborn v. Bank of the United States*¹¹⁷ Chief Justice Marshall had construed broadly the test for cases "arising" under the Constitution:

We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts

rights, (which the assignees contended remained unimpaired.) It might be their wish to prosecute in a Federal court, expecting to gain advantages in it which could not be had from the courts of Virginia. His object was to defeat the purpose by limiting the jurisdiction of the circuit courts to sums beyond the amount of quit rents, alleged to be due by any individual.

[It is understood that the present assignees of the claims of Lord Fairfax, are General Marshall, General Lee, and a third individual, and that they maintain their claims under the British Treaty.]

The motion was opposed by Messrs. HARPER and BAYARD.

On the question being taken, it was lost by the casting vote of the Chairman—ayes 37, noes 37. The blank was then filled with \$400—ayes 41. 10 ANNALS OF CONG. 897 (1801).

¹¹³ Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132. F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 24-29 (1927), discusses the Act of 1801 and its repeal in 1802.

¹¹⁴ Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470.

¹¹⁵ 28 U.S.C. § 1331(a) (1964). "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." *Id.* The jurisdictional amount was increased from \$500 plus to \$2,000 plus in 1887, to \$3,000 plus in 1911, and to \$10,000 plus in 1958. The circuit courts were abolished in 1912, and jurisdiction under the Act of 1875 was transferred to the district courts. The present removal provisions are contained in 28 U.S.C. § 1441 (1964).

¹¹⁶ "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, cl. 1.

¹¹⁷ 22 U.S. (9 Wheat.) 738 (1824).

jurisdiction of that cause, although other questions of fact or of law may be involved in it.¹¹⁸

Did Congress intend the word "arising" in the Act of 1875 to be as broad as the "ingredient" test promulgated by the Court in 1824 for "arising" in the constitutional provision? Senator Carpenter, on behalf of the Judiciary Committee, presented a bill on June 15, 1874, which, approximately nine months later, was to become the Act of 1875. In the middle of a long debate on the floor of the Senate on section 11 of the bill (which was concerned with service of process on agents), Senator Carpenter said:

The act of 1789 did not confer the whole power which the Constitution conferred; it did not do what the Supreme Court has said Congress ought to do; it did not perform what the Supreme Court has declared to be the duty of Congress. This bill does.¹¹⁹

This language taken out of context¹²⁰ and without regard to other factors

¹¹⁸ *Id.* at 823.

¹¹⁹ 2 CONG. REC. 4986 (1874).

¹²⁰ The context surrounding Senator Carpenter's statement was as follows:

Mr. BAYARD. The wisdom of the law of 1789 and the wisdom of the Senator from Wisconsin who now proposes to amend it. That is the difference between the two. The law of 1789 requires one of the parties to be a resident in the district where the suit is brought, and the Senator from Wisconsin in his anxiety to increase the Federal jurisdiction proposes that neither of the parties may be a resident of the district but that they shall be citizens of the different States. That is all.

Mr. CARPENTER. That is all the Constitution requires.

Mr. BAYARD. The Constitution requires that; but I say the law of 1789 was built by wise men. It has been the law of this country until to-day. The action under it has been satisfactory by requiring one of the parties to be a resident of the district where the suit is brought. It was a wise restriction. It has been tested by the experience of time. And what cause is there for uprooting this and other venerable landmarks of the past? I do put the wisdom of the Senate of 1789 against the wisdom of the Senator of Wisconsin of today, and it is no disparagement to him to say that this law having stood the test of time should not be lightly changed.

You are now allowing a man to sue his defendant in a district where the defendant does not reside, and in a district where he himself does not reside. He follows him until he finds both of them in a strange country; and there, where neither is known, where less opportunity for a just trial exists than the law of 1789 required, the suit may be commenced and may be commenced in this excessively unreal, highly constructive method of summoning him not personally but by some man who is called his agent. Even the word "authorized" is not inserted before "agent." The agency is of the most shadowy character. He may be his agent by the merest conversation. He may be alleged to be his agent only, and then proved to be his agent perhaps by the man himself if the agent can prove his authority; and that is to deprive a man

lends support to the notion that Congress intended to confer on the circuit courts all the jurisdiction over federal questions permitted by the Constitution. But further inquiry indicates that such a conclusion is not altogether justified. In the first place, an express provision of the Act of 1875 specifically excludes from the Act's purview cases in which the

of his property to the extent of his entire fortune, or it may be of that which is more value to him in the shape of his character.

Mr. CARPENTER. The Senator from Delaware says that he puts the act of 1789 against the wisdom of the Senator from Wisconsin. Well, it is pretty hard on me to put the wisdom of a statute against mine; but I propose to state the issue a little differently. I put the wisdom of the Constitution of the United States against the wisdom of the Senator from Delaware.

Mr. BAYARD. Is the act of 1789 in contravention of the Constitution?

Mr. CARPENTER. I think it is substantially in contravention of the Constitution, and I will state why. The Constitution says that certain judicial powers shall be conferred upon the United States. The Supreme Court of the United States in an opinion delivered by Judge Story—I do not recollect now in what celebrated case it was, whether *Cohens vs. Virginia* or some of those famous cases—said that it is the duty of the Congress of the United States to vest all the judicial power of the Union in some Federal court, and if they may withhold a part of it they may withhold all of it and defeat the Constitution by refusing or simply omitting to carry its provisions into execution.

The Constitution of the United States declares that the judicial power of the United States shall extend to all controversies between citizens of different States. A controversy between the Senator and myself is a controversy between citizens of different States. If we both happen to meet in New York, it is a controversy between citizens of different States, and by the Constitution I may sue him in the Federal court in New York, because the controversy between us is between citizens of different States. *The act of 1789 did not confer the whole power which the Constitution conferred; it did not do what the Supreme Court has said Congress ought to do; it did not perform what the Supreme Court has declared to be the duty of Congress. This bill does. This bill confers that right, and why have we done so?* The act of 1789 was undoubtedly a wise act for that time; but the thirteen States which then constituted the Union have grown now to thirty-seven; our commerce that was streaming up and down the Atlantic coast crosses the continent; our people have become totally changed in their methods of doing business; we are a roving, traveling people; the New Yorker is as much at home in California as he used to be in Massachusetts; he does not feel farther away from his fireside when he sits down by the billows of the Pacific than he used to when he was at Cape Cod, and in fact he is not, because he can return as quickly. The whole circumstances of the people, the necessities of business, our situation, have totally and entirely changed.

As the law now stands—I speak of the law Federal and State—if there is a difficulty between the Senator from Delaware and myself, and we both meet in New York, he can sue me there in the State court. What does this bill do? It authorizes him to sue me there in the Federal court. Is that hardship?

2 CONG. REC. 4986-87 (1874) (emphasis added).

jurisdictional amount is not in excess of five hundred dollars exclusive of costs. Moreover, the Supreme Court has not held that all constitutionally permissible judicial power ought to be vested in lower federal courts. In *Turner v. Bank of America*¹²¹ the Court said:

[T]he political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress; and Congress is not bound to enlarge the jurisdiction of the federal courts to every subject, in every form which the Constitution might warrant.¹²²

In 1816, in *Martin v. Hunter's Lessee*,¹²³ Justice Story in dealing with the appellate jurisdiction of the United States Supreme Court to review federal questions decided in a state court stated:

It would seem, therefore, to follow, that Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is *exclusively* vested in the United States, and of which the supreme court cannot take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested *either in an original or appellate form*, in some courts created under its authority.¹²⁴

Further, as Professor Mishkin¹²⁵ has observed, the words "arising under" should be broader in the Constitution than in the Act of 1875 because, as used in the Constitution, they include appellate jurisdiction of the Supreme Court over state courts. Then, too, the Court has from time to time stated that the same words not only may have different meaning in the same act but also may be used in a statute in a different sense from that in which they were used in the Constitution.¹²⁶ And, finally, the "in-

¹²¹ 1 U.S. (1 Dall.) 8 (1799).

¹²² *Id.* at 10.

¹²³ 14 U.S. (1 Wheat.) 304 (1816).

¹²⁴ *Id.* at 331 (emphasis added). Senator Carpenter was referring, no doubt, to this case rather than to *Cohens v. Virginia*.

¹²⁵ Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 162-63 (1953).

¹²⁶ *Towne v. Eisner*, 245 U.S. 418 (1918); *Lamar v. United States*, 240 U.S. 60 (1916). 1 J. MOORE, FEDERAL PRACTICE § 0.60[2], at 606 (2d ed. 1964) states: Hence parallel language in the Constitution and in a jurisdictional statute does not in and by itself demand an identical interpretation. Thus Marshall was surely right in holding that Congress could constitutionally give the circuit court jurisdiction of actions brought by or against a federally chartered bank; that these were suits 'arising under' the Constitution and laws

gredient" test of the *Osborn* case¹²⁷ was not mentioned in the debates, and certainly there is no indication that Congress was aware of the enormous consequences¹²⁸ which would flow from incorporating such a test in the Act of 1875. In any event, the judicial history of the Act of 1875 (both original and removal provisions) reveals that with one exception¹²⁹ the Court has not adopted the "ingredient" test in interpreting it. The tests for its application are narrower than the "ingredient" test. Even under the narrow tests adopted, the increase in the number of cases in the federal courts was too much to suit Congress. As early as 1887 Congress enacted legislation restricting the scope of the Act of 1875. Further limitations have since been imposed.

A working knowledge of the Act of 1875 involves, first, the manner in which the Court has interpreted it¹³⁰ and, second, the limitations imposed on it by Congress. At the time the Act of 1875 became law, thousands of landowners held title from the United States by act of Congress or their title could be traced directly to a federal land patent. Cases involving these land patents provided the setting for the Court to interpret the Act of 1875.

A. Land Cases: Rejection of the "Ingredient" Test

Prior to considering the first land patent case under the Act of 1875, the Court in reviewing state court decisions held¹³¹ that a federal question was not involved in a land dispute simply because one or both parties derived title to the land directly or indirectly from an Act of Congress. The Court indicated that an actual construction of the Act of Congress would be necessary in the decision of the case in order to invoke its appellate review.

In 1877 in *Gold-Washing & Water Co. v. Keyes*,¹³² the Court had an opportunity to deal with the term "arising" as used in the Act of 1875 in

of the United States, within the intendment of Article III. But in applying the Statutory grant, § 1331, which uses similar language, courts do not give the statute such a latitudinarian construction.

¹²⁷ 22 U.S. (9 Wheat.) 738 (1824).

¹²⁸ For instance, suits on patent contracts would meet the "ingredient" test and thus "arise" under the Act of 1875 without further legislation by Congress.

¹²⁹ The Pacific Removal Cases, 115 U.S. 1 (1885). See pp. 28-31 *infra* for a discussion of these cases.

¹³⁰ Annot., 14 A.L.R.2d 992 (1950); Annot., 13 A.L.R.2d 390 (1950); Annot., 12 A.L.R.2d 5 (1950).

¹³¹ *McStay v. Friedman*, 92 U.S. 723 (1875); *Romie v. Casanova*, 91 U.S. 379 (1875).

¹³² 96 U.S. 199 (1871).

a case removed from the state court to a federal court. The plaintiff sought to restrain the defendant from polluting Bear River by depositing "tailings" in it in the course of its mining operations. Defendant in its petition for removal set forth its ownership of title derived under the laws of the United States. Further, it was alleged that the action would involve the construction of certain laws of the United States (specifically set forth in the petition for removal) dealing with the development of mining resources of the United States. In upholding a remand order the Court did not discuss the "ingredient" test, but its decision, in effect, rejected it. The Court defined the test for removal of these land patent cases in the following language:

A cause cannot be removed from a State court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. That this was the intention of Congress is apparent from sect. 5 of the act of 1875, which requires the Circuit Court to dismiss the cause, or remand it to the State court, if it shall appear, "at any time after such suit has been brought or removed thereto, that such suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court."

Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, "in legal and logical form," such as is required in good pleading (1 Chit. Pl. 213), that the suit is one which "really and substantially involves a dispute or controversy" as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States. If these facts sufficiently appear in the pleadings, the petition for removal need not restate them; but, if they do not, the omission must be supplied in some form, either by the petition or otherwise. Under the application of this rule, we think that the record in this case is insufficient and that the Circuit Court did not err in remanding the cause.¹³³

¹³³ *Id.* at 203-04. In *Robinson v. Anderson*, 121 U.S. 522 (1887), an original suit involving a land patent, the Court applied section 5 of the Act of 1875 (referred to in *Gold-Washing & Water Co. v. Keyes*) to dismiss the case for want of jurisdiction because the pleadings indicated that it was not a case "arising." Section 5 later became 28 U.S.C. § 80, and in 1948 it became 28 U.S.C. § 1359 (1964), and it now applies to "Parties collusively joined or made." The clause employed in *Robinson v. Anderson* is now deleted.

The narrow test adopted by the Court for removal of federal questions under the Act of 1875 somewhat resembles the test for appellate review of state court decisions. The fundamental difference is that under the Act of 1875 a case may be removed if the *pleadings* show that the suit is one which really and substantially involves a dispute or controversy as to a right which depends upon the construction or effect of the Constitution, some law, or treaty of the United States; whereas review by the Court of a state court decision concerning a federal question requires that the *final judgment* must show that a federal question was actually decided and the outcome of the case depended on it. As will be subsequently shown, the test for removal was narrowed further when removal based on a federal defense was eliminated.¹³⁴

In *Shosone Mining Co. v. Rutter*¹³⁵ involving an original and a removal case, the Court rejected¹³⁶ the "ingredient" test of the federal

¹³⁴ *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894). See pp. 32-33 *infra*.

¹³⁵ 177 U.S. 505 (1900).

¹³⁶ *Id.* at 509-10:

As against this we are met by these suggestions: First, that a corporation created by Congress has a right to invoke the jurisdiction of the Federal courts in respect to any litigation which it may have, except as specifically restricted by some act of Congress. *Osborn v. Bank of United States*, 9 Wheat. 738; *Pacific Railroad Removal Cases*, 115 U.S. 1. The argument of Chief Justice Marshall in support of this was, briefly, that a corporation has no powers and can incur no obligations except as authorized or provided for in its charter. Its power to do any act which it assumes to do, and its liability to any obligation which is sought to be cast upon it, depend upon its charter, and when such charter is given by one of the laws of the United States there is the primary question of the extent and meaning of that law. In other words, as to every act or obligation the first question is whether that act or obligation is within the scope of the law of Congress, and that being the matter which must be first determined a suit by or against the corporation is one which involves a construction of the terms of its charter; in other words, a question arising under the law of Congress. But that argument is not pertinent here. The right of the contestants in an adverse suit, as we have seen, does not always call for any construction of an act of Congress. It may depend solely on local rules or customs or state statutes, and in that case does not involve a dispute or controversy "which depends upon the construction or effect of the Constitution, or some law or treaty of the United States." "In most actions concerning mining claims, the parties agree as to the proper rule of construction to be applied to the mining laws, and the controversies are usually limited to questions of fact relating to the compliance with these laws. In such cases the Federal courts have no original jurisdiction, unless there is a diversity of citizenship; but in cases arising under section twenty-three hundred and twenty-six of the Revised Statutes, the authority for the action is found in the legislation of Congress. Without this authority the action for the purposes avowed by the statute could not be maintained." 2 Lindley on Mines, sec. 748. A statute authorizing an action to establish a right is very different from one which creates a right to be

charter cases and adhered to the test set forth in *Gold-Washing & Water Co. v. Keyes*.¹³⁷ Congress could, according to the Court, confer jurisdiction on the federal courts to litigate any controversy growing out of the disposal of the public lands, but it had not done so. The Court put it this way:

By the Constitution (art. 3, sec. 2) the judicial power of the United States extends "to all cases, in law and equity, arising under this Constitution, the laws of the United States" and to controversies "between citizens of different States." By article 4, s. 3, cl. 2, Congress is given "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Under these clauses Congress might doubtless provide that any controversy of a judicial nature arising in or growing out of the disposal of the public lands should be litigated only in the courts of the United States. The question, therefore, is not one of the power of Congress, but of its intent. It has so constructed the judicial system of the United States that the great bulk of litigation respecting rights of property, although those rights may in their inception go back to some law of the United States, is in fact carried on in the courts of the several States.¹³⁸

In 1912 the Court shed some light on the policy involved in adopting a narrow construction of the Act of 1875 in the land cases:

A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. *If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws.*¹³⁹

It is possible for a land patent case to qualify for federal jurisdiction under the Act of 1875. In *Kansas Pacific Railroad Co. v. Atchison Rail-*

established. An action brought under the one may involve no controversy as to the scope and effect of the statute, while in the other case it necessarily involves such a controversy, for the thing to be decided is the extent of the right given by the statute.

¹³⁷ 96 U.S. 199 (1877). See also *Joy v. St. Louis*, 201 U.S. 332 (1906) (no jurisdiction where land formed by accretion).

¹³⁸ *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 506 (1899).

¹³⁹ *Shulthis v. McDougal*, 225 U.S. 561 (1912) (emphasis added).

road,¹⁴⁰ both parties claimed title to the same land in Kansas under different acts of Congress, and the Court held that the case would involve the construction of these acts of Congress. In *Hopkins v. Walker*,¹⁴¹ in plaintiff's action to remove a cloud on his title sufficient facts were alleged to convince the court that it would be necessary for the district court to construe the mining laws of the United States. In both cases the Court held that jurisdiction under the Act of 1875 was proper.

B. Original Jurisdiction—No Anticipation of Defense Rule

In 1888, in *Metcalf v. Watertown*,¹⁴² the Court decided that a plaintiff could not invoke the jurisdiction of the federal courts under the Act of 1875 by anticipating a defense in the complaint. This rule, which is still applicable, was stated in the following language:

Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer, or motion, or upon its own inspection of the pleading, must dismiss the suit; just as it would remand to the state court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the Circuit Court. It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind.¹⁴³

In *Tennessee v. Union & Planters' Bank*¹⁴⁴ the State of Tennessee sought to collect taxes allegedly due and in its complaint stated that the

¹⁴⁰ 112 U.S. 414 (1884).

¹⁴¹ 244 U.S. 486 (1917). Two recent cases in the Tenth Circuit Court of Appeals follow the tests employed in these early land patent cases. *Simpson v. Utah*, 365 F.2d 185 (10th Cir. 1966) (no jurisdiction); *Midwestern Devs., Inc. v. City of Tulsa*, 333 F.2d 1009 (10th Cir.), cert. denied, 379 U.S. 989 (1964) (jurisdiction).

¹⁴² 128 U.S. 586 (1888).

¹⁴³ *Id.* at 589.

¹⁴⁴ 152 U.S. 454 (1894). The Court relied on the following language to defeat jurisdiction: "[T]he right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior that defence, and must depend on the state of things when the action is brought." *Id.* at 459. This

defendant claimed that the taxes sought to be collected were in violation of the Impairment of Contract clause of the Constitution. The Court held that the lower federal court did not have jurisdiction under the Act of 1875 and ordered the case dismissed. Another illustration of the application of the rule of *Metcalf v. Watertown*¹⁴⁵ appeared in the often cited case of *Louisville & Nashville Railroad v. Mottley*.¹⁴⁶ In that case plaintiffs sought specific performance of a contract with defendant railroad in the federal court. Under the contract plaintiffs were entitled to a free pass. Subsequent to the execution of the contract, Congress outlawed free passes, and defendant, thereafter, refused to perform the contract. Plaintiffs alleged that defendants had ceased to perform the contract because of the Act of Congress. They further alleged that the legislation did not apply retroactively; and, if so, it violated the fifth amendment of the Constitution in that it deprived the plaintiffs of their property without due process of law. The Court raised the question of jurisdiction on its own motion and dismissed the case on the ground that the plaintiff could not invoke the jurisdiction of the federal courts by anticipating the defense.

In *Skelly Oil Co. v. Phillips Petroleum Co.*,¹⁴⁷ suit was begun under the Federal Declaratory Judgment Act in federal district court. The plaintiff sought a declaration that the contracts between it and the defendant were in full force and effect. Plaintiff alleged jurisdiction under the Act of 1875 on the ground that it would be necessary for the court to construe a federal law inasmuch as the defendant's right to terminate the contract was dependent upon whether a certificate of public convenience and necessity had issued in accordance with provisions of the Natural Gas Act. The Court held that this was not a case arising under a federal law because plaintiff was suing on a common law contract. The Natural Gas

language was used in the *Osborn* case to create jurisdiction. The removal cases, also involved in *Tennessee v. Union & Planters' Bank*, are discussed in the next section at pp. 24-36 *infra*.

¹⁴⁵ 128 U.S. 586 (1888).

¹⁴⁶ 211 U.S. 149 (1908) (Numerous cases applying the *Metcalf* rule are cited). The plaintiffs started over in a state court and lost on the merits in the United States Supreme Court. *Louisville & N.R.R. v. Mottley*, 219 U.S. 467 (1911). The ALI does not recommend changing the "Well-Pleaded Complaint" Rule to permit invoking original federal jurisdiction by anticipating a defense that defendant will raise, but it does recommend under section 1312 of the ALI proposals that either the plaintiff or the defendant be able to remove a case such as *Louisville & N. R.R. v. Mottley* because of the federal defense interposed in the state court proceeding. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 25, at 169 (1969).

¹⁴⁷ 339 U.S. 667 (1950). Compare declaratory judgment in patent cases. See p. 9 *supra*. See also *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 248 (1952).

Act was a matter of defense. Plaintiff in a suit for specific performance could not invoke federal jurisdiction by anticipating the defense, and since the declaratory judgment was a procedural device only, it could not be used to get around the rule which forbids the plaintiff to anticipate a federal defense. To have held otherwise would have permitted the declaratory judgment to be used to enlarge the jurisdiction of the federal courts. Thus the Court adhered to the rule of *Metcalf v. Watertown*¹⁴⁸ and did not permit the plaintiff to invoke federal jurisdiction by anticipating a federal defense in the complaint.

C. Removal on the Basis of a Federal Defense

In 1880 in *Railroad Company v. Mississippi*,¹⁴⁹ Mississippi sued in its state court seeking the removal of defendant's bridge across Pearl River located on the Mississippi-Louisiana boundary line and to require defendant to erect a drawbridge of specified dimensions. Plaintiff alleged that the stationary bridge was an obstruction to navigation and a public nuisance and that its erection and maintenance was in violation of defendant's charter. Defendant responded that it was authorized to erect the bridge in question by an act of Congress and that under this act Congress reserved authority to alter its authorization should this bridge become an obstruction to navigable waters. The Court held that it would be necessary for the lower court to construe an act of Congress; therefore, defendant's federal defense was a case "arising" under a federal law and removable under the Act of 1875.

In 1894 in *Tennessee v. Union & Planters' Bank*¹⁵⁰ the Court did not adhere to its holding in *Railroad Company v. Mississippi*¹⁵¹ and thus eliminated removal based on a federal defense. The Court relied on the language of the Acts of 1887-1888¹⁵² to reach this result. Congress in 1887-1888 restricted the application of the Act of 1875 in several ways: The jurisdictional amount was increased from over \$500 to over \$2,000; plaintiffs could no longer remove; and removal jurisdiction was restricted to those cases in which the federal courts would have "original" jurisdiction. The latter provision was interpreted by the Court to mean that

¹⁴⁸ 128 U.S. 586 (1888).

¹⁴⁹ 102 U.S. 135 (1880).

¹⁵⁰ 152 U.S. 454 (1894).

¹⁵¹ 102 U.S. 135 (1880).

¹⁵² Act of August 13, 1888, ch. 866, 25 Stat. 433; Act of March 3, 1887, ch. 373, 24 Stat. 552. The former Act corrected certain minor errors appearing in the Act of March 3, 1887.

the defendant could remove only when the plaintiff's complaint alleged a case "arising." The result was to eliminate removal based on a federal defense.

The legislative history of the Acts of 1887-1888 supports the Court's interpretation of the intent of Congress. The bill before Congress specifically provided:

Sec. 2 That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district *whenever it is made to appear from the application of such defendant or defendants that his or their defense depends in whole or in part upon a correct construction of some provision of the Constitution or law of the United States, or treaty made by their authority.* . . .¹⁵³

¹⁵³ 18 CONG. REC. 613 (1887) (emphasis added).

Mr. CULBERSON. Mr. Speaker, this bill has passed the House of Representatives in the last three Congresses, in substantially the same form as the present. I propose, however, to state briefly what will be the effect of the amendments which the bill proposes to make in the existing law.

