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Federal Right Jurisdiction and the Declaratory Remedy

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FEDERAL RIGHT JURISDICTION AND THE DECLARATORY REMEDY

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"The forms of action we have buried, but they still rule us from their graves." F. W. Maitland[1]

"To be observant of these restrictions is not to indulge in formalism or sterile technicality." Mr. Justice Frankfurter[2]

Why should we have federal district courts? What should be their primary function?[3] These questions are fundamental to the formula-

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1. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 2 (Chaytor and Whittaker ed. 1948).

2. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673, 70 Sup. Ct. 876, 94 L. Ed. 1194 (1950).

3. For a consideration of what they actually are doing see REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 49 *et seq.* (1953); *The Supreme Court, 1952 Term,* 67 HARV. L. REV. 91 (1953).

There were 64,001 civil cases commenced in the United States district courts during fiscal year 1953. Of these 23,881 were cases in which the United States was a party, and 40,120 were private cases. Of the private cases, jurisdiction in 17,383 was based on diversity of citizenship, an increase of more than 14 per cent over the year before; in 8,982 jurisdiction was based upon a "federal question"; 3,223 were cases in admiralty; and 10,532 were cases of general local jurisdiction in the District of Columbia, Alaska, Canal Zone, Guam and Virgin Islands. Of the "federal question" cases, jurisdiction in almost all seems to depend upon one of the federal specialties—28 U.S.C. §§ 1333-1358—with personal injuries to seamen under the Jones Act leading at 2,463, personal injuries to railroad employees at 1,319, habeas corpus 549, patent 562, rent control 500, and banks and banking 1,369 being the leaders. There does not seem to be any separate breakdown for cases in which jurisdiction depends solely on 28 U.S.C. § 1331. The total number of cases classified as "all other" is 150. REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 148-49, Table C 2 (1953).

The *Harvard Law Review* survey at p. 170 shows that during the term the Supreme Court disposed of 475 cases which came from state courts. Of these, only 59 cases were decided on the merits, and 416 were disposed of on certiorari petition.

With this data compare (1) a statement by Chief Justice Taft on the function of the Supreme Court; and (2) a statement by Mr. Justice Frankfurter on the considerations which move the court in granting or refusing certiorari:

(1) "The function of the Supreme Court is conceived to be, not the remedying of a party litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest and which should be authoritatively declared by the final court." Taft, *The Jurisdiction of the Supreme Court under The Act of February 13, 1925,* 35 YALE L.J. 1, 2 (1925).

(2) "Petitions may have been denied because, even though serious constitutional questions were raised, it seemed to at least six members of the Court that the issue was either not ripe enough or too moribund for adjudication; that the question had better await the perspective of time or that time would soon bury the question or, for one reason or another, it was desirable to wait and see. . . . Divergent and contradictory reasons often operate as to the same petition and lead to a common vote of denial. The want of explanations for denials

tion of a rational basis for the distribution of judicial power between state courts and the trial courts of the federal government.

Our American federal system seeks as a constant objective an appropriate division of governmental power between a national unit, which deals with problems requiring uniform treatment, and state units, which have responsibility for problems depending more upon local conditions. Applying the principle to the federal district courts, it seems clear that their primary function should be to adjudicate *federal* substantive rights and duties. It is a paradox in American federalism that under existing rules for determining jurisdiction between the courts of the two units of government many of our most cherished federal rights under the Constitution and other federal laws cannot be adjudicated in the federal trial courts. State courts are regularly employed for the enforcement of federal substantive rights and duties having no "necessary connection" with state substantive law, while federal courts are employed in diversity cases for the enforcement of state substantive rights and duties having no "necessary connection" with federal substantive law.[4] Since federal and state courts maintain separate systems of procedure and separate remedial concepts, there is added to the burden of distinguishing between federal and state substantive rights, the problem of disentangling federal and state remedies and procedures.[5] There seems indeed to be a real need for general re-evaluation of the types of cases which federal district courts ought to determine, with appropriate recommendations to the Congress.

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of certiorari is in part due to the fact that a collective reason frequently could not be given." Mr. Justice Frankfurter in Darr v. Burford, 339 U.S. 200, 227, 70 Sup. Ct. 587, 94 L. Ed. 761 (1950). See also Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917-19, 70 Sup. Ct. 252, 94 L.Ed. 562 (1950); Agoston v. Pennsylvania, 340 U.S. 844, 71 Sup. Ct. 9, 95 L. Ed. 619 (1950).

4. See Hart, *The Relations between State and Federal Law*, 54 COL. L. REV. 489, 498 (1954). Consider (1) the present rule of general federal question jurisdiction as developed by Metcalf v. Watertown, 128 U.S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543 (1888); Tennessee v. Union and Planters' Bank, 152 U.S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511 (1894); Louisville & Nashville R.R. v. Mottley, 211 U. S. 149, 29 Sup. Ct. 42, 53 L. Ed. 126 (1908); (2) the rule that state courts can be compelled to take jurisdiction of newly created federal rights of action, Testa v. Katt, 330 U.S. 386, 67 Sup. Ct. 810, 91 L. Ed. 967 (1947); and (3) the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938) to be applied in the determination of non-federal issues in the federal courts. Guaranty Trust Co. v. York, 326 U.S. 99, 65 Sup. Ct. 1464, 89 L. Ed. 2079 (1945); Angel v. Bullington, 330 U.S. 183, 67 Sup. Ct. 657, 91 L. Ed. 832 (1947); Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 60 Sup. Ct. 201, 84 L. Ed. 196 (1939); Palmer v. Hoffman, 318 U.S. 109, 63 Sup. Ct. 477, 87 L. Ed. 645 (1943); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 69 Sup. Ct. 1233, 93 L. Ed. 1520 (1949); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 Sup. Ct. 1221, 93 L. Ed. 1528 (1949).

5. See Hart, *supra* note 4; Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711 (1950); Gavit, *States' Rights and Federal Procedure*, 25 IND. L. J. 1 (1949).

Considerable attention has been given in recent years to the federal question jurisdiction of the district courts.[6] This valuable research has stressed in the main the difference between the interpretation given by the Supreme Court to the words *"arising under this Constitution, the Laws of the United States and Treaties made"* in Article III, Section 2 of the Constitution, and the almost identical words in the Act of Congress of March 3, 1875,[7] and its subsequent amendments. There is apparent in these writings a very considerable disagreement both with respect to what the present rule *is* and what it *ought* to be. The principal emphasis of this paper will be to show that the present rule[8] of general federal question jurisdiction in the district courts depends for its application upon the uncertainties implicit in an analysis of modern fact situations in terms of common law and equity forms of action and pleading, rather than the adjudication of federal substantive rights and duties; to consider critically whether such a rule based upon the formalistic detail of remedies and pleading will tolerate a new twentieth century remedy—the declaratory judgment remedy—because of the latter's capacity for presenting the actual issues in the case at an earlier stage in the pleading; and to suggest possible avenues of reform.

I.

THE BACKGROUND OF THE PRESENT RULE

(a) *The Term "Federal Question" Jurisdiction:*

6. For historical background and interpretation of the statutory grant of jurisdiction see, Willard, *When Does a Case "Arise" under Federal Laws?* 45 AM. L. REV. 373 (1911); Forrester, *The Nature of a "Federal Question,"* 16 TULANE L. REV. 362 (1942); Chadbourn and Levin, *Original Jurisdiction of Federal Questions,* 90 U. OF PA. L. REV. 639 (1942); Forrester, *Federal Question Jurisdiction and Section 5,* 18 TULANE L. REV. 263 (1943); 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 COL. L. REV. 157 (1953). See also, Forrester, *The Jurisdiction of Federal Courts in Labor Disputes,* 13 LAW & CONTEMP. PROB. 114 (1948); and Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 LAW & CONTEMP. PROB. 216, 223-234 (1948). There have also been several excellent student notes.

7. C. 137 § 1, 18 STAT. 470; Act of Mar. 3, 1887, c. 373 § 1, 24 STAT. 552; Act of Aug. 13, 1888, c. 866, § 1, 25 STAT. 433; Act of Mar. 3, 1911, c. 231, § 24, 36 STAT. 1091, 28 U.S.C. § 41(1) (1947). This section appears in the 1948 revision of the Judicial Code as 28 U.S.C.A. § 1331 (1949).

8. The present rule is summarized in Gully v. First National Bank in Meridian, 299 U.S. 109, 112-13, 57 Sup. Ct. 96, 81 L. Ed. 70 (1936) as follows: "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto, . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. . . . 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."

The phrase *federal question jurisdiction* as applied to trial courts is ambiguous. When applied to the appellate review jurisdiction of the United States Supreme Court, it seems quite clear because the case has been tried and the record made up, so that the only basis for such a review is to decide *questions* of law raised in the record. But jurisdiction in the trial court, unlike appellate jurisdiction, is necessarily jurisdiction to decide whole cases, not merely questions in cases. Such jurisdiction requires power to determine both issues of law and issues of fact.

