Federal Question Doctrines and American Indian Law

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Occasionally a case will arise at the intersection of two otherwise unrelated areas of law, in a manner which invites the illumination of each.¹ Sometimes, the nation's highest forum is the setting, presenting the opportunity for definitive resolution of formerly opaque principles and the creation of watersheds in both fields. More than occasionally, the opportunity presented is lost.² Oklahoma Tax Commission v. Graham,³ in its second Supreme Court incarnation, is an example of this sometimes purposeful phenomenon.

¹ See, e.g., United States v. Nixon, 418 U.S. 683 (1974) (articulating standard of review in cases of constitutional conflict; defining scope and reviewability of presidential executive privilege assertions); Baker v. Carr, 369 U.S. 186 (1962) (enumerating criteria for ascertaining existence of nonjusticiable political questions; recognizing federal subject matter jurisdiction over suit challenging malapportionment of state legislature as equal protection violation); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (assuming judicial review of congressional acts; rejecting congressional power to expand original jurisdiction of United States Supreme Court beyond that granted by article III).

² See, e.g., Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986) (purporting to apply—but distorting—the controlling commercial speech test; confusing analytical categories by reasoning that the existence of legislative power can a fortiori evidence a correlative absence of supervening rights); Palmore v. Sidoti, 466 U.S. 429 (1984) (affirming the “controlling” nature of the “best interests of the child” test in child custody proceedings; acknowledging “the reality of private [racial] biases and the possible injury” as a result of those biases to the child in question; holding that equal protection forbids consideration of race in child custody proceedings, gratuitous potential injury to the child notwithstanding); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (eschewing clarification of extent of federal power to bar aliens from federal civil service; either articulating sui generis procedural due process test, or revitalizing discredited nondelegation doctrine in sui generis fashion).

From a substantive law standpoint, Graham—should any court ever reach its merits (a doubtful proposition)—constitutes a frontier-expanding foray into the area of Indian country state taxation jurisdiction, raising issues which have heretofore been unresolved at the United States Supreme Court level. Included are the scope of available state enforcement options for tribal noncollection of applicable state cigarette taxes and the taxability of revenues from tribally-operated Indian country bingo, restaurant, and motel operations.


5. But cf. California State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9 (1985); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) (taxability of Indian country cigarette sales to tribal nonmembers, where legal incidence of the tax falls on nonmember purchasers). In Colville, 447 U.S. at 161-62, the Court approved the state-employed remedy of seizure of unstamped cigarettes outside Indian country where the tribe had failed to pay cigarette taxes upheld therein. While Washington had argued that "it may enter onto the reservations, seize stocks of cigarettes ... and sell these stocks in order to obtain payment of taxes due," the Court determined that the question was not properly before it, and was "considerably different" from the remedy which it endorsed. Id. at 162. In the aftermath of the Chemehuevi litigation, California's threat of seizure outside Indian country generated a settlement between the Board of Equalization and the Tribe. In Graham, the state eschewed the seizure remedy and sought an injunction precluding further operations until all allegedly due back taxes were paid, effectively seeking money damages against the Tribe.

6. See generally California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (tribally-operated bingo operations in Indian country immune from state regulatory jurisdiction, where bingo games are not in all cases criminally prohibited by the state); Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n, 829 F.2d 967 (10th Cir. 1987), cert. denied, 108 S. Ct. 2870 (1988) (holding that unlike cigarette sales, in which the tribes would simply be "marketing an exemption," bingo operations actually involve the creation of value in Indian country and are thus immune from state taxation); Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (creating comprehensive federal regulatory scheme, and limiting state taxation to regulatory expenses involved). Although the Gaming Act was not expressly made retroactive by Congress, in Graham, counsel for the state (upon questioning from Justice Scalia) appeared to concede that the taxation implications of the Act have retroactive effect. See Transcript of Oral Argument at 11-13, Graham, 109 S. Ct. 1519 (No. 88-266).

7. Cabazon Band, 480 U.S. at 219-20, distinguished, for purposes of state regulatory jurisdiction, cigarette sales (where the tribes were held simply to be "marketing an exemption") from bingo operations (where the Tribe was "generating value" and
Graham presented a number of non-taxation questions of substantive Indian law as well. The tribal assertion of sovereign immunity from unconsented suit raised questions concerning the scope of that (apparently absolute) doctrine. The Tax Commission's rather surprising assertion that "[i]nsofar as [18 U.S.C.] § 1151 operates . . . to administer its tax laws evenly upon all citizens, it is not within the authority granted Congress by the Commerce Clause" potentially raised the question whether Garcia v. San Antonio Metropolitan Transportation District, which overruled National League of Cities v. Usery, should itself be overruled. Equally surprising—but far from unprecedented—was the Tax Commission's assertion that tribal sovereignty has been extinguished in Oklahoma and that no Indian country exists therein; these assertions potentially presented the question whether Oklahoma Indians are sui generis in American Indian

where the patrons "do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide"). Indian Country, U.S.A., 829 F.2d at 982, employed Cabazon Band's distinction in extending the immunity from regulatory jurisdiction granted to Indian country bingo operations by Cabazon Band to the taxation arena as well. No Supreme Court case has yet addressed the issue in the restaurant and motel room context. But see Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (taxability of proceeds from tribal ski resort located on land leased from the United States, outside of Indian country). By contrast, the Inn involved in Graham is located on land held in trust by the United States, see infra note 25, and falls within the Indian country definition of 18 U.S.C. § 1151(a). See United States v. John, 437 U.S. 634, 648-49 (1978); United States v. McGowan, 302 U.S. 535 (1938); United States v. Pelican, 232 U.S. 442, 449 (1914).

8. See infra text accompanying note 29.
9. See cases cited infra note 29.
Arguments more specific to the sovereignty of the respondent Chickasaw Nation were also presented by both parties.

But these substantive issues are not the focus herein. Rather, after tracing the evolution of the federal question issues in *Graham*, this Article will attempt to distill those issues into discrete components, as they were presented to the Court for resolution. Next, it will trace the evolution of the fundamental conflicts and ambiguities in the various components of federal question doctrine, and illustrate how those components are potentially at war with each other and how the Court failed to take advantage of the opportunity presented by *Graham* to harmonize those components both within and without the field of American Indian law. Finally, it concludes that the *Graham* Court unanimously got it wrong and presents a suggested harmonizing approach.

The evolution of the federal question conundrum underlying *Graham* will now be more fully addressed.

II. THE OPPORTUNITY MISSED: OKLAHOMA TAX COMMISSION V. GRAHAM

*Graham* involved a 1985 state court lawsuit by the Oklahoma Tax Commission which sought to enjoin the Chickasaw Nation and the manager of the tribally-owned Chickasaw Motor Inn from conducting any business at the Inn until

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19. See infra text accompanying notes 22-76.

20. See infra text accompanying notes 77-625.

21. See infra text accompanying notes 626-796.
allegedly due back state taxes were paid on cigarette sales,\(^\text{22}\) bingo operations,\(^\text{23}\) and (apparently) restaurant meals and motel room rentals,\(^\text{24}\) all of which occurred at the Inn.\(^\text{25}\) Neither tribal waiver nor congressional abrogation of tribal sovereign immunity was alleged in the state’s petition, which made reference solely to state law.\(^\text{26}\) On the same day the petition was filed, the state court issued a temporary restraining order against the Tribe,\(^\text{27}\) which then removed the case to federal court. In its removal petition, the Tribe maintained that the state’s action was within the federal question jurisdiction granted by 28 U.S.C. § 1331(a) and was removable pursuant to 28 U.S.C. 1441(b). Since Oklahoma is a non-Public Law 280 state,\(^\text{28}\) the Tribe attacked the civil jurisdiction of Oklahoma.

\(^\text{22}\) The allegedly apposite cigarette taxes are contained in OKLA. STAT. tit. 68, §§ 302, 302-1(a), 302-2(a), 302-3(a) (Supp. 1985), quoted in Petition for Certiorari at A-37 to 41, Graham, 109 S. Ct. 1519 (No. 88-266).

\(^\text{23}\) The state based the applicability of its tax on the tribal bingo operation on OKLA. STAT. tit. 68, § 1354(1) (Supp. 1985), quoted in Petition for Certiorari at A-42, Graham, 109 S. Ct. 1519 (No. 88-266).

\(^\text{24}\) Although state law imposes restaurant and motel room taxes, the state’s position on this issue was left unclear by its state court petition, which, while alleging neither the applicability of such taxes nor any violation specifically in regard thereto, requested an Order “[p]reliminarily enjoining [defendants] from conducting any business” at the Inn and restaurant until “complete and accurate reports are filed with, and taxes paid to, the Oklahoma Tax Commission as required by State law.” Petition, Oklahoma ex rel. Okla. Tax Comm’n v. Graham, No. C-85-223 (Dist. Ct., Murray County, Okla., Oct. 18, 1985), quoted in Joint Appendix at 3, 5, Graham, 109 S. Ct. 1519 (No. 88-266).

\(^\text{25}\) Id. In 1972, the Tribe had purchased the Inn, with tribal trust monies, as an economic development project. See Joint Appendix at 14, Graham, 109 S. Ct. 1519 (No. 88-266). It conveyed the property to the United States in trust for the Tribe on Aug. 23, 1985. Id. at 16.


courts over Indian activities in Indian country and, more generally, asserted its sovereign immunity from unconsented suit. The federal district court denied the state's motion to remand, finding federal question jurisdiction over "civil actions involving Indian Tribes and a State seeking enforcement of its tax and revenue laws." The same day, it granted the Tribe's motion to dismiss, pursuant to the "long-standing rule that absent congressional authorization Indian Tribes are exempt from suit under the doctrine of sovereign immunity."

A divided Tenth Circuit panel affirmed. Regarding the removal issue, it found that federal question jurisdiction is not perforce bounded by the face of a complaint. Indeed, when the state plaintiff couches his "necessarily federal cause of action solely in state law terms . . . the federal re-

(1982)), required all post-1968 extensions of state jurisdiction pursuant to Public Law 280 to be "with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption," 25 U.S.C. § 1321(a) (1982), and permitted retrocessions of "all or any measure of the criminal or civil jurisdiction, or both," acquired by states pursuant to Public Law 280 in its pre-1968 form. 25 U.S.C. § 1323 (1982). Partial listings of state extensions and retrocessions of Public Law 280 civil and criminal jurisdiction may be found in M. PRICE & R. CLINTON, LAW AND THE AMERICAN INDIAN 464 (2d ed. 1982); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 370-71 n.195 (rev. ed. 1982). Public Law 280, as amended, has been held to be the exclusive method by which a state may acquire jurisdiction not otherwise held over Indian country therein. See Kennerly v. District Ct., 400 U.S. 423 (1971). While Oklahoma has from time to time maintained that legislation by it pursuant to Public Law 280 was unnecessary since it already possessed plenary authority over Indian activities in Indian country, this position has been rejected by both state and federal courts. See, e.g., Indian Country, U.S.A. v. Oklahoma ex rel. Okla. Tax Comm'n, 829 F.2d 967, 980 n.6 (10th Cir. 1987), cert. denied, 108 S. Ct. 2870 (1988). Oklahoma has enacted no legislation pursuant to Public Law 280 which extends its civil or criminal jurisdiction over Indian country in the state.


moval court will look beyond the letter of the complaint to the substance of the claim in order to assert jurisdiction.\(^3\)

The court thought the substance of the claim was clear. "Indeed," it stated, "when we strip the State's complaint of its statutory baggage, we are left with an action in which the State is attempting to enforce an essential element of its sovereignty, the power to tax, over an Indian tribe."\(^4\)

After noting the preeminence of federal law and interests in Indian affairs\(^6\) and the absence of state jurisdiction over unconsenting tribes absent congressional abrogation of tribal immunity from suit, it found congressional permission to sue such a tribe to be "a necessary element of the well-pleaded complaint."\(^3\) As a correlative matter, it rejected the state's contention that both the lack of state civil jurisdiction and tribal sovereign immunity were "mere" federal defenses (which have not, since 1894,\(^7\) warranted removal). In addition, it invoked "threshold question of federal law" analysis in support of both the above conclusions.\(^8\) Finally, it rejected the state's contention that _Franchise Tax Board v. Construction Laborers Vacation Trust_\(^9\) compelled the conclusion that the Tribe's arguments presented nonremovable federal defenses.

Having decided that removal was proper based on the inherency of the federal questions in the state's claim, dismissal was an easier bridge to cross. Regarding the Tribe, absent any

\(^{33.}\) *Graham*, 822 F.2d at 954 (emphasis added) (quoting 14A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3722, at 243 (2d ed. 1985)).

\(^{34.}\) *Graham*, 822 F.2d at 954.

\(^{35.}\) Id. (citing Montana v. Blackfeet Tribe, 471 U.S. 759, 764 (1985)).

\(^{36.}\) *Graham*, 822 F.2d at 954 (emphasis in original).


\(^{38.}\) *Graham*, 822 F.2d at 954 (citing North Davis Bank v. First Nat'l Bank, 457 F.2d 820, 822 (10th Cir. 1972)); see also First Nat'l Bank v. Dickinson, 396 U.S. 122 (1969) (exposition of "threshold federal question" analysis).

allegation of waiver or congressional abrogation of tribal sovereign immunity (any such allegation would have not only been unfounded, but would have clearly presented, on the face of the state's petition, the federal questions which it sought so earnestly to avoid), the court needed to do little beyond citing the usual litany of Supreme Court tribal immunity decisions (Santa Clara Pueblo v. Martinez, Puyallup Tribe v. Department of Game of Washington, and United States v. United States Fidelity & Guaranty Co.) and move on.

Given the federal court's conclusions concerning the presence of inherent federal questions in the complaint, it would have had jurisdiction (at least as a threshold matter) had the case initially been brought in federal court. Nonetheless, under the "derivative" nature of removal jurisdiction in effect at the time of removal in Graham ("[i]f the state court lacks jurisdiction over the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction"), no residual federal jurisdiction could obtain.

Judge Tacha dissented, invoking Justice Cardozo's opinion in Gully v. First National Bank—of which a great deal will be said later in this Article—for the proposition that "the need for federal authority to sue a party does not raise a federal question for the purposes of a well-pleaded complaint." Therefore, she reasoned, the majority's reliance on the premise that a "necessarily federal cause of action [was here couched] solely in state law terms" was misguided.

42. 309 U.S. 506, 512 (1940).
43. Graham, 822 F.2d at 955-56.
45. 299 U.S. 109 (1936).
47. Graham, 822 F.2d at 958 (Tacha, J., dissenting).
48. Id. (citing 14A C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3722, at 243 (2d ed. 1985)).
That tribal sovereign immunity is jurisdictional was equally unpersuasive:

The question here is which court decides the question of sovereign immunity.

... A challenge to state court jurisdiction cannot be sufficient to invoke removal jurisdiction.

... The state court is constitutionally obligated to follow the commands of federal law regarding Indian tribal sovereignty. Should the state court fail to do so, the Supreme Court can review that decision on appeal.49

Finally, she raised a point which was to carry great weight in the Supreme Court's 1989 Graham decision.50 The removal of cases in which federal officers51 or agencies52 or the federal53 or foreign54 sovereigns are sued in state court is controlled by federal statute, not federal quasi-common law doctrines like the "well-pleaded complaint" rule, the "threshold question of federal law" doctrine, the "inherent in the complaint" approach, the "artful pleading" rule, and the "complete preemption" "corollary." "Congress has not," Judge Tacha observed, "enacted an equivalent provision that would allow the removal of actions brought against an Indian tribe in state court."55

The Supreme Court granted certiorari, vacated the Tenth Circuit majority's decision, and remanded for further consideration in light of Caterpillar, Inc. v. Williams56 (its then-most recent removal decision) in December 1987.57

Caterpillar was a strange referent for remand; it is, at bottom, a rather analytically mundane case in which the "complete preemption" removal jurisdiction doctrine first ar-

49. Graham, 822 F.2d at 960 (Tacha, J., dissenting).
55. Graham, 822 F.2d at 960 (Tacha, J., dissenting).
Articulated in Avco Corp. v. Aero Lodge No. 735, and applied for the second time only two months prior to Caterpillar in Metropolitan Life Insurance Co. v. Taylor, was held to be inapplicable to the facts therein. While the Court made approving reference to the "artful pleading" doctrine, the reference was a passing one, peripheral to the outcome of the case.

Given this Supreme Court guidance, the Tenth Circuit panel, on remand, decided it had gotten it right the first time.

58. 390 U.S. 557 (1968). Aveo held that the pre-emptive force of § 301 [of the Labor Management Relations Act] is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. Aveo stands for the proposition that if a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.

59. 481 U.S. 58 (1987). In Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987), a companion case to Metropolitan Life, the Court had held "that state common law causes of action asserting improper processing of a claim for benefits under an employee benefit plan regulated by the Employee Retirement Income Security Act of 1974 (ERISA) are pre-empted by the Act." Metropolitan Life, 481 U.S. at 60 (citation omitted). Metropolitan Life went beyond Pilot Life, holding, pursuant to the "complete" preemption doctrine of Aveo, that not only were state law and remedies preempted by ERISA in the covered area, see generally U.S. Const. art. VI, para. 2, cl. 1 (supremacy clause); Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368-69 (modern "ordinary" statutory preemption analysis), but also "that complaints filed in state courts purporting to plead such state common law causes of action are removable to federal court under 28 U.S.C. § 1441(b)." Metropolitan Life, 481 U.S. at 60.