The object of the bill is to diminish the jurisdiction of the circuit courts and the Supreme Court of the United States, to promote the convenience of the people, and to lessen the burden and expense of litigation. The methods employed by the bill are, first, to raise the minimum amount giving the circuit courts jurisdiction from \$500 to \$2,000. In the second place, we propose to take away from the circuit courts of the United States all jurisdiction of controversies between the assignees of promissory notes and the makers thereof, unless suit could have been maintained in such courts had no assignment been made. In the next place, the bill proposes to take away wholly from the circuit courts the jurisdiction now exercised by them over controversies in which one of the parties is a corporation organized under the laws of one State and doing business in another State. We propose to provide that the circuit courts shall have no jurisdiction over controversies of that sort; that whenever a corporation organized under the laws of one State shall carry on its business in another State, the corporation shall, for judicial purposes, be considered as a citizen of the State in which it is carrying on business.

These are the three methods by which the jurisdiction of the circuit courts of the United States, in respect to the subject-matter, is proposed to be diminished. There is another provision in the bill, in relation to the removal of causes from State to Federal courts. The provisions of the bill take away all right on the part of the plaintiff in a suit to remove his cause from a State to a Federal court after he has elected the forum in which to bring suit. The bill further provides that wherever the cause of action

These italicized words were deleted by Senate amendment without debate.¹⁵⁴ Although this legislative history does not appear in the record of *Tennessee v. Union & Planters' Bank*,¹⁵⁵ deletion of this proposal reveals that the Court was on target when it concluded that Congress meant to eliminate removal on the basis of a federal defense when it amended the Act of 1875 in 1887-1888 to allow removals from a state court to be made by defendants of suits "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section. . . ."

Although the rule precluding removal on the ground of a federal defense remains in effect, the American Law Institute recommends¹⁵⁶ legislation that would, with some important exceptions, permit removal on this basis.

D. Well Pledged Complaint Rule—Original and Removal Jurisdiction

When *Gully v. First National Bank in Meridian*¹⁵⁷ was decided in 1936, as previously indicated, removal on the basis of a federal defense was no longer permitted. Hence, removal in that case hinged on whether the federal court would have had original jurisdiction. Plaintiff tax collector sued for taxes imposed by the state on defendant bank's predecessor and alleged that defendant was under contract to pay. Since defendant and its predecessor were national banks, the state could not have levied the taxes without congressional authorization. Because Congress had authorized the tax, the defendant contended that there was a federal question involved and that it was entitled to remove the case to the federal court. Mr. Justice Cardozo, writing for the Court, denied removal on the ground

arises under the Constitution of the United States, or a law or treaty thereof, the defendant who is sued in a State court upon such a cause of action may remove the cause to a Federal court, provided he shall make it appear to the court in which the case is pending that his defense depends upon a proper construction of the Constitution of the United States, or some law or treaty thereof.

Id. 613-14.

¹⁵⁴ 18 CONG. REC. 2542 (1887).

¹⁵⁵ 152 U.S. 454 (1894).

¹⁵⁶ ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1312, at 25-27 (1969). Currently, removal based on a federal defense is permitted in several special acts. For example, transactions growing out of international or foreign banking, 12 U.S.C. § 632 (1964); federal reserve banks, 28 U.S.C. § 1349 (1964); federal officers, examined pp. 17-20 *supra*; and the Civil Rights Removal Statute, 28 U.S.C. § 1443(1) (1964), recently construed in *City of Greenwood v. Peacock*, 384 U.S. 808 (1966) and in *Georgia v. Rachel*, 384 U.S. 780 (1966).

¹⁵⁷ 299 U.S. 109 (1936).

that the tests to invoke federal jurisdiction under the Act of 1875 had not been met. He stated the rules as follows:

How and when a case arises "under the Constitution or laws of the United States" has been much considered in the books. Some tests are well established. To bring a case within the statute [*i.e.*, Act of 1875], a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto, . . . and the controversy must be disclosed on the face of the complaint, unaided by the answer or petition for removal. . . . Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. . . .¹⁵⁸

Obviously, these well-established tests were not met. A suit on a contract to establish liability to pay a state tax which Congress authorized does not present a federal question in the complaint. At most, according to the Court, a federal law was "lurking" in the background.

The narrow tests developed for the Act of 1875 serve to prevent the federal courts from being flooded with cases such as *Gully*. On the other hand, the Act of 1875 serves an important function as will be illustrated in the following sections.

E. Function of the Act of 1875

To invoke jurisdiction under the Act of 1875, it is necessary to hurdle the jurisdictional amount requirement imposed by Congress which was initially over \$500 increased to over \$2,000 in 1887; to over \$3,000 in 1887; and, in 1958, to the current figure of over \$10,000. If this requirement is met, the judicial tests of the "well pleaded complaint rule," summarized in the *Gully* case,¹⁵⁹ provide an additional hurdle. Unless both tests are met jurisdiction over federal questions is left *exclusively to the state courts* except in those instances where Congress has enacted a special statute with less exacting requirements. A notable example of a special statute is the Act of 1871—presently codified in 42 U.S.C. § 1983 and its

¹⁵⁸ *Id.* at 112-13.

¹⁵⁹ *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109 (1936).

jurisdictional companion 28 U.S.C. § 1343(3)—which does not require any jurisdictional amount in civil actions:

To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States, or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Notwithstanding the limitations on the Act of 1875, many civil actions qualify under it. Expanded federal constitutional rights coupled with a growing number of state and federal laws serve to increase the case load of the federal courts under the Act of 1875. The result has been further Congressional and judicial limitations. The function of the Act of 1875 and further limitations on it are taken up in the following sections:

(1) *State Action*

a. Impairment of Obligation of Contracts

In the early years many civil actions were brought under the Act of 1875 in which it was alleged that state law impaired the obligation of contracts in violation of article I, section 10, clause 1 of the Constitution which forbids any state to pass a "Law impairing the Obligation of Contracts."¹⁰⁰ Currently, this is not a fertile source of federal question jurisdiction, perhaps because states no longer pass laws which contravene this Constitutional provision.¹⁶¹

b. Public Utility Rate Cases

For approximately a quarter of a century, the Act of 1875 provided the jurisdictional basis for a large volume of litigation involving an attack on state rate orders on the ground that such rates violated the fourteenth amendment of the Constitution. In 1890, the Court declared¹⁶² that the reasonableness of rates was a matter for judicial review under the due process clause. In 1894, the Court held¹⁶³ that the eleventh amendment did not bar a suit against state officials who undertook to enforce rates

¹⁰⁰ *E.g.*, *Vicksburg Waterworks Co. v. Vicksburg*, 185 U.S. 65 (1902); *Pennoy v. McConaughy*, 140 U.S. 1 (1891).

¹⁶¹ A more recent case is *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952).

¹⁶² *Chicago, M. & St. P.R.R. v. Minnesota*, 134 U.S. 418 (1890).

¹⁶³ *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894).

alleged to violate the Constitution. In 1898, the Court upheld¹⁶⁴ the lower court which had issued an injunction against the enforcement of a state statute fixing rates for railroads on the ground that the statute violated the fourteenth amendment. In 1908, in the famous case of *Ex parte Young*,¹⁶⁵ the Court reiterated that federal courts had authority to enjoin state officials from enforcing a state rate statute which was found to violate the fourteenth amendment. Shortly after the decision in *Ex parte Young*,¹⁶⁶ the Court held that state administrative remedies must be exhausted before an injunction would be issued against state administrative action.¹⁶⁷

In *Siler v. Louisville & Nashville Railroad Co.*,¹⁶⁸ decided in 1909, the Court said the following about jurisdiction under the Act of 1875:

The Federal questions, as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.

State officials and representatives of the public were highly critical of judges of the lower federal courts for enjoining state rate orders.¹⁶⁹ In 1910 Senator Overman observed that "there are 150 cases of this kind now where one federal judge has tied the hands of state officers, the governor and the attorney-general. . . ."¹⁷⁰ Congress responded by requiring a three-judge court¹⁷¹ in an action for an interlocutory injunction to restrain the act of any officer of a state under a statute alleged to violate the Constitution. In 1934 Congress passed the Johnson Act¹⁷² which withdraws jurisdiction from the federal courts in cases involving a state rate order when such order does not interfere with interstate commerce; when the order is made after reasonable notice and hearing; and when a

¹⁶⁴ *Smyth v. Ames*, 169 U.S. 466 (1898).

¹⁶⁵ 209 U.S. 123 (1908).

¹⁶⁶ *Id.*

¹⁶⁷ *Prentiss v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908).

¹⁶⁸ 213 U.S. 175, 191 (1909).

¹⁶⁹ Lillienthal, *The Federal Courts and State Regulation of Public Utilities*, 43 HARV. L. REV. 379, 420-21 (1929).

¹⁷⁰ 45 CONG. REC. 7256 (1910).

¹⁷¹ Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557. This Act was subsequently expanded and is now codified at 28 U.S.C. § 2281 (1964).

¹⁷² Now 28 U.S.C. § 1342 (1964). Comment, *Limitation of Lower Federal Court Jurisdiction over Public Utility Rate Cases*, 44 YALE L.J. 119 (1934).

plain, speedy, and efficient remedy may be had in the issuing state's courts. Congress thus severely limited the function of the Act of 1875 in this area and rerouted most public utility rate cases back to the state court for initial determination of federal questions involved in them.

c. State Taxes

In 1907 the Court upheld¹⁷³ jurisdiction of the lower court to issue an injunction against enforcement of a state tax law on the ground that it violated the fourteenth amendment. The Court itself imposed restrictions on the exercise of jurisdiction under the Act of 1875 in these tax cases. Equity jurisdiction should not be exercised, according to the Court,¹⁷⁴ where there was an adequate remedy at law in the state courts. Further, the Court adopted¹⁷⁵ a strict test for jurisdictional amount by requiring that the amount of the tax would control rather than a more lenient test such as the right of the plaintiff to do business free of the tax. In 1937 Congress passed the Tax Injunction Act¹⁷⁶ which provides:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.

This statute does not preclude a declaratory judgment proceeding, but the Court, nevertheless, withholds¹⁷⁷ this type of relief where the state court provides an adequate remedy for the taxpayer to question the validity of the tax. Occasionally, the Court finds that a state remedy is not adequate. In such cases, the Tax Injunction Statute does not apply, and jurisdiction may be exercised under the Act of 1875 to grant an injunction¹⁷⁸ or issue a declaratory judgment¹⁷⁹ provided, of course, the jurisdictional amount¹⁸⁰ is present.

¹⁷³ *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907). Mr. Justice Holmes dissented: "So far as I know this is the first instance in which a Circuit Court has been authorized to take jurisdiction on the ground that the decision of a state tribunal [Board of Equalization] was contrary to the Fourteenth Amendment." *Id.* at 41.

¹⁷⁴ *Matthews v. Rodgers*, 284 U.S. 521 (1932).

¹⁷⁵ *Healy v. Ratta*, 292 U.S. 263 (1934).

¹⁷⁶ Now 28 U.S.C. § 1341 (1964).

¹⁷⁷ *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943).

¹⁷⁸ *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952).

¹⁷⁹ *Town of Hillsborough v. Cromwell*, 326 U.S. 620 (1946).

¹⁸⁰ *Alterman Transp. Lines v. Public Serv. Comm'n*, 259 F. Supp. 486 (M.D. Tenn. 1966), *aff'd*, 386 U.S. 262, *rehearing denied*, 386 U.S. 1014 (1967) (jurisdictional amount insufficient).

d. Other Illustrative Cases

Jurisdiction has been exercised under the Act of 1875 to contest the following: state legislation on the ground that it was an undue burden on interstate commerce,¹⁸¹ a zoning ordinance alleged to contravene the fourteenth amendment,¹⁸² a governor's orders alleged to be an invasion under color of state law of rights secured by the fourteenth amendment,¹⁸³ and a state statute¹⁸⁴ alleged to violate the privileges and immunities clause of the Constitution.

e. Abstention

A plaintiff seeking to attack the validity of a state statute on the ground that it violates the Constitution, laws, or treaties of the United States may have no difficulty in meeting the jurisdictional requirements of the Act of 1875. However, if there are questions of state law that may be dispositive of the case, he may be wiser in choosing to litigate in the state court rather than the federal court. If he chooses the federal court, he may be introduced to a judicially created rule stemming from *Railroad Commission v. Pullman Co.*¹⁸⁵ which requires the federal trial court to abstain¹⁸⁶ from exercising jurisdiction while the plaintiff goes to the state court to seek a resolution of uncertain state law. In *Reetz v. Bozanich*¹⁸⁷ plaintiffs attacked a statute of Alaska regulating fishing licenses alleging that it violated both the equal protection clause of the fourteenth amendment and also the constitution of Alaska. A three-judge district court did not think that this was a proper case for abstention even though the Alaska Court had not passed on the state constitutional issue. The trial court proceeded to find the statute unconstitutional and enjoined its enforcement. In proceeding to try the case on the merits, the trial court was of the opinion that the Alaska court would not uphold the statute and that delay inherent in abstention would result in the plaintiffs losing an opportunity to engage in their occupation of fishing during the forthcoming season. On appeal the Supreme Court reversed and held that the trial court should have stayed its hand while the plaintiffs went to the state

¹⁸¹ *McNeill v. Southern Ry.*, 202 U.S. 543 (1906).

¹⁸² *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

¹⁸³ *Sterling v. Constantin*, 287 U.S. 378 (1932).

¹⁸⁴ *Toomer v. Witsell*, 334 U.S. 385, *rehearing denied*, 335 U.S. 837 (1948).

¹⁸⁵ 312 U.S. 496 (1941).

¹⁸⁶ For an excellent discussion of "The Abstention Doctrines," see C. WRIGHT, *LAW OF FEDERAL COURTS* § 52 (2d ed. 1970).

¹⁸⁷ 397 U.S. 82 (1970).

courts for a resolution of their state constitutional questions. The consequence of the plaintiffs choosing the federal court rather than the state court probably means that, for some time, they will be litigating rather than fishing.

The Court is usually not reluctant to require district courts to deal with uncertain questions of state law when jurisdiction is based on diversity,¹⁸⁸ but it is unwilling for the trial courts to do so when jurisdiction is invoked under the Act of 1875. So long as this dubious distinction exists, a prudent plaintiff will choose a state court and thus avoid being sent to it via a federal court.

(2) *Federal Government Action*

The Civil Rights Act of 1871 applies only to *state* action. Congress has not enacted a comparable special statute providing for jurisdiction in the federal courts to contest the validity of federal government action. Thus the Act of 1875 must be relied upon for federal jurisdiction in this important class of cases. But the jurisdictional amount requirement in the Act of 1875 leads to the incongruous result that Congress has left exclusive jurisdiction in the state courts initially to adjudicate claims of deprivation of constitutional rights by the federal government where the amount involved does not exceed \$10,000. This jurisdictional amount obstacle can be hurdled in a case such as *Powell v. McCormack*¹⁸⁹ where back pay was sought in a suit alleging that Congress could not *exclude* from its ranks a duly elected member who met the age, citizenship, and resident requirements specified in the Constitution. Cases such as *Lamont v. Postmaster General*¹⁹⁰ might pose a serious jurisdictional amount problem. However, in that case the Court upheld the plaintiff's assertion that his first amendment rights were violated because federal law required him to request delivery of unsealed communist propaganda mail before he was entitled to receive it, and nothing was said about jurisdictional amount. In *Flast v. Cohen*¹⁹¹ the Court expressly lowered the barrier erected in *Frothingham v. Mellon*¹⁹² against "standing" of a

¹⁸⁸ *Meredith v. Winter Haven*, 320 U.S. 228 (1943). *But see* *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959) (state law unclear in an eminent domain case).

¹⁸⁹ 395 U.S. 486 (1969).

¹⁹⁰ 381 U.S. 301 (1965). *See also* *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970) (upholding validity of 39 U.S.C. § 4009 providing a procedure for an addressee to stop delivery of specified types of mail).

¹⁹¹ 392 U.S. 83 (1968).

¹⁹² 262 U.S. 447 (1923).

taxpayer to attack the constitutionality of an appropriation act of Congress, but no light was shed on how the plaintiffs could hurdle the jurisdictional amount obstacle. In *Oestereich v. Selective Service System Local Board No. 11*,¹⁹³ the Court rendered an opinion on the merits of the plaintiff's claim for a pre-induction judicial review. It concluded with the following statement:

We accordingly reverse the judgment and remand the case to the District Court where petitioner must have the opportunity to prove the facts alleged and also to demonstrate that he meets the jurisdictional requirements of 28 U.S.C. § 1331 [Act of 1875].¹⁹⁴

Lower federal courts¹⁹⁵ subsequently have found the required jurisdictional amount in pre-induction cases.

In *Giancana v. Johnson*¹⁹⁶ plaintiff sought to enjoin an F.B.I. agent from interfering with his civil rights. The court of appeals dismissed for lack of jurisdictional amount. The plaintiff should have tried the back door approach to the federal court. Had he started in the state court, the defendant, a federal officer, according to custom, would probably have removed under 28 U.S.C. § 1442. No jurisdictional amount is required in this special removal statute.

In 1958 when Congress raised the jurisdictional amount from over \$3,000 to over \$10,000 for both the Act of 1875 and diversity cases, the Senate Report stated:

The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies.¹⁹⁷

¹⁹³ 393 U.S. 233 (1968).

¹⁹⁴ *Id.* at 239.

¹⁹⁵ *E.g.*, *Walsh v. Local Board No. 10*, 305 F. Supp. 1274 (S.D.N.Y. 1969) (judicial notice of the pecuniary rewards of a college education); *Murray v. Vaughn*, 300 F. Supp. 688 (D.R.I. 1969) (loss of opportunity to teach music). Judge Medina said: "It is an unfortunate gap in the statutory jurisdiction of the federal courts that our ability to hear a suit of this nature depends on whether appellants can satisfactorily show injury in the amount of \$10,000 but the fact remains and on remand the District Court must determine this question." *Wolff v. Selective Serv. Local Board No. 16*, 372 F.2d 817, 826 (2d Cir. 1967) (footnote omitted).

¹⁹⁶ 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965). See Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385 (1964). Should a state court take the view that it had no jurisdiction to enjoin acts of a federal officer, the derivative jurisdiction doctrine would dictate no jurisdiction in the federal courts on removal.

¹⁹⁷ U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 3101 (1958).

This Senate Report focuses on property rights and does not take into account human rights frequently involved in litigation under the Act of 1875. There is no sound reason why the jurisdictional amount required in diversity cases should always be included in the Act of 1875. In order to provide a federal forum for alleged violations of constitutional rights by the federal government, the Court, in cases involving rights not readily susceptible of evaluation in monetary terms, must either be very lenient in finding the jurisdictional amount or overlook the requirement altogether.¹⁹⁸ Federal courts should have concurrent jurisdiction with state courts in all civil actions contesting the validity of federal government action. This will be accomplished if Congress accepts the recommendation¹⁹⁹ of the American Law Institute to eliminate the jurisdictional amount requirement in the Act of 1875.

(3) *State Created Rights*

Although a right of action may be state created, jurisdiction may exist under the Act of 1875 provided that federal law has "inserted itself" into the texture of state law.²⁰⁰ This situation is illustrated in *Smith v. Kansas City Title & Trust Co.*²⁰¹ in which a shareholder sought to enjoin his corporation from investing in farm loan bonds issued by Federal Land Banks on the ground that Congress did not have the authority to authorize the issuance of the bonds. The Court upheld jurisdiction under the Act of 1875 on the ground that the controversy between the shareholder and the corporation was over the validity of an act of Congress directly drawn in question and that the decision of the case depended upon the determination of this issue. In this unusual case federal law was in the forefront and not "lurking" in the background.

¹⁹⁸ In order to avoid the jurisdictional amount requirement in the Act of 1875, a lower court has resorted to 28 U.S.C. § 1361 which provides the federal courts with jurisdiction to issue the writ of mandamus. *Walker v. Blackwell*, 360 F.2d 66 (5th Cir. 1966).

¹⁹⁹ ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* § 1311, at 24-25 (1969). A recent case vividly illustrates the wisdom of the ALI proposal. In *Goldsmith v. Sutherland*, 426 F.2d 1398 (6th Cir. 1970), the plaintiff sought to enjoin an order excluding him from a military reservation on the ground that it was unconstitutional. The court of appeals held that the district court properly dismissed the action for a lack of jurisdiction because it did not appear to a legal certainty that the amount in controversy was present.

²⁰⁰ Mr. Justice Frankfurter in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 450 (1955). Mr. Justice Brennan dissenting in *Wheeldin v. Wheeler*, 373 U.S. 647, 659 (1963).

²⁰¹ 255 U.S. 180 (1921). Mr. Justice Holmes dissented on the ground that the cause of action was created by state law.

F. Conclusion on the Act of 1875

The Act of 1875 has been strictly construed except in the removal of federal charter cases and in finding jurisdictional amount in civil actions contesting the validity of federal government action. In rejecting the contention that federal admiralty law is a "law of the United States" within the meaning of the Act of 1875, Mr. Justice Frankfurter writing for the Court stated:

The Act of 1875 is broadly phrased, but it has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation. It is a statute, not a Constitution, we are expounding.

The considerations of history and policy which investigation has illuminated are powerfully reinforced by the deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes.²⁰²

Although logic supports the decision of the Court of Appeals for the Second Circuit in *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*²⁰³ that "federal common law" is a law of the United States within the meaning of the Act of 1875, history does not teach that the Supreme Court will approve. It is one thing for the Court to apply the federal common law to decide a dispute where jurisdiction has been specifically authorized by Congress,²⁰⁴ but it is quite a different matter to find "federal common law" and then to use it *as a basis to create* jurisdiction under the Act of 1875. The *Erie*²⁰⁵ Doctrine which declared that the decisions of state courts were "laws" within the meaning of the Rules of Decision Act²⁰⁶ logically should be negotiable in construing the word "laws" in the Act of 1875,²⁰⁷ but history and pragmatism will

²⁰² *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959).

²⁰³ 391 F.2d 486 (2d Cir. 1968).

²⁰⁴ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (Labor Management Relations Act of 1947, § 301, 29 U.S.C. § 185 (1964)); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (United States a party).

²⁰⁵ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

²⁰⁶ Now 28 U.S.C. § 1652 (1964).

²⁰⁷ ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 180 (1969) states: "[I]t seems probable that the Court would hold that the 'laws' referred to in the statute are not confined to Acts of Congress but include also such 'federal common law' as may exist outside of admiralty or maritime matters."

probably dictate otherwise. *Erie* did not enlarge federal jurisdiction. *Ivy* would.

The Act of 1875 serves a limited²⁰⁸ but useful function. It provides the jurisdictional basis for contesting certain state and federal government action which could not otherwise be litigated in the lower federal courts.

VII. CONCLUSION

In the *Federalist Papers* Alexander Hamilton wrote:

When . . . we consider the State governments and the National government, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems conclusive, that the State courts would have concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.²⁰⁹

From the beginning state courts have played a vital role in deciding federal questions.²¹⁰ The Act of 1875 did not take away state court jurisdiction. Rather, it permitted the federal courts to share some of it with the state courts. Today the state courts have exclusive jurisdiction to decide any federal question which cannot meet the jurisdictional requirements of the Act of 1875 unless, of course, Congress has by a special act conferred jurisdiction on the federal courts. Frequently special acts conferring jurisdiction on the federal courts to enforce specific federal rights also provide for concurrent jurisdiction in the state courts. Even when Congress decides to reserve jurisdiction exclusively to the federal courts, as in patent and copyright infringement cases, practicality has dictated that state courts may decide infringement "questions" as distinguished from "cases."²¹¹ Since state courts are courts of general jurisdiction, the tests for civil actions "arising" under the Act of 1875 do not apply.

²⁰⁸ In 1969 there were twenty-eight reported decisions in the federal district courts involving the Act of 1875. Jurisdiction was present in twenty-two of those cases. Of the fourteen cases decided in the courts of appeals, nine were dismissed for a lack of jurisdiction. In 1968 a total of 197,811 bankruptcy cases were filed. REPORT OF THE ADMINISTRATIVE OFFICE, UNITED STATES COURTS 88 (1968).

²⁰⁹ THE FEDERALIST No. 82, at 514 (B. Wright ed. 1961).

²¹⁰ Occasional efforts by a state court to prevent review of federal questions by the Supreme Court are thwarted. NAACP v. Alabama, 377 U.S. 288 (1964).

²¹¹ Conversely, even where federal jurisdiction exists solely because of a federal question, federal courts in the interest of "judicial economy" decide questions of state law. UMW v. Gibbs, 383 U.S. 715 (1966); 28 U.S.C. § 1338 (1964) (claim of unfair competition when joined with a substantial and related claim under the copyright, patent, or trademark laws).

Congress was wise to rely on the state courts to have an important role in the federal question jurisdiction family. It is unlikely that Congress will either curtail the federal question jurisdiction of state courts or significantly expand original or removal jurisdiction of the federal courts by amending the Act of 1875. Hopefully, however, Congress will eliminate the jurisdictional amount requirement in that Act. Also, special federal question jurisdiction to enforce federally-created rights should continue to grow. Congress will enact new laws creating new federal rights. Whether this jurisdiction is concurrent or exclusive it will result in an increase in the business of the federal courts.