In *Cohens v. Virginia*,[9] the Supreme Court established its jurisdiction under the "arising under" clause of the Constitution to exercise appellate review over questions of federal law appearing in the record of a case tried and decided by a Virginia state court. Chief Justice Marshall said:

> "A case . . . 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."[10]

It is clear that the only issues at that stage of the proceeding were issues of law. In the *Osborn*[11] case the Court held that Congress had the power to grant jurisdiction to federal trial courts over whole cases in which a federal law was only an "ingredient," even though only issues of fact concerning non-federal rights were involved. But in the course of the opinion Chief Justice Marshall repeated in substance the words set forth above. He said:

> "If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, . . . then all the other questions must be decided as incidental to this, which gives that jurisdiction."[12]

In 1877 when the Court in the *Gold-Washing*[13] case was called upon for the first time to consider the new statutory grant to the trial courts of jurisdiction generally to determine cases "arising under" federal laws, the language of Marshall construing the Constitution was repeated:

> "In the language of Chief Justice Marshall, a case 'may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either' (*Cohens* v. *Vir-*

9. 6 Wheat. 264, 5 L. Ed. 257 (U.S. 1821).
10. *Id.* at 379.
11. Osborn v. Bank of the United States, 9 Wheat. 738, 6 L. Ed. 204 (U.S. 1824).
12. *Id.* at 822.
13. Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 24 L. Ed. 656 (1877).

> *ginia,* . . .); or when 'the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, or sustained by the opposite construction' (*Osborne* [sic] v. *Bank.* . . .).[14]

Thus language descriptive only of an issue of *law* in a case involving only appellate review was transplanted as an element in the statutory grant of trial court jurisdiction. It has been repeated year after year to the present day and fits about as well as the traditional square peg in a round hole. Clearly it is not a constitutional limitation, else Marshall in the *Osborn* case would be overruled and the dissent of Mr. Justice Johnson adopted, and many acts of Congress granting jurisdiction in cases depending wholly on fact issues in such federal specialties as bankruptcy, patents, taxes and labor would be unconstitutional.[15] Since it is also clear that the courts pay no attention to it in the federal specialties,[16] if it means anything at all, it can only be that in cases where jurisdiction is based on the general federal right section—28 U.S.C.A. § 1331—the district courts do not have jurisdiction unless there is an issue of *federal law* raised in the case; whereas if jurisdiction is based on one of the federal specialty sections—*e.g.* 28 U.S.C.A. §§ 1333-1358—it exists if there is either an issue of fact or an issue of law.[17]

While it is believed that this distinction between the sections of the statute using substantially the same words is neither desirable nor rational, a search of the cases will compel the conclusion that it is a point of considerable uncertainty and difference of opinion in the court decisions[18] as well as among commentators.[19] Certainly

14. *Id.* at 201.

15. See *e.g.*, 28 U.S.C.A. §§ 1334-1359 (1950). Litigation concerning the Employers Liability Act, the Jones Act, patents, civil rights, and taxes frequently depend solely on issues of fact.

16. See McGoon v. Northern Pac. Ry., 204 Fed. 998 (D.N.Dak. 1913), cited with approval many times by the Supreme Court.

17. *See* Jordine v. Walling, 185 F.2d 662, 668 (3d Cir. 1950), where Judge Maris says: "For cases arising under the Constitution within the meaning of Article III, Section 2, and of Section 1331 which implements it, are only such cases as really and substantially involve a controversy as to the effect or construction of the Constitution upon the determination of which the result depends." *Cf.* Doucette v. Vincent, 194 F.2d 834, 845 (1st Cir. 1952), where Chief Judge Magruder says: "Furthermore, it cannot be that the jurisdiction of a district court under § 1331 depends upon whether the case develops into a controversy on an issue of law as to the construction of the Constitution or a law of the United States. When a complaint is filed it cannot be known whether the defendant is going to raise any such issue; he may concede that a cause of action is well pleaded, and merely raise issues of fact by denial of the allegations of the complaint."

18. *Cf. Jordine v. Walling* and *Doucette v. Vincent supra* note 17. See also Shoshone Mining Co. v. Rutter, 177 U.S. 505, 509, 20 Sup. Ct. 726, 44 L. Ed. 864 (1900) where the Court said: "Inasmuch, therefore, as the 'adverse suit' to determine the right of possession may not involve any question as to the construction or effect of the Constitution or laws of the United States, but may present simply *a question of fact* . . . it would seem to follow that it is not one which necessarily arises under the Constitution and laws of the United States." [Italics supplied] *Cf. McGoon v. Northern Pac. Ry., supra* note 16,

the power of the district courts to act in the area defined by statute ought to extend to issues of fact as well as to issues of law. Because the phrase "federal question jurisdiction" implies only a question of law as is true in appellate review jurisdiction, it is believed that a phrase more descriptive of the power of the district courts to act in this area would be the phrase *federal right* jurisdiction.

(b) *The Constitution and the Statute:*

The scope of the judicial power of the United States under the Constitution in cases "arising under" federal law as authorized in Article III, Section 2, was given a very broad interpretation in the *Osborn*[20] case. "This clause enables the judicial department to receive jurisdiction to the full extent of the constitution. . . ."[21] When a federal law forms an ingredient, Congress may give the trial courts jurisdiction, although other questions of fact or of law may be involved in it. Indeed, there need be no issue either of fact or law in regard to the federal ingredient. Thus it was held that the mere fact of the federal incorporation of the Bank of the United States was a sufficient federal ingredient to make any case in which it was a party—even though the only issue might be one of tort, contract, property or anything else—a case "arising under" federal law within the judicial power of the United States. There was thus established the basic principle discussed in the conventions on the Constitution that "if there were any political axiom under the sun, it must be, that the judicial power ought to be co-extensive with the legislative. . . ."[22] Pursuant to the principle, Congress has granted special juris-

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a federal specialty case which has been cited approvingly many times by the Supreme Court in cases where jurisdiction was based on the general statute, § 1331. "It cannot be that the jurisdiction of a suit originally brought in the District Court, or removed thereto, on the ground that it arises under the federal Constitution or law, must depend upon whether in the actual trial of the case a controversy will arise as to the effect or construction of the federal Constitution or law. . . . But when the complaint asserts a right created by federal law, it presents a suit which *may properly* turn upon a construction of that law; and such a suit 'arises out of' the law for purposes of federal jurisdiction, notwithstanding the defendant may raise *only issues of fact* [italics supplied] by his answer." *Id.* at 1001, 1005. See also, Note, 12 A.L.R. 2d 5, 28 (1950) and cases cited in n. 20 (1950).

19. Compare HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 763 (1953): "The problem of jurisdiction when the controversy in such a case relates solely to questions of fact has bemused some commentators but few courts," citing only the *McGoon case, supra* note 16; and Mishkin, *The Federal "Question" in the District Courts,* 53 COL. L. REV. 157, 170 (1953) concluding as "the only possible inference" that "the demand for a 'genuine controversy' about federal law is not" required; with Chadbourn and Levin, *Original Jurisdiction of Federal Questions,* 90 U. OF PA. L. REV. 639 (1942), and Note, *Proposed Revision of Federal Question Jurisdiction,* 40 ILL. L. REV. 387 (1945).

20. Osborn v. Bank of the United States, 9 Wheat. 738, 6 L. Ed. 204 (U.S. 1824).

21. *Id.* at 819.

22. 4 ELLIOTT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 158 (2d ed. 1836); and see 3 *Id.* at 532.

diction to the district courts in many types of cases in which the actual issues are of such common law types as negligence and other torts generally, contracts, and property,[23] in which the federal ingredient is not in issue and indeed is quite remote.

When, however, the first statute that granted jurisdiction generally to the federal trial courts in cases "arising under" federal laws—the Act of 1875[24]—was brought before the Supreme Court in the *Gold-Washing*[25] case, the narrow interpretation of Mr. Justice Johnson's dissent on the constitutional construction in the *Osborn* case was adopted as a proper interpretation of the statute. In order to be within the statutory grant of jurisdiction, the case must be capable of being decided on federal issues,[26] and indeed, the interpretation of the statute may have been even narrower than Justice Johnson's view insofar as the Court may be considered to have held that trial court jurisdiction exists only if there is a substantial issue of *law*.[27] This narrow interpretation of the statute continues to the present day.[28] Thus it was established at the outset that under the statute

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In his dissent Mr. Justice Johnson thought that the scope of the judicial power of the United States under the Constitution should be limited to cases in which one of the issues litigated was a federal issue.

23. Contract and tort rights and duties in labor relations are the subjects of Sections 301 and 303 of the Taft-Hartley Act, 61 STAT. 136 (1947), 29 U.S.C.A. § 141 *et seq.* (Supp. 1953); issues of negligence are the most frequent in actions under the Federal Employers' Liability Act, 45 U.S.C.A. § 56 (1943), and the Jones Act, 46 U.S.C.A. § 688 (1944); issues of property and fraud are frequently involved in administration of the Bankruptcy Act, particularly plenary actions between the trustee and adverse claimants. See §§ 2a (6), (7), and § 23 of the Act, 11 U.S.C.A. §§ 11a (6), (7), and § 46 (Supp. 1953). See also 28 U.S.C.A. §§ 1333-1358 (1949) for other instances of special federal question jurisdiction.

24. See note 7 *supra*. The Federalist statute of Feb. 13, 1801, § 11, 2 STAT. 89, 92 is excepted. It was repealed by Act of Mar. 8, 1802, 2 STAT. 132.

25. Gold-Washing and Water Co. v. Keyes, 96 U.S. 199, 24 L. Ed. 656 (1877).

26. "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." *Id.* at 203.

27. "Before, therefore, a circuit court can be required to retain a cause under the 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." *Id.* at 203-04.

While Mr. Justice Johnson is not explicit about questions of fact as well as questions of law, his words were: "[T]hey contended, that until a question involving the construction or administration of the laws of the United States did actually arise, the *casus federis* was not presented. . . . And this doctrine has my hearty concurrence in its general application." Osborn v. Bank of the United States, 9 Wheat. 738, 885, 6 L. Ed. 204 (U.S. 1824).

28. Gully v. First National Bank in Meridian, 299 U.S. 109, 57 Sup. Ct. 96, 81 L. Ed. 70 (1936); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 Sup. Ct. 876, 94 L. Ed. 1194 (1950); Doucette v. Vincent, 194 F.2d 834 (1st Cir. 1952).

The proof submitted by Dean Forrester that Congress intended in the Act of 1875 to grant to the trial courts the full scope of the jurisdiction authorized by the Constitution seems direct and persuasive. See 16 TULANE L. REV. 362,

the basic test of jurisdiction was whether or not a *federal substantive right* is actually an *issue* in the case.[29] Jurisdiction was not limited to cases where the federal right could be made to appear in the plaintiff's complaint. The only test was whether there was a federal issue which was determinative of the case.

Even the often criticized *Gold-Washing* case held that if it appeared from "the record, by a statement of facts"[30]—not just the plaintiff's complaint—that the suit really involved a controversy between the parties "as to a right which depends"[31] on federal law, there would be jurisdiction.

In *Tennessee v. Davis* the Court said:

> "Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or *defence* of the party, in whole or in part, by whom they are asserted." [Italics supplied][32]

In *Albright v. Teas* the Court said:

> "It is clear, *from an inspection of the bill and answers,* that the case is founded. . . ." [Italics supplied][33]

In *Starin v. New York* the Court said:

> "The character of a case is determined by the questions involved. . . . The questions in this case, *as shown by the pleadings,* are. . . ." [Italics supplied][34]

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375 *et seq.* (1942). Also see, In re Hohorst, 150 U.S. 653, 659, 14 Sup. Ct. 221, 37 L. Ed. 1211 (1893). But Professors Hart and Wechsler ask whether the practically synonymous language in the Constitution and the statute plus the proof of Congressional intent offered by Dean Forrester are nevertheless "sufficient justification for disregarding the manifest differences in the functions of the provisions?" HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 750 (1953). No doubt, the effect of such a broad grant of statutory jurisdiction would have overwhelmed the dockets of the federal trial courts with cases turning wholly upon state law issues, so long as there was a federal "ingredient" however remote. But if Congress intended what Senator Carpenter said it did, the Supreme Court's decision in the *Gold-Washing* case would seem to be a usurpation of the admitted power of Congress to control the jurisdiction of the federal courts.

29. Gold-Washing and Water Co. v. Keyes, 96 U.S. 199, 24 L. Ed. 656 (1877); Tennessee v. Davis, 100 U.S. 257, 264, 25 L. Ed. 648 (1879); Feibelman v. Packard, 109 U.S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984 (1883); Starin v. New York, 115 U.S. 248, 6 Sup Ct. 28, 29 L. Ed. 388 (1885). See also Swafford v. Templeton, 185 U.S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005 (1902); The Fair v. Kohler Die and Specialty Co., 228 U.S. 22, 33 Sup. Ct. 410, 57 L. Ed. 716 (1913); Bell v. Hood, 327 U.S. 678, 66 Sup. Ct. 773, 90 L. Ed. 939 (1946).

30. Gold-Washing and Water Co. v. Keyes, 96 U.S. 199, 203, 24 L. Ed. 656 (1877).

31. *Ibid.*

32. 100 U.S. 257, 264, 25 L. Ed. 648 (1879).

33. 106 U.S. 613, 616, 1 Sup. Ct. 550, 27 L. Ed. 295 (1882).

34. 115 U.S. 248, 257, 6 Sup. Ct. 28, 29 L. Ed. 388 (1885).

In *Feibelman v. Packard* the Court said:

> "for if we look at the nature of the plaintiff's cause of action *and the grounds of the defence* . . . it is apparent that the suit arose under a law of the United States." [Italics supplied][35]

In *Robinson v. Anderson* the Court said:

> "The Circuit Court cannot be required to keep jurisdiction of a suit . . . if, *when the pleadings are all in,* it appears that these averments are immaterial in the determination of the matter really in dispute. . . ." [Italics supplied][36]

Thus there was established a parallel in jurisdiction between the federal trial courts and the Supreme Court's exercise of appellate review in state court cases "arising under" the federal law.[37] In neither case would jurisdiction exist under the respective statutes of Congress unless in fact there was a federal substantive right actually in issue in the case, and the outcome of the whole case would be controlled by the decision on this issue.[38] The essential difference in the function of the Supreme Court and the trial courts is of course basic: the Supreme Court would decide only *questions* of federal law upon which the entire case depends; while the trial courts would adjudicate *whole cases.* Indeed, it has been suggested that the Act of 1875, passed some two months after the decision in *Murdock v. City of Memphis,*[39] was a reaction to the Supreme Court's refusal in that case to decide all of the issues—state and federal—when there exists a federal issue sufficient for appellate review of the case.[40] It was feared that federal questions might be buried in state court records.[41] Therefore, it is said that the Act of March 3, 1875,[42] granting jurisdiction over federal issues generally to the federal trial courts, would enable them to decide whole cases, and the Supreme Court would thus be enabled to review matters which the *Murdock*

35. 109 U.S. 421, 423, 3 Sup. Ct. 289, 27 L. Ed. 984 (1883).
36. 121 U.S. 522, 524, 7 Sup. Ct. 1011, 30 L. Ed. 1021 (1887).
37. The modern version of the famous Section 25 of the Judiciary Act of 1789 is 28 U.S.C.A. § 1257 (1949). The modern version of the Act of 1875 which granted jurisdiction to federal trial courts in cases arising under federal laws generally is 28 U.S.C.A. § 1331 (1949). See note 7 *supra.*
38. With respect to the limitations on appellate review by the Supreme Court see Murdock v. City of Memphis, 87 U.S. 590, 22 L. Ed. 429 (1874); Herb v. Pitcairn, 324 U.S. 117, 65 Sup. Ct. 459, 89 L. Ed. 789 (1945). See, generally, ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §§ 89-112 (Wolfson and Kurland ed. 1951); Weisberg, *Supreme Court Review of State Court Decisions Involving Multiple Questions,* 95 U. OF PA. L. REV. 764 (1947); Note, *Supreme Court Disposition of State Decisions Involving Non-Federal Questions,* 49 YALE L.J. 1463 (1940).
39. 20 Wall. 590, 22 L. Ed. 429 (U.S. 1875).
40. See Weisberg, *supra* note 38 at 766. It was feared that federal questions might be buried deep in state court records. *Id.* at 765.
41. See Murdock v. City of Memphis, 87 U.S. 590, 605, 22 L. Ed. 429 (1874).
42. Note 7 *supra.*

case had eliminated on appellate review of state court cases.[43] In either event the basis of federal court jurisdiction was the same—(1) there must be a federal substantive right in issue in the case; (2) the outcome of the case must be controlled by it; and (3) the court will look to the entire record to find it.

It is the position of this paper that this was a rational and sensible basis for determining the jurisdiction of the federal trial courts, and that it afforded adequate protection against the possibility that the dockets of federal courts might be turned into "a vast current of litigation indubitably arising under State law."[44] Instead, with appropriate regard for the functional differences between trial and appellate courts, both the district courts and the Supreme Court would have been available to perform their primary function—the vindication of federal rights.

II.

THE PRESENT RULE AND FORMS OF ACTION

The federal right test of trial court jurisdiction discussed above was muddled considerably by three later cases beginning in 1888 with *Metcalf v. Watertown;*[45] *Tennessee v. Union and Planters' Bank*[46] in 1894; and *Louisville and Nashville R.R. v. Mottley*[47] in 1908. In these three cases the Court took upon itself, without any real proof of Congressional approval, the function of reducing the jurisdiction of the federal trial courts so that it was much narrower than the parallel scope of appellate jurisdiction exercised by the Supreme Court over state decisions.

In *Metcalf v. Watertown,*[48] the plaintiff brought suit in the federal circuit court as an assignee to recover on a judgment of a federal court. The defendant City answered setting up the Wisconsin ten-year statute of limitations. Since the Wisconsin statute prescribed a limitations period of ten years for actions on judgments of courts of other states and courts of the United States, while a twenty-year period of limitations was allowed for actions on judgments of Wisconsin courts, the plaintiff contended that the state statute violated the federal

43. Weisberg, *supra* note 38. Except for the Act of Feb. 13, 1801, 2 STAT. 89, 92, passed by the Federalists, which was repealed by the Act of March 8, 1802, 2 STAT. 132, Congress did not confer upon the trial courts jurisdiction over federal issues generally until 1875. Even then a mimimum jurisdictional amount was required. However Section 25 of the Judiciary Act of 1789, 1 STAT. 73, gave the Supreme Court the power of appellate review over federal questions in cases decided by state courts when the claim of federal right was denied.

44. Mr. Justice Frankfurter in Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673, 70 Sup. Ct. 876, 94 L. Ed. 1194 (1950).

45. 128 U.S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543 (1888).

46. 152 U.S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511 (1894).

47. 211 U.S. 149, 29 Sup. Ct. 42, 53 L. Ed. 126 (1908).

48. Note 45 *supra.*

Constitution. The case "was argued entirely" below on this federal issue. The Supreme Court held that it did not have to decide the federal issue at this time because the lower court was without jurisdiction. The Court drew a distinction between cases filed originally in the federal trial courts and cases removed there from state tribunals. Jurisdiction must appear at the outset when it is invoked in either instance. In the former, it must appear "from the declaration or the bill of the party suing," whereas in removal cases the federal substantive right could appear in the record for the first time in the answer, plea, or petition and affidavit of removal. In an action filed originally, if the plaintiff's initial pleading did not show a federal substantive right, the court could not wait to see whether such rights were actually in issue in the case under a general allegation, as in diversity of citizenship cases; the case would have to be dismissed because under the rules of common law pleading the federal issue would not be presented until the plaintiff's reply in avoidance of the defendant's answer setting up the Wisconsin ten-year statute of limitation as a defense.

In *Tennessee v. Union and Planters' Bank*,[49] the State asserted a tax on the shares of stock of the Bank. The Bank contended that since its corporate charter prescribed an annual capital stock tax "in lieu of all other taxes" the tax now asserted violated the impairment of contract clause of the federal Constitution. Thus the only issue was a federal issue. Actually, there were three cases, two of which were filed by the State against Union and Planters' Bank and Bank of Commerce in the federal circuit court, and the third filed by the State against Bank of Commerce in the state court, and removed by the Bank to the federal court. In the cases filed originally in the federal court the State's action was a bill in equity setting forth the tax asserted and the Bank's contention of federal immunity under the Constitution, and praying for an order deciding the issue. In the removed case the Bank's claim of federal immunity appeared in the petition for removal. In this case the Court was also confronted with a revision of the Act of 1875, passed in 1887,[50] which was corrected by the Act of August 13, 1888.[51] In the revision Congress pared down federal trial court jurisdiction by raising the jurisdictional amount from $500 to $2,000, eliminating removal by plaintiffs, and making orders of remand to the state courts non-appealable. Prior to this time Congress had begun the process of reducing jurisdiction based solely on federal incorporation.[52]

The majority opinion disposes of the two cases filed originally in

49. Note 46 *supra*.
50. 24 STAT. 552 (1887).
51. 25 STAT. 433 (1888).
52. Act of July 12, 1882, 22 STAT. 163.

the federal court on the authority of the *Metcalf* case. Despite the fact that the only issue in the case was a federal issue of rights under the Constitution, the Court found it unnecessary to decide them. The statement of the federal right and the federal issue which was alleged in the plaintiff's bill was held to be anticipatory pleading. "In each of the three cases now before this court, the only right claimed by the plaintiffs is under the law of Tennessee."[53] In the third case, which was removed from the state tribunal, the Court found that the distinction made in *Metcalf* was no longer valid. A federal substantive right asserted as a *defense* could not be vindicated in a federal trial court by removal; only those federal substantive rights which belonged to the plaintiff could be presented to the federal trial courts; and then only if they were *essential* allegations of the plaintiff's initial pleading, measured in terms of common law and equity forms of action. Authority for this discrimination against the federal rights of defendants was based on Section 2 of the Act of 1887 which provided that those civil suits "arising under" federal laws "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section" may be removed. The Court argued that since the *Metcalf* case had construed the preceding section under the 1875 Act to grant jurisdiction in original actions only when the plaintiff's initial pleading alleged a federal right, the quoted words above in the 1887 Act limited removal jurisdiction in the same way. Mr. Justice Harlan, who wrote the opinion in *Metcalf*, dissented in regard to the removed case, arguing that the words quoted above referred solely to the increased jurisdictional amount required in the Act of 1887. He forcefully asserted that the majority opinion discriminates unfairly against the defendant whose defense "is grounded entirely" upon federal law.

Suppose, instead of being so accommodating, the state tax collector had seized or threatened to seize the property of the bank in each instance, or placed a cloud on its title? If the bank had filed the suit in the federal court to enjoin the state tax collector from invading its alleged federal immunity from the tax, there is no doubt that there would be jurisdiction under the new test laid down by the *Metcalf* and the *Union and Planters' Bank* cases.[54]

Louisville and Nashville R.R. v. Mottley[55] was a suit by a husband and wife filed in the federal trial court to compel the specific performance of a contract in which the railroad agreed for a valid consideration to issue free passes during the lives of the plaintiffs. It was

53. 152 U.S. 454, 464, 14 Sup. Ct. 654, 38 L. Ed. 511 (1894).
54. Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 41 Sup. Ct. 243, 65 L. Ed. 577 (1921); Bell v. Hood, 327 U.S. 678, 66 Sup. Ct. 773, 90 L. Ed. 939 (1946).
55. 211 U.S. 149, 29 Sup. Ct. 42, 53 L. Ed. 126 (1908).

alleged that the Company had issued the passes until 1907, and then refused to do so because of an act of Congress in 1906 which prohibited "free passes." The plaintiffs' bill alleged that the Act of Congress did not apply to plaintiffs' contract for passes, and if it did, it violated the Fifth Amendment. The lower court took jurisdiction and decided for the plaintiffs. While neither party questioned jurisdiction, and the only issue involved was the federal issue, the Supreme Court of its own motion reversed and directed dismissal:

> "It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. *Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution.*" [Italics supplied][56]

Thus the Court abandoned the parallel in jurisdiction between the federal trial courts and Supreme Court review of state court decisions on federal right issues. Instead the jurisdiction of the district courts is placed upon the narrower esoteric uncertainties implicit in the forms of action and pleading. It is no longer sufficient that the outcome of the entire case depends upon the adjudication of an issue concerning a federally created substantive right. The more important test now is whether the assertion of the federal right is an essential allegation of the plaintiff's initial pleading when measured by the forms of remedies. This was the technique used by the 1888-94 Supreme Court to restrict narrowly the general federal right jurisdiction of the federal trial courts created by Congress in 1875. No doubt it was felt that many federal right cases would thus get lost in the state courts and that this would balance to some extent the large influx of non-federal right litigation in the federal courts, which the Supreme Court itself had gone far to assure.[57]

Equitable remedies stand a better chance of establishing jurisdiction than do common-law forms of action,[58] because the pleading forms in equity were inherently verbose. But alas, there are distinctions drawn between even equitable remedies. The essential allegations of a suit to remove a cloud on the plaintiff's title are considered sufficiently broad to include the federal substantive right involved.[59] In an action to quiet title, however, "it is not necessary for the plaintiff to do more than allege his own title and that the defendant claims

56. *Id.* at 152.
57. See note 67 *infra.*
58. Taylor v. Anderson, 234 U.S. 74, 34 Sup. Ct. 724, 58 L. Ed. 1218 (1914); Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 41 Sup. Ct. 243, 65 L. Ed. 577 (1921).
59. Hopkins v. Walker, 244 U.S. 486, 37 Sup. Ct. 711, 61 L. Ed. 1270 (1917).

adversely to him;" therefore notwithstanding the fact that the plaintiff alleged a federal substantive right with the good faith required in *Bell v. Hood*[60] and *The Fair v. Kohler Die & Specialty Co.*,[61] it will be regarded as "immaterial" when measured by the pleading rules for an action to quiet title.[62]

In *White v. Sparkill Realty Corp.*[63] the plaintiff, out of possession, brought a suit in equity to enjoin the defendants from continuing in possession of his land, which they as members of the New York Board of Commissioners had taken for a state park pursuant to certain state statutes. Plaintiff asserted that the acts of the board and state officers, and the statutes under which they proceeded were invalid under the Fourteenth Amendment and other provisions of the federal Constitution. First the Court analyzed the plaintiff's complaint in terms of remedies and decided that since plaintiff was out of possession, the proper remedy was ejectment; and when only the essential allegations of an action in ejectment are considered, plaintiff's assertion of a federal substantive right under the Constitution is anticipatory. There was no regard at all for the fact that the only real issue in the case was over a federal substantive right. While the complaint was well pleaded as a suit in equity and as such presented the federal right involved, when measured in terms of a declaration in ejectment, the allegation of the federal right was anticipatory of that which is set forth in a reply to the defendant's answer.