60. Aveo held that claims under collective bargaining agreements were completely pre-empted by the Labor Management Relations Act. Aveo, 390 U.S. at 560. See also Franchise Tax Bd., 463 U.S. at 23. The state court plaintiffs in Caterpillar alleged "that Caterpillar has entered into and breached individual employment contracts with them." Caterpillar, 482 U.S. at 395 (emphasis in original). The Court distinguished the legal consequences of the Caterpillar facts from those of Aveo in straightforward fashion:

[R]espondent's complaint is not substantially dependent upon interpretation of the collective bargaining agreement. It does not rely upon the collective agreement indirectly, nor does it address the relationship between the individual contracts and the collective agreement. As the Court has stated, "it would be inconsistent with congressional intent under [§ 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."

Caterpillar, 482 U.S. at 395 (footnote omitted).

61. Id. at 397 & n.11. Concerning the nature and consequences of the "artful pleading" rule, see infra text accompanying notes 222-24, 341-74.
and affirmed. It reiterated its earlier conclusions that federal questions were inherent in the petition and that that petition, absent any allegation of waiver or abrogation of tribal sovereign immunity, was not well pleaded in any case. It concluded that Caterpillar was inapposite since federal questions inhered "because of the parties subject to the action." Judge Tacha again dissented, and the Supreme Court granted certiorari for a second time. Given the gestalt, it may safely have been speculated that it did not do so to pat the circuit on the back.

The questions on which the Supreme Court granted certiorari were:

1. Did the Circuit Court of Appeals err in determining that removal jurisdiction was proper for an action brought against an Indian tribe in state court?
2. Does tribal sovereign immunity prohibit an action brought by the State to enforce the collection and remittance requirements of its tax laws on commercial activities conducted by an Indian tribe on off-reservation lands?

The second of these questions, as phrased by the Tax Commission, assumes a great deal of ground. Specifically, it assumes that the Inn was not located on a "reservation," as defined for modern jurisdictional purposes by 18 U.S.C. § 1151(a); if this position were correct, state taxes could be collectable pursuant to Mescalero Apache Tribe v. Jones. And since the Tax Commission's attacks on the sovereignty of the thirty-four federally recognized Oklahoma tribes went further than necessitated by the second question

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63. See Graham, 822 F.2d at 954.
64. Graham, 846 F.2d at 1259-60.
65. Id. at 1260.
66. Id. at 1261 (Tacha, J., dissenting).
68. No issue related to Jan Graham, the former manager of the Inn, was raised by either party during the later stages of the Graham litigation.
69. Petition for Certiorari at i, Graham, 109 S. Ct. 1519 (No. 88-266).
70. See generally supra note 4 (modern "Indian country" approach defined by § 1151); supra note 25 (status of land); supra note 18 (untenability of state's proffered approach).
presented, a number of amici tribes focused primarily on the substantive law issues raised.

But the first issue lies at the heart of the federal question conundrum. In response to it, respondent Chickasaw Nation and amicus Inter-Tribal Council of the Five Civilized Tribes focused the majority of their argumentation.

The Tribe pressed the federal question issues on all fronts. It urged that federal questions (concerning the civil jurisdiction of a non-Public Law 280 state over Indian activities in Indian country, tribal sovereign immunity, state taxing and enforcement authority, and the exercise of the congressional trust responsibility over Indian affairs) were inherent in the state's petition. Alternatively, it maintained that the petition was not well plead absent jurisdictional allegations, since state courts should be regarded as sitting as courts of limited, not general, original jurisdiction where Indian country Indian activities are involved. As a consequence of either of the above-described positions, it contended that neither the jurisdictional nature of tribal sovereign immunity nor the lack of a non-Public Law 280 state's subject-matter jurisdiction could be properly characterized as a "mere" federal defense in this case.

Even were the Court to determine that the state court petition was facially well-plead and grounded wholly in state law, the Tribe further urged that reference to the removal petition for purposes of ascertaining the existence of a removable federal question was warranted by the "artful pleading" exception to the "well-pleaded complaint" rule. Finally, and alternatively, it maintained that the "complete preemption"

72. See, e.g., Brief of Petitioners at 16-23, Graham, 109 S. Ct. 1519 (No. 88-266) (suggestion that allotment and assimilation approximated a federal duty given tribal treaty delicts); id. at 19 (citation to eighth Dawes Commission report finding that "a higher law than that of Congress destined [the Indians] to extinction as a race. . . . While sympathy may well be felt for the American Indian, his passing is but one of the melancholy events which are so often followed by most fitting sequences"); id. at 13 (Oklahoma Indians as "assimilated" tribes).

73. See, e.g., Brief Amicus Curiae of the Sac and Fox Nation at 10-23, Graham, 109 S. Ct. 1519 (No. 88-266); Brief Amicus Curiae of the Wyandotte Tribe at 6-24, id.

74. See Brief of Respondents at 6-26, Graham, 109 S. Ct. 1519 (No. 88-266) [hereinafter Chickasaw Brief]; Brief Amicus Curiae of the Inter-Tribal Council of the Five Civilized Tribes at 10-23, id. [hereinafter Five Tribes Brief].

75. See supra note 28.
“corollary” to the “well-pleaded complaint” rule warranted removal based on the overwhelming potency of the federal interest in regulating both Indian country civil jurisdiction and tribal sovereign immunity, unencumbered by inconsistent state court adjudications.

The Court held against the Tribe, effectively remanding the case to the state district court, in a two-page, per curiam opinion.  

III. THE COMPONENTS OF FEDERAL QUESTION DOCTRINE

Federal question doctrine is both analytically rich and of great practical import for the system of American federalism; not surprisingly, it has attracted continuing scholarly interest. While no attempt will be made herein to rehearse in de-
to facilitate analysis of the conflicts and tensions among its various components, a brief exposition of the historical doctrinal evolution will now be undertaken.

A. The "Classical" Historical Period: 1789-1876

Article III of the Constitution states that "[t]he judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Justice Story was later, in dictum, to maintain that article II declares that "the executive power shall be vested in a president of the United States of America." Could congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent that such a construction . . . would be utterly inadmissible. Why, then, is it entitled to better support in reference to the judicial department?

If then, it is a duty of congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power.79

But the Judiciary Act of 178980 extended no general federal question jurisdiction to the newly created federal courts,81 and what is known of the constitutional Framers’ intent, Story’s dictum notwithstanding, supports the legitimacy of

78. See, e.g., Chadbourn & Levin, supra note 77, at 640-63; Cohen, supra note 77, at 896-905; Collins, supra note 77, at 718-65; Frankfurter, supra note 77, at 501-14.
80. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.
81. But cf. id., § 9, 1 Stat. 76 (exclusive jurisdiction in federal criminal cases, admiralty cases, certain actions against consuls or vice-consuls; concurrent jurisdiction in certain other cases); Engdahl, Federal Question Jurisdiction Under the 1789 Judiciary Act, 14 OKLA. CITY U.L. REV. ___ (1989) (forthcoming) (federal question jurisdiction, though not in article III language, fully vested by 1789 Act).
the 1789 decision to vest less than the whole of the power granted by article III.  

In 1793, mistrust of the federal judiciary was rekindled when the Court, in a decision which "literally shocked the nation," ruled in *Chisholm v. Georgia* that an unconsenting state was subject to suit in federal court. Before the judgment had even become final, the Georgia House of Representatives passed a bill providing that any federal marshal or other person attempting to execute any process in that case would be "guilty of felony and shall suffer death, without benefit of clergy, by being hanged." Final judgment in *Chisholm* was entered on February 4, 1794; by March 4, both the House and Senate had passed what was to become the eleventh amendment, and submitted it to the states for ratification. By February of 1795, three-quarters of the states had ratified, with President Adams proclaiming its ratification (perhaps reluctantly) in 1798.

In the opposite direction, the Federalist Congress passed the so-called "Midnight Judges' Bill" immediately prior to the accession of Jefferson and the Republicans. This Act, now widely ignored, granted federal courts the full federal question jurisdiction—in verbatim article III terms—which the 1789 Act had denied. One year later, the Jeffersonians repealed the Act, potentially raising the constitutional issue.

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82. See, e.g., Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 HARV. L. REV. 49, 65-69 (1923). The converse proposition, that Congress lacks the constitutional authority to expand the judicial powers beyond those granted by article III was established, of course, by Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). This aspect of *Marbury* recently has been sub silentio overruled. Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989).

84. 2 U.S. (2 Dall.) 419 (1793).  
85. 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 100 (1922).  
89. Act of Mar. 8, 1802, ch. 8, 2 Stat. 132. See also Act of Apr. 29, 1802, ch. 31, 2 Stat. 156; Act of Mar. 3, 1803, ch. 40, 2 Stat. 244 (further modifications).  
90. See FRANKFURTER & LANDIS, supra note 87, at 26 n.75.
alluded to by Story fifteen years hence, but which was not to be resolved then or now.

In the interstitial period between 1802 and 1875—when enduring original federal question jurisdiction was finally granted—\(^9\) the Supreme Court had occasion to construe the constitutional “case arising” phrase where its power to review state court decisions on appeal was addressed. In *Cohens v. Virginia*,\(^9\) Chief Justice Marshall articulated the “classical” constitutional test:

> If it be to maintain that a case arising under the constitution, or a law, must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either.\(^9\)

This broad article III test, by which federal question jurisdiction may obtain whenever dispositive federal issues are *involved* in a case, was to be further amplified three years later in *Osborn v. Bank of the United States*,\(^9\) where the “dispositive” requirement of *Cohens* was extended to infinity-approaching dimensions.

In *Osborn*, the Act which incorporated the Bank authorized it “‘to sue and be sued . . . in all state courts having competent jurisdiction, and in any circuit court of the United States.’”\(^9\) The Bank sued Osborn, Auditor of Ohio, in a federal circuit court to enjoin his enforcement of an Ohio tax. If Congress, consistent with the “case arising” language of article III, could constitutionally grant the federal courts jurisdiction over suits by the Bank (and assuming that the eleventh amendment interposed no barrier),\(^9\) then the invalidity of the

92. 19 U.S. (6 Wheat.) 264 (1821).
93. Id. at 379 (emphasis added).
94. 22 U.S. (9 Wheat.) 738 (1824).
95. Id. at 817.
96. See generally id. at 846-59 (disposing of Ohio’s eleventh amendment contention).
state tax would be virtually a foregone conclusion pursuant to *McCulloch v. Maryland*.

Osborn contended that the jurisdiction-conferring provision of the Bank’s charter was an unconstitutional extension of federal jurisdiction beyond the judicial power granted by article III. The Court, again per Marshall, held that cases brought by the Bank “arose” under its charter and consequently arose under federal law.

In analysis from which Professor Hornstein’s “hierarchical” approach can take comfort, Marshall reasoned:

> Take the case of a contract, which is put as the strongest against the Bank.

> When a bank sues, the *first* question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United States. The *next* question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case.

Moreover, neither the fact that the federal questions have already been judicially decided, nor the fact that the defend-

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99. *See Hornstein, supra note 77, at 566:*

[T]he existence of arising under jurisdiction depends upon whether the federal element of the case is sufficiently anterior to other elements so that reliance on it will be necessary to resolve the dispute. The federal interest relied upon to confer jurisdiction must appear to be analytically antecedent to other elements at the time the jurisdictional determination is made. The exercise of original jurisdiction requires the presence of federal matter in the case at its outset, while the exercise of appellate jurisdiction requires the emergence of determinative issues of federal concern by the time review is sought. Both, however, require that the federal element in the case be present at a level in the analytic hierarchy which the court must reach in disposing of the case.

*Cf. id. at 566-76 (analysis of “adequate and independent state ground” doctrine for denying federal review of state decisions and application of “hierarchical” approach thereto).* The use of Professor Hornstein’s test as an exclusionary rule is, however, criticized *infra* at note 692.

100. *Hornstein, supra note 77, at 579.*

ant chose to pursue neither suggested federal defense could defeat federal jurisdiction over the claim. As to the former, Marshall reasoned that "[t]he right to sue, if decided once, is decided forever; but the power of congress was exercised ante-cedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided."102 As to the defendant's forbearance to raise a federal defense, Marshall insisted,

[t]he question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involves, then,103 must determine its character, whether those questions be made in the cause or not.104

This test, often referred to as the "federal ingredient" test,105 has been cited as the "fullest permissible extension of federal judicial power."106

102. Id. at 824.
103. This excerpt was later quoted in Tennessee v. Union & Planters' Bank, 152 U.S. 454, 459 (1894), to support the conclusion, in interpreting the Judiciary Act of 1887, that a state court case was nonremovable where removal was based solely on a federal defense. Interpreting the word "then" in Marshall's Osborn opinion, the Union & Planters' Bank Court stated that "[i]n this last clause, as the context shows, the word 'then' (though printed between commas) means 'at that time,' that is to say, 'when the action is brought.'" Id. While the Court's interpretation of the phrase is undoubtedly correct, as Professors Chadbourn and Levin aptly noted,

the fact goes unmentioned that this language was used by Marshall to ar-
rive at the precise converse of the dogma to which it is here being applied. He proceeded from the premises cited to argue that irrespective of whether a defendant sued by the Bank of the United States might choose to raise the defense of lack of power in the Bank under the federal incorporating act, since that defense might be raised it "is still a part of the cause." . . . Again a statement of Marshall's is lifted from its context and made to bol-
ster a conclusion contrary to the one it originally supported.

Chadbourn & Levin, supra note 77, at 662 (emphasis in original).
105. See, e.g., ALI Study, supra note 77, at 482-83; London, supra note 77, at 837.
106. See, e.g., Hornstein, supra note 77, at 576. But see Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989); see generally supra note 82 (ramifications of Union Gas).
Justice Johnson dissented from Marshall's Osborn approach. While recognizing that federal jurisdiction was necessary to the Bank's protection in the face of local opposition thereto,107 he could find no constitutional justification for such jurisdiction "in cases in which the privilege is exclusively personal, or in any case, merely on the ground that a question might possibly be raised in it involving the constitution or constitutionality of a law of the United States."108 Recognizing the potential sweep of such jurisdiction,109 he articulated a constitutional standard attaching federal jurisdiction only when "a question involving the construction or administration of the laws of the United States did actually arise."110 But Johnson's view did not prevail, and the constitutional standard which arose eschewed not only any requirement that a federal question be demonstrable from the face of a well-pleaded complaint but also the existence of any requirement that a federal issue actually be litigated at all.

In 1875, Congress invested the federal courts with the general federal question jurisdiction which it had rejected in 1802111 and, excepting the substitution of "suits" for "cases," did so in the language of article III. While Justice Miller was later to base his dissent in Railroad Co. v. Mississippi112 on this substitution, it appears to have been an inconsequential matter of form. Certainly, Senator Carpenter, the drafter of the Act, thought he was constructing a bill which extended federal question jurisdiction to constitutional limits and made express reference to Justice Story's exhortations in Martin v. Hunter's Lessee.113

108. Id. at 874 (emphasis added).
109. Id. at 874-75.
110. Id. at 885 (emphasis added).
112. 102 U.S. 135, 143-44 (1880) (Miller, J., dissenting).
The 1875 Act also authorized removal, by either party, in federal question cases\textsuperscript{114} and provided further, in its controversial\textsuperscript{115} section 5, that

\emph{if}, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, \emph{it shall appear} to the satisfaction of said circuit court, \emph{at any time} after such suit has been brought or removed thereto, \emph{that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined}, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but \emph{shall dismiss the suit or remand it} to the court from which it was removed as justice may require \textsuperscript{116}

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B. The Complications of Original and Removal Jurisdiction: Searching for a Unifying Approach

1. Inconsistent Requirements, Statutory Distortions, and Latent Federalism Concerns: 1877-1935

Modern federal question doctrine has elicited scholarly description ranging from “perplexing”\textsuperscript{117} to “patently spurious.”\textsuperscript{118} The confusion began almost immediately after the adoption of the 1875 Act and stemmed in no small part from out-of-context citation to Osborn to support most conceivable propositions related to the federal question issue.\textsuperscript{119}

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\textsuperscript{114}. Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 471.
\textsuperscript{115}. Compare Chadbourn & Levin, supra note 77, at 656 (section 1 defines federal question jurisdiction; section 5 limits its exercise) \textit{with} Forrester II, supra note 77, at 266 ("[T]he writer does not believe that Section 5 was intended for such a purpose or should be strained to serve it."). As an historical matter, Chadbourn & Levin seem to have the stronger position in this argument.
\textsuperscript{116}. Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 472 (emphasis added).
\textsuperscript{117}. London, supra note 77, at 835.
\textsuperscript{118}. Forrester II, supra note 77, at 266 n.16. \textit{See generally} ALI Study, supra note 77, at 478 ("crazy quilt that defies any purely logical explanation"); Cohen, supra note 77, at 890 ("a puzzle to the judge and scholar alike"); Hornstein, supra note 77, at 563 ("problematic" and unsatisfactory); Comment, supra note 77, at 388 (replete with "strange doctrines" and inconsistencies).
\textsuperscript{119}. \textit{See, e.g.}, Chadbourn & Levin, supra note 77, at 655 (misuse in Provident Sav. Life Assurance Soc'y v. Ford, 114 U.S. 635 (1885)); id. at 662 (misuse in Tennes-
The broad article III language employed in the 1875 Act, the floor statements of its drafter, and the breadth of the article III test articulated by Osborn pointed in the direction of an equally expansive construction of the Act. Conversely, as Professor William Cohen has noted,

[t]o have interpreted the statutory grant of jurisdiction to extend the jurisdiction of the federal trial courts to all cases where issues of federal law might possibly be in issue was impractical. Such an interpretation would make those courts substantially courts of general jurisdiction, since large numbers of law suits could be said to depend potentially on relevant issues of federal law.120

And the language of section 5, which required federal courts to relinquish jurisdiction if it appeared at any time that a suit did not "really and substantially involve a dispute or controversy" within federal jurisdiction, further supported the inevitable judicial impulse toward a more restrictive interpretation. The problem, of course, was where to draw the line, and neither Justice Marshall's sweeping constitutional test121 nor Justice Johnson's dead-end approach122 could conceivably fit the bill. The search for a statutory interpretation both faithful to the text and supportive of rational federalism began with


120. Cohen, supra note 77, at 891.

121. See supra text accompanying notes 98-106.

122. See supra text accompanying notes 107-10. Since Justice Johnson believed that federal jurisdiction was contingent on the actual litigation of federal issues in the suit, and since that fact was incapable of determination prior to the filing of the defendant's first responsive pleading, he conceded that "the peculiar nature of this jurisdiction is such, as to render it impossible to exercise it in a strictly original form." Osborn, 22 U.S. (9 Wheat.) at 889 (Johnson, J., dissenting). Of course, Johnson's rule could be made applicable to removal cases, provided that the law remained as stated in Railroad Co. v. Mississippi, 102 U.S. 135 (1880), which, pursuant to section 2 of the 1875 Act, permitted removal by a defendant maintaining a federal defense in the face of a state-law based petition (or, for that matter, by a plaintiff with a federal rejoinder to a state-law based defense). But Johnson's approach would have resulted inevitably in the constitutional invalidation of the original jurisdiction provisions of the Act, and, in any case, the Railroad Co. rule would not long survive. Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894).
Gold-Washing & Water Co. v. Keyes.\textsuperscript{123} In its first civil general federal question case, the Court took its first wrong turn.

Keyes had sued in a California court concerning pollution of a river as to which his agricultural land enjoyed riparian rights. Defendants removed, contending that their mining rights were held under federal law, and that any restraint on their pollution would render valueless those rights. The federal circuit court remanded to state court.

Pursuant to Marshall's \textit{Cohens} and \textit{Osborn} tests, a question of federal law—the consequences of the federal mining rights conferred—would clearly have been an issue of potentially determinative effect.\textsuperscript{124} But those were constitutional, not statutory, tests.

Chief Justice Waite's majority opinion cited them nevertheless,\textsuperscript{125} 

"thus, at the very first, establishing the precedent of assuming that those cases were apposite to the construction of the jurisdictional statute."\textsuperscript{126} Having invoked Marshall's expansive approach, it then affirmed the remand on pleading grounds, since the removal petition stated conclusions of law, not facts,\textsuperscript{127} and (paradoxically) since "[t]he statutes referred to [in the removal petition] contain many provisions; but the particular provision relied upon is nowhere indicated."\textsuperscript{128}

It gets worse. Having cited approvingly Marshall's \textit{Osborn} test—that a federal question arises 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"\textsuperscript{129}—the Court proceeded to also state the opposite test: "A cause \textit{cannot} be removed from a State court simply because, in the progress of the litigation it may

\textsuperscript{123} 96 U.S. 199 (1877).
\textsuperscript{124} For that matter, Johnson's "actually litigated" test would likely have been satisfied as well. \textit{See supra} text accompanying notes 107-10.
\textsuperscript{125} \textit{Gold-Washing}, 96 U.S. at 201.
\textsuperscript{126} London, \textit{supra} note 77, at 842.
\textsuperscript{127} \textit{Gold-Washing}, 96 U.S. at 202-03. That these procedural subtleties have not completely dissipated, even in an era of notice pleading, is evidenced by cases such as \textit{Warth} v. \textit{Seldin}, 422 U.S. 490 (1975) ("conclusory" allegations insufficient to establish injury in fact for article III case and controversy purposes). \textit{But see}, \textit{e.g.}, \textit{Village of Arlington Heights v. Metropolitan Housing Dev. Corp.}, 429 U.S. 252 (1977) (less arcane and technical article III standing approach).
\textsuperscript{128} \textit{Gold-Washing}, 96 U.S. at 203.
\textsuperscript{129} \textit{Id.} at 201 (quoting \textit{Osborn}, 22 U.S. (9 Wheat.) at 822 (emphasis added)).
become necessary to give a construction to the Constitution or laws of the United States."¹³⁰

Having spun off enough dictum and counterdictum to ensure full employment for generations of attorneys, the Court invoked the "real and substantial dispute or controversy" language of section 5 of the 1875 Act.¹³¹ Eschewing substantive explication of the phrase, the Court obtusely¹³² concluded, for the reasons above described, that the pleadings did not raise the federal question concerning the scope of the federally-granted mining rights.

Of such stuff is doctrinal incoherence made. The final paragraph of its opinion "almost apologetically"¹³³ concluded that

[t]he Act of 1875 has made some radical changes in the law regulating removals. Important questions of practice are likely to arise under it, which, until the statute has been longer in operation, it will not be easy to decide in advance. For the present, therefore, we think it best to confine ourselves to the determination of the precise question presented in any particular case, and not to anticipate any that may arise in the future. Under these circumstances, the present case is not to be considered as conclusive upon any question except the one directly involved and decided.¹³⁴

But the Court, in *Tennessee v. Union & Planter's Bank*¹³⁵ (which applied the well-pleaded complaint rule to removal jurisdiction), relied in critical respect on *Gold-Washing*'s anti-*Osborn* dictum.¹³⁶ *Union & Planter's Bank*, in turn, was cited for a critical proposition in *Gully v. First National Bank*,¹³⁷ which supplied a critical proposition in *Graham*.¹³⁸ But we are getting ahead of ourselves.

¹³⁰. *Id.* at 203 (emphasis added).
¹³¹. *Id.*
¹³². See *id.* at 204 (Bradley, J., dissenting).
¹³⁴. *Gold-Washing*, 96 U.S. at 204.
¹³⁵. 152 U.S. 454 (1894).
¹³⁶. *Id.* at 460. *Union & Planters' Bank* overruled *Railroad Co. v. Mississippi*, 102 U.S. 135 (1880), which relied on *Gold-Washing*'s approving citation to *Osborn*. *Id.* at 140.
¹³⁷. 299 U.S. 109, 113 (1936).
Three years after *Gold-Washing, Railroad Co. v. Mississippi*¹³⁹ presented the question of removal, unencumbered by pleading issues, on the basis of an admittedly federal defense. Professors Chadbourn and Levin have succinctly articulated the state court plaintiff's (Mississippi's) analysis:

Ingenious counsel apparently urged upon the Court that a suit *arises* only from the plaintiff's cause of action, and hence cannot be said to arise under given laws if this does not necessarily appear in the plaintiff's complaint. In other words, how can a suit be said to *arise* under federal laws when such laws enter the case only at a point distant from that of origin—a point not reached until long after the suit is in progress?¹⁴⁰

But Marshall's *Osborn* analysis had already disposed of a similar contention in the context of article III, whose phraseology is virtually identical to that of the 1875 Act. And Justice Harlan's opinion in *Railroad Co.*, which upheld federal defense removal therein, noted this fact with what were fast becoming obligatory citations to *Cohens* and *Osborn*.¹⁴¹

Justice Miller, whose approach was later to become the law,¹⁴² dissented. Noting that removal "is always a matter of delicacy,"¹⁴³ he eschewed citation to *Osborn* for purposes of construing the 1875 Act and based his opinion on the single textual difference between that statute and article III. Where the Constitution referred to *cases* arising, the statute referred to *suits*.¹⁴⁴ Supporting the distinction by reference to Bouvier's Law Dictionary and Webster,¹⁴⁵ he concluded:

Taking the idea of a "suit" as thus defined, what is meant by the suit *arising* under a law of Congress? The obvious answer seems to be that the *cause of action* is *founded* on the act of Congress; that the *remedy* sought is one *given* by an act of Congress; that the *relief* which is prayed is a relief *dependent* on an act of Congress; that the right to be

139. 102 U.S. 135 (1880).
140. Chadbourn & Levin, supra note 77, at 652 (emphasis in original).
141. *Railroad Co.*, 102 U.S. at 140.
143. *Railroad Co.*, 102 U.S. at 142 (Miller, J., dissenting).
144. As has been noted, this appears to have been unintentional. See supra text accompanying note 113.
enforced in the suit is a right which rests upon an act of Congress. In all this I see no place for holding that a defense to a suit not so founded on an act of Congress, or a plea which the defendant may interpose to any ordinary action, though that plea be founded on an act of Congress, is a suit arising under an act of Congress.\textsuperscript{146}

Thus was the well-pleaded complaint rule first articulated. As is apparent, the rule has a number of consequences. While this Article will maintain that the first—nonremovability based solely on a federal defense—is historically unjustifiable and jurisprudentially perverse, the second—requiring the federal issue to be apparent on the face of the complaint—presents analytical problems of its own.

Concerning the first consequence, unless rigid adherence to formal pleading rules is maintained, drawing a line between defenses and elements of a prima facie case (or “facts constituting a cause of action,” or “the claim showing that the pleader is entitled to relief,” or what have you) is a problem of no small dimension. If slavish adherence to formal pleading rules is the answer, then two problems—one jurisprudential, one practical—remain. First, from the standpoint of rational federalism—which must inform federal question analysis\textsuperscript{147}—such rules are essentially arbitrary and make federal jurisdiction contingent on the party suing first.\textsuperscript{148} From a practical standpoint, avoidance doctrines recognized in modern caselaw (such the “complete preemption” “corollary”), which are essential to the uniform vindication of federal rights, would be impossible.

The conundrums presented by the second consequence of the rule are even greater. Ignoring the italics of Justice Miller in his Railroad Co. dissent, one finds, more revealingly, that an issue, in order to arise under federal law, must be, in right or remedy, “founded on,” “given by,” “dependent on,” or must “rest upon” federal law. These concepts, though apparently more or less synonymous in Justice Miller’s mind, are

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\textsuperscript{146} \textit{Id.} at 144 (emphasis in original).

\textsuperscript{147} \textit{See generally} Hutto v. Finney, 437 U.S. 678, 691 (1978) (analogous eleventh amendment context).

\textsuperscript{148} \textit{See, e.g.,} Currie, \textit{supra} note 77, at 269 & n.233; Fraser, \textit{supra} note 77, at 78.
anything but, and the distillation of their essence has eluded the Court to the present day.

The residuum of 1875 Act cases did little to dispel the confusion. The Court continued to hold that a case could be removed where removal was based solely on a federal defense, and, in the Pacific Railroad Removal Cases, authorized removal based on the defendants' federal incorporation (pursuant to Osborn) even where no federal issue was likely to be litigated at all. While the "real and substantial dispute or controversy" language of section 5 of the 1875 Act had been read into the statutory federal question test by Gold-Washing, it was ignored in its entirety in the Pacific Railroad case.

Apart from the federal defense removal and "substantiality" questions, the problem of articulating the general federal question test persisted. The amorphousness of the "founded on," "given by," "dependent on," or "resting upon" test articulated by Justice Miller in his Railroad Co. dissent has already been described. The Railroad Co. majority had proffered the following test, which first harkened back, without citing it, to Cohens, and then—unsuccessfully—attempted to clarify it: "[A] case . . . may, properly, be said to arise under the Constitution or a law of the United States, when- ever its correct decision depends on the construction of either; . . . cases arising under the laws of the United States are such as grow out of the legislation of Congress . . . ."

But not even the equally conclusory "growing out of federal law" test was consistently applied. In Feibelman v. Pack-
ard, the Court approved removal of a suit brought against the bond of a federal marshal (who had seized the plaintiff's goods pursuant to a federal court's writ) since the suit "related" to federal law. But the following Term, in *Provident Savings Life Assurance Society v. Ford*, the Court, after invoking *Osborn*, concluded that a suit on a federal judgment raised no federal question.

In 1887, Congress rewrote the 1875 Act, and it revised the 1887 Act one year later. For purposes of original federal jurisdiction, both the 1887 and 1888 Acts continued the 1875 Act's use of the article III federal question language with the substitution of "suits" for "cases." But in their respective removal sections, both provided in relevant part that suits arising under federal law, "of which the circuit courts of the United States are given original jurisdiction by the preceding section," were subject to removal; the italicized language had not been included in the 1875 Act. Furthermore, removal could now be sought only by defendants. In the context of removal jurisdiction, it would turn out, these modifications would push Justice Miller's *Railroad Co.* dissent (for different reasons than those which he had therein advanced) over the top.

158. Id. at 426. In that case, federal statutes expressly required the bond, and provided for suit thereon. In Bock v. Perkins, 139 U.S. 628 (1891), *Feibelman* was extended to a trespass suit against a federal marshal under facts similar to those of *Feibelman*. In Sonnentheil v. Christian Moerlein Brewing Co., 172 U.S. 401 (1899), original (as opposed to removal) jurisdiction was sustained over a similar suit against a marshal, after the well-pleaded complaint rule had been made applicable to original jurisdiction cases. In *Sonnentheil*, the Court found it unnecessary to consider whether federal issues other than the marshal's status as such were presented in the plaintiff's complaint and grounded its decision wholly on that status. See *Sonnentheil*, 172 U.S. at 402, 404-05.
159. 114 U.S. 635 (1885).
160. Id. at 642.
166. See supra text accompanying notes 142-46.
Metcalf v. Watertown\textsuperscript{167} was a case decided after the passage of the 1888 Act but pursuant to the jurisdictional scheme of 1875; it was in this case that a majority of the Court first applied the well-pleaded complaint rule to original jurisdiction cases. Justice Harlan, who had authored Railroad Co., the then-leading federal defense removal case, now proceeded to distinguish it away where original federal jurisdiction was involved:

It has been often decided by this court that a suit may be said to arise under the Constitution or laws of the United States, within the meaning of [the 1875] act, even where the Federal question upon which it depends is raised, for the first time in the suit, by the answer or plea of the defendant. \textit{But these were removal cases}, in each of which the grounds of Federal jurisdiction were disclosed either in the pleadings, or in the petition or affidavit for removal; in other words, \textit{the case, at the time the jurisdiction of the Circuit Court of the United States attached, by removal, clearly presented a question or questions of a Federal nature}. \ldots Where, however, the \textit{original} jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, \textit{at the outset, from the declaration or the bill of the party suing}, that the suit is of that character \ldots \textsuperscript{168}

No authority was offered for the final proposition, and the distinction between “suits” and “cases” proffered by Justice Miller in his Railroad Co. dissent was not invoked, presumably since that distinction would have required Justice Harlan to reverse his own Railroad Co. opinion in the removal jurisdiction context as well.

Harlan’s Metcalf opinion foreclosed the possibility of the plaintiff’s filing a state-law complaint in federal court, hoping to preserve federal jurisdiction should the defendant choose to offer a federal defense. That result, as the second italicized passage quoted above illustrates, was apparently derivative, in Justice Harlan’s mind, of Marshall’s Osborn assertion that jurisdiction “must depend on the state of things when the ac-

\textsuperscript{167} 128 U.S. 586 (1888).
\textsuperscript{168} Id. at 588-89 (emphasis added) (citation omitted).
tion is brought." But given the broad and hypothetical nature of Marshall's article III federal question test, an application of that test (seemingly required by virtue of the near-verbatim language of the 1875 Act), would inevitably have produced the opposite result. And exceptions to the rule that federal jurisdiction must exist at the time of filing are not unknown in other contexts.170

In any case, the other shoe soon dropped. In Tennessee v. Union & Planters' Bank,171 which was based on the new language of the 1887 and 1888 Acts, the Court applied the well-pleaded complaint rule to removal jurisdiction cases. It opened with the new obligatory reference to Osborn, adduced for the same minor premise which it silently supported in Metcalf: the essentiality of federal jurisdiction upon filing. It then borrowed Gold-Washing's antithesis of Osborn's major premise: "[a] cause cannot be removed . . . simply because . . . it may become necessary to give a construction"172 to federal law.173 And it invoked both Metcalf's application of the well-pleaded complaint rule to original jurisdiction cases and Justice Miller's earlier suggestion of its application in the removal jurisdiction context, for as much support as they could provide.174 Atypically, it sought statutory support as well. After invoking the new language contained in section 2 of the 1887 and 1888 Acts,175 Justice Gray, writing for the Court, continued:

The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the Circuit Courts of the United States.

Congress, in making this change, may well have had in mind the reasons which so eminent a judge as Mr. Justice Miller invoked in support of his dissent from the original decision that a defence under the Constitution, laws, or treaties of the United States was sufficient to justify a removal

170. See generally, Fraser, supra note 77, at 76-77 (enumerating examples).
171. 152 U.S. 454 (1894).
172. Gold Washing, 96 U.S. at 203.
173. Union & Planters' Bank, 152 U.S. at 460.
174. Id. at 460-62.
175. Supra text accompanying note 164.
by the defendant under the act of 1875. "Looking," said he, "to the reasons which may have influenced Congress, it may well be supposed that while that body intended to allow the removal of a suit where the very foundation and support thereof was a law of the United States, it did not intend to authorize a removal where the cause of action depended solely on the law of the State, and when the act of Congress only came in question incidentally as part (it might be a very small part) of the defendant's plea in avoidance. In support of this view, it may be added, that he in such case is not without remedy in a Federal court; for if he has pleaded and relied on such defence in the state court, and that court has decided against him in regard to it, he can remove the case into this court by writ of error, and have the question he has thus raised decided here."

This analysis triggered a belated fusillade of criticism from scholars of the past half-century.

First, as a policy matter, issue was taken with the Court's last quoted argument, which relates to the adequacy of Supreme Court appellate review from the highest court of a state. This argument, of course, continues to be made today and was articulated by Justice O'Connor during the oral argument in Graham. But Marshall in Osborn had rejected the categorical adequacy of this remedy, noting the insecurity of the remedy furnished by "an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which one is forced against his will." Professor Cohen's development of Marshall's point is certainly correct:

Potential antagonism in the state courts to the enforcement of the plaintiff's federal right may adversely color findings of fact as well as rulings on issues of law. It is desirable that a

176. Union & Planters' Bank, 152 U.S. at 462 (emphasis added) (citations omitted).
177. See, e.g., Chadbourn & Levin, supra note 77, at 659-63; Collins, supra note 77, at 718-56; Fraser, supra note 77, at 79, 83; London, supra note 77, at 846-47; Wechsler, supra note 77, at 233-34; Comment, supra note 77, at 394.
179. Osborn, 22 U.S. (9 Wheat.) at 822-23. See also id. at 809-11 (arguments of Clay as counsel); Mishkin, supra note 77, at 174 (further developing this analysis).
federal forum be available for trial of factual issues upon which the enforcement of federal rights may be based.

The availability of discretionary review on certiorari is, of course, not a fair substitute for jurisdiction as of right in the trial court, if it is assumed that it is important to give parties access to federal courts for trial of federal law issues.\(^{180}\)

Of course, the Court has, on occasion, assumed appellate jurisdiction over state court factual findings where such findings were inextricably intertwined with federal rights.\(^{181}\) Nevertheless, since Supreme Court review is the exception, not the rule, and since, where the evidence is evenly divided, the findings of fact will be outcome-determinative, appellate review is not the categorical solution to the problem.

Second, issue was taken with the Court’s analysis—or lack thereof—of the legislative history of the 1887 and 1888 Acts. By the Court’s tacit (if not express) admission, its analysis of that history was wholly speculative;\(^{182}\) this should not be surprising, since the issue was not briefed by either party in the case.\(^{183}\) In fact, as Professor Collins’ persuasive analysis of the 1887 and 1888 Acts demonstrates, both of Union & Planters’ Bank’s legislative intent conclusions are incorrect. While Justice Gray’s majority opinion correctly notes that the “general policy” of those Acts was to constrict federal jurisdiction,\(^{184}\) it was diversity jurisdiction, not federal question jurisdiction, that was the focus of the revision.\(^{185}\) And the language added to the removal jurisdiction sections of the Acts\(^{186}\) “was probably inserted to ensure that removed cases, whether fed-

180. Cohen, supra note 77, at 893, 894 n.24 (citation omitted). See also England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416-17 (1964) (critical nature of federal trial court’s role in constructing record and making findings of fact); Pittman, The Emancipated Judiciary in America: Its Colonial and Constitutional History, 37 A.B.A. J. 485, 487 (1951), cited in Mishkin, supra note 77, at 173 (“power to make ‘findings of fact’ and make them binding is the power to rule the world”).

181. See Mishkin, supra note 77, at 173 n.78 (citing cases).

182. See supra text accompanying note 176 (quoting relevant passage of Union & Planters’ Bank).

183. Collins, supra note 77, at 737.

184. Union & Planters’ Bank, 152 U.S. at 462.

185. Collins, supra note 77, at 738-56.

186. Supra text accompanying note 164.
eral question or diversity, would be limited by the amount in controversy, the assignee clause, and the other newly-added limitations imposed in section 1 on the original jurisdiction."

Third, it may be recalled that Gold-Washing had read the "real and substantial dispute or controversy" language of section 5 of the 1875 Act into its statutory federal question test, and Metcalf required that such dispute or controversy, in original jurisdiction cases, be apparent from the face of a well-pleaded complaint. Absent Gold-Washing's requirement, such a showing would be possible, since pursuant to Osborn, that a federal question might be determinative would suffice. Absent the well-pleaded complaint requirement of Metcalf, Gold-Washing (or section 5) could be satisfied by permitting the existence vel non of the requisite "real or substantial dispute or controversy" to emerge from pleadings subsequent to the complaint. Taken together, however, Gold-Washing and Metcalf established a test logically incapable of being met, since by definition no "dispute" or "controversy" can exist until the issues have been framed. Even Lon Fuller's Rex would have been chagrined. Union & Planters' Bank compounded this dilemma by extending it to removal jurisdiction cases.

In that context, since the Court was to determine that formal pleading rules were controlling (thus preventing plaintiffs from anticipating federal defenses even where only federal issues would be litigated in the case), the rule oper-
ates in a manner wholly independent of rational federalism concerns, making federal jurisdiction contingent on the party suing first. While the plaintiff-defendant alignment may affect the outcome in other areas as well, its relevance is especially clear in the context of American Indian law where, by first invoking a federal court’s jurisdiction, a tribe negates the favorable posture it enjoys by virtue of its sovereign immunity from suit.

While the articulation of a satisfactory general federal question test continued to elude, the Court, in Blackburn v. Portland Gold Mining Co. (an original jurisdiction case), held that no federal question arose from a federal mining statute providing procedures for federal patent application and requiring adverse claimants to commence proceedings within thirty days “in a court of competent jurisdiction.” As a consequence of the preceding phrase, the Court held, “the intention of Congress, in this legislation, was to leave open to suitors all courts.” As a historical matter, it may be noted that after invoking Gold-Washing’s “real and substantial dispute or controversy” dictum, Cohens and Osborn were invoked to defeat federal jurisdiction:

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. Virginia, 6 Wheat.

eral court, alleging in their complaint that the railroad’s sole defense was the federal act, that the act did not forbid such passes in this context, and if it did, it would constitute a proscribed fifth amendment taking. The Court rejected original federal question jurisdiction based on pleading grounds, since in an action for specific performance it was only necessary to allege a contract and its breach. It did not deny that only federal questions would be litigated and expressed no federalism-oriented concern regarding inconsistent state court interpretations of the Act (presumably relying on subsequent certiorari to solve the problem). Cf. infra note 735 (subsequent history of Mottley).

194. See supra text accompanying note 148.
195. See generally supra note 29 (citing case law recognizing tribal sovereign immunity).
196. See, e.g., Mottley, 211 U.S. at 152 (stating that a federal question arises “only when the plaintiff’s statement of his own cause of action shows that it is based upon” federal law) (emphasis added).
197. 175 U.S. 571 (1900).
198. Id. at 579.
199. Id. at 580.
379. 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.” Osborn v. Bank of the United States, 9 Wheat. 822. 200

Neither the fact that Cohens and Osborn were inconsistent with the now-established well-pleaded complaint rule nor the fact that Marshall’s Osborn analysis could sustain jurisdiction even where no federal issue would actually be litigated 201 were noted by the Court. Three months later, the Court “interpreted” Blackburn in Shoshone Mining Co. v. Rutter, 202 another original jurisdiction suit based on the same mining patent statute as the one at issue in Blackburn. Subsequent to reasoning supportive of Blackburn’s statute-specific analysis, 203 the Rutter Court pursued a more universally applicable “underlying federal source” approach:

We pointed out in [Blackburn] that it was well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses, for if it did every action to establish title to real estate (at least in the newer States) would be such a one, as all titles in those States come from the United States or by virtue of its laws. 204 As said by Mr. Chief Justice Waite, in Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203:

“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. . . . Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, in legal and logical form, such as is required in good pleading, that the suit

200. Id.
201. See supra text accompanying note 103.
202. 177 U.S. 505 (1900).
203. Id. at 506-07.
204. The Court’s desire to avoid federal jurisdiction over such suits is consistent with the “rational federalism” approach defended herein, see infra text accompanying notes 713-14, and traces back, in the context of Supreme Court appellate review, to cases antedating the grant of general original federal question jurisdiction in the 1875 Act. E.g., Romie v. Casanova, 91 U.S. 379, 381 (1875).
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.\textsuperscript{205}

As a consequence of Blackburn and Rutter, Gold-Washing's "substantial controversy" requirement, Metcalf's well-pleaded complaint rule, and Osborn's "outcome-determinative federal question" approach (in distorted form) had finally been hammered together. And as Rutter makes clear, formal pleading rules control. In short order, \textit{Louisville & Nashville Railroad v. Mottley}\textsuperscript{206} would make express the inevitable result of Rutter's pleading approach: that a plaintiff could not invoke federal jurisdiction on a state-law "based" cause of action even where only federal issues would actually be litigated in the case.\textsuperscript{207} As a logical matter, Rutter had made general civil original federal question jurisdiction a logical impossibility (since no real and substantial, outcome-determinative federal "dispute" could be revealed solely by the plaintiff's complaint, and since suits whose underlying "origin" was federal would not "necessarily" sustain federal jurisdiction), completely negating the grant of general federal question jurisdiction in the 1887 and 1888 Acts. In the context of removal jurisdiction, a similar result was guaranteed by \textit{Union & Planters' Bank.}

It did not, of course, turn out that way. Where Blackburn and Rutter could be distinguished, complaints were read as presenting questions "arising" under federal law pursuant to the earlier-articulated "founded on," "given by," "dependent on," "resting upon," and "growing out of" federal law tests,\textsuperscript{208} despite the logical impossibility of establishing a "controversy" based on a single pleading.\textsuperscript{209} In \textit{The Fair v. Kohler}

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\item \textsuperscript{205} \textit{Rutter}, 177 U.S. at 507 (emphasis added) (ellipsis in original).
\item \textsuperscript{206} 211 U.S. 149 (1908).
\item \textsuperscript{207} \textit{Id.} at 152-53.
\item \textsuperscript{208} \textit{See generally supra} text accompanying notes 146-56 (derivation of these tests).
\item \textsuperscript{209} \textit{E.g., Swafford v. Templeton}, 185 U.S. 487, 492 (1902) (emphasis added) (action for infringement of right to vote in congressional election presents cognizable federal question for purpose of original jurisdiction, since it "has its foundation in the Constitution of the United States").
\end{itemize}
\end{footnotesize}
Die & Specialty Co., for example, Kohler brought a federal court suit which the Supreme Court was to characterize as "[o]bviously" relying upon federal patent law. Justice Holmes, writing for a unanimous Court, reasoned that since federal law provided a remedy for the type of injury claimed, the only residual jurisdictional issue was whether the plaintiff, the "master" of the complaint, presented a non-frivolous claim "relying on" federal law.

In American Well Works Co. v. Layne & Bowler Co., a state court defendant sought removal of a suit which was based on its allegedly libelous statements denying plaintiff's right to produce a certain pump; defendant had also threatened suits against plaintiff and its customers for violation of defendant's patent. Justice Holmes, again writing for the Court, held that no federal question obtained, the suit sounding solely in state tort law, since "[a] suit for damages to business caused by a threat to sue under the patent law is not itself a suit under the patent law." Assuming the analytical cohesiveness of Rutter (and the well-pleaded complaint rule itself), Holmes' conclusion could be justified pursuant to that case. But Holmes, attempting to distill the answer to the "underlying federal source" question in a sentence, went on to state: "A suit arises under the law that creates the cause of action."

The ambiguity of the word "creates" in the above-proffered test is manifest. Presumably, in Holmes' mind, it would preclude federal jurisdiction in cases like Blackburn and Rutter, where federal law seemed to authorize—almost expressly—the bringing of a state court suit. But the perimeters of the test are amorphous, and even should its clarifying case law render it susceptible to mechanistic application, it would still promote rational federalism in only the most simplistic

210. 228 U.S. 22 (1913).
211. Id. at 24.
212. Id. at 25.
213. See id. at 26.
214. Id. at 25.
215. Id. at 25-26.
217. Id. at 259 (emphasis added).
218. Id. at 260 (emphasis added).
manner. And avoidance doctrines, such as the complete pre-emption "corollary" (it is really an exception) to the well-pleaded complaint rule are also impossible to reconcile with Holmes' test.

In any case, the dictum was ignored only a year after American Well Works. A year after that, in Great Northern Railway v. Alexander, the Court supported the continuing validity of what is now known as the "artful pleading rule," stating that fraudulent attempts to evade removal would not be permitted. This principle previously had been applied in cases involving the "artful" (if not fraudulent) joinder or

See also Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 808-09 & n.5 (1986).

220. See Hopkins v. Walker, 244 U.S. 486 (1917).

221. 246 U.S. 276 (1918).


As one treatise puts it, 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 the plaintiff's characterization." 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3722, pp. 564-566 (1976) (citing cases) (footnotes omitted). The District Court applied that settled principle to the facts of the case.

223. Great N. Ry., 246 U.S. at 281-82.
alignment of parties in order to evade diversity removal. And in 1921, Justice Day—clearly a federal jurisdiction “activist” —harkened back to *Cohens* and *Osborn* in sustaining federal jurisdiction over a corporate shareholder’s suit to enjoin a corporation from investing in bonds of federal land banks, on the grounds of the unconstitutionality of the federal statute which had created those banks. Holmes dissented, invoking his *American Well Works* test, and maintained that the case arose pursuant to Missouri corporate law.

Holmes, however, was partially vindicated by the result in *Puerto Rico v. Russell & Co.*, which involved an attempted removal of a suit by Puerto Rico to collect its property tax. Prior to the institution of Puerto Rico’s suit, various federal court suits had been brought to restrain collection of any tax imposed by virtue of its laws; such suits were later forbidden by federal legislation, which was held to have abated all pending federal suits. Subsequently, Congress provided that in all cases in which a taxpayer had obtained an injunction prior to abatement, Puerto Rico could collect the enjoined tax solely by lawsuit as opposed to summary proceeding. In holding that Puerto Rico’s suit, brought in its insular district court, could not be removed based on the federal statute, Justice Stone, writing for the Court (perhaps realizing the amor-

224. Fritzlen v. Boatmen’s Bank, 212 U.S. 364, 373 (1909); Wecker v. National Enameling & Stamping Co., 204 U.S. 176 (1907). In the latter case, Justice Day, writing for a unanimous Court, sustained the viability of the doctrine absent proof of plaintiff’s awareness of the relationship of certain parties, since “knowledge may be imputed where one willfully closes his eyes to information within his reach.” *Id.* at 185. See also *infra* note 757 (current vitality of doctrine in diversity cases). The converse of the Fritzlen-Wecker approach, that where parties “have been improperly or collusively made or joined, either as plaintiffs of defendants, for the purpose of creating” a federal question, the federal court should remand or dismiss the case, was established by section 5 of the 1875 Act, 18 Stat. 472.


226. Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921). *Cf. infra* text accompanying notes 429-33 (subsequent utility of *Smith*).


228. *Id.* at 214.

229. 288 U.S. 476 (1933).


phousness of Holmes' proffered test),\textsuperscript{233} struggled toward one of his own:

Federal jurisdiction may be invoked to vindicate a right or privilege claimed \textit{under} a federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law . . . . The federal \textit{nature} of the right to be established is decisive—not the \textit{source} of the authority to establish it.\textsuperscript{234}

The "source" component of the \textit{Russell} test refines Holmes' "the law that creates the cause of action" approach. Its analytic and pragmatic ancestor can be found in the instinct of the \textit{Gold-Washing} Court (and section 5 of the 1875 Act) to eschew the expenditure of federal judicial resources on cases which do not present substantial and determinative federal issues. Even so, it is an overbroad tool for that purpose.

But what did the "nature" component mean?

2. \textit{Gully v. First National Bank}\textsuperscript{235}

Justice Cardozo, the author of \textit{Gully}, left an abhorrence of absolutes as no small part of his jurisprudential legacy.\textsuperscript{236}

\textsuperscript{233} In this context, it is interesting to note that while Holmes' \textit{American Well Works} dictum could have fit the \textit{Russell} facts, and while the Court invoked a comprehensive litany of federal question cases (ranging from \textit{Osborn} to \textit{Gold-Washing} and including \textit{Railroad Co., Blackburn, Rutter}, and cases more obscure), \textit{American Well Works} was nowhere mentioned in Justice Stone's \textit{Russell} opinion.

\textsuperscript{234} \textit{Russell}, 288 U.S. at 483 (emphasis added).

\textsuperscript{235} 299 U.S. 109 (1936).


Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone.

\ldots . It does not matter that [injuries] are unusual, unexpected, unforeseen, and unforeseeable. But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former.

These two words have never been given an inclusive definition. What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations . . . .

But in *Gully*, his recent\textsuperscript{237} instincts failed him, and, while his opinion contains "important new insights,"\textsuperscript{238} those insights are so intertwined with the conflicting accretions of the past as to make *Gully* an unsatisfactory instrument for shaping a modern and rational general federal question approach. Like the cases which came before, it can be (and has been) cited to support virtually any conceivable result in a given federal question case. One of its conflicting premises—not *Caterpillar*, on the basis of which the first Supreme Court remand in *Graham* occurred\textsuperscript{239}—controlled the result in the second *Graham* case.

At the time of *Gully*, the only authority for a state to impose taxes relating to a national bank (which is considered a federal instrumentality)\textsuperscript{240} was provided by federal statute permitting such taxation of shares, shareholder dividends, and the income of the bank.\textsuperscript{241} *Gully*, the Mississippi tax collector, sued the First National Bank in state court for taxes which had been assessed against an insolvent predecessor national bank, some of the obligations of which the First National Bank had contractually assumed. Gully's theory was that the prior bank, pursuant to Mississippi law, was the agent of non-resident shareholders regarding their local tax obligations, that the prior bank had failed to withhold appropriate monies and remit them to the state, and that, pursuant to both state law and the relevant contractual provisions, the assets of the new bank could be sought in satisfaction of any taxes due. Invoking the relevant federal statute, the bank removed to federal court.

On appeal, the Fifth Circuit sustained removal. Distinguishing *Union & Planters’ Bank*,\textsuperscript{242} it reasoned that the federal statute did not present a "mere" federal defense:

\textsuperscript{237} See supra note 236.
\textsuperscript{238} Cohen, supra note 77, at 905.
\textsuperscript{239} *Graham*, 108 S. Ct. 481. See generally supra text accompanying notes 22-76 (describing the procedural odyssey of *Graham*).
\textsuperscript{241} *Gully* v. First Nat’l Bank, 81 F.2d 502, 505 (5th Cir. 1936) (discussing federal statutory provisions).
\textsuperscript{242} *Union & Planters’ Bank*, 152 U.S. 454, discussed supra in the text accompanying notes 171-94.
But section 548 is not a limitation placed by the federal laws upon an antecedent right of the state to tax national banks, so as to be considered only a weapon of defense against such taxation. Both in form and in substance it is a grant of authority to state legislatures to tax such banks...

The state taxing statute, the court went on to reason, “depends for its force on this law of the United States.”

But Gully had alleged only claims based on state tax laws and the contract (also governed by Mississippi law) in his complaint, and the well-pleaded complaint rule of Metcalf and Union & Planters’ Bank would, if applied, ipso facto preclude removal. To this, too, the Fifth Circuit had an answer, which was based on the “judicial notice” approach of Spokane Falls & Northern Railway v. Ziegler and Texas & Pacific Railway v. Cody, both post-Union & Planters’ Bank cases:

A pleader need in general not plead any law, but only the facts on which he relies. When a petitioner is claiming federal jurisdiction, he usually and properly points out the federal law on which he relies. But he cannot, by omitting reference to the law of the United States by virtue of which alone the facts pleaded could avail to support the relief which he seeks, escape the jurisdiction of the federal courts over his suit when invoked by a petition for removal. Irrespective of the merit of his claims, the present suit of the state tax collector, in so far as it involves the assertion of a valid state tax against the old bank or against the shares of its stock, necessarily depends upon an application of the laws of the United States and arises under them. In [Texas & Pacific Railway], judicial notice that the defendant railway company was a corporation organized under the laws of the United States was taken in order to sustain removal.

As the reader will by now not be surprised to learn, Supreme Court cases coming to precisely the exact opposite conclusion regarding judicial notice were handed down both immediately

243. Gully, 81 F.2d at 505.
244. Id. at 506.
246. 167 U.S. 65, 72 (1897).
248. Gully, 81 F.2d at 506 (emphasis added) (citations omitted).
before\textsuperscript{249} and immediately after\textsuperscript{250} the \textit{Spokane Falls Railway} and \textit{Texas \& Pacific Railway} decisions.

Be that as it may, \textit{Gully} could have easily been controlled at the Supreme Court level by a rigid application of the well-pleaded complaint doctrine as articulated in cases such as \textit{Blackburn},\textsuperscript{251} \textit{Rutter},\textsuperscript{252} and \textit{Mottley},\textsuperscript{253} and "clarified" in Holmes' test.\textsuperscript{254} As Professor Cohen noted, the federal statute "was relevant only because it had renounced a defense which the United States Constitution would otherwise have given the defendant; like the \textit{Mottley} case, federal law, as a matter of pleading, provided a defense and a reply to the defense."\textsuperscript{255} And Cardozo, in reversing the Fifth Circuit's validation of removal, gets to this point towards the end of his opinion\textsuperscript{256} and appears to place his primary reliance on it.\textsuperscript{257} But interspersed with what is likely the principle of decision (a simple application of Holmes' test), and offered, as Professors Chadbourn and Levin described it fifty years ago, in "prose so beautiful that it seems almost profane to analyze it,"\textsuperscript{258} is nonabsolutist analysis antithetical to that of Holmes.\textsuperscript{259} Offered also are repeated citations to \textit{Union \& Planters' Bank} and the historical

\begin{itemize}
\item \textsuperscript{249} Oregon Short Line \& Utah N. Ry. v. Skottowe, 162 U.S. 490, 496-97 (1896); Powell v. Brunswick County, 150 U.S. 433, 440 (1893).
\item \textsuperscript{250} Arkansas v. Kansas \& Tex. Coal Co., 183 U.S. 185, 190 (1901); Mountain View Mining \& Milling Co. v. McFadden, 180 U.S. 533, 535-86 (1901); Yazoo \& Miss. R.R. v. Adams, 180 U.S. 41, 45, 48-49 (1901).
\item \textsuperscript{251} Blackburn, 175 U.S. 571, discussed supra in the text accompanying notes 197-201.
\item \textsuperscript{252} Rutter, 177 U.S. 505, discussed supra in the text accompanying notes 202-07.
\item \textsuperscript{253} Mottley, 211 U.S. 149, discussed supra in the text accompanying note 207.
\item \textsuperscript{254} See \textit{American Well Works}, 241 U.S. at 260.
\item \textsuperscript{255} Cohen, supra note 77, at 903.
\item \textsuperscript{256} Gully, 299 U.S. at 116 ("[A] suit does not arise under a law renouncing a defense . . . ."). See also id. at 113 (invoking the well-pleaded complaint rule).
\item \textsuperscript{257} Cohen, supra note 77, at 903. Cf. Hornstein, supra note 77, at 580-81 (footnote omitted):
\begin{quote}
The Supreme Court's reversal was based upon its view that the permissive statute, rather than being analytically antecedent to the state's power to tax, was the renunciation of a defense that would have been available in the absence of the statute. Thus, the federal statute was, in effect, two analytic steps from the basis of the suit. Before the statute became relevant there would have to be an action for the tax and the constitutional defense; the permissive statute could then be raised as a reply to that defense.
\end{quote}
\item \textsuperscript{258} Chadbourn \& Levin, supra note 77, at 671.
\item \textsuperscript{259} See \textit{Gully}, 299 U.S. at 116, 118-19.
\end{itemize}
accretions of the ages. As did Chadbourn and Levin, this Article will attempt the profane, and analyze Cardozo's prose.

Both to facilitate analysis and avoid out-of-context citation, a sequential approach to Cardozo's reasoning will be employed. The major assertions of the opinion will be numbered 1 through 11, in the order in which they were articulated. These, it may be seen, are the more "standard" federal question propositions which, although contradictory among themselves, are generally accompanied by citation to earlier cases, which established the contradictions.

Next (in both Cardozo's opinion and this discussion) will be listed what amount to Cardozo's own commentaries on the "standard" propositions described above; these will be given the letter designations A through C. These, too, are contradictory among themselves and tend to qualify the "standard" doctrine in various respects. Commentary will be provided following each proposition.

Cardozo's analysis begins:

[1] To bring a case within the [federal question] 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.260

As Cardozo's citation to First National Bank v. Williams261 illustrates, the purpose of this passage is to reaffirm that a plaintiff will not be permitted to invoke federal jurisdiction by anticipating federal defenses in his complaint. The premise may be traced back to Union & Planters' Bank.262

[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.263

260. Id. at 112.
261. 252 U.S. 504, 512 (1920).
262. Union & Planters' Bank, 152 U.S. at 464 ("[A] suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws."). See also Boston & Mont. Consol. Copper & Silver Mining Co. v. Montana Ore Purchasing Co., 188 U.S. 632, 638-39 (1903).
263. Gully, 299 U.S. at 112.
This language traces back to *Cohens,* and, as *Osborn* made clear, the construction might be very remote and hypothetical indeed. But Cardozo’s citation to *Starin v. New York* makes clear that the *Cohens-Osborn* requirement is a necessary but insufficient condition; *Starin* cites, among other things, to *Gold-Washing,* which had appropriated the “real and substantial dispute or controversy” language of section 5 of the 1875 Act. That this was Cardozo’s intent is made clear by proposition 3:

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

At this point, Cardozo has already fallen into the trap of requiring that a single pleading—the complaint—demonstrate that a substantial *dispute or controversy* will arise relating to a question of federal law. Cardozo candidly admits that “the early cases were less exacting than the recent ones” in this respect. He makes particular reference to *Osborn* and *Pacific Railroad* (which recognized federal jurisdiction based solely on federal incorporation) and approvingly cites both the statutory rejection of this approach and the recent judicial tendency to reject federal jurisdiction based on status irrespective of the issues to be litigated. The latter statutes and cases effectuate needed reform in an area where federal question jurisdiction is the least essential, but the former analytical trap remains.

265. *See supra* text accompanying notes 101-02.
266. 115 U.S. 248, 257 (1885).
270. *See supra* text accompanying notes 188-91.
273. *E.g., Gay v. Ruff,* 292 U.S. 25 (1934) (two conflicting federal statutes read in pari materia held not to authorize federal jurisdiction over tort suit against federally-appointed receiver); *Russell,* 288 U.S. 476 (discussed *supra* in the text accompanying notes 229-34).
[4] The controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.\textsuperscript{274}

The first clause contains the well-pleaded complaint rule of \textit{Metcalf}\textsuperscript{275} and is also subject to the objection that a "controversy" cannot exist in isolation; the second is the rule of \textit{Union \\& Planters' Bank}. The conflict between propositions 3 and 4 is manifest, and proposition 4 is itself both arbitrary and structurally unsound.\textsuperscript{276}

[5] 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.\textsuperscript{277}

This proposition is a clarification of the consequences of proposition 1 and seals the logical conclusion that general federal question jurisdiction is impossible. Given proposition 4, jurisdiction must be determinable from the complaint alone. Proposition 3 requires a "genuine and present controversy," not merely a possible one. This is true since \textit{even if} plaintiff's claim is federal in nature,\textsuperscript{278} there can be no guarantee that "the right . . . [will] be . . . supported if [federal law is] given one construction or effect, and defeated if [it] . . . receive[s] another"\textsuperscript{279} (as, for example, where defendant raises only factual questions)\textsuperscript{280} unless plaintiff is allowed to so plead, and proposition 5 forecloses that option. If plaintiff's claim is not federal in nature, proposition 5 and the pleading rule of proposition 1 foreclose federal jurisdiction \textit{ipso facto}.

[6] The probable course of the trial, the real substance of the controversy, has taken on a new significance.\textsuperscript{281}

\textsuperscript{274} \textit{Gully}, 299 U.S. at 113.
\textsuperscript{275} \textit{Metcalf}, 128 U.S. 586, discussed \textit{supra} in the text accompanying notes 167-70.
\textsuperscript{276} See \textit{supra} notes 178-95.
\textsuperscript{277} \textit{Gully}, 299 U.S. at 113.
\textsuperscript{278} This, of course, was the Russell test, \textit{supra} text accompanying note 234, which \textit{Gully} invokes, 299 U.S. at 114, and which is quoted \textit{infra} as proposition 9 in the text accompanying note 287.
\textsuperscript{279} Proposition 2, \textit{supra} text accompanying note 263.
\textsuperscript{280} Assuming the application of proposition 3.
\textsuperscript{281} \textit{Gully}, 299 U.S. at 113-14.
Here it appears that Cardozo is beginning to waver, but the context reveals that the statement refers generally back to proposition 3 and his rejection of a fortiori federal jurisdiction based on status. But the observation also looks forward to proposition 7 and attempts to apply itself to the rejection of federal jurisdiction in cases like Rutter, where, although federal statutes regulated the necessity and timing of certain types of suits, the federal ingredient would not necessarily satisfy proposition 2.

[7] "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws . . . ."\(^{282}\)

Here, Cardozo quotes from Shulthis v. McDougal,\(^{283}\) in which federal jurisdiction over a suit to determine title to a Creek Indian allotment (title being derived from federal statute) was sustained on diversity grounds. In rejecting federal question jurisdiction, the Court articulated the quotation adduced as propositions 7 and 8, and added after proposition 8:

"This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws."\(^{284}\)

This context makes proposition 7 a bit difficult to decipher. On the one hand, since Shulthis cites, inter alia, to Blackburn and Rutter immediately following the above-cited passage,\(^{285}\) a close linkage between propositions 6 and 7 might be suggested. Apart from that, the language of proposition 7 was original to the Shulthis Court, was dictum, and was qualified by the "[t]his is especially so [in land title] cases" language cited above, which was omitted by Cardozo in Gully.

Had Cardozo finally begun to waffle? By omitting Shulthis' "[t]his is especially so" language, it could certainly be

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282. Id. at 114 (quoting Shulthis v. McDougal, 225 U.S. 561, 569 (1912)) (emphasis added).
283. 225 U.S. 561, 569 (1912).
284. Id. at 569-70. See also supra text accompanying note 204 (quoting Rutter).
285. Shulthis, 225 U.S. at 570.
maintained that Cardozo was offering an escape from Holmes' flat test. And noting Cardozo's citation to Shulthis, which included the intriguing words "for that reason alone," it might be inferred that the federal "origin" of a suit might be a factor in a multifaceted equation. The tantalizing nature of proposition 7 was compounded by proposition 8, which continued the quotation from Shulthis:

[8] "... [A] suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends."286

While proposition 8, standing alone, does nothing more than rehearse proposition 2, the conjunction of propositions 7 and 8 and, more particularly, the conjunction of the word alone in proposition 7 with unless in proposition 8, might constitute a genuine breakthrough. Literally, it could mean that federal "origin" suits would be analyzed multidimensionally, or that the Union & Planters' Bank rule would be modified in such suits where a proferred federal defense could satisfy propositions 2 and 3.

It didn't. In proposition 9, Cardozo got back to basics:

[9] Today, even more clearly than in the past, "the federal nature of the right to be established is decisive—not the source of the authority to establish it."287

Cardozo's citation, of course, was to Stone's formulation in Russell. While this formulation is more linguistically open-ended than Holmes' flat "[a] suit arises under the law that creates the cause of action"288 approach, Cardozo's tenth proposition was rigid:

[10] A suit does not arise under a law renouncing a defense, though the result of the renunciation is an extension of the area of legislative power which will cause the suitor to prevail.289

286. Gully, 299 U.S. at 114 (citing Shulthis, 225 U.S. at 569) (emphasis added).
287. Id. (citing Russell, 288 U.S. at 483) (emphasis added).
Cardozo reasoned that in the absence of a federal statutory authorization of state taxation, *McCulloch* would provide a federal defense. That there was an authorizing statute did not change the basis of the suit, which was still the state tax law. The result would have been no different under Holmes' *American Well Works* approach. The dictum of proposition 11 was even more categorical:

[11] [A] suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby.\(^{290}\)

But Cardozo was not through. Perhaps evidencing that Andrews' dissent in *Palsgraf v. Long Island Railroad*\(^{291}\) had not fallen on deaf ears, he began to backtrack:

[A] [If Mississippi law had been violated by the taxes sought to be imposed herein, t]he 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 . . . . A dispute so doubtful—and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states.\(^{292}\)

The language, of course, is reminiscent of *Union & Planters' Bank*’s speculations on the legislative intent behind the modifications of the removal jurisdiction statute effected by the Judiciary Acts of 1887 and 1888:

[I]t may well be supposed that [Congress] . . . did not intend to authorize a removal where the cause of action depended solely on the law of the State, and when the act of Congress only came in question incidentally as a part (it might be a very small part) of the defendant’s plea in avoidance.\(^{293}\)

But what if, in Cardozo’s words, there were no unresolved questions of Mississippi law, and the dispute was not “doubtful,” “conjectural,” or “far removed from plain necessity”?

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290. Id.
292. Gully, 299 U.S. at 117 (emphasis added).
293. Union & Planters' Bank, 152 U.S. at 462.
Federal Jurisdiction

What if, in the words of Justice Gray, the federal question was neither "incidental" (whatever that means)\textsuperscript{294} nor a "very small part" of the controversy? What if, as in \textit{Graham}, the removing party made it clear that not a single dispute involved the interpretation of any state law, and that not a single alleged "fact" was disputed?

Eschewing citation to Andrews, Justice Cardozo continued:

\textbf{[B]} What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law.\textsuperscript{295}

So maybe there are questions of degree involved in "federal origin" cases after all. If so, perhaps the observations adduced above concerning propositions 7 and 8 have vitality, and, in light of proposition A, proposition 10 is overbroad, proposition 11 is gratuitous obiter, and proposition 9 should be construed in light of proposition B.

Cardozo concluded:

\textbf{[C]} To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.\textsuperscript{296}

In words incapable of improvement by the present author, Professor William Cohen commented:

There is room here for weighing countervailing pragmatic considerations in determining whether classes of cases should be eligible for initial trial in federal courts. But what

\textsuperscript{294} See generally Cohen, supra note 77, at 903-05 (criticizing Gully's "arising directly" approach).

\textsuperscript{295} Gully, 299 U.S. at 117-18 (emphasis added) (citations omitted).

\textsuperscript{296} Id. at 118.
are those factors, and how are they to be judged? Here, Car-dozo's opinion lapses into an opaque mysticism which, thirty years later, is as impenetrable as when the opinion was written. What is the nature of the distinction between federal law controversies "that are basic and those that are collateral"? Can anyone chart a line between "disputes that are necessary and those that are merely possible"? If we have been given a compass to escape the maze, it is one with all directions pointing back into the maze.297


"Modern" federal question analysis is, alas, little more than a footnote to Gully. That this is so may be disappointing but is certainly not surprising: while statutory changes subsequent to Gully have been made,298 the streamlining of 28 U.S.C. §§ 1331(a)299 and 1441(b)300 envisaged "no major alteration in the . . . distribution of judicial power between na-

297. Cohen, supra note 77, at 905.
299. See, e.g., H.R. Rep. No. 3214, 80th Cong., 1st Sess., at A114-A115 (1947) (reviser's notes) (substitution of "all civil actions" for "all suits of a civil nature, at common law or in equity," to conform with Federal Rules of Civil Procedure; substitution of "or treaties" for "or treaties made, or which shall be made under their authority" for purposes of brevity).
300. Regarding section 1441(b), the reviser commented:

Phrases such as "in suits of a civil nature, at law or in equity," the words "case," "cause," "suit," and the like have been omitted and the words "civil action" substituted in harmony with rules 2 and 81(c) of the Federal Rules of Civil Procedure.

All the provisions with reference to removal of controversies between citizens of different States because of inability, from prejudice or local influence, to obtain justice, have been discarded. These provisions, born of the bitter sectional feelings engendered by the Civil War and the Reconstruction period, have no place in the jurisprudence of a nation since united by three wars against foreign powers. Indeed, the practice of removal for prejudice or local influence has not been employed much in recent years.

Id. at A133. See generally Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 553 ("prejudice" removal provision).

The residuum of section 5 of the 1875 Act, supra text accompanying note 116, which had been most recently codified in 28 U.S.C. § 80 (1940), was omitted in the 1948 version as "unnecessary." The reviser reasoned that "[a]ny court will dismiss a case not within its jurisdiction when its attention is drawn to the fact, or even on its own motion." H.R. Rep. No. 3214, 80th Cong., 1st Sess., at A125 (1947).
And the Court has continued to solemnly pronounce that "the right of removal . . . is statutory," though such statements have dissembling tendencies since the field is replete with quasi-common law rules and avoidance doctrines, such as the complete preemption "corollary." The search for rational federalism and necessary avoidance doctrines has thus been partially confounded.

The "judicial notice" approach, by virtue of which facts of which a court was aware (but which went unpleaded by the plaintiff) could be employed in ascertaining the existence of a

301. Wechsler, supra note 77, at 216. But see Collins, supra note 77, at 720 n.17 ("A formidable barrier to such a reconsideration is, of course, the current wording of section 1441, which, as discussed more fully below, is more difficult to read consistent with a federal defense removal option than is the 1887 Act.").


303. See generally infra text accompanying notes 375-414 (exposition of "complete preemption" approach). It may also be noted that both the well-pleaded complaint rule and its application to removal jurisdiction were judge-made rules with only the most tenuous link to genuine statutory interpretation. See supra text accompanying notes 143-46, 168, 175-76, & 182-87. But cf. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983), which seems to suggest an unwillingness to broadly re-evaluate the field pending subsequent congressional direction:

It is possible to conceive of a rational jurisdictional system in which the answer as well as the complaint would be consulted before a determination was made whether the case "arose under" federal law, or in which original and removal jurisdiction were not coextensive. Indeed, until the 1887 amendments to the 1875 Act, the well-pleaded complaint rule was not applied in full force to cases removed from state court; the defendant's petition for removal could furnish the necessary guarantee that the case necessarily presented a substantial question of federal law. Commentators have repeatedly proposed that some mechanism be established to permit removal of cases in which a federal defense may be dispositive. But those proposals have not been adopted.

Id. at 10-11 n.9 (citations omitted).

On the other hand, the Court has described the "artful pleading" rule as a "settled principle," Federated Dep't Stores v. Moitie, 452 U.S. 394, 397 n.2 (1981); see generally supra text accompanying notes 222-24 (describing earlier version of the rule), and if that rule means anything, it must mean that reference to the removal petition is sometimes warranted for purposes of ascertaining the existence of a "necessary, substantial federal question." If the rule does not mean at least that, then very artful pleading by a plaintiff will avail in defeating federal jurisdiction.

Finally, it may be noted that the "complete preemption" "corollary"—also judicially created—postdates the most recent revision of the statutory removal provisions. See generally Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987) (describing evolution of the complete preemption approach).
determinative and substantial federal controversy, was teetering by the turn of the century.

But the doctrine, in the lower courts, was dying hard. As will be further explored, in *Avco Corp. v. Aero Lodge No. 735*, the Supreme Court invented the "complete preemption" doctrine in a case which held that state court suits "for violation of contracts between an employer and a labor organization" would be recharacterized as based on federal law, despite the fact that the plaintiff's well-pleaded complaint relied solely on state law. But *Avco* was not handed down until 1968; two years earlier, in *Lang v. American Motors Corp.*, a federal district court was confronted with an identical situation.

From a rational federalism approach, it may be noted that the federal interest in the enforcement of collective bargaining agreements is so powerful that it later caused the Supreme Court to create a formal exception to the well-pleaded complaint rule; but the district judge was confronted with the rigidity of Holmes' statement of that rule (and Cardozo's proposition 9). He was confronted with an artful pleader as well.

Plaintiff's damages complaint pled a state wrongful discharge cause of action and asserted a violation of his contract—a collective bargaining agreement. He refrained from pleading that the activities of the automobile industry affected interstate commerce, which would have subjected the agreement to section 301(a) of the Labor Management Relations Act of 1947. That section provided then, and provides now, that

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304. See generally supra text accompanying note 248 (authority supporting and application of the doctrine).
309. See *Franchise Tax Bd.*, 463 U.S. at 23 (interpreting *Avco*).
310. Supra text accompanying note 218.
311. Supra text accompanying note 287.
[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.\textsuperscript{312}

As every second-year law student knows, not a law professor in generations has been able to concoct a hypothetical in which activity did not "affect" commerce in a constitutional sense,\textsuperscript{313} but the matter had not been pled. Quite sensibly, Judge Reynolds took judicial notice (citing C.J.S. and the Cyclopedia of Federal Procedure as his authority so to do)\textsuperscript{314} of the fact "that American Motors Corporation carries on extensive activities with regard to its products in interstate commerce"\textsuperscript{315} and authorized removal of the case; no appeal was taken.

Other cases have not been so candid in their forthright rejection of the Holmes (and Cardozo proposition 9) approach. Charles D. Bonanno Linen Service v. McCarthy\textsuperscript{316} involved a damages claim brought by the linen service against a union and several individual defendants, alleging both state tort and federal secondary boycott claims. Since the suit did not relate to rights arising out of a collective bargaining agreement, the complete preemption rule of Avco was not involved. The defendants removed without opposition, but later had second thoughts and unsuccessfully sought remand. After losing on the merits of the state tort claims, they argued to the First Circuit that federal jurisdiction had properly obtained, since Bonanno's state complaint had not alleged an interstate commerce effect.

The circuit panel unanimously affirmed removal. It expressly eschewed "judicial notice" analysis,\textsuperscript{317} holding that, to

\begin{itemize}
\item \textsuperscript{312} 29 U.S.C. § 185(a) (1982) (emphasis added).
\item \textsuperscript{314} Lang, 254 F. Supp. at 894.
\item \textsuperscript{315} Id.
\item \textsuperscript{316} 708 F.2d 1 (1st Cir.), cert. denied, 464 U.S. 936 (1983).
\item \textsuperscript{317} Id. at 4.
\end{itemize}
find a substantial and dispositive federal question, "[w]e need only engage in a little statutory logic".318

The state complaint alleges that the parties held "four meetings with the Federal Mediation and Conciliation Service." This federal service is available by statute only "in any industry affecting [interstate] commerce . . . ." 29 U.S.C. § 173(b).319 Thus, the necessary jurisdictional impact is ascertainable from the face of the complaint (without looking to the removal petition), even though the words "interstate commerce" do not themselves appear in the complaint.320

In Graham, the "Chickasaw Nation by and through Overton James, Governor of the Chickasaw Nation," was named as a defendant in the caption of the Tax Commission's state court petition.321 The Supreme Court denied certiorari in Bonanno.322

A second avoidance doctrine may be described as the "inherent in the complaint" approach. Pursuant to this approach,

upon removal the removal court should inspect the complaint carefully to determine whether a federal claim is necessarily presented, even if the plaintiff has couched his pleading exclusively in terms of state law. The reviewing court looks to the substance of the complaint, not the labels used in it.323

Again, two examples will suffice for purposes of illustration.324

318. Id.
319. In Yazoo & Mississippi R.R. v. Adams, 180 U.S. 41, 45 (1901), where plaintiff had asserted that unspecified Mississippi statutes had impaired the obligation of a contract, the Supreme Court rhetorically inquired: "But are we bound to search the statutes of Mississippi to find one which can be construed as impairing the obligation of the charter?" It then rejected federal appellate jurisdiction over the case.
324. See generally Note, supra note 77, at 652-55 (citing other cases and elucidating doctrinal tensions).
In *Sylgab Steel & Wire Corp. v. Strickland Transportation Co.*, plaintiff had brought a state court action for damage to machinery shipped in interstate commerce. Defendant removed and plaintiff sought remand, strenuously asserting that he relied solely on state law. But federal law provided that any common carrier is liable for any actual damages to property shipped in interstate commerce, and its legislative intent was to preclude inconsistent applications of state law. The problem, of course, was that under the "master of the complaint" approach and the well-pleaded complaint rule, plaintiff's disavowal of any federal claim would control.

The court refused to remand, basing its recognition of federal jurisdiction on the preemptive effect of federal law.\(^{326}\) It rejected the notion that the absence of reference to federal law in the complaint was dispositive.\(^{327}\) But the court's "preemption" approach has a fatal flaw, which reveals the real principle of decision.

As has been noted, *Avco* invented the "complete preemption" doctrine in 1968; *Sylgab* was decided the year before. Apart from the chronology, "preemption" and "complete preemption" (both conceptually and as the latter evolved) are two very different things. By virtue of the former, state law is displaced by federal law in a given preempted area\(^{328}\) pursuant to the supremacy clause.\(^{329}\) But the same supremacy clause, having established the controlling nature of federal law, goes on to state that "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."\(^{330}\) In short, there is nothing remotely unusual about state courts resolving relevant questions of federal law.

"Complete" preemption, by contrast, is a removal jurisdiction doctrine which divests a state court of *jurisdiction* by recharacterizing otherwise valid state-law claims (in areas

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326. Id. at 268-69.
327. Id. at 267.
329. U.S. CONST. art. VI, para. 2.
330. Id.
subject to the doctrine) as "necessarily federal in character."\textsuperscript{331} In such cases, preemption—normally a federal defense—loses that character and causes the federal question to inhere in the complaint. This, of course, is the point that Judge Weinstein was trying to make, but without analyzing in detail the potency of the federal interest, as required by the later-developed complete preemption approach.\textsuperscript{332} His implicit invocation of Cardozo's proposition \textsuperscript{2333} ("for a case to be one which 'arises under federal law,' the federal substantive element must be at least sufficiently central to the dispute that it will have some impact on its outcome")\textsuperscript{334} reveals the "inherency" of the federal question as the basis on which the case was to turn.

\textit{North American Phillips Corp. v. Emery Air Freight Corp.}\textsuperscript{335} involved a state court lost freight complaint against an airline; the Second Circuit sustained the carrier's removal of the case. As in \textit{Sylgab}, the court here held that the absence of a reference to federal law by plaintiff did not control,\textsuperscript{336} but in this case it expressly invoked Cardozo's propositions A, B, and C\textsuperscript{337} (and, by implication, proposition 6)\textsuperscript{338} as well. Looking to the "substance"\textsuperscript{339} of plaintiff's allegations, and finding that federal law was a "pivotal issue" in the case,\textsuperscript{340} it held that a federal question was inherent in the plaintiff's complaint.

A third avoidance doctrine, the "artful-pleading" rule, retained its vitality in lower federal courts as well. In \textit{Magnuson v. Burlington Northern, Inc.},\textsuperscript{341} a train dispatcher brought a
state court action for intentional infliction of emotional distress following his allegedly conspiratorial discharge by a railroad. While prior case law had held that state-law breach of contract and wrongful discharge actions were preempted by the grievance and arbitration procedures of the Railway Labor Act,\(^3\)\(^4\)\(^2\) plaintiff urged that the "outrageous conduct" exception\(^3\)\(^4\)\(^3\) to this rule controlled, and that his emotional distress state claim consequently raised no federal issue. After rejecting the applicability of the exception, the Magnuson court continued:

[Magnuson's] emotional distress was an incident of the wrongful discharge, rather than a result of an alleged conspiracy. Every employee who believes he has a legitimate grievance will doubtless have some emotional anguish occasioned by his belief that he has been wronged. Artful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge. If the pleading of emotional injury permitted aggrieved employees to avoid the impact of the [Railway Labor Act], the congressional purpose of providing a comprehensive federal scheme for the settlement of employer-employee disputes in the railroad industry, without resort to the courts, would be thwarted.\(^3\)\(^4\)\(^4\)

The Supreme Court declined review of the Ninth Circuit's decision to authorize removal jurisdiction.\(^3\)\(^4\)\(^5\)

Magnuson was decided with benefit of the guidance provided by Avco,\(^3\)\(^4\)\(^6\) which was apparently sufficient to trigger reference to the federalism policies which the Magnuson result promoted. But it was not until 1983, five years after Magnuson, that the Supreme Court, in Franchise Tax Board v. Construction Laborers Vacation Trust,\(^3\)\(^4\)\(^7\) fully explained that the "necessary ground of decision [in Avco] was that the pre-emptive force of [the preemempting statute] is so power-

\(^3\)\(^4\)\(^4\). Magnuson, 576 F.2d at 1369.
\(^3\)\(^4\)\(^6\). In the complete preemption context, however, this guidance was incomplete. See, e.g., Note, supra note 77, at 635 n.7; infra text accompanying note 348.
\(^3\)\(^4\)\(^7\). 463 U.S. 1 (1983).
ful" as to require federal recharacterization of purportedly state-law, state court suits. Given the chronology—and the doctrinal confusion of the day—it is not surprising that the Magnuson court relied on the "artful pleading" approach.

Upon analysis, however, it may be seen that the Magnuson decision, while placing formal reliance on the artful pleading exception to the well-pleaded complaint rule, partakes of aspects of both the "inherent in the complaint" and "complete preemption" approaches as well. Certainly, the use of the artful pleading doctrine in Magnuson bears little resemblance to its historical antecedents, and the analysis of legal doctrine engaged in by the court rendered unnecessary any reference to the removal petition. This being the case, the Magnuson result could be justified pursuant to Sylgab's and North American Phillips' "inherent in the complaint" approach. Moreover, given Magnuson's "rational federalism" Avco-type analysis of the potency of the federal preemptive policy, support could also have been sought in complete preemption analysis. In Schroeder v. Trans World Airlines, a more appropriate usage of the artful pleading doctrine per se may be found.

In that case, airline employees brought state court actions for wrongful demotion, and the Ninth Circuit sustained removal jurisdiction over the case. Since the employment was pursuant to a collective bargaining agreement, and since Avco had held that state causes of action "for violation of contracts between an employer and a labor organization" were completely preempted, plaintiffs specifically pled that the airline's allegedly state-law violative business practices were "not provided for nor authorized" by the collective bargaining agreement.

The court proceeded directly to the core of the artful pleading doctrine, properly understood:

348. Id. at 23 (emphasis added).
349. See supra notes 222-24 and accompanying text.
350. See supra text accompanying notes 325-40.
351. 702 F.2d 189 (9th Cir. 1983).
352. Franchise Tax Bd., 463 U.S. at 23.
353. Schroeder, 702 F.2d at 190.
Federal Jurisdiction

It is proper to use the petition for removal to clarify the action plaintiff presents and to determine if it encompasses an action within federal jurisdiction.

...[J]urisdiction based upon the presence of a federal question may not be evident from the language of the complaint. It is clear from plaintiffs' complaints here, they intended to avoid application of federal law and relied solely on state law to articulate their claims. However, viewing the complaint with the additional facts in the petition for removal, we see the nature of plaintiffs' complaints is a grievance or dispute between an employee and his employer. This dispute involves removal from the captain training program, salary and conditions of employment. Such topics are discussed in the collective bargaining agreement. Artful pleading by the plaintiff will not be allowed to conceal the true nature of the complaint.354

Federated Department Stores v. Moitie355 presents a rare example of modern Supreme Court thought regarding the artful pleading approach. In that case, seven federal private antitrust actions were brought by groups of retail purchasers for alleged price fixing by Federated; they were dismissed at the district court level for failure to allege a legally cognizable injury to "business or property" within the meaning of the Clayton Act. While most of the plaintiffs appealed, Moitie refiled in state court, couching her claims wholly in state-law terms. Federated removed, and the district court declined to remand, finding the complaints "in many respects identical" to the

354. Id. at 191 (emphasis added).

355. 452 U.S. 394 (1981). An earlier Supreme Court reflection on "artful pleading"—with a twist—may be found in Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950). In that case, which involved a declaratory judgment action to validate a contract which allegedly had been anticipatorily breached, the Court held that declaratory judgment actions must be tested, for federal question jurisdiction purposes, by reference to the "real" nature of the complaint. In Skelly, the gravamen of the complaint was held to be an underlying action for damages or injunctive relief; the Court then reasoned that

[t]o sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because, as in this case, artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act.

Id. at 673-74.
prior complaints, raising "essentially federal" claims.\textsuperscript{356} It dismissed on res judicata grounds.

In an unrelated case, the Supreme Court thereafter decided that a monetary injury could constitute a "property" injury of the type contemplated by the Clayton Act.\textsuperscript{357} and the Ninth Circuit reversed the dismissal of the five suits whose dismissal had been directly appealed.\textsuperscript{358} It subsequently reversed the district court's res judicata dismissal of Moitie's removed state court suit, finding that "[t]he doctrine of res judicata must, in rare instances, give way to overriding considerations of public policy and simple justice."\textsuperscript{359} The Supreme Court reversed, finding no such exceptions, but limited its holding to Moitie's \textit{federal-law} claims.\textsuperscript{360} Since the Court curiously remanded rather than dismissed,\textsuperscript{62} and since Moitie\textsuperscript{363} had not cross-petitioned from the lower courts' con-

\begin{thebibliography}{9}
\bibitem{356} Moitie, 452 U.S. at 396.
\bibitem{358} Moitie v. Federated Dep't Stores, 608 F.2d 1374 (9th Cir. 1979), \textit{rev'd} Weinberg v. Federated Dep't Stores, 426 F. Supp. 880 (N.D. Cal. 1977).
\bibitem{359} Moitie v. Federated Dep't Stores, 611 F.2d 1267, 1269 (9th Cir. 1980), \textit{rev'd}, 452 U.S. 394 (1981).
\bibitem{360} Moitie, 452 U.S. at 402. \textit{But cf. infra} note 362 (interpretation of Supreme Court decision on remand). \textit{Compare infra} text accompanying note 367 ("at least some" state claims sufficiently federal to warrant removal) \textit{with infra} text accompanying note 369 (Court "will not disturb" lower courts' factual findings that all state claims were essentially federal in nature).
\bibitem{361} Justice Blackmun commented in this regard:
\begin{quote}
I would flatly hold that [the initial district court dismissal] is res judicata as to respondents' state-law claims. Like the District Court, the Court of Appeals found that those state-law claims were simply disguised federal claims; since respondents have not cross-petitioned from that judgment, their argument that this case should be remanded to state court should be itself barred by res judicata.
\end{quote}
\textit{Moitie}, 452 U.S. at 404 (Blackmun, J., concurring in the judgment).
\bibitem{362} Prior to the Supreme Court's decision in \textit{Moitie}, Moitie had agreed to the voluntary dismissal of her suit, leaving the action of Brown, the only other original federal court plaintiff who had not directly appealed, as the sole subject of the \textit{Moitie} Supreme Court litigation. In Brown v. Federated Dep't Stores, 653 F.2d 1266 (9th Cir. 1981), the court concluded that the Supreme Court had not reversed the district and circuit courts' conclusion that Moitie's and Brown's state court claims were federal in nature. It further held that since such claims arose from the same transaction as the federal ones, absent evidence that the district court would have declined jurisdiction over the state-law claims, they were barred by res judicata in any case. \textit{Id.} at 1267. Brown did not appeal this decision.
\bibitem{363} Although Brown, not Moitie, was the only residual party by this point, see \textit{supra} note 362, Moitie, whose legal posture was identical, will be referred to in the text for purposes of simplicity.
\end{thebibliography}
clusion that the state-law claims were merely federal claims in
disguise, the Court’s “artful pleading” analysis may be obiter.\textsuperscript{364} Nevertheless, it merits study in its own right insofar as it reveals the thoughts of all the justices save one\textsuperscript{365} concerning this critical avoidance device.

As has been indicated, the district court, on removal of Moitie's state court suit, had held that her state and federal claims were “in many respects identical” and raised “essentially federal” claims. The Ninth Circuit, while reversing on other grounds, agreed with that conclusion.\textsuperscript{366} Despite the absence of a cross-petition by Moitie on this point, the Court's analysis began by waffling: “We agree that at least some of the claims had a sufficient federal character to support removal.”\textsuperscript{367} Subsequently, however, it stated:

As one treatise puts it, 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.” 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3722, pp. 564-566 (1976) (citing cases) (footnote omitted).

The District Court applied that settled principle to the facts of this case. After “an extensive review and analysis of the origins and substance of” the two Brown\textsuperscript{368} complaints, it found, and the Court of Appeals expressly agreed, that

\textsuperscript{364} But cf. infra text accompanying note 367 (some, but indeterminable, impact of Court's “artful-pleading” analysis). But cf. infra text accompanying note 369 (final sentence conflict with statement quoted infra in the text accompanying note 367).

\textsuperscript{365} See generally Moitie, 452 U.S. at 409 (Brennan, J., dissenting) (indeterminability of impact of Court's conclusion that at least some of the state-law claims were essentially federal).

\textsuperscript{366} See Moitie, 452 U.S. at 408-10 (Brennan, J., dissenting). Interestingly, while Justice Brennan felt that the state court complaints presented independent state-law questions, he agreed, at least, that “[t]he federal court must . . . scrutinize the complaint in the removed case to determine whether the action, though ostensibly grounded solely on state law, is actually grounded on a claim in which federal law is the exclusive authority,” id. at 408 (emphasis added), and cited North American Phillips, see generally supra text accompanying notes 335-40 (examining Phillips), to that effect.

\textsuperscript{367} Moitie, 611 F.2d at 1268.

\textsuperscript{368} Moitie, 452 U.S. at 397 n.2.

\textsuperscript{368} See supra note 363. The use of “Brown,” not “Moitie,” in the quoted passage is the Court's.
respondents had attempted to avoid removal jurisdiction by “artful[ly]” casting their “essentially federal law claims” as state-law claims. *We will not question here that factual finding. 369*

Neither the Ninth Circuit 370 nor the Supreme Court on appeal analyzed the reasoning of the district court sufficiently to determine whether it necessarily referred to the removal petition in determining the congruence of the state and federal claims. 371 As a result, neither articulated what Schroeder had made express: that “[i]t is proper to use the petition for removal to clarify the action plaintiff presents.” 372 In the case of the Supreme Court’s opinion, the absence of discussion of this critical point may have been intentional: the sentence immediately preceding the sentence quoted from Wright, Miller, and Cooper by the Court opines that the “better practice” is to permit reference to the removal petition for some purposes in determining the existence of removal jurisdiction. 373

369. Moitie, 452 U.S. at 397 n.2 (emphasis added).
370. See Moitie, 611 F.2d at 1268.
371. The district court’s opinion is equally unclear on this point, and seems to cumulate its “artful pleading” analysis with judicial notice of the similarity of plaintiff’s state court allegations to the government’s original antitrust complaint. See Moitie v. Federated Dept Stores, No. C-77-0576 SW (N.D. Cal. July 8, 1977) (order denying plaintiff’s motion to remand and granting defendants’ motion to dismiss), quoted in Petition for Certiorari at 12a-17a, Moitie, 452 U.S. 394 (No. 79-1517).
372. Schroeder, 702 F.2d at 191 (emphasis added).

*The better practice seems to be that the court may resort to the petition for removal to inform itself of such matters as the status of a defendant or the interstate character of the activity that is the subject matter of the action, but that only the complaint will be examined for the purpose of ascertaining the existence of a federal question.*


The author should hasten to add that he does not agree with either the qualification adduced above or its context. The qualification is both mechanistic and artificial, and does not necessarily promote the “rational federalism” approach which will be defended herein. *See infra* text accompanying notes 765-77. Language elsewhere in *Wright, Miller & Cooper* seems to recognize this point. E.g., *id.* at 261 (footnote omitted) (“Arguably, . . . the policy should be changed to permit removal on the basis of federal questions raised in defenses and compulsory counterclaims.”). The context of the “better practice” quotation is also unsatisfactory, in that it serves as a bridge from what is essentially “inherent in the complaint” analysis to the “artful pleading” rule and fails to recognize that its application to the latter is inherently
other hand, it may be accidental, since the bulk of the Court's opinion was dedicated to the res judicata issue. While formally recognizing that the "artful pleading" doctrine is a "settled principle" of law, Moitie left unsettled the specific mechanism by which that doctrine is to be enforced.

The final avoidance doctrine created by the courts is "complete preemption," of which much already has been said. Essentially, it provides that where the preemptive effect of federal law is sufficiently powerful, not only state law, but also state jurisdiction will be preempted, through the "recharacterization" of purported state-law claims (in the affected area) as "essentially federal in nature." The doctrine was invented in Avco, which resolved (in the context of § 301(a) of the Labor Management Relations Act of 1947) a practical and analytical problem which had troubled lower courts, by determining that state causes of action for violations of collective bargaining agreements were completely preempted by federal law.

As has been noted, the distinction between preemption and complete preemption was highlighted by companion 1987 Supreme Court cases which resulted in the extension of the

more essential than it is to the former. Compare supra text accompanying notes 349-50 (nonessentiality in Magnuson, where unaided "inherent in the complaint" analysis would suffice) with supra text accompanying notes 352-54 (essentiality in Schroeder in the face of an artfully—and misleadingly—pled complaint).

The citation is here adduced simply to illustrate that the Court may well have considered its insertion into the Moitie opinion, but reserved its inclusion for another day. This Article maintains that the day for express Supreme Court recognition of the Schroeder rule has now come.

374. See Moitie, 452 U.S. at 398-402.

375. See generally supra text following note 219 (impossibility of reconciling complete preemption doctrine with Holmes' "a suit arises under the law that creates the cause of action" approach); supra text accompanying 303 (complete preemption as quasi-common law rule); supra text accompanying note 307 (genesis of doctrine in Avco); supra text accompanying note 316 (distinguishability of Avco in Bonnano Linen Serv.); supra text accompanying notes 328-31 (distinguishability of ordinary preemption from complete preemption); supra text accompanying note 348 (Franchise Tax Bd. interpretation of basis for decision in Avco).


complete preemption approach. In *Pilot Life Insurance Co. v. Dedeaux*,\(^1\) the Court determined that the "preemption clause" of the Employee Retirement Income Security Act of 1974 (ERISA) preempted a state common law suit for alleged improper processing of a claim under an ERISA-regulated benefit plan, since such a suit "relates to" a covered plan.\(^2\) Since the case was brought in federal court based on diversity of citizenship grounds, "ordinary" preemption (of state law) was all that needed to be considered, and no federal question arose.

But in *Metropolitan Life Insurance Co. v. Taylor*,\(^3\) decided the same day as *Pilot Life*, plaintiff had filed a state-law, state court action for "mental anguish" due to his employer's alleged breach of a contractual benefits plan. No diversity theory being available,\(^4\) defendant's removal was based upon federal questions which it urged inhered in ERISA. The district court denied plaintiff's motion to remand,\(^5\) but the Sixth Circuit rejected federal jurisdiction and reversed. It noted a split in the circuits in ERISA removal cases,\(^6\) distinguished the "artful pleading" doctrine, and concluded that Taylor's state court complaint stated only state-law causes of action, subject to ERISA preemption as a mere federal defense.\(^7\) It invoked Cardozo's proposition 5\(^8\) and

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\(^1\) 481 U.S. 41 (1987).

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

\(^3\) *Pilot Life*, 481 U.S. at 44-57.


\(^5\) Taylor, the plaintiff, was a citizen of Michigan, as was co-defendant General Motors Corp. for diversity purposes. *Taylor v. General Motors Corp.*, 763 F.2d 216, 220 n.3 (6th Cir. 1985), rev'd on other grounds sub nom. *Metropolitan Life*, 481 U.S. 58. *See generally Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) ("complete diversity" requirement).


\(^7\) *Taylor*, 763 F.2d at 218-19.

\(^8\) *Id.* at 219.

\(^8\) *Supra* text accompanying note 277.
the rigid Mottley approach (both of which had been recently revitalized by Franchise Tax Board) as well.

The Supreme Court began by reciting Pilot Life's conclusion that "improper processing" claims are subject to ("ordinary") ERISA preemption. The distinctive nature of complete preemption analysis was highlighted by its formulation of the issue in the case:

The question presented by this litigation is whether these state common law claims are not only pre-empted by ERISA, but also displaced by ERISA's civil enforcement provision, to the extent that complaints filed in state courts purporting to plead such state common law causes of action are removable to federal court under 28 U.S.C. § 1441(b).

It answered this question in the affirmative.

Invoking Gully and Mottley, the Court began by paying obeisance to the well-pleaded complaint rule, deeming it "the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts." The Court's subsequent explication of complete preemption warrants reproduction in full:

Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-empt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character.

389. See supra text accompanying note 207.
390. Franchise Tax Bd., 463 U.S. at 14:
[S]ince 1887 [sic] 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 pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.

391. Taylor, 763 F.2d at 219.
392. Metropolitan Life, 481 U.S. at 60 (footnote omitted) (citation omitted).
393. Id. at 63.
394. Id. at 63-64 (emphasis added) (citation omitted).
The Court then approvingly cited *Franchise Tax Board’s “interpretation”* of *Avco* and held, supported by federalism concerns, textual similarities, and legislative history, that ERISA’s civil enforcement provisions stand in the same posture as § 301(a) of the Labor Management Relations Act. On this point, it concluded that “Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) [of ERISA] removable to federal court.”

Recognizing the “extraordinary preemptive power” of the doctrine it applied, the Court expressed its reluctance so to do. Both the exceptional nature of complete preemption and its distinguishability from the ordinary variety were re-emphasized by Justices Brennan and Marshall, writing separately, who cautioned:

> [O]ur decision should not be interpreted as adopting a broad rule that any defense premised on congressional intent to pre-empt state law is sufficient to establish removal jurisdiction. The Court holds only that removal jurisdiction exists when, as here, “Congress has clearly manifested an intent to make causes of action . . . removable to federal court.”

Despite these caveats, *Metropolitan Life* left unanswered a number of critical questions regarding the application of complete preemption analysis. Interesting at the threshold is the Court’s insistence on describing the doctrine as a “corollary” of the well-pleaded complaint rule when it is, manifestly, an exception. Perhaps, like Justice Cardozo, Justice O’Connor (who wrote for a unanimous Court) succumbed to the irresistible temptation to reconcile irreconcilables through citation to “great numbers of musty cases”, her citation of

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395. *Id.* at 64. *See generally supra* text accompanying note 348 (quoting cited passage).


399. *Id.* at 65.

400. *Id.* at 67-68 (Brennan, J., concurring) (emphasis in original) (ellipses in original) (quoting *id.*, 481 U.S. at 66).

Gully's propositions 4 and 5\textsuperscript{402} (but not A, B, or C)\textsuperscript{403} may corroborate this observation. Be that as it may, Justice O'Connor's candor in recognizing the judge-made nature of the rule\textsuperscript{404} is commendable. But the degree of reliance which she places on congressional intent, which admittedly tends to promote the "rational federalism" approach argued for herein,\textsuperscript{405} raises two analytical problems.

First, \textit{Illinois v. City of Milwaukee}\textsuperscript{406} and its progeny have long held that, for purposes of \textit{original} federal jurisdiction under 28 U.S.C. § 1331(a), no distinction exists between "claims founded upon federal common law [and] those of a statutory origin."\textsuperscript{407} \textit{Erie Railroad v. Tompkins}\textsuperscript{408} notwithstanding, admiralty, American Indian law, and other areas continue to be replete with federal common law doctrines.\textsuperscript{409} Since the Court has eschewed divergent interpretations of federal question doctrines in the contexts of original and removal jurisdiction,\textsuperscript{410} complete preemption based upon federal common law must necessarily be possible as well. In that context, of course, a "clear" manifestation of congressional intent to make a cause of action "removable to federal court"\textsuperscript{411} would be very difficult to evidence indeed; if in \textit{Graham} such a showing could not be made, it may, in fact, be utterly impossible to make. But rational federalism is not promoted by an arbitrary and dispositive distinction between federal statutes and federal common law.

\begin{itemize}
\item \textsuperscript{402} Supra text accompanying notes 274, 277.
\item \textsuperscript{403} Supra text accompanying notes 292, 295-96.
\item \textsuperscript{404} Supra text accompanying note 394.
\item \textsuperscript{405} See infra text accompanying notes 627-777.
\item \textsuperscript{406} 406 U.S. 91 (1972).
\item \textsuperscript{407} Id. at 100. See also 1 W. Crosskey, Politics and the Constitution 621-32 (1953).
\item \textsuperscript{408} 304 U.S. 64 (1938) (no \textit{general} federal common law).
\item \textsuperscript{410} But cf. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10-11 n.9 (1983) ("It is possible to conceive of a rational jurisdictional system in which . . . original and removal jurisdiction were not coextensive.").
\item \textsuperscript{411} Metropolitan Life, 481 U.S. at 66. See also id. at 68 (Brennan, J., concurring).
\end{itemize}
Second, in both Avco and Metropolitan Life, great reliance was placed on federal statutory provisions which themselves provided some federal remedy; in these remedy-oriented times, was such a provision a sine qua non of the complete preemption rule? If it was, a claim such as that raised by the Chickasaw Nation in Graham was in deep trouble ab initio; one of its complete preemption claims was based on congressional preemption of the area of tribal sovereign immunity from suit. But such fears had already been partially put to rest by Avco, in which a collective bargaining agreement-based claim was held removable pursuant to complete preemption even though, at the time, plaintiff's requested relief could be obtained only in state court:

The nature of the relief available after jurisdiction attaches is . . . different from the question whether there is jurisdiction to adjudicate the controversy. The relief in § 301 cases varies . . . . But the breadth or narrowness of the relief which may be granted . . . in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter. That the absence of a federal remedy was irrelevant to complete preemption analysis generally was confirmed, subsequent to Metropolitan Life, in Caterpillar Inc. v. Williams.


It is, perhaps, inappropriate to refer to an era of retrenchment in a field whose every historical period is replete with oscillations and inconsistencies. But with the exception of Metropolitan Life, Supreme Court cases of the last four Terms have evidenced a tightening down on the lower courts' creative utilization of doctrines in avoidance of the well-pleaded complaint rule and a correlative neglect of Cardozo's propositions A, B, and C.
This trend began with the Court’s five to four decision in *Merrell Dow Pharmaceuticals Inc. v. Thompson*; even in that case, however, the Court’s steps were tentative, and much open-ended dictum found its way into Justice Stevens’ majority opinion.

*Merrell Dow* involved state court suits by residents of Canada and Scotland against a local drug manufacturer, alleging that plaintiff’s children were born with deformities as a result of their mothers’ use, while pregnant, of one of Merrell Dow’s drugs. Plaintiffs pled state-law tort theories and included a claim that “misbranding” of the drug, in violation of the Federal Food, Drug, and Cosmetic Act [hereinafter Food and Drug Act] was a proximate cause of their injuries. The Sixth Circuit reversed Merrell Dow’s initially successful removal, finding that since there was no contention by either party that a private right of action could be implied from the Food and Drug Act, the alleged “misbranding” would be mere evidence that state negligence (or other tort) standards had been violated. It subsequently found that “[f]ederal question jurisdiction would, thus, exist only if plaintiffs’ right to relief depended necessarily on a substantial question of federal law.” But even this lenient formulation of the test could not be met, since “the jury could find negligence on the

\[1, 20-21 (1983). \] Justice Brennan, writing for a unanimous Court therein, added: “We have always interpreted . . . ‘the current of jurisdictional legislation since the [1875 Act] with an eye to practicality and necessity.” Id. at 20 (emphasis added). In the same opinion, the Court also expressly rejected the Holmes test (“a suit arises under the law that creates the cause of action”) as an exclusionary principle, in language quoted *supra* in note 219.


418. Id. (emphasis in original). This expansive dictum, of course, is analytically derivative of Cardozo’s propositions A, B, and C. See *supra* text accompanying notes 292, 295-96.
part of Merrell Dow without finding a violation of the [Food and Drug Act]."

Not surprisingly (given its reliance on the well-pleaded complaint rule as articulated by *Louisville & Nashville Railroad v. Mottley*), the Supreme Court affirmed. It was clear, however, that the Court fought an internal battle on the road to the holding it reached.

Justice Brennan, whose restrictive and cautionary concurrence in *Metropolitan Life* (only one year after *Merrell Dow*) has already been examined, wrote an expansive dissent in *Merrell Dow*, in which Justices White, Marshall, and Blackmun concurred. They began by suggesting that the text of 28 U.S.C. §§1331 supports the inference that Congress intended "to confer upon federal courts the full [constitutional] breadth of permissible 'federal question' jurisdiction," presumably to the limits of *Osborn*. Although noting that modern caselaw has rejected this interpretation, they employed both the text of § 1331 and the generally ignored but fundamental concept of federalism to shift the burden of proof where close questions of federal question jurisdiction are in issue:

> [G]iven the language of the statute and its close relation to the constitutional grant of federal-question jurisdiction, *limitations* on federal-question jurisdiction under § 1331 *must be justified* by careful considerations of the reasons underlying the grant of jurisdiction and the need for federal review.

This is radical stuff indeed, and although this author will not be the first to observe that Justice Brennan’s substantive constitutional (and general federalism) agendas are incongruent with those of many of his contemporary colleagues, the procedural consequences of this analysis are radically differ-

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419. *Thompson*, 766 F.2d at 1006.
420. 211 U.S. 149 (1908), cited in *Merrell Dow*, 478 U.S. at 808. See generally *supra* text accompanying notes 206-07 (discussing *Mottley*).
421. See *supra* text accompanying notes 400-11.
423. *Id*.
424. See *supra* text accompanying notes 94-106 (discussing *Osborn*).
ent from those which flow from his Metropolitan Life concurrence.428

Dismissing Holmes' American Well Works test427 as an exclusionary rule, Justice Brennan expressly invoked the further reaches of Cardozo's proposition 1428 (to the prejudice of virtually all the others), and cited the Court's "path-breaking"429 1921 opinion in Smith v. Kansas City Title & Trust Co.430 to support the proposition that "there may be federal-question jurisdiction even though both the right asserted and the remedy sought . . . are state created."431 Of course, Justice Brennan's string citation of dictum and dissents aside,432 the path broken by Smith is one that, as applied by the dissent in Merrell Dow, the Supreme Court has subsequently avoided as potentially overgrown with brambles. In Merrell Dow Justice Brennan's proffered application of this approach was straightforward:

Respondents pleaded that petitioner's labeling of the drug Bendectin constituted "misbranding" in violation of [the Food and Drug Act], and that this violation "directly and proximately caused" their injuries. Respondents asserted in the complaint that this violation established petitioner's negligence per se and entitled them to recover damages without more. No other basis for finding petitioner negligent was asserted in connection with this claim. As pleaded, then, respondents' "right to relief depend[ed] upon the construction or application of the Constitution or laws of the United States."433

426. Compare supra text accompanying notes 423-25 with supra text accompanying note 400.
427. Supra text accompanying note 218.
429. Merrell Dow, 478 U.S. at 819 (Brennan, J., dissenting).
430. 255 U.S. 180 (1921), discussed supra in the text accompanying notes 225-28 and infra note 728.
431. Merrell Dow, 478 U.S. at 819 (Brennan, J., dissenting).
432. Id. at 820. See generally London, supra note 77, at 851-52 (subsequent adoption of rationale offered by Justice Holmes in his Smith dissent). But see ALI Study, supra note 77, at 178-79 (defending Smith); Cohen, supra note 77, at 906 (same); infra note 728 (same).
433. Merrell Dow, 478 U.S. at 823 (Brennan, J., dissenting) (emphasis added) (citations omitted).
The last internal quotation quoted Smith.

But the parties had agreed that the Food and Drug Act "does not create or imply a private right of action for individuals injured as a result of violations of the Act." Thus, Justice Brennan's penultimate sentence quoted above fails as a link in the chain of reasoning: while "no other basis [for negligence] was asserted in connection with this claim," "this" claim did not exist, and the Sixth Circuit's conclusion—that "the jury could find negligence [in the other, 'real' claims] without finding a violation [of the Food and Drug Act]"—was secure.

Justice Stevens' majority opinion, although invoking Motley and stating that "[t]he significance of the necessary assumption that there is no federal private cause of action . . . cannot be overstated," took a circuitous route in reaching its result. It ignored the obvious fact that since the plaintiffs did not assert the existence of an implied federal right of action, the separate identity of their purported federal "claim" was illusory, and that the federal statutory violation was mere evidence in the residual state claims. Instead, initially noting the absence of any implied-right-of-action assertion, it made the assumption that no such action exists. Second, it drew conclusions based upon that assumption, although the

434. Thompson, 766 F.2d at 1006.
436. Thompson, 766 F.2d at 1006.
438. Id. at 810.
439. While cognizant of recent case law focusing on congressional intent as the touchstone of "implied right of action" analysis, see Merrell Dow, 478 U.S. at 812 n.9, cf. supra note 417 (citing post-1975 case law), Justice Stevens inexplicably turned his attention to the outmoded, but cf. Thompson v. Thompson, 484 U.S. 174, 179 (1988) (continued marginal utility of Cort), four-factor analysis of Cort v. Ash, 422 U.S. 66, 78 (1975):

Thus, as the case comes to us, it is appropriate to assume that, under the settled framework for evaluating whether a federal cause of action lies, some combination of the following factors is present: (1) the plaintiffs are not part of the class for whose special benefit the statute was passed; (2)
question was not in issue in the case. Third, based on those conclusions, it uttered a non sequitur, on the basis of which it concluded that it would 

undermine . . . congressional intent to conclude that the federal courts might . . . exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because [its] violation . . . is said to be a “rebuttable presumption” or a “proximate cause” under state law, rather than a federal action under federal law.441

The statement is tautological.

Apart from the analytical difficulties inherent in the more substantive portions of the Court’s opinion, like Justice Cardozo, Justice Stevens—perhaps not wishing to be outdone by the dissent—created a profusion of expansive federal question obiter as well. Subsequent to invoking the well-pleaded complaint rule and Mottley, he invoked Franchise Tax Board to support the proposition that there is no “single, precise definition” of federal question jurisdiction; rather, “the phrase ‘arising under’ masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.”442 He invoked Romero v. International Terminal Operating Co.443 in support of the proposition that “[i]f the history of the interpretation of judiciary legislation teaches us anything, it teaches the duty to reject treating such statutes as a wooden set of self-sufficient


the indicia of legislative intent reveal no congressional purpose to provide a private cause of action; (3) a federal cause of action would not further the underlying purpose of the legislative scheme; and (4) the respondents’ cause of action is a subject traditionally relegated to state law. In short, Congress did not intend a private federal remedy for violations of the statute that it enacted.

Merrell Dow, 478 U.S. at 810-11 (emphasis added) (footnote omitted).

Apart from the analytical difficulties of getting to the point where Justice Stevens commenced the above line of reasoning, see supra text accompanying notes 438-39, the quotation, an assumption, is based on another assumption. The final sentence is at least a non sequitur, if it does not squarely contradict the opening clause of the second sentence of the quotation. The last sentence was the starting point for the residue of Justice Stevens’ analysis. Of such stuff is doctrinal incoherence made.

440. See supra note 439.
441. Merrell Dow, 478 U.S. at 812 (footnote omitted).
442. Id. at 808 (quoting Franchise Tax Bd., 463 U.S. at 8).
He expressly invoked Cardozo's proposition B and interpreted Franchise Tax Board as "candidly recognizing the need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction," embellishing that observation with the statement that "[w]e have consistently emphasized that, in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." Finally, he noted "that a case may arise under federal law 'where the vindication of a right under state law necessarily turned on some construction of federal law.'

The last observation, an extremely expansive one, takes cognizance of Smith, and is reminiscent of Cardozo's proposition 1: the Court, however, began to backtrack even in Merrell Dow. The following year, it backtracked into the relatively rigid complete preemption approach of Metropolitan Life, and Justices Brennan and Marshall, perhaps infused with uncharacteristic conservatism by the near Armageddon of Merrell Dow, took up the banner of retrenchment with the zeal of recent converts. Eight months after Metropolitan Life, the Court remanded Graham to the Tenth Circuit in light of an intervening case which had denied the applicability of complete preemption to its facts. The following Term, it resolved the federal question issues in Graham.

444. Merrell Dow, 478 U.S. at 810 (quoting Romero, 358 U.S. at 379).
445. Id. at 813-14. See generally supra text accompanying note 295 (quoting proposition B).
446. Merrell Dow, 478 U.S. at 814.
447. Id. at 810.
448. Id. at 808 (quoting Franchise Tax Bd., 463 U.S. at 9).
449. Supra text accompanying note 260.
450. Merrell Dow, 478 U.S. at 809: "Our actual holding in Franchise Tax Board demonstrates that this statement must be read with caution; the central issue presented in that case turned on the meaning of [ERISA], but we nevertheless concluded that federal jurisdiction was lacking."
451. See Metropolitan Life, 481 U.S. at 67-68 (Brennan, J., concurring). See generally supra text accompanying note 400 (quoting concurring opinion); supra text accompanying notes 401-11 (examining Metropolitan Life approach).
IV. FEDERAL QUESTION DOCTRINES IN AMERICAN INDIAN LAW

A. The Federal Question Backdrop of Graham

In the context of federal question jurisdiction, the Graham Court did not write upon a clean slate in the field of American Indian law. Early on, the Court had held that suits based on title acquired from the United States did not (for that reason alone) "arise under" federal law;\(^{455}\) in 1912, this principle was also applied to suits involving title to individual Indian allotments.\(^{456}\) And a number of early cases make clear that federal question jurisdiction does not obtain merely because of the Indian status of a party, or because Indian property or contracts are involved.\(^{457}\) But since the dominance of federal law in the field of Indian law is overwhelming,\(^{458}\) federally recognized tribes do not stand in the same posture as non-Indians for purposes of federal question jurisdiction.

An early illustration of this fact may be found in United States v. Santa Fe Pacific Railroad,\(^{459}\) in which the United States, in its own right and as guardian\(^{460}\) for the Hualapai Tribe, sued a railroad in federal court to quiet title to land granted to the railroad by federal law,\(^{461}\) but which the United States asserted to be subject to the Indians' federal common

\(^{455}\) See supra note 204.

\(^{456}\) Shulthis v. McDougal, 225 U.S. 561 (1912), discussed supra in the text accompanying notes 282-86.


\(^{459}\) 314 U.S. 339 (1941).


law right of occupancy.\textsuperscript{462} Since the United States is not a "citizen," no diversity jurisdiction could obtain. Since the suit was one essentially to quiet title, state law would ordinarily be controlling; and Holmes' test,\textsuperscript{63} Mottley,\textsuperscript{64} and Cardozo's proposition 10\textsuperscript{465} (all of which were in place at the time of the Santa Fe Pacific Railroad decision) could not be satisfied. But both the Ninth Circuit\textsuperscript{466} and the Supreme Court\textsuperscript{467} affirmed the exercise of original federal jurisdiction without comment.

Express consideration was given to an analogous federal question issue in Oneida Indian Nation v. County of Oneida.\textsuperscript{468} In that case, the Tribe brought an original federal action for the fair rental value (for a specified time period) of land which it had ceded to New York in 1795. The cession, it argued, was void pursuant to prior treaties with the United States,\textsuperscript{469} which had been implemented by the Indian Nonintercourse Act.\textsuperscript{470} The Second Circuit determined that the action was essentially one in ejectment\textsuperscript{471} (the Supreme Court accepted this premise)\textsuperscript{472} and thought that Taylor v. Anderson\textsuperscript{473} controlled. As the Oneida Court explicated Taylor,

\textsuperscript{462} See generally Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573-74 (1823) (origin and nature of right to occupy, sometimes referred to as "original Indian title"); F. Cohen, supra note 460, at 487 n.132 (citing scholarly commentaries).

\textsuperscript{463} Supra text accompanying note 218.

\textsuperscript{464} See supra text accompanying note 207.

\textsuperscript{465} Supra text accompanying note 289.

\textsuperscript{466} See United States v. Santa Fe Pac. R.R., 114 F.2d 420 (9th Cir. 1940), aff'd as modified, 314 U.S. 339 (1941).

\textsuperscript{467} See Santa Fe Pac. R.R., 314 U.S. 339.

\textsuperscript{468} 414 U.S. 661 (1974).

\textsuperscript{469} The complaint alleged that the treaties confirmed the tribal right to possession until the land was purchased by the United States. See Oneida, 414 U.S. at 664 n.3 (citing treaties).

\textsuperscript{470} Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138:

[N]o sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

\textsuperscript{471} Oneida Indian Nation v. County of Oneida, 464 F.2d 916, 920 (2d Cir. 1972), rev'd, 414 U.S. 661 (1974).

\textsuperscript{472} Oneida, 414 U.S. at 666.

\textsuperscript{473} 234 U.S. 74 (1914).
[t]here, a complaint in ejectment did not state a claim arising under the laws of the United States even though it alleged that the defendants were claiming under a deed that was void under acts of Congress restraining the alienation of lands allotted to Choctaw and Chickasaw Indians. The Court applied the principle that whether a case arises under federal law for purposes of the jurisdictional statute "must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose."474

The Second Circuit reasoned that since under New York law, allegations of the plaintiff's right to possession, defendant's wrongful possession, and damages would state a cause of action in ejectment, no federal question arose.475

The Supreme Court reversed, applying in conjunctive fashion the "nature/source" test first established by Puerto Rico v. Russell & Co.476 and adopted by Justice Cardozo as his proposition 7:477 "Given the nature and source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under [federal law]."478

That the Court had not generally rejected the approach of Shoshone Mining Co. v. Rutter479 was revealed by the remainder of the Court's reasoning on this issue. First, it held that, apart from any New York law-based ejectment claim (and unlike the circumstances which should have controlled

474. Oneida, 414 U.S. at 665-66 (quoting Taylor, 234 U.S. at 75-76). Inter alia, Taylor cited Union & Planters' Bank, Mottley, and Shulthis for this proposition, which is Cardozo's proposition 5. See supra text accompanying note 277.
475. See Oneida, 414 U.S. at 666.
476. 288 U.S. 476, 483 (1933), discussed supra in the text accompanying notes 229-34.
477. Supra text accