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Removal Doctrine Reaffirmed Franchise Tax Board v. Construction Laborers Vacation Trust

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REMOVAL DOCTRINE REAFFIRMED: *FRANCHISE TAX BOARD V. CONSTRUCTION LABORERS VACATION TRUST*

INTRODUCTION

In *Franchise Tax Board v. Construction Laborers Vacation Trust,*[1] the Supreme Court unanimously reaffirmed the well-pleaded complaint rule, which provides that a federal question must appear on the face of a properly pleaded complaint in order for the case to be cognizable in a federal court.[2] The Court also established a rule for determining the removability of actions brought in state courts for declaratory judgments, holding such actions removable only if the anticipated coercive action would raise a federal question.[3]

Directly addressing the well-pleaded complaint rule for the first time in nine years,[4] the Court clarified the rule, and discussed grounds for an exception to it based on federal preemption.[5] By rejecting possible broader approaches to jurisdiction in *Franchise Tax Board,* the Court clearly indicated its intent to interpret the well-pleaded complaint rule and federal jurisdiction as narrowly as possible.[6]

This Note surveys the provisions of the well-pleaded complaint rule in the removal context and the requirements for original federal jurisdiction over federal declaratory judgment actions and removal jurisdiction over state declaratory judgment actions. The Note then examines how the *Franchise Tax Board* Court applied the law in these areas. The Note concludes that while the Court's application of the well-pleaded complaint rule represents the proper ap-

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1 103 S. Ct. 2841 (1983).

2 *See infra* notes 7-32 and accompanying text.

3 The Court applied the rule for federal declaratory judgments articulated in Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950), *see infra* notes 39-50 and accompanying text, to actions for declaratory judgments brought in state court. *Franchise Tax Bd.*, 103 S. Ct. at 2851. *See infra* notes 108-32 and accompanying text.

4 The Court last addressed the well-pleaded complaint rule in Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974), where it reaffirmed the rule in a per curiam opinion.

5 *See infra* notes 28-32, 133-48 and accompanying text.

6 Commentators have advocated a broader approach than those employed by the Court for questions of federal jurisdiction. *See, e.g.,* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, OFFICIAL DRAFT § 1312, at 187-207 (1969) (advocating extending federal jurisdiction to cases where dispositive federal defense exists to state cause of action) [hereinafter cited as ALI STUDY]; Mishkin, *The Federal Question in the District Courts,* 53 COLUM. L. REV. 157 (1953) (arguing that face of declaratory complaint test should replace *Skelly Oil* rule for determining existence of federal jurisdiction in actions for declaratory judgment).

proach to questions of federal jurisdiction, the Court's treatment of declaratory judgment actions is misguided.

I
BACKGROUND

A. The Well-Pleaded Complaint Rule

In general, actions brought in state court that could have been brought originally in federal court under federal question jurisdiction[7] may be removed to federal court by the defendant.[8] The Supreme Court developed the well-pleaded complaint rule to guide federal courts in their exercise of original and, derivatively,[9] removal jurisdiction. The rule provides that no federal question jurisdiction exists unless the face of the plaintiff's complaint, properly pleaded, presents a federal question.[10]

The most influential case applying the well-pleaded complaint rule in the removal context is *Gully v. First National Bank*.[11] In *Gully*, the Mississippi state tax collector brought suit in state court claiming that the defendant national bank had failed to pay tax liabilities assumed from a predecessor corporation.[12] The defendant bank removed the action to federal district court, where it prevailed on the merits.[13] The court of appeals affirmed, noting that removal was appropriate because the power for states to tax national banks "has

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7 *See* 28 U.S.C. § 1331 (1982). Federal question jurisdiction exists over "all civil actions arising under the Constitution, laws, or treaties of the United States." *See generally* Note, *The Outer Limits of "Arising Under,"* 54 N.Y.U. L. REV. 978, 981-90 (1979) (discussion and criticism of "arising under" requirement for federal jurisdiction).

8 *See* 28 U.S.C. § 1441 (1982):

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

The Supreme Court first stated the well-pleaded complaint rule in Gold-Washing & Water Co. v. Keyes, 96 U.S. 199 (1877).

9 Removal jurisdiction may only be exercised derivatively, meaning that only those cases which could properly have been brought in either federal or state court may be removed. An action brought in state court within exclusive federal jurisdiction may not be removed. Instead, such a case must be dismissed by the state court and refiled in federal court. *See* General Inv. Co. v. Lake Shore & Mich. S. Ry., 260 U.S. 261, 287-88 (1922); *see also* C. WRIGHT, THE LAW OF FEDERAL COURTS § 38, at 212 (4th ed. 1983).

10 *See* Gully v. First Nat'l Bank, 299 U.S. 109, 112-13 (1936). Prior to 1887, a federal defense could provide the basis for removal. *See* Railroad Co. v. Mississippi, 102 U.S. 135 (1880). Congress then amended the removal statute to allow removal only where original federal jurisdiction existed. Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, *as amended* Act of Aug. 13, 1888, ch. 866, 25 Stat. 433. *See* Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894) (first application of amended removal statute).

11 299 U.S. 109 (1936).

12 *Id.* at 111.

13 *Id.* at 112.

its origin and measure in . . . the provisions of a federal statute."[14] The Supreme Court, in a unanimous opinion by Justice Cardozo, reversed for lack of federal jurisdiction. Applying the well-pleaded complaint rule, the Court held that in order for a case to be removed to federal court, the federal issue must be an essential element of the plaintiff's cause of action.[15] The Court stated that a "genuine and present controversy, not merely a possible or conjectural one, must exist, . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal."[16]

Applying this principle, the Court held that the suit in *Gully* was founded on state, not federal law, making removal inappropriate.[17] The tax obligation arose out of a state law contract enforceable without reference to federal law.[18] The defendant national bank had agreed to pay the tax liabilities of its predecessor, but asserted that a federal controversy existed because no valid debt existed unless the original tax levy on the predecessor bank conformed to federal statutory requirements.[19] The Court, however, noted that state law could be dispositive of the case, without reaching the federal issue.[20] The Court concluded:

> The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states.[21]

In *Gully*, application of the well-pleaded complaint rule precluded removal because the defendant, not the plaintiff, raised the federal issue.

Just as the defendant cannot create federal jurisdiction in the answer, the plaintiff cannot manufacture federal jurisdiction by an-

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14 *Id.* (citation omitted).

15 According to Justice Cardozo, an asserted federal right or immunity is an essential element of the cause of action when "[t]he right or immunity . . . will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." *Id.* at 112.

16 *Id.* at 113 (citations omitted).

17 *See id.* at 114-18.

18 *Id.* at 114.

19 *Id.* at 115.

20 *See id.* at 117. State law could be dispositive because the tax collector "will have to prove that state law has been obeyed before the question will be reached whether anything in its provisions or in administrative conduct under it is inconsistent with the federal rule." *Id.*

21 *Id.* All questions of federal jurisdiction invoke concern over the infringement by federal courts upon the jurisdiction of state courts. *See generally* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

ticipating federal defenses to state law claims.[22] Nor can a plaintiff gain access to a federal forum by alleging federal questions unnecessary to prove the claim.[23]

A plaintiff, as master of his claim,[24] may avoid federal jurisdiction by foregoing available federal remedies and relying solely upon

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22 *See* Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974) (no federal jurisdiction where plaintiff's invocation of Helium Act Amendments of 1960 and National Gas Act in complaint merely constitute anticipated defenses); *Gully*, 299 U.S. at 113 ("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"); Louisville & Nash. R.R. v. Mottley, 211 U.S. 149 (1908) (plaintiff cannot establish federal jurisdiction by alleging anticipated defense to state cause of action).

Mottley, the most famous application of the well-pleaded complaint rule, exemplifies significant criticism of the rule: faithful application of the rule may delay the necessary determination of a federal question. *Cf.* Trautman, *Federal Right Jurisdiction and the Declaratory Remedy*, 7 VAND. L. REV. 445, 468-71 (1954) (proposes allowing federal jurisdiction when determination of federal issue will control outcome). In *Mottley*, the parties contested the validity of free passes that the Louisville & Nashville Railroad had given them in 1871 to settle a claim for damages. *Mottley*, 211 U.S. at 150-51. In 1906, Congress prohibited free travel on railroads and the railroad subsequently refused to honor the passes. The Mottleys sued in federal court for specific performance alleging that the 1906 act did not apply to them, and, in the alteruative, that the act could not constitutionally be applied to them. The Supreme Court applied the well-pleaded complaint rule and dismissed for lack of jurisdiction. The Court held that the plaintiffs simply stated a cause of action for specific performance to remedy a breach of a state law contract. *Id.* at 152-53. The application or validity of the 1906 act could therefore only enter the suit as a defense to this breach of contract action. The Court thus denied jurisdiction. *Id.* at 154. The Mottleys then sought relief in Kentucky state court. Again, they were successful. The railroad appealed an adverse decision on the merits to the Supreme Court. Three years after they first heard the case, the Supreme Court finally decided the federal issue and upheld the application of the statute to the Mottleys. Louisville & Nash. R.R. v. Mottley, 219 U.S. 467 (1911).

23 *See* Hopkins v. Walker, 244 U.S. 486, 489-91 (1917). The rule against overpleading to create jurisdiction has particular applicability to land disputes which are often based on ancient forms of action. For example, a plaintiff in possession of land acquired by federal title may sue in a federal court to enjoin another from using that land, because an allegation concerning the federal title raises a federal question. *See* Lancaster v. Kathleen Oil Co., 241 U.S. 551 (1916). *Cf. Hopkins*, 244 U.S. at 289-91 (allegation that plaintiff has federal title to land raises federal question in suit to remove cloud). A plaintiff out of possesssion must bring an action of ejectment in order to regain possession. In an ejectment action, however, pleading allegations concerning title are inappropriate. Thus an allegation that plaintiff has federal title does not create federal jurisdiction. *See* White v. Sparkhill Realty Corp., 280 U.S. 500, 510-12 (1930). These formalistic distinctions seem to be based on outmoded forms of action. *See generally* C. WRIGHT, *supra* note 9, § 18, at 100-01. The Supreme Court has recently indicated that it will relax this rule in appropriate circumstances. *See* Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661 (1974) (federal jurisdiction exists in ordinary ejectment action brought by Indian tribe where tribe added allegation of ownership under federal statute). Nevertheless, Justice Rehnquist warned in his concurring opinion that "[t]he general standards for determining federal jurisdiction, and, in particular, the standards for evaluating compliance with the well-pleaded complaint rule, will retain their traditional vigor tomorrow as today." *Id.* at 684.

24 The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) ("Of course, the party who brings a suit is master to decide what law he will rely upon.") (Holmes, J.)

state law.[25] A plaintiff may not, however, defeat federal jurisdiction by artfully pleading the complaint to disguise an essentially federal claim.[26] The actual nature of the claim, not merely the plaintiff's characterization of it, determines whether federal jurisdiction exists and thus whether the defendant may remove.[27]

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25 *See, e.g.*, Great N. Ry. v. Alexander, 246 U.S. 276, 282 (1918) ("[t]he plaintiff may by the allegations of his complaint determine the status with respect to removability of a case"); Illinois v. Kerr-McGee Chem. Corp., 677 F.2d 571, 575 (7th Cir. 1982) ("A plaintiff who has both federal and state causes of action may choose to ignore the federal claims and pursue only the state claims in state court."); Warner Bros. Records v. R.A. Ridges Distrib. Co., 475 F.2d 262, 264 (10th Cir. 1973) ("It is for the plaintiffs to design their case as one arising under federal law or not, and it is not within the power of the defendants to change the character of plaintiff's case by inserting allegations in the petition for removal.").

26 *See* Federated Dep't Stores v. Moitie, 452 U.S. 394, 397 n.2 (1981) ("courts 'will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization.' ") (quoting 14 C. WRIGHT, A. MILLER & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3722, at 564-66 (1976) [hereinafter cited as WRIGHT & MILLER]; *see also* Illinois v. Kerr-McGee Chem. Corp., 677 F.2d at 575 ("The defendant is entitled to have the case removed to federal court . . . if the plaintiff is attempting to avoid having an essentially federal claim adjudicated in a federal forum by artfully drawing the complaint in terms of state law."). When a court may appropriately look beyond the face of the complaint to determine federal jurisdiction is a matter of dispute. *See* 14 WRIGHT & MILLER, *supra*, § 3734. For example, some courts have held that if jurisdiction depends on the parties having a certain federal status, then courts may appropriately look to the answer or the petition for removal to ascertain that status. *See, e.g.*, Fay v. American Cystoscope Makers, Inc., 98 F. Supp. 278, 280 (S.D.N.Y. 1951) (court looked beyond complaint to determine whether union had status as representative of employees engaged in industry affecting commerce); George D. Roper Corp. v. Local 16, Store, Furnace & Allied Appliance Workers, 279 F. Supp. 717 (S.D. Ohio 1968) (court looked beyond complaint to petition for removal to determine whether parties operated in industry affecting commerce). *See also* Ulichny v. General Elec. Co., 309 F. Supp. 437 (N.D.N.Y. 1970) (court looked beyond complaint to see whether party had status as holder of federally registered trademark). In La Chemise La Coste v. Alligator Co., 506 F.2d 339, 345 (3d Cir. 1974), *cert. denied*, 421 U.S. 937 (1975), the Third Circuit rejected removal jurisdiction based only on a party's status noting that "inferior federal courts should not attempt to engraft exceptions contrary to the legislative policy so zealousy protected by the Supreme Court." *Id.* at 345.

27 *See* Clinton v. Hueston, 308 F.2d 908 (5th Cir. 1962) (plaintiff's complaint stated facts which made his cause of action one under Landrum-Griffin Act, 29 U.S.C. § 401 (1982), and therefore removable); Produce Terminal Realty Corp. v. New York, N.H. & H.R. Co., 116 F. Supp. 451, 453 (D. Mass. 1953) (although plaintiff's claim set forth common law contract action, real nature of claim arose out of Interstate Commerce Act, 49 U.S.C. § I (1982)); Pocahontas Terminal Corp. v. Portland Bldg. & Constr. Trade Council, 93 F. Supp. 217, 219 (D. Me. 1950) (complaint which states state action to enjoin strike actually states claim under Taft-Hartley Act and is removable).

Though lower federal courts have often employed the artful pleading doctrine, *see* 14 WRIGHT & MILLER, *supra* note 26, § 3722 n.35 (citing cases), the Supreme Court's only treatment of artful pleading provides little guidance. *See* Federated Dep't Stores v. Moitie, 452 U.S. 394 (1981). In *Moitie*, the plaintiffs filed a state antitrust action. The plaintiffs had earlier filed a federal antitrust action against the same defendants that the federal court had dismissed because the plaintiffs lacked standing. The defendants removed the state case to federal court and moved for dismissal on the ground of res judicata. *Id.* at 395-96. The Supreme Court upheld the removal because the plaintiff's

Some courts have articulated a second restriction on a plaintiff's ability to avoid federal jurisdiction. Such courts have adopted a rule that permits a defendant to remove a plaintiff's state law claim if federal law preempts the state law upon which the plaintiff has relied.[28] Such courts allow removal because federal law provides the only remedy available to the plaintiff, regardless of what the plaintiff has asserted in the complaint. For example, in *Avco Corp. v. Aero Lodge No. 735*,[29] the plaintiff sued in state court to enjoin a strike by the defendants, alleging that a strike would violate a no-strike clause in a collective bargaining agreement between the parties. After the state court granted the injunction, the defendants removed to a federal district court which dissolved the injunction.[30] The Sixth Circuit affirmed both the removal and the dissolution of the injunction, holding that "[s]tate law does not exist as an independent source of private rights to enforce collective bargaining contracts" and the "force of Federal preemption in this area of labor law cannot be

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state antitrust claims were "essentially federal law claims," and thus plaintiffs had used artful pleading to avoid federal jurisdiction. *Id.* at 397 n.2. The plaintiffs could have initially brought either federal or state law antitrust claims; the Court's characterization of their state remedy as essentially federal in character therefore seems questionable. The Court relegated the jurisdictional discussion to a single footnote devoid of reasoning. *Id.* In dissent, Justice Brennan sharply criticized the majority for neglecting the well-pleaded complaint rule. *Id.* at 404-11.

The decision in *Moitie* may signal the Supreme Court's acceptance of the artful pleading doctrine. Nevertheless, because of the unique circumstances of *Moitie*, the case should not be read as relaxing the requirements of the well-pleaded complaint rule. The first suit was filed and dismissed in federal court and federal law governs the res judicata effect of the dismissal. *See* C. WRIGHT, *supra* note 9, § 100A, at 694-96. The Supreme Court could have simply denied the removal and directed the state court to apply federal res judicata law and dismiss the action. In its haste to apply res judicata to the plaintiffs, however, the Court ignored the troubling implications of the removal question. For a full discussion of the issues in *Moitie*, see Note, Federated Department Stores v. Moitie: *Removal and Relitigation Reappraised*, 1983 WIS. L. REV. 989.

The Supreme Court's strict application of the well-pleaded complaint rule in *Franchise Tax Board* indicates that the rule has not been undermined by *Moitie*. 103 S. Ct. at 2848.

28 *See* Avco Corp. v. Aero Lodge No. 735, 376 F.2d 337 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968) (plaintiff's state law breach of contract claim preempted by § 301 of Labor Management Relations Act (LMRA), 29 U.S.C. §§ 301-531 (1982)). The removal of the state court action on the grounds of federal preemption occurs often under the LMRA because of the firmly established preemptive nature of that statute. *See generally* Note, *Intimations of Federal Removal Jurisdiction in Labor Cases: The Pleadings Nexus*, 1981 DUKE L.J. 743. Courts have also permitted preemption removal in other contexts. *See, e.g.*, McKinney v. International Ass'n of Machinists, 624 F.2d 745 (6th Cir. 1980) (Railway Labor Act); Bailey v. First Fed. Sav. & Loan, 467 F. Supp. 1139 (C.D. Ill. 1979) (Home Owner's Loan Act of 1933); Baines v. Hartford Fire Ins. Co., 440 F. Supp. 15 (N.D. Ga. 1977) (National Flood Insurance Act of 1968); Sweeney v. Morgan Drive Away, Inc., 394 F. Supp. 1216 (D. Colo. 1975) (Carmack Amendment to Interstate Commerce Act). For a discussion of cases on the preemption exception, see Billy Jack For Her, Inc. v. New York Coat & Allied Workers, 511 F. Supp. 1180 (S.D.N.Y. 1981).

29 376 F.2d 337 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968).

30 *Id.* at 338-39.

avoided by failing to mention Section 301 [of the Labor Management Relation Act (LMRA)] in the complaint."[31]

Other courts reject *Avco* and do not allow removal based on federal preemption. Such courts characterize preemption as an affirmative defense to a state law action, and conclude that it cannot support removal.[32]

B. Declaratory Judgments and Federal Jurisdiction

1. *Federal Declaratory Judgment Actions*

The Federal Declaratory Judgment Act[33] presents unique problems for the application of the well-pleaded complaint rule. In a declaratory judgment action, the plaintiff brings an action for a declaration of the legal rights of the parties in order to avoid a coercive action between the parties.[34] Because the Declaratory Judgment Act has been construed as having no effect on jurisdiction,[35] it is necessary to determine what constitutes the face of the complaint in order to apply the well-pleaded complaint rule and determine whether federal jurisdiction exists.[36] Prior to *Franchise Tax Board,* the Supreme Court addressed this problem in *Skelly Oil Co. v. Phillips Petroleum Co.*[37] and *Public Service Commission v. Wycoff Co.*,[38] where it developed the rule that the nature of the plaintiff's potential coercive action determines whether federal jurisdiction exists.

In *Skelly Oil,* Skelly Oil Co. contracted to sell natural gas to Phillips Petroleum Co., which in turn would resell the gas to the Michigan-Wisconsin Pipeline Co. The contract gave Skelly Oil the right to cancel if, by December 1, 1946, the Federal Power Commission

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31 *Id.* at 340 (citations omitted).

32 *See, e.g.,* First Nat'l Bank v. Aberdeen Nat'l Bank, 627 F.2d 843, 851 (9th Cir. 1980) ("assertion of preemption is a *defense* to plaintiff's state law claim and not a ground for federal jurisdiction") (emphasis in original); *see also* Trent Realty Ass'n v. First Fed. Sav. & Loan, 657 F.2d 29, 35 (3d Cir. 1981) ("we can find no basis for removal jurisdiction in the anticipated defense of federal preemption); Washington v. American League of Professional Baseball Clubs, 460 F.2d 654, 660 (1972) (assertion that plaintiff's attack on televising agreements of league games is preempted by federal law cannot form basis for removal); Martin v. Wilkes-Barre Publishing Co., 567 F. Supp. 304, 310 (M.D. Pa. 1983) ("the issue of federal preemption is merely an affirmative defense to the Plaintiff's state law claims and, as such, is an insufficient predicate for removal"). For the Supreme Court's treatment of this issue in *Franchise Tax Board,* see *infra* notes 133-48 and accompanying text.

33 28 U.S.C. § 2201 (1982).

34 *See* Note, *Developments in the Law—Declaratory Judgments,* 62 HARV. L. REV. 787, 802-03 (1949).

35 *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950).

36 *See* Mishkin, *supra* note 6, at 176-84; Trautman, *supra* note 22, at 463-68; Note, *supra* note 34, at 802-03.

37 339 U.S. 667 (1950).

38 344 U.S. 237 (1952).

had not issued a "certificate of public convenience and necessity" to Michigan-Wisconsin to approve the building of a pipeline.[39] On November 30, 1946, the Federal Power Commission notified Michigan-Wisconsin that it would issue the required certificate, subject to certain specified conditions, but did not make public the certificate until December 2, after Skelly Oil had notified Phillips that it was cancelling the contract.[40]

Phillips sought a declaratory judgment in federal court that the contract was still in effect.[41] Phillips sought declaration that the Federal Power Commission's statement on November 30 constituted an actual issuance of the certificate, and that, notwithstanding the conditions attached to the certificate, it constituted a "certificate of public convenience and necessity" within the meaning of the Natural Gas Act and the contracts.[42] Despite the presence of federal issues, the Supreme Court held that no federal jurisdiction existed.[43]

On its face, Phillips's request for federal declaratory judgment called for an interpretation of the Natural Gas Act.[44] The Court felt constrained, however, to look beyond the face of the declaratory complaint to the underlying conventional action which Phillips could have brought. Had the Court not looked to the underlying action, the Declaratory Judgment Act would have served as a device for artful pleading, bringing state claims into federal court[45] in violation of the observation that the Declaratory Judgment Act did not extend federal court jurisdiction.[46]

Phillips's underlying action for breach of contract was a state law action and thus could not be brought in federal court absent diversity of citizenship. A federal question of interpretation of the Natural Gas Act would arise in such a state breach of contract action only if and when Skelly Oil raised the defense that a "certificate of public convenience and necessity" had never been issued within the meaning of the Act.[47] The Court applied the well-pleaded complaint rule to the plaintiff's claim in the underlying cause of action, which did not contain a federal question.[48] Because the federal issue arose only in anticipation of a defense, it provided an insuffi-

39 *Skelly Oil,* 339 U.S. at 669.
40 *Id.* at 669-70.
41 *Id.* at 671.
42 *Id.* at 670-71.
43 *Id.* at 674.
44 *Id.* at 670-71.
45 *Id.*
46 *Id.* at 671.
47 *Id.*
48 *Id.*

cient basis for federal jurisdiction.[49] Allowing Phillips to sue in federal court simply because it sought a declaratory judgment would, thus, distort the limited procedural purpose of the Declaratory Judgment Act.[50]

Skelly Oil indicates that a federal court in a declaratory judgment action must look to the underlying coercive action which the plaintiff could have brought in order to determine whether federal jurisdiction exists. In many declaratory actions, however, the functional position of the litigants is reversed as a declaratory plaintiff seeks relief in anticipation of a coercive action brought by the defendant.[51] In *Public Service Commission v. Wycoff Co.*,[52] the Supreme Court, in dictum, suggested that in such circumstances it is appropriate to look to the action which the defendant could have brought in order to determine whether federal jurisdiction exists.

In *Wycoff*, the plaintiff, who allegedly transported motion picture films and newsreels in interstate commerce, sought a declaratory judgment in federal court that it was engaging in interstate commerce and therefore immune from regulation by Utah's Public Service Commission.[53] The Supreme Court dismissed the complaint for want of a showing of an actual controversy between the parties,[54] but proceeded to discuss whether federal jurisdiction existed.[55]

The Court noted that federal jurisdiction would be improper, even in the event of an actual controversy between the parties, because the federal issue raised by Wycoff, immunity from state regulation, could arise only as a defense to a state action by the Commission against Wycoff to enforce its regulations.[56] The cause of action that the Commission could have asserted did not arise under federal law, and Wycoff could not create federal jurisdiction by seeking a declaratory judgment to establish the validity of a federal defense to that state cause of action.[57]

The test that emerges from *Skelly Oil* and *Wycoff* for jurisdiction over federal declaratory judgment actions is that the federal courts, out of deference to the relationship between federal and state law, must look beyond the face of the declaratory complaint, to the face of the underlying coercive action that could have been brought in

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49 *Id.* at 673-74; *see supra* note 22 and accompanying text.
50 *Skelly Oil*, 339 U.S. at 673-74; *see also supra* note 46 and accompanying text.
51 Note, *supra* note 34, at 802-03.
52 344 U.S. 237 (1952).
53 *Id.* at 239.
54 *Id.* at 245-46.
55 *Id.* at 248-49.
56 *Id.* at 248.
57 *Id.*

the absence of a claim for declaratory relief.[58] In both *Skelly Oil* and *Wycoff*, this underlying coercive action arose under state law making original federal jurisdiction inappropriate.

2. *State Declaratory Judgment Actions and Federal Jurisdiction*

Prior to *Franchise Tax Board*, the Supreme Court had never addressed the removability of declaratory judgment actions brought in state court for declarations of federal law. The Third Circuit addressed this issue in *La Chemise LaCoste v. Alligator Co.*,[59] where it declined to apply the rule of *Skelly Oil* to the removal context.[60] In *La Chemise*, La Chemise La Coste, a French corporation, claimed a common law trademark over certain emblems. Alligator, a Delaware corporation, held a federally registered trademark over these emblems. La Chemise La Coste sought a declaration in state court of its ownership and right to use these emblems, and an injunction against Alligator using them anywhere in the United States.[61] Alligator removed to federal district court.[62]

Citing *Wycoff*, the district court looked to the action which the declaratory defendant, Alligator, could have brought against the declaratory plaintiff, La Chemise La Coste. The action underlying La Chemise La Coste's declaratory judgment action was a threatened federal patent infringement suit by Alligator, and the district court held that a federal question was properly presented.[63] On appeal, the Third Circuit held that *Wycoff* applied only to federal declaratory judgment actions, and refused to extend the rule to state declara-

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58 A number of commentators have suggested applying the well-pleaded complaint rule to the face of the declaratory complaint rather than to the underlying coercive action. If the face of the declaratory complaint reveals a need to determine a substantial federal right, then federal jurisdiction is proper. *See* Mishkin, *supra* note 6, at 177-84. Professor Mishkin argues that the Supreme Court did not have to give extended consideration to the declaratory procedure in *Skelly Oil*, because the face of the declaratory complaint test would reveal that the rights needed to be determined under state contract law not the federal Natural Gas Act. *Id.* at 183-84. *See also* ALI STUDY, *supra* note 6, § 1311, at 170-72 (if initial pleading in declaratory judgment proceeding shows substantial federal claim, federal jurisdiction exists); Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 395, 478-82 (1976) (same); Trautman, *supra* note 22, at 463-68. For a discussion of the Supreme Court's treatment of this issue in *Franchise Tax Bd.*, see *infra* notes 108-32 and accompanying text.

59 506 F.2d 339 (3d Cir. 1974), *cert. denied*, 421 U.S. 937 (1974).

60 *Id.* at 343-45.

61 *Id.* at 341.

62 *Id.*

63 La Chemise La Coste v. Alligator Co., 313 F. Supp. 915, 917-18 (D. Del. 1970), *rev'd*, 506 F.2d 339 (3d Cir.), *cert. denied*, 421 U.S. 937 (1974). The district court also asserted jurisdiction because the case involved the ascertainment of the status of a federal trademark holder. It was, therefore, appropriate to look beyond the complaint. 313 F. Supp. at 917-18 (citing Fay v. American Cystoscope Makers, 98 F. Supp. 278 (S.D.N.Y. 1951); Ulichny v. General Elec. Co., 309 F. Supp. 437 (N.D.N.Y. 1970)). *See generally supra* note 26.

tory judgment actions.[64] Due to the reversed positions of the litigants in a declaratory judgment action,[65] defendant Alligator was in reality a "functional plaintiff."[66] Because "a plaintiff may not remove an action to federal court[,] . . . [t]o allow a defendant in a state declaratory [judgment] action to remove, therefore, would accord to 'functional plaintiffs' a right not given other plaintiffs."[67] The Court then applied the well-pleaded complaint rule to the face of the complaint unaided by the removal petition and found that no federal jurisdiction existed because questions concerning La Chemise's right to use the emblems raised only state law issues.[68]

II
THE CASE

The Franchise Tax Board of California, the state agency charged with collecting state personal income taxes, brought two causes of action in state court against Construction Laborers Vacation Trust (CLVT).[69] First, the Board sought enforcement of a levy against funds held by CLVT for the payment of back taxes owed by three of the trust's members.[70] Second, the Board sought a declaratory judgment that the Employee Retirement Income Security Act (ERISA)[71] did not preempt the levy, and that CLVT was bound to honor future levies of the Board.[72] CLVT removed to the District Court for the Central District of California, contending that ERISA preempted the state tax levy.[73] The district court upheld federal ju-

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64 *La Chemisee La Coste,* 506 F.2d at 341-45.

65 *See supra* note 51 and accompanying text.

66 506 F.2d at 343 n.4.

67 *Id.*

68 *Id.* at 343-44. The Third Circuit also noted that even if *Skelly Oil* and *Wycoff* applied, it would still deny jurisdiction because where a federal claim is only one of three possible trademark actions that the threatening party could bring, an averment of the federal action in the complaint for declaratory judgment will not provide the basis for removal jurisdiction. *Id.* at 345-46. For a critical discussion of *La Chemise,* see Note, *Removal—State Declaratory Judgment Actions Based on Federal Question Jurisdiction,* 17 B.C. IND. & COM. L. REV. 72 (1975).

Franchise Tax Board held that *Skelly Oil* and *Wycoff* applied to state declaratory judgments actions, 103 S. Ct. at 2851, thus repudiating *La Chemise.*

69 CLVT was a welfare benefit plan within the meaning of § 3 of ERISA, 29 U.S.C. § 1002(1) (1982). *See Franchise Tax Bd.,* 103 S. Ct. at 2844.

70 The Board's complaint demanded money damages not to exceed $380.56 plus interest for unpaid state personal income taxes.

71 29 U.S.C. §§ 1001-1461 (1982).

72 103 S. Ct. at 2844-45. Declaratory judgment was sought under the California declaratory relief statute, CAL. CIV. PROC. CODE § 1060 (West 1980).

73 The litigants did not dispute CLVT's status as a "welfare benefit plan" within the meaning of § 3 of ERISA, 29 U.S.C. § 1002(1) (1982). Section 514(a) of ERISA preempts "any and all state laws" which "relate to any employee benefit plan," 29 U.S.C. § 1144(a), such as the Construction Laborers' trust at issue. *See* 29 U.S.C. § 1002(1)-(3). Thus, if the tax levy "relates to" the trust, § 514(a) precludes enforce-

risdiction, and held for the Board on the merits.[74] The Ninth Circuit reversed without questioning jurisdiction, and held that ERISA preempted the state tax levy.[75] The Supreme Court, in a unanimous opinion written by Justice Brennan, reversed for lack of jurisdiction, and did not reach the ERISA preemption question.[76]

The Court found that state law provided the sole basis for the Board's causes of action. As a result, application of the well-pleaded complaint rule barred federal jurisdiction. The first cause of action, the enforcement of the state tax levy, arose under California law, and a federal issue, that ERISA barred the levy, entered the dispute only as a defense to the levy.[77] Because the plaintiff's claim arose solely under state law, straightforward application of the well-pleaded complaint rule barred federal jurisdiction over the Board's first cause of action.[78]

The Board's second cause of action, for a declaration that ERISA did not preempt the levy, posed a more difficult problem for the Court.[79] The Court noted that the scope of the preemptive effect of ERISA was the sole issue presented in the declaratory complaint as there could be no relief for the plaintiff "without a construction of ERISA and/or an adjudication of its preemptive effect and constitutionality—all questions of federal law."[80] Thus, the face of the plaintiff's well-pleaded declaratory complaint presented a federal question.

The Court, however, declined to adopt a face of the declaratory complaint test. Instead, it applied the rule of *Skelly Oil,* developed for declaratory judgment actions brought in federal court,[81] to actions for declaratory judgments brought in state court. Therefore, in order to determine whether removal jurisdiction exists, a court must look to the nature of the underlying claim which either party

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ment of the levy. In other contexts, the Supreme Court has broadly construed the "relate to" language of § 514(a). *See* Shaw v. Delta Airlines, 103 S. Ct. 2890 (1983) (New York's Human Rights Law relates to employee benefit plans); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522 (1981) (New Jersey workers compensation law indirectly relates to employee benefit plan and is preempted by ERISA).

74 *Franchise Tax Bd.,* 103 S. Ct. at 2845.

75 Franchise Tax Bd. v. Construction Laborers Vacation Trust, 679 F.2d 1307 (9th Cir. 1982), *rev'd,* 103 S. Ct. 2841 (1983). Circuit Judge Tank, in dissent, argued that under the well-pleaded complaint rule, the federal court had no jurisdiction and that even conceding jurisdiction, ERISA would not preempt the state tax levy. 679 F.2d at 1309, 1312-13.

76 103 S. Ct. 2841 (1983).

77 *Id.* at 2848. The Board brought suit to enforce the levy pursuant to CAL. REV. & TAX CODE § 18831 (West 1983).

78 103 S. Ct. at 2847-48 (citing Gully v. First Nat'l Bank, 299 U.S. 109, 116 (1936)).

79 103 S. Ct. at 2849.

80 *Id.*

81 *See supra* notes 33-58 and accompanying text.

could have brought against the other.[82] *Skelly Oil* did not require such a test, turning in part on the congressional intention concerning the Declaratory Judgment Act,[83] but fidelity to its principles required examination of the possible coercive actions underlying the state declaratory judgment action. Otherwise, an action could be brought in state court for an interpretation of federal law and then removed, even if such a declaratory action could not have been brought in federal court.[84]

Applying the *Skelly Oil* rule to the facts of *Franchise Tax Board,* the Court found that the coercive action underlying the declaratory claim was a suit by CLVT to enjoin a tax levy against the trust.[85] ERISA provides exclusive federal jurisdiction for such an injunctive action by CLVT and, thus, application of *Skelly Oil* would permit removal.[86] The Court created an exception to the *Skelly Oil* rule, however, holding that deference to state governments dictated that a suit brought by a state in its own court to determine the validity of its own law should not be snatched from state court.[87]

After denying federal jurisdiction over the Board's two causes of action, the Court considered CLVT's contention that the preemptive effect of ERISA supported federal jurisdiction and that removal was therefore appropriate.[88] Analogizing to *Avco Corp. v. Aero Lodge No. 735*,[89] CLVT argued that the preemptive power of ERISA superseded all state law causes of action and thus the Board's complaint was in substance a claim under federal law.[90] The Court held that in order for preemption to support removal, the rights that the plaintiff sought to assert had to be of central concern to the federal statute involved, and that federal law must not merely afford a defense to a state law claim, but must deprive the plaintiff of the state cause of action. The Court denied removal because although ERISA provided a possible defense to the state tax levy, it did not

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82 *Franchise Tax Bd.*, 103 S. Ct. at 2851.

83 *Id.* at 2850-51; *see also Skelly Oil,* 339 U.S. at 880; *supra* notes 46-50 and accompanying text.

84 103 S. Ct. at 2851.

85 *Id.* at 2851-52.

86 *Id.* at 2851-52 & n.20, 2854 n.26. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) (1982), provides exclusive federal jurisdiction over any action brought by a participant, beneficiary, or fiduciary of a benefit plan or the Secretary of Labor to enjoin any act inconsistent with the provisions of a benefit plan. The Court in *Franchise Tax Bd.* declined to reach the question whether a suit to enjoin a state tax levy on an ERISA-covered trust would be barred from the federal courts by the Tax Injunction Act, 28 U.S.C. § 1341 (1982). *Franchise Tax Bd.*, 103 S. Ct. at 2852 n.21.

87 *Franchise Tax Bd.*, 103 S. Ct. at 2852-53.

88 *Id.* at 2353-55.

89 376 F.2d 337 (6th Cir. 1967), *aff'd,* 390 U.S. 557 (1968). *Avco* is discussed *supra* notes 29-32 and accompanying text.

90 *Franchise Tax Bd.*, 103 S. Ct. at 2853.

supersede the power to bring the levy by replacing it with a federal cause of action.[91]

III
ANALYSIS

A. The Well-Pleaded Complaint Rule Applied

The Court's denial of removal jurisdiction over the Board's first cause of action, the enforcement of the state tax levy, involved a straightforward application of the well-pleaded complaint rule. The Court reaffirmed the longstanding principle that a federal defense to a state law cause of action will not, by itself, provide the basis for original or removal jurisdiction.[92] In *Franchise Tax Board,* the California law providing for the enforcement of state tax levies formed the law of the complaint.[93] CLVT's contention that ERISA, a federal statute, gave it immunity from the levy was merely a defense to the application of state law.[94]

Various authorities argue that federal jurisdiction and therefore removal jurisdiction should be allowed on the basis of a federal defense.[95] They contend that a federal forum should be available whenever a substantial federal question must be litigated, whether it enters the case by way of the complaint or the answer.[96] Ensuring a federal forum would provide greater uniformity in federal law and guard against misapplication of federal law by state courts.[97]

In *Franchise Tax Board,* CLVT's asserted defense to the state tax levy, that ERISA preempted it, was substantial and potentially dis-

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91 *Id.* at 2854-55.

92 *Id.* at 2845-48. In applying the well-pleaded complaint rule, the Court stated:

> [S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit tbat the defense is the only question truly at issue in the case.

Id. at 2848. *See, e.g.,* Gully v. First Nat'l Bank, 299 U.S. 109 (1936); Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908); *see also supra* notes 22-23 and accompanying text. Prior to *Franchise Tax Bd.,* the Court had faced a similar question in *Gully.* For a discussion of *Gully,* see *supra* notes 11-21 and accompanying text.

93 *Franchise Tax Bd.,* 103 S. Ct. at 2848.

94 *Id.*

95 *See, e.g.,* ALI STUDY, *supra* note 6, § 1312, at 25-28, 187-207; Trautman, *supra* note 22, at 745.

96 *See* ALI STUDY, *supra* note 6, at 189-92.

97 *Id.* In addition to proposing federal defense removal, the ALI proposes to allow both plaintiffs and defendants to remove. *Id.* § 1312(a)(2). The ALI would permit either party to remove on the basis of a federal defense to avoid a potential unsympathetic construction of federal law. *Id.* at 191-94. The ALI would limit federal defense removal to cases where the amount in controversy exceeds $10,000 in order to avoid the use of federal defense removal as an extortionate tactic where the amount in controversy is small. *Id.* § 1312(a)(2), at 194-96.

positive of the action.[98] Therefore, under a federal defense jurisdictional approach, CLVT would be permitted to remove.[99] The adoption of such an approach, however, would be unwise. The well-pleaded complaint rule preserves the proper relationship between state and federal courts and operates more efficiently than would federal defense jurisdiction.

The well-pleaded complaint rule properly strikes the balance between state and federal jurisdiction. Federal courts are courts of limited, not general jurisdiction.[100] The Supreme Court has narrowly construed the jurisdiction of the federal courts to avoid intrusions upon the jurisdiction of the state courts whenever possible.[101] The well-pleaded complaint rule preserves the jurisdiction of state courts by excluding cases predominantly founded upon state law from federal courts.[102] Even though the well-pleaded complaint rule operates to exclude federal issues raised in defense from federal court, the supremacy clause[103] requires state courts to enforce federal rights faithfully, and the Supreme Court has the power to remedy state court misapplications of federal law.[104]

The well-pleaded complaint rule is more efficient than federal

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98 *See Franchise Tax Bd.*, 103 S. Ct. at 2843. In fact, whether ERISA preempted the state tax levy was the only point that the parties disputed. *Id.*

99 Actually, under the ALI proposal, CLVT would be unable to remove because of a proposed exception to federal defense removal. The ALI would not allow a defendant to remove an action "brought by a State . . . , or an officer or agency of a State . . . , to enforce the statues, ordinances, or administrative regulations of such State." ALI STUDY, *supra* note 6, § 1312(b)(6). The ALI would bar removal because "proper respect for the states suggests that they should be allowed to use their own courts for routine matters of law enforcement." *Id.* at 201.

100 *See* C. WRIGHT, *supra* note 9, § 7, at 10; *see also* Hart, *supra* note 22, at 495 ("As to certain matters, federal law assumes and accepts the basic responsibility of the states, and seeks simply to regulate the exercise of state authority").

101 *See, e.g.*, Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941). In *Shamrock Oil* the Court noted that

> [t]he power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."

Id. at 108-09 (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934)). *See also* Hart, *supra* note 21, at 495.

102 The Supreme Court in *Skelly Oil* expressed concern about keeping the docket of federal courts manageable, and avoiding potential misapplication of state law. 339 U.S. at 673.

103 The supremacy clause reads in part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . 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, cl. 2.

104 28 U.S.C. § 1257 (1982).

defense removal. Federal defense removal creates uncertainty because the significance of a federal defense to a state law cause of action may not be evident from the initial pleadings. The availability of the federal defense may not become apparent until subsequent pleadings or trial. Thus, in some cases, the grounds for federal defense to support removal may not exist until after a substantial expenditure of time and resources in state court. The well-pleaded complaint rule allows determination of removal jurisdiction on the basis of the initial pleading, preventing such a potential waste of state resources.[105]

The well-pleaded complaint rule provides a convenient rule of thumb to efficiently allocate cases between federal and state courts.[106] Concededly, the rule is rigid and excludes from federal court the determination of substantive federal issues that might merit a federal forum.[107] However, the rule's certainty and efficiency, in addition to its reflection of the proper relationship between state and federal courts, compensate for its shortcomings.

B. The Application of *Skelly Oil* to State Declaratory Judgment Actions

The Board's second cause of action, the state declaratory judgment action, posed a more difficult problem for the Court.[108] On its face, the Board's declaratory judgment complaint asked that the California state court determine whether ERISA preempted the state tax levy.[109] Commentators have argued that federal jurisdic-

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105 *See* Stone v. Stone, 450 F. Supp. 919, 922 (N.D. Cal. 1978) ("If the existence of a federal cause of action depended on the defense, a . . . court could not know whether it had jurisdiction until the [defendant] answered the complaint, and the well-pleaded complaint rule . . . was designed to avoid just this kind of uncertainty and confusion."), *aff'd*, 632 F.2d 740 (9th Cir. 1980).

106 *See* Cohen, *The Broken Compass: The Requirements That a Case Arise "Directly" under Federal Law*, 115 U. PA. L. REV. 890, 915-16 (1967). *See also* Gully v. First Nat'l Bank, 299 U.S. at 117-18 (countless causes arguably have basis in federal law; the well-pleaded complaint rule helps determine which deserve federal forum).

107 *See* Trautman, *supra* note 22, at 469 (well-pleaded complaint rule improperly focuses on pleading rules rather than identification of federal issues). Louisville & Nash. R.R. v. Mottley, 211 U.S. 149 (1908), is an excellent example of a case where rigid application of the well-pleaded complaint rule delayed the ultimate determination of a substantial federal issue. *See supra* note 22.

108 *See Franchise Tax Bd.*, 103 S. Ct. at 2849.

109 *Id.* at 2845. Franchise Tax Board's complaint alleged in pertinent part that,

> "The Board . . . contends that defendants [CLVT] are obligated and required by law to pay over to the Board all amounts held . . . in favor of the Board's delinquent taxpayers. On the other hand, defendants contend that section 514 of ERISA preempts state law and that the trustees lack the power to honor the levies made upon them by the State of California.
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> . . . [D]efendants will continue to refuse to honor the Board's levies in

tion should exist if the face of a complaint for declaratory judgment discloses a substantial federal issue.[110] The Court, however, rejected a face of the declaratory complaint test. Instead, the Court extended the rule developed in *Skelly Oil* for federal declaratory judgment actions to state declaratory judgment actions, and held that a court must look to the nature of the underlying coercive action to determine whether federal jurisdiction exists.[111] By rejecting a face of the declaratory complaint test, the Court missed an opportunity to simplify the jurisdictional approach to declaratory judgment actions. Furthermore, the Court misapplied *Skelly Oil* to the facts, which will create even more confusion over the proper jurisdictional analysis for declaratory judgment complaints.

Courts should apply the well-pleaded complaint rule to the face of the declaratory complaint, rather than to the underlying coercive action, because the face of the declaratory complaint rule is easier to apply and provides greater certainty than the *Skelly Oil* rule.[112] Under such an approach, a court would determine whether federal jurisdiction exists from the actual pleading filed, rather than on the speculative basis of a hypothetical coercive action that could have been brought by one of the parties.[113] By limiting the inquiry to the face of the declaratory complaint, and the actual issues placed in dispute, a court can quickly and readily determine jurisdiction from what is placed in controversy.[114] A party who could bring either state or federal claims exemplifies the inadequacy of the speculative inquiry mandated by *Skelly Oil*. Such a party could legitimately choose to forego the federal claims in order to avoid federal jurisdiction.[115] Yet under *Skelly Oil*, a court would look to those claims which the party might be willing to forego in order to establish jurisdiction.

A face of the declaratory complaint rule would not violate the limited procedural purpose of the Declaratory Judgment Act.[116] The prohibitions against federal jurisdiction based on an anticipation of a federal defense or artful pleading provide ample protection against an unwarranted expansion of federal jurisdiction due to the

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this regard. Accordingly, a declaration by this court of the parties' respective rights is required to fully and finally resolve this controversy."

Id. (quoting from Franchise Tax Board's Complaint at 8-9).

110 *See, e.g.*, ALI STUDY, *supra* note 6, § 1311, 170-72; Mishkin, *supra* note 6, at 177-84; Trautman, *supra* note 22, at 463-68.

111 *Franchise Tax Bd.*, 103 S. Ct. at 2851; *see also supra* notes 33-58 and accompanying text (discussing development of *Skelly Oil* rule).

112 *See* Mishkin, *supra* note 6, at 181.

113 *Id.*

114 *Id.*

115 *See supra* notes 24-25 and accompanying text.

116 *See Skelly Oil*, 339 U.S. at 671; *see also supra* notes 46-50 and accompanying text.

procedural posture of a declaratory judgment action.[117] A court could determine from the face of the declaratory complaint whether a substantial federal question was presented, or whether a party was seeking improperly to gain access to a federal forum through artful pleading. For example, in *Skelly Oil,* the plaintiff sought a declaration of the continuing effectiveness of a state law contract. The face of the declaratory complaint in *Skelly Oil* indicated, therefore, that the action did not arise under federal law, but state contract law. Thus, it was not necessary for the Court there to determine that the underlying coercive action arose under state law in order to deny federal jurisdiction.[118]

Application of the face of the declaratory complaint test to *Franchise Tax Board* reveals that the Board's complaint raises a substantial federal question—the scope of ERISA[119]—and that removal would be appropriate. The Court's decision in *Franchise Tax Board,* however, forecloses any use of the face of the declaratory complaint test by federal courts. In *Franchise Tax Board,* the Court reaffirmed *Skelly Oil,* and extended it to state declaratory judgment actions.[120] The Court held that, as a general rule, declaratory judgment actions are removable only if the underlying coercive action arises under federal law.[121]

In *Franchise Tax Board,* the Court applied the rule of *Skelly Oil* and looked to the coercive action which the declaratory defendant CLVT could have brought. Section 502(e)(1) of ERISA grants trustees of ERISA-covered plans the power to sue for injunctive relief to resolve disputes concerning their rights and duties under ERISA.[122] In addition, section 502(e)(1) of ERISA provides exclusive federal jurisdiction over such an injunction.[123] The Court created an exception to the *Skelly Oil* rule and declined to allow removal, asserting

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117 *See supra* notes 22-27 and accompanying text.

118 *See Skelly Oil,* 339 U.S. at 670-71; *see also* Mishkin, *supra* note 6, at 183 (denial of jurisdiction appropriate in *Skelly Oil* under face of declaratory complaint rule). Had the plaintiff sought a declaration that the federal agency had issued the certificate, it would have been clear that the plaintiff was seeking merely to plead its state law action in an artful manner.

119 *Franchise Tax Bd.,* 103 S. Ct. at 2843.

120 *Id.* at 2850-51.

121 *Id.*

122 *Id.* at 2852-53. Section 502(e)(1) of ERISA is codified at 29 U.S.C. § 1132(e)(1) (1982).

123 *See* 29 U.S.C. § 1132(e)(1) (1982). The fact that the declaratory judgment defendant's coercive action would arise under the exclusive jurisdiction of the federal courts does not bar removal. Removal is only barred when the action asserted by the actual plaintiff in state court arises under the exclusive jurisdiction of the federal courts. *See supra* note 9.

The Court also indicated that even if ERISA did not contain a jurisdictional provision, CLVT might be able to sue in federal court under the doctrine that a "person subject to a scheme of federal regulation may sue in federal court to enjoin application

that "considerations of comity [made the Court] reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it."[124] The Court noted that a state is not "prejudiced by an inability to come to federal court for a declaratory judgment in advance of a possible injunctive suit by a person subject to federal regulation."[125] States can enforce their own laws in their own courts and do not suffer if any federal questions are tested there.[126] Although ERISA grants certain parties the right to bring suit in federal court, it does not provide that suits against these parties likewise be cognizable in a federal court.[127] The Court believed that federal jurisdiction should not govern a suit brought by a state in its courts for a declaration of the validity of its laws because of the notions of comity that underlie the well-pleaded complaint rule and all questions of federal jurisdiction.[128]

Although such an exception to the *Skelly Oil* rule may be arguably justified when the coercive action falls under *original* federal jurisdiction, such an exception should not be recognized when the coercive action falls under *exclusive* federal jurisdiction. If the coercive action arises under exclusive federal jurisdiction, any questions of comity have been already resolved by Congress in favor of federal jurisdiction. By bestowing exclusive jurisdiction, Congress has determined that certain types of federal rights should be vindicated only in federal court. If the coercive action would be cognizable only in federal court, the denial of the removal to federal court of a state declaratory judgment action that seeks to foreclose that exclusive federal remedy contravenes the intent of Congress. The coercive action in question in *Franchise Tax Board,* an injunction by CLVT to bar state interference with an ERISA trust, falls under exclusive federal jurisdiction.[129] Removal therefore should be allowed under the principles of *Skelly Oil.* The Court's creation of this exception to

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to him of conflicting state regulations, and a declaratory judgment by the same person does not necessarily run afoul of the *Skelly Oil* doctrine." *Id.* at 2852 n.20.

124 *Franchise Tax Bd.*, 103 S. Ct. at 2852 n.22.

125 *Id.* at 2852.

126 *Id.*

127 *Id.* at 2852. *See* § 502 of ERISA, 29 U.S.C. § 1132 (1982).

128 *See supra* notes 100-03 and accompanying text. As the Court in *Franchise Tax Bd.* explained:

> The situation presented by a State's suit for a declaration of the validity of state law is sufficiently removed from the spirit of necessity and careful limitation of district court jurisdiction that informed our statutory interpretation in *Skelly Oil* and *Gully* to convince us that, until Congress informs us otherwise, such a suit is not within the original jurisdiction of the United States district courts. Accordingly, the same suit brought originally in state courts is not removable either.

Franchise Tax Bd., 103 S. Ct. at 2852-53 (footnote omitted).

129 *See* 29 U.S.C. § 1132(e) (1982).

Skelly Oil effectively allows the use of the procedural device of the declaratory judgment to reduce federal jurisdiction in violation of *Skelly Oil*'s underlying policy.[130] The Court in *Franchise Tax Board* extended *Skelly Oil* to state declaratory judgment actions to avoid the contravention of *Skelly Oil*'s observation that the Federal Declaratory Judgment Act did not affect federal jurisdiction.[131] The Court then violated the policy of *Skelly Oil* by creating an exception. If the Board had originally brought suit for a declaration of the inapplicability of ERISA in federal court, federal jurisdiction would exist since *Skelly Oil* mandates looking to the underlying coercive action: a suit by CLVT. The Court has thus reduced federal jurisdiction by denying the removal of such an action brought in state court although federal jurisdiction would exist if the action had been originally brought in federal court.[132]

The Court has thus created a potential race to the courthouse by enabling a potential defendant to a federal cause of action (in this instance a state) to close off the potential plaintiff's congressionally mandated forum by filing a state declaratory judgment action. Furthermore, rather than clarifying determinations of jurisdiction in declaratory judgment actions, the Court has added even more complexity and confusion to such determinations.

C. Clarification of the Preemption Exception to the Well-Pleaded Complaint Rule

Finally, the Court considered CLVT's contention that ERISA preempted the Board's complaint, making the claims, in substance, ones arising under federal law.[133]

Relying on *Avco Corp. v. Aero Lodge No. 735*,[134] CLVT argued that removal should be permitted because ERISA preempted any state causes of action involving an interpretation or application of ERISA.[135] The Court properly rejected this argument and clarified

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130 *Skelly Oil*, 339 U.S. at 671; *see supra* notes 46-50 and accompanying text.

131 *Franchise Tax Bd.*, 103 S. Ct. at 2851 (*citing Skelly Oil*, 339 U.S. at 671).

132 The Court's action also violates the removal statute, 29 U.S.C. § 1441 (1982), which allows the removal of any action which could have originally been brought in federal court.

133 *Franchise Tax Bd.*, 103 S. Ct. at 2853-55.

134 376 F.2d 337 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968). *See supra* notes 29-32 and accompanying text.

135 *Franchise Tax Bd.*, 103 S. Ct. at 2853. In *Avco*, the plaintiff sued under state law to enjoin a strike by the defendants which violated a collective bargaining agreement by the parties. The defendants were allowed to remove to federal court because § 301 of LMRA was so pervasive in the area of collective bargaining agreements, that no state-created remedy existed for disputes involving those agreements. *See Avco*, 376 F.2d at 339-40. Similarly, CLVT argued that ERISA preempted state law, making the Board's complaint, in substance, a claim under federal law. 103 S. Ct. at 2853.

the requirements of the preemption exception to the well-pleaded complaint rule.[136]

In order to remove under the preemption exception, the defendant must show not only that the plaintiff's cause of action affects a federal right of the defendant, but that the right the plaintiff seeks to enforce is itself governed by federal law to the exclusion of state law.[137] In *Avco,* the plaintiff brought suit to enjoin the breach of a collective bargaining agreement.[138] Although state law would provide a remedy in the absence of the federal statute, the federal labor act "displace[d] entirely" any state cause of action for such a breach. Federal law provided the only remedy available under these circumstances to the plaintiff.[139] As the Court in *Franchise Tax Board* explained, "*Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law."[140]

In *Franchise Tax Board,* the plaintiff sought enforcement of a tax levy, and declaratory judgment that ERISA did not preempt the state tax levy.[141] Under ERISA, however, only certain named persons may bring causes of action to seek relief in accordance with its provisions.[142] Thus, unlike *Avco* where the plaintiff was required to seek relief under a federal statute, state law provides the only remedy available to the Board to enforce its tax levy. Therefore, even though ERISA may well preclude enforcement of the tax levy on the trust, "an action to enforce the levy is not itself preempted by ERISA."[143]

The Court has thus distinguished between a federal defense to a state law claim and federal preemption of a state cause of action. First, when federal law merely operates to provide a defense to a plaintiff's attempt to enforce a state created right, no removal is permitted. In such a case, the plaintiff asserts a state law right and the defendant contends that federal law precludes the operation of the state law right against him. In the second situation, when federal law deprives the plaintiff of his state law right and replaces it with an analogous federal right, removal is permitted. In the latter case, there is no state law to apply because federal law provides the only cause of action available to the plaintiff.

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136 *See supra* notes 28-32 and accompanying text.
137 *Franchise Tax Bd.,* 103 S. Ct. at 2855.
138 *Avco,* 376 F.2d at 339.
139 *Id.* at 340.
140 *Franchise Tax Bd.,* 103 S. Ct. at 2854.
141 *Id.* at 2855.
142 29 U.S.C. § 1132(a).
143 *Franchise Tax Bd.,* 103 S. Ct. at 2855.

Under the Court's analysis, the preemption exception to the well-pleaded complaint rule is simply an application of the artful pleading exception.[144] The issue is whether the plaintiff, though required to seek a remedy under federal law, has artfully pleaded his complaint to avoid federal jurisdiction by improperly casting his claim for relief under state law.[145] If the plaintiff has adequately pleaded a valid state law remedy, then preemption will not support jurisdiction; if, however, the plaintiff pleads a state cause of action that has in reality been superseded by a federal cause of action, then removal will be allowed.

The Court has articulated a workable and sensible distinction between a defense of federal preemption and federal preemption of state causes of action. Allowing removal only in the latter case, when, in substance, no state cause of action exists, is consistent with the principles of federal jurisdiction and the well-pleaded complaint rule: first, a federal defense to a state law cause of action cannot support removal;[146] second, a plaintiff, as master of his claim, can choose to bring a valid state law claim in state court;[147] and, third, federal courts should narrowly construe their jurisdiction to avoid deciding questions of state law whenever possible.[148]

CONCLUSION

The Supreme Court's reaffirmation of the well-pleaded complaint rule and its treatment of the preemption exception to the rule in *Franchise Tax Board* represent the proper approach to problems of federal court jurisdiction. The Court's approach to jurisdiction in these areas is consistent with the traditionally limited scope of federal jurisdiction. However, the Court's treatment of determinations of federal jurisdiction in actions for declaratory judgment brought in state courts is misguided. First, by rejecting a face of the declaratory complaint test and reaffirming the rule of *Skelly Oil* that a court must base its jurisdiction on the underlying coercive action, the Court missed an opportunity to lay down a simpler and more efficient rule. In addition, by creating an exception to the rule of *Skelly*

144 *See supra* notes 26-27 and accompanying text.

145 This artful pleading test resembles the one articulated by the Ninth Circuit in Guinasso v. Pacific First Fed. Sav. & Loan Ass'n, 656 F.2d 1364, 1367 (9th Cir. 1981) (footnote omitted):

> Removal may be appropriate when federal law not only displaces state law but also confers a federal remedy on the plaintiffs or compels them to rely, explicitly or implicitly, on federal propositions. But when the claim presents a prima facie basis for relief entirely under state law, the preemption defense does not support federal jurisdiction.

146 *See supra* note 22 and accompanying text.

147 *See supra* notes 24-25 and accompanying text.

148 *See supra* notes 100-01 and accompanying text.

Oil, holding that an action brought by a state in state court to test the validity of its own laws is not removable even in the presence of a substantial federal question, the Court undermined the rule of *Skelly Oil* and also violated the limited procedural purpose of declaratory judgments. Furthermore, in its effort to restrict federal court jurisdiction, the Court has added confusion and uncertainty to an already confused area of jurisdictional analysis.

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