In *Campbell v. Chase Nat. Bank*[64] plaintiff had delivered gold bullion to the defendant bank for safe-keeping. The President of the United States had issued an executive order pursuant to an act of Congress which prohibited the purchase or hoarding of gold. The bank notified plaintiff that pursuant to the executive order, it would surrender the bullion to the Government. The plaintiff demanded delivery of the gold to him, which was refused, whereupon he sued the bank in the federal court to enjoin its surrender to the Government. Plaintiff contended that he was entitled to equity because with whatever money damages he might receive at law the alleged unconstitutional statute and executive order would prevent him from the purchase of gold bullion. Upon analysis of the complaint in terms of trover and detinue the court concluded that the plaintiff's "ownership with right of possession is not dependent upon the federal law or Constitution," and that the plaintiff's complaint was guilty of anticipating a federal question. The federal right could not be asserted

60. 327 U.S. 678, 66 Sup. Ct. 773, 90 L. Ed. 939 (1946).
61. 228 U.S. 22, 33 Sup. Ct. 410, 57 L. Ed. 716 (1913).
62. Devine v. Los Angeles, 202 U.S. 313, 26 Sup. Ct. 652, 50 L. Ed. 1046 (1906); Marshall v. Desert Properties Co., 103 F.2d 551 (9th Cir.), *cert. denied* 308 U.S. 563 (1939).
63. 280 U.S. 500, 50 Sup. Ct. 186, 74 L. Ed. 578 (1930).
64. 71 F.2d 669 (2d Cir. 1934).

until the reply to the defendant's answer. Therefore there was no jurisdiction. The court reached this result despite the fact that the federal substantive right alleged was "essential" for the plaintiff to show a right to equity.[65]

Thus the basic test established by the early cases between 1875 and 1888—that there must be a federal substantive right actually in issue upon which the decision of the whole case depends—has had superimposed upon it two further restrictions: (1) only substantive federal rights of the *plaintiff* will be considered; and (2) even the plaintiff's federal substantive rights are not to be considered unless they can be set forth as essential allegations of his initial pleading, which is to be analyzed in terms of common law and early equity forms of action. There is a third restriction discussed in the first section of this paper, as to whether the issue can be only an issue of law, or either an issue of law or fact. Thus the present rule is summarized by Mr. Justice Cardozo in *Gully v. First National Bank in Meridian:*

(1) "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."

(2) "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."

(3) "A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto."

(4) "and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal."

(5) "Indeed, the complaint itself will not avail as a basis of jurisdiction insofar as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense."[66]

The results in these cases seem to be indefensible upon any rational basis.[67] In each case the whole controversy could have been determined by a decision on the federal substantive right which was

65. For other cases see Devine v. Los Angeles, 202 U.S. 313, 26 Sup. Ct. 652, 50 L. Ed. 104 (1906); Boston and Montana Consol. Copper and Silver Mining Co. v. Montana Ore Purchasing Co., 188 U.S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626 (1903); Lancaster v. Kathleen Oil Co. 241 U.S. 551, 36 Sup. Ct. 711, 60 L. Ed. 1161 (1916); Ter Haar v. Kettleman North Dome Ass'n, 34 F. Supp. 823 (S.D. Cal. 1940); Brown v. Stufflebean, 187 F.2d 347 (10th Cir. 1951); City of Monroe v. Detroit, M. & T. S. L. Ry., 257 Fed. 782 (E.D. Mich. 1919) with which compare Columbus Ry., P. & L. Co. v. Columbus, 249 U.S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669 (1919). See 2 MOORE, FEDERAL PRACTICE 396, 404-05 (1948); Note, 12 A.L.R.2d 5, 41-67 (1950) and cases there cited.

66. 299 U.S. 109, 112-13, 57 Sup. Ct. 96, 81 L. Ed. 70 (1936).

67. When it is remembered that the principle of these cases was initiated by the *Metcalf* case in 1888 at a turbulent time in the history of the Supreme Court, when the justices were supposed to ride circuit and were unable to do so because of the back-log of cases on the Supreme Court docket; at a time before the establishment of nine intermediate appellate courts to serve as courts of last resort for righting litigants' wrongs, so that the Supreme Court could limit itself to questions of national judicial policy and principle; and at a time when it was realized that the effect of *Ex Parte* Schollenberger,

actually put in issue by the time the pleadings and pre-trial procedures were completed. I cannot agree with those who feel that the present rule, with issues of fact clearly permissible, "seems quite plainly the correct solution and one that would be happily adopted by statute."[68] This conclusion assumes only two alternatives. On the one hand is the present rule with its "vacillation"[69] among remedies and pleading requirements; and on the other hand a construction of the statute in equal scope to the broad constitutional concept in which the federal law may constitute only a remote ingredient.[70] Neither extreme is a necessary or a desirable alternative. It would seem perfectly feasible to have the jurisdiction of the federal trial courts parallel the appellate review jurisdiction of the Supreme Court over state court decisions, with appropriate regard for the functional difference between trial courts and appellate courts concerning issues of fact. In both instances jurisdiction would exist only if a federal substantive right was actually in issue and the outcome of the case depended upon its determination. A general allegation in the plaintiff's complaint, similar to that used in diversity cases, that a federal substantive right is a controlling issue in the case, could suffice until the pre-trial procedure has progressed to the point where such an issue could be ascertained, or the case disposed of accordingly.

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96 U.S. 369, 24 L. Ed. 853 (1877), and the Pacific Railroad Removal Cases, 115 U.S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319 (1885), was to allow corporate business interests the privilege of removing all of their litigation of the requisite jurisdictional amount to the federal trial courts even though no federal rights or issues were involved, the desire to narrow the jurisdiction is at least understandable. But this is "justification" on no higher principle than self-interest; and it seems unfortunate that the effort for such trivial relief was aimed at what should be the primary area of federal trial court jurisdiction. See FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT 56-103 (1928); *cf.* Hart, *The Relations between State and Federal Law*, 54 COL. L. REV. 489, 512 (1954).

68. Wechsler, *Federal Jurisdiction and The Revision of The Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 225 (1948). While Professor Wechsler recognizes that the present rule on removal is "anomalous," he would prefer to see the right of removal in federal right cases completely eliminated, leaving the present rule, with fact issues, applicable only where the case is filed originally in the federal court.

See also, Mishkin, *The Federal "Question" in the District Courts*, 53 COL. L. REV. 157, 168 (1953). "[T]he criterion for original federal jurisdiction—a substantial claim founded 'directly' upon federal law—was not arrived at by explicit consideration of various available tests and the probabilities of each yielding a high percentage of questions of national interest and a meager proportion of actions turning upon state law. *Nevertheless, it serves as a fairly good discriminator.* Eliminated by it are cases which, because of the remoteness of the federal element. . . ." [Italics supplied]. But compare his discussion of the problem here emphasized in *Id.* at 176-84.

69. Wechsler, *supra* note 68 at 225.

70. "Needless to say, Congress has not meant to grant the district courts a general jurisdiction in every case involving the jurisdictional amount in which it could confer judicial power under any of its sources of authority. That would have brought to federal adjudication all cases in the western states involving devolution of public lands." Wechsler, *supra* note 68 at 225, citing Chadbourn and Levin, *Original Jurisdiction of Federal Questions*, 90

There is nothing in either the Constitution or the statute[71] which compels the conclusion that the jurisdiction of the court must be determined finally from the plaintiff's complaint. The Supreme Court has recognized in several diversity cases that jurisdiction of the subject matter may be ascertained and perfected after the action is commenced.[72] The appellate review jurisdiction of the Supreme Court in federal right cases decided by state courts is not limited to only the federal rights of the plaintiff. The entire record is looked to. The type of thinking which reasons that the assignment of error or petition for certiorari is the complaint in the Supreme Court and that therefore in the parallel case of trial court jurisdiction "A court must either have jurisdiction or not have it from the beginning of the case, and cannot gain or lose it as the trial progresses,"[73] is simply an example of antiquated common law pleading used as a basis for determining the distribution of judicial power in twentieth century American federalism.

This is not to say that the dockets of federal trial courts should be turned into "a vast current of litigation indubitably arising under State law."[74] At the outset it should be recognized that the *Gully* case[75] and many of the other leading cases which have gone far to establish the present narrow rule of statutory construction were cases in which there was actually no federal substantive right in issue which would have controlled the outcome of the case.[76] These cases are different from *Metcalf, Union and Planters' Bank, Mottley* and the other cases discussed above in which it clearly appears that

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U. OF PA. L. REV. 639 (1942) and Forrester, *The Jurisdiction of Federal Courts in Labor Disputes,* 13 LAW & CONTEMP. PROB. 114 (1948). See also Forrester, *The Nature of a "Federal Question,"* 16 TULANE L. REV. 362 (1942); Forrester, *Federal Question Jurisdiction and Section 5,* 18 TULANE L. REV. 263 (1943).

71. "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States." 28 U.S.C.A. § 1331 (1949).

72. Conolly v. Taylor, 2 Pet. 556, 7 L. Ed. 518 (U.S. 1829); Gordon v. Third National Bank, 144 U.S. 97, 103, 12 Sup. Ct. 657, 36 L. Ed. 360 (1892); Sun Printing and Publishing Ass'n. v. Edwards, 194 U.S. 377, 382, 24 Sup. Ct. 696, 48 L. Ed. 1027 (1904). And see Drumright v. Texas Sugarland Co., 16 F.2d 657 (5th Cir. 1927). See Fraser, *Some Problems in Federal Question Jurisdiction,* 49 MICH. L. REV. 73, 76-77 (1950).

73. See *e.g.* BUNN, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 26-30, 55 (5th ed. 1949); MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 143 (1949).

74. Mr. Justice Frankfurter in Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673, 70 Sup. Ct. 876, 94 L. Ed. 1194 (1950).

75. Gully v. First National Bank in Meridian, 299 U.S. 109, 57 Sup. Ct. 96, 81 L. Ed. 70 (1936).

76. Arkansas v. Kansas and Texas Coal Co., 183 U.S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144 (1901); Defiance Water Co. v. Defiance, 191 U.S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140 (1903); Joy v. St. Louis, 201 U.S. 332, 26 Sup. Ct. 478, 50 L. Ed. 776 (1906); Puerto Rico v. Russell & Co., 228 U.S. 476, 53 Sup. Ct. 447, 77 L. Ed. 903 (1933).

the outcome of the case depends solely upon an issue concerning a federal substantive right. It is true that under the doctrine of *The Fair v. Kohler Die & Specialty Co.*[77] and *Bell v. Hood*[78] if a party alleges a federal substantive right in good faith, jurisdiction exists no matter how wrong he is on the merits. But then there are true federal issues, and they are what federal courts should decide. No doubt, in the past parties have made sham assertions of federal rights,[79] but these can certainly be disposed of today after the pleadings are in and before trial by either a motion to dismiss or a motion for summary judgment.

In addition there is developing what seems to be a sensible modification of the *Hurn v. Ousler*[80] doctrine to the effect that where the district court decides on the pleadings that there is no substantive merit to an alleged federal right, it may in its discretion decline to exercise jurisdiction in the pendant state law claims.[81] This will go far to place the "good faith allegation" doctrine of *Bell v. Hood* in proper perspective and yet preserve federal trial courts for the decision of federal rights issues.

Also, in recent years the Supreme Court has developed the new principle that even where there is admitted jurisdiction, a federal court may, indeed should, exercise self-restraint and stay further proceedings in deference to an action to be commenced in the state court where a decision on a point of undetermined state law may make the determination of the federal issue unnecessary;[82] or even where the federal issues are so affected by local circumstances that convenience dictates a deference of the entire matter to the state court.[83] This is a very different thing from a decision that no jurisdiction exists at all. Techniques of intergovernmental cooperation have been used appropriately in other fields,[84] and with a little imagination can be used effectively so as to preserve state courts for the determina-

77. 228 U.S. 22, 33 Sup. Ct. 410, 57 L. Ed. 716 (1931).
78. 327 U.S. 678, 66 Sup. Ct. 773, 90 L. Ed. 939 (1946).
79. See note 76 *supra.*
80. 289 U.S. 238, 53 Sup. Ct. 586, 77 L. Ed. 1148 (1933).
81. Massachusetts Universalist Convention v. Hildreth and Rogers Co., 183 F.2d 497 (1st Cir. 1950), 19 GEO. WASH. L. REV. 450 (1951); 29 TEXAS L. REV. 547 (1951). See also, Strachman v. Palmer, 177 F.2d 427 (1st Cir. 1949); Fitzhenry v. Erie R.R., 7 F. Supp. 880 (S.D.N.Y. 1934).
82. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 Sup. Ct. 643, 85 L. Ed. 971 (1941); Shipman v. DuPre, 339 U.S. 321, 70 Sup. Ct. 640, 94 L. Ed. 877 (1950) and see Learned Hand in Mottolese v. Kaufman, 176 F.2d 301, 302 (2d Cir. 1949).
83. Burford v. Sun Oil Co., 319 U.S. 315, 63 Sup. Ct. 1098, 87 L. Ed. 1424 (1943); Alabama Pub. Serv. Comm. v. Southern Ry., 341 U.S. 341, 71 Sup. Ct. 762, 95 L. Ed. 1002 (1951). See Comments, 19 U. OF CHI. L. REV. 361 (1952); 7 *id.* 727 (1940).
84. See Koenig, *Federal and State Cooperation under the Constitution,* 36 MICH. L. REV. 752 (1938); CLARK, THE RISE OF A NEW FEDERALISM (1938); Note, *Supreme Court Interpretations of Federal Law Incorporated by Reference,* 66 HARV. L. REV. 1498 (1953).

tion of state law issues and federal courts for the determination of those cases which depend predominantly upon the vindication of federal substantive rights.[85]

III.

Jurisdiction and the Declaratory Remedy

Because the present rule narrowly restricts general federal right jurisdiction to those comparatively few cases where the federal substantive right can be fitted in as an essential allegation in a plaintiff's "well-pleaded" complaint, analyzed in terms of the law of remedies and anticipatory pleading, it has been seriously questioned whether such jurisdiction will include actions for a declaratory judgment in cases where the court would not have had jurisdiction if one of the older common law or early equity remedies had been used by the plaintiff.[86]

Historically an outgrowth of such equitable remedies as the bill *quia timet* to quiet a title or remove a cloud, the action for a declaratory judgment is a twentieth century remedy intended to permit the plaintiff to obtain an authoritative judicial statement of the legal relationship existing between the parties to a justiciable case or controversy within the judicial power of the United States. Since the complaint must allege facts showing a justiciable controversy, this is generally accomplished by alleging either that the plaintiff's rights have been invaded, or are about to be invaded by the defendant, and then alleging the plaintiff's contentions and the defendant's contentions. The prayer is for a judgment of declaration or determination of the rights of the parties; it does not seek coercive relief.[87] Thus the pleading rules of this new remedy require the plaintiff to present in his initial pleading the actual issues in the case. Perhaps the most striking features of the declaratory remedy are that either party to a controversy is allowed to bring a suit as "plaintiff," and his complaint may set forth as essential allegations that which would be considered anticipatory under formalistic common law pleading. Because of this a complaint for a declaratory judgment may show on its face that the declaratory plaintiff claims a federal substantive right or immunity which under common law pleading could not be alleged until the answer or reply.

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85. *Cf.* Comment, *Contraction of Federal Jurisdiction: Convenience or Necessity?* 19 U. of Chi. L. Rev. 361 (1952).

86. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 Sup. Ct. 876, 94 L. Ed. 1194 (1950). See Mishkin, *The Federal "Question" in the District Courts*, 53 Col. L. Rev. 157, 177-84 (1953); Notes, 4 Vand. L. Rev. 827 (1951); 29 N.C.L. Rev. 173 (1951); 8 Wash. & Lee L. Rev. 89 (1951).

87. Ter Haar v. Kettleman North Dome Ass'n, 34 F. Supp. 823 (S.D. Cal. 1940); 3 Anderson, Actions for Declaratory Judgments 1606-07 (2d ed. 1951); Borchard, Declaratory Judgments 25 (2d ed. 1941).

If this remedy could have been used in *Metcalf, Union and Planters' Bank, Mottley,* and other cases discussed above in which a federal substantive right was admittedly the determinative issue, would there have been jurisdiction? While the Supreme Court has made clear that the *Constitution* "did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy,"[88] did Congress intend to crystallize it in defining by *statute* the general federal right jurisdiction of the federal trial courts? "[T]he operation of the Declaratory Judgment Act is procedural only"[89] in the sense that it did not enlarge the scope of the judicial power authorized by the Constitution. But when "Congress enlarged the range of remedies available in the federal courts,"[90] did it not necessarily affect the general federal right jurisdiction of the federal trial courts under the present rule? While the Declaratory Judgment Act was clearly not intended to enlarge the jurisdiction of the federal courts,[91] if jurisdiction is to be defined in terms of the essential allegations in pleading different remedies, will not the new declaratory remedy by definition affect jurisdiction?

Soon after the enactment of the Declaratory Judgment Act it was clearly established that the concept of anticipatory pleading measured by the earlier common-law remedies would have no application in diversity cases.[92] Insurance companies were allowed to initiate the action in the federal trial courts to vindicate their state-created rights and immunities even though they could not have done so by the earlier remedies. The *"character . . . of the issue to be determined"*[93] was the controlling factor in upholding jurisdiction.

Also in controversies over federally created rights and privileges under the patent laws it was soon established that the alleged infringer could initiate the declaratory remedy procedure to establish that his product did not infringe the defendant's patent.[94] Prior to

88. Nashville, Chatt. & St. L. Ry. v. Wallace, 288 U.S. 249, 264, 53 Sup. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191 (1933); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 57 Sup. Ct. 461, 81 L. Ed. 617, 108 A.L.R. 1000 (1937).

89. Aetna Life Ins. Co. v Haworth, *supra* note 86, at 240.

90. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671, 70 Sup. Ct. 876, 94 L. Ed. 1194 (1950).

91. 28 U.S.C.A. §§ 2201, 2202 (1950); See 48 STAT. 955 and 49 STAT. 1027. The statute itself says, "In a case of actual controversy within its jurisdiction."

92. See *e.g.,* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 57 Sup. Ct. 461, 81 L. Ed. 617, 108 A.L.R. 1000 (1937).

93. *Id.* at 244. [Italics supplied].

94. E. Edelmann & Co. v. Triple—A Specialty Co., 88 F.2d 852 (7th Cir.), *cert. denied,* 300 U.S. 680 (1937); Zenie Bros. v. Miskend, 10 F. Supp. 779 (S.D.N.Y. 1935); Grip Nut Co. v. Sharp, 124 F.2d 814 (7th Cir. 1941); Measurement Corp. v. Ferris Instrument Corp., 159 F.2d 590 (3d cir. 1947). See also Edward Katzinger Co. v. Chicago Metallic Mfg. Co., 329 U.S. 394, 67 Sup. Ct. 416, 91 L. Ed. 374 (1947); Jungersen v. Ostby & Barton Co., 335 U.S. 560, 69 Sup. Ct. 269, 93 L. Ed. 235 (1949). See Notes, 4 VAND. L. REV. 827 (1951) and 62 HARV. L. REV. 787, 802-03, 863-64 (1949), 29 N.C.L. REV. 173, 176 (1951), and cases cited.

the Declaratory Judgment Act the owner of a patent could enlarge the scope of his monopoly by harassing his competitors and their customers with threats of suits for infringement, while studiously avoiding and delaying a court test. Circulation of these threats among the trade could be ruinous to the competitor. The only check developed against this practice had been a suit by the alleged infringer for an injunction against unfair competition, an unsatisfactory common-law remedy because of the difficulty of proving that the patentee had been acting in bad faith.[95] But since the Declaratory Judgment Act the lower federal courts have consistently allowed the alleged infringer to bring suit for a declaration of either non-infringement or invalidity.[96] In the leading case the court said:

> "But the controversy between the parties as to whether a patent is valid, and whether infringement exists is in either instance essentially one arising under the patent laws of the United States. It is of no moment, in the determination of the character of the relief sought, that the suit is brought by the alleged infringer instead of by the owner."[97]

In a few other cases where an issue of federal substantive right was determinative of the whole case the lower federal courts took jurisdiction under the general federal right statute of actions for a declaratory judgment where such jurisdiction could not have been maintained under the present rule by one of the earlier coercive remedies.[98]

But in *Skelly Oil Co. v. Phillips Petroleum Co.*[99] the Supreme Court through Mr. Justice Frankfurter went far to say that in actions for a declaratory judgment the federal right jurisdiction of the district courts would be determined by the pleading rules of the older com-

95. American Well Works Co. v. Lane and Bowler Co., 241 U.S. 257, 36 Sup. Ct. 585, 60 L. Ed. 987 (1916); Alliance Securities Co. v. De Vilbiss Mfg. Co., 41 F.2d 668, 670 (6th Cir. 1930); Zenie Bros. v. Miskend, 10 F. Supp. 779, 782 (S.D.N.Y. 1935). The alleged infringer in a declaratory action however is not required to prove bad faith. Treemond Co. v. Schering Corp., 122 F.2d 702 (3d Cir. 1941). See Note, 4 VAND. L. REV. 827, 837 n. 62 (1951); 62 HARV. L. REV. 787, 863 (1949).

96. See cases in note 94 *supra*. In at least two instances the Supreme Court has passed on the merits of an action for a declaratory judgment of invalidity or non-infringement without questioning the jurisdiction. Edward Katzinger Co. v. Chicago Metallic Mfg., 329 U.S. 394, 67 Sup. Ct. 416, 91 L. Ed. 374 (1947); Jungersen v. Ostby & Barton Co., 335 U.S. 560, 69 Sup. Ct. 269, 93 L. Ed. 235 (1949).

97. E. Edelmann & Co. v. Triple-A Specialty Co., 88 F.2d 852, 854 (7th Cir.), *cert. denied*, 300 U.S. 680 (1937).

98. Ter Haar v. Kettleman North Dome Ass'n., 34 F. Supp. 823 (S.D. Cal. 1940); Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945); Zaconick v. City of Hollywood, 85 F. Supp. 52 (S.D. Fla. 1949). *Quare*, Regents of New Mexico College v. Albuquerque Broadcasting Co., 158 F.2d 900 (10th Cir. 1947). While it is believed that this case should have been dismissed because no federal substantive right existed, the court held otherwise and took jurisdiction.

99. 339 U.S. 667, 70 Sup. Ct. 876, 94 L. Ed. 1194 (1950).

mon-law and early equity forms of actions; that even when the essential allegations in a complaint for a declaratory remedy show a federal substantive right in issue, jurisdiction will nevertheless not exist unless it would have existed under one of the old remedies. This reasoning was unnecessary to the desired disposition of the jurisdiction problem in the case. Like the *Gully* case and many of the other leading cases which have gone far to obfuscate the early basic test, the *Skelly* case does not involve a federal substantive right at all. It is a contract which simply incorporates by reference the action of a federal commission. This poses a problem in contract interpretation; clearly it is not a federally created substantive right.[100]

In the *Skelly* case, Phillips as buyer contracted with Skelly as seller for the purchase of natural gas for resale to a pipe line company. The contract provided that if the pipe line company should fail to secure a certificate of convenience and necessity from the Federal Power Commission as required by the Natural Gas Act on or before October 1, 1946, Seller should have the right to terminate the contract by written notice to Buyer delivered any time after December 1, 1946, but before the issuance of such certificate. As the Court said, "The legal significance of this provision is at the core of this litigation."[101] On November 30, 1946, the Federal Power Commission issued a certificate to the pipe line company, but it was upon certain specified terms and conditions to be later accomplished by the pipe line company. On December 2, 1946, Skelly as seller gave notice to Phillips of the termination of the contract, taking the position that by the terms of the contract it had the right to terminate since the pipe line company had not as yet received a certificate as required in the contract. Phillips thereupon brought suit for a declaratory judgment alleging that a certificate "within the meaning of said Natural Gas Act and said contracts" had been issued prior to Skelly's notice of termination. Since there was no diversity, jurisdiction had to be based upon the claim of a federal right. The District Court assumed jurisdiction and decided on the merits that the contract had not been terminated. The Court of Appeals affirmed on the ground that the primary question was whether the order of the Federal Power Commission "constituted a certificate of convenience and necessity . . . within the

100. *Cf.* cases where state statutes have incorporated by reference a provision in a federal law. Standard Oil Co. of California v. Johnson, 316 U.S. 481, 62 Sup. Ct. 1168, 86 L. Ed. 1611 (1942); State Tax Commission v. Van Cott, 306 U.S. 511, 59 Sup. Ct. 605, 83 L. Ed. 950 (1939); Flournoy v. Wiener, 321 U.S. 253, 64 Sup. Ct. 548, 88 L. Ed. 708 (1944). See the dissenting opinion of Mr. Justice Frankfurter in the *Flournoy* case in favor of federal appellate review jurisdiction over state courts in such cases because of the decision in the *Standard Oil* case. See Note, *Supreme Court Review of State Interpretations of Federal Law Incorporated by Reference*, 66 HARV. L. REV. 1498 (1953).

101. 339 U.S. 667, 669, 70 Sup. Ct. 876, 94 L. Ed. 1194 (1950).

requirements of the Act."[102] The Court of Appeals said that it was "not an action to enforce or to construe the contracts."[103] The Supreme Court granted certiorari "because it raises in sharp form the question whether a suit like this 'arises under the Constitution, laws or treaties of the United States,' 28 U.S.C. § 1331, so as to enable District Courts to give declaratory relief under the Declaratory Judgment Act."[104]

In reversing the lower courts and properly directing that the part of the case here discussed should be dismissed for lack of jurisdiction, the Supreme Court did not seem to consider whether a federal substantive right was involved.[105] The Court did say that jurisdiction of the lower federal courts "means the kinds of *issues* which give right of entrance to federal courts," but then it forsook that true principle of jurisdiction and dwelt at length upon the spurious principle of determining jurisdiction by the pleading requirements of older remedies:

> "If Phillips sought damages from petitioners or specific performance of their contracts, it could not bring suit in a United States District Court on the theory that it was asserting a federal right. . . . Whatever federal claim Phillips may be able to urge would in any event be injected into the case only in anticipation of a defense to be asserted by petitioners."[106]

The Court then comes down through cases from *Metcalf* through *Union and Planters' Bank* and *Mottley* to *Gully* to show that where a federal right is not an essential allegation of the plaintiff's complaint but only an anticipatory allegation, there is no jurisdiction:

> "To be observant of these restrictions is not to indulge in formalism or sterile technicality. It would turn into the federal courts a vast current of litigation indubitably arising under State law, in the sense that the right to be vindicated was State-created, if a suit for a declaration of rights could be brought into the federal courts merely because an anticipated defense derived from federal law."[107]

If a federal substantive right is not involved in the case, it is difficult to see how even anticipatory pleading would make it so. But of more serious importance is the suggestion that the essential

102. Skelly Oil Co. v. Phillips Petroleum Co., 174 F.2d 89, 97 (10th Cir. 1949).
103. *Ibid.*
104. 339 U.S. 667, 671 (1950).
105. As to other parties in the case there was diversity of citizenship. In dealing with the merits as to these parties the Court clearly indicates that a state created contract right was involved. "Even though the language of the contract may be identic with that of § 7(c) [of the Natural Gas Act], this language in the contract may have a scope independent of the proper construction of § 7(c). The same words, in different settings, may not mean the same thing." *Id.* at 678.
106. *Id.* at 672.
107. *Id.* at 673.

allegations of a complaint for a declaratory judgment will not be counted in determining the federal right jurisdiction of the federal trial courts. This seems unnecessary and unfortunate in an area of the law which already is unnecessarily complex. If there is to be discrimination between plaintiffs and defendants, and discrimination between essential allegations and anticipatory allegations measured by the differences in the old remedies, must there now be discrimination against even the essential allegations of a new remedy? If jurisdiction is to be measured by the essential allegations in pleading different remedies, it would seem that whenever a federal substantive right appears properly pleaded in a complaint for a declaratory judgment, there should be jurisdiction.

If this is not true, then federal right jurisdiction in declaratory actions must be determined in terms of the essential pleading requirements in the older forms of action. This will require analysis in terms of each of the older remedies that might be available to either of the parties, as well as the pleading requirements in each instance. Indeed, as indicated by the patent cases, in some instances the declaratory plaintiff could not be a plaintiff in one of the older remedies and still litigate the precise issue which he needs to have determined.[108] This can lead only to further obfuscation and uncertainty[109] in an area which should be and can be made relatively clear and certain.

IV.

A PROPOSAL FOR REFORM

It is the thesis of this paper that the basic principle established by the early cases[110] which construed the Act of 1875 between that date and the *Metcalf* case in 1888 is a desirable principle and a feasible one for defining the federal right jurisdiction of the district courts. That principle was essentially that jurisdiction would exist if there was a federal substantive right actually in issue in the case and if

108. See cases cited in notes 94-96 supra. Also, Zaconick v. City of Hollywood, 85 F. Supp. 52 (S.D. Fla. 1949).

For cases since the *Skelly* case in which the federal district courts have assumed jurisdiction in declaratory actions by the alleged infringer of a patent, see Alamo Refining Co. v. Shell Development Co., 99 F. Supp. 790 (D. Del. 1951); Kobre v. Photoral Corp., 100 F. Supp. 56 (S.D.N.Y. 1951).

109. See *e.g.*, 3 VAND. L. REV. 320 (1950); Note, 62 HARV. L. REV. 787, 802-03 (1949). The *Harvard Law Review* Note, which was cited with apparent approval in the majority *Skelly* opinion, suggests three possible views of the jurisdictional effect of the Declaratory Judgment Act; (1) that jurisdiction exists if the federal question is properly set forth in the complaint, even though the question would have arisen only as a defense, reply, or otherwise in a coercive action between the same parties; (2) that jurisdiction exists only if it would exist in a coercive action by this particular plaintiff against this defendant; and (3) that jurisdiction exists if, it would exist in a coercive action by either party against the other. The Note, referring to the patent cases, recommends adoption of the third view.

110. See notes 29 to 34 *supra*.

the outcome of the whole case would be controlled by the decision on this federal issue. This is essentially the test of the parallel jurisdiction of the Supreme Court to exercise appellate review over state court decisions, with appropriate allowances for functional differences. "[J]urisdiction," said Mr. Justice Frankfurter, "means the kinds of issues which give right of entrance to federal courts."[111]

Whether or not federal issues control the decision in the case should not be determined solely from the plaintiff's complaint. It can be determined at any time during the pre-trial procedure when the controlling issues are made to appear. While normally such issues will appear when the answer is filed, they may not do so until a reply is filed, and in many cases a motion to dismiss or a motion for summary judgment will better serve to identify them.

It is believed that if this test is applied, the federal courts will not be turned into "a vast current of litigation indubitably arising under State law." Instead the emphasis will properly be upon the identification of those federal issues which control the outcome of the case, rather than on the rules of pleading and forms of action. Without a doubt the Federal Rules of Civil Procedure, with one motion to dismiss including as grounds both lack of jurisdiction and lack of merit,[112] and the motion for summary judgment,[113] as well as deposition-discovery, pre-trial conference and other procedures, provide much more efficient and flexible tools for sifting the actual issues in the case than the procedures in vogue at the time of *Metcalf* and *Union and Planters' Bank* in 1888-1894.

To so define jurisdiction will remove at least a part of the judicial paradox in American federalism. It would allow the federal district courts to take jurisdiction in those cases having the requisite jurisdictional amount[114] in which the outcome is controlled wholly by federal issues. On the other hand cases like *Skelly, Gully,* and others[115] which have gone far to stress the anticipatory pleading phase of the present rule of jurisdiction will still be excluded, because analysis will disclose that there is no issue concerning a right created by the Constitution, laws or treaties of the United States which will control the outcome of the case.

This will also to some extent relieve state court judges of the burden of deciding what are often new and novel questions of federal law. It is believed that frequently under the present rule there is

111. Skelly Oil Co. v. Phillips Petroleum, *supra* note 102 at page 671.
112. FED. R. CIV. P. 12b.
113. FED. R. CIV. P. 56.
114. Professor Wechsler has sensibly suggested that there should be no jurisdictional amount in general federal right cases. Wechsler, *Federal Jurisdiction and The Revision of The Judicial Code,* 13 LAW & CONTEMP. PROB. 216, 225 (1948.
115. See note 76 *supra.*

embarrassment and resentment when the Supreme Court of the United States reverses the Supreme Court of a State upon a federal issue which is new, equivocal, and not at all dependent upon State law. State court judges ought not to be subjected to such career hazards. In the expanding economy of the twentieth century the state courts are busy with state litigation as well as those federal specialties which Congress has expressly required them to adjudicate.[116] Since general federal right jurisdiction is so frequently called into play in the more unusual cases—*e.g.*, human rights cases or cases involving individual economic interests as distinguished from industry or large group interests—it does not seem to be a sound policy which requires such federal rights to be initially vindicated in state courts. It would seem that federal courts should specialize in federal law and federal rights and be available to determine cases in which the outcome will be controlled by issues about federal rights. This would seem to be a more rational distribution of judicial power between state courts and federal courts.

Since it is the Congress which has the responsibility under the Constitution, it is believed that legislation clarifying the general federal right jurisdiction of the district courts should be enacted. Two proposals for reform have been published previously. In one,[117] the jurisdiction of the district court would seem to be limited to issues of law. This seems inconsistent with the inherent function of trial courts to determine whole cases. In the other,[118] the identical language of the Constitution is retained in the statutory grant of jurisdiction. The substantial difference in function between the Constitution and the statute makes this seem undesirable. Without taking sides in the differing opinions[119] about what Congress intended by the Act of 1875, it is believed that clarification could be achieved by the following proposal.

Amend 28 U.S.C. § 1331 to read as follows:

> (a) The district courts shall have original jurisdiction of all civil actions [wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs,][120] in which there is an issue of law or fact concerning a right created by the Constitution, laws or treaties of the United States, and the determination of such issue will control the outcome of the case.
>
> (b) Whether or not there is such an issue in the case may be determined by the district court from all the pleadings and papers filed in

116. See *e.g.*, Testa v. Katt, 330 U.S. 386, 67 Sup. Ct. 810, 91 L. Ed. 967, 172 A.L.R. 225 (1947).

117. See Comment, *Proposed Revision of Federal Question Jurisdiction*, 40 ILL. L. REV. 387, 396-403 (1945).

118. Fraser, *Some Problems in Federal Question Jurisdiction*, 49 MICH. L. REV. 73, 89 (1950).

119. See articles in note 6 *supra*.

120. See note 114 *supra*.

the case, and such determination of jurisdiction may be made at any time during the pendency of the case.

(c) If prior to the trial of the case the district court should decide that the federal right asserted is without substantive merit, the court may in its discretion dismiss without prejudice pendant claims for relief based upon state created rights.

Amend 28 U.S.C. § 1441 to read as follows:

(a) Except as otherwise expressly provided by Act of Congress, any civil action [wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs,] brought in a State court in which there is an issue of law or fact concerning a right created by the Constitution, laws or treaties of the United States may be removed by either party[121] to the district court of the United States for the district and division embracing the place where such action is pending, if the determination of such issue will control the outcome of the case.

(b) Any other civil action filed in a State court of which the district courts of the United States have original jurisdiction may be removed by the defendant or defendants to the district court of the United States for the district and division embracing the place where such action is pending if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

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121. Subsection (a) of Section 1446 could be amended by substituting the phrase "party or parties" for the phrase "defendant or defendants." See Fraser, *supra* note 117.

Subsection (b) of section 1446 could be amended to read: "The petition for removal of a civil action as described in Section 1441(a) must be filed within.....days after receipt by the moving party through service or otherwise of a copy of the pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."

"The petition for removal of a civil action as described in Section 1441(b) shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter. If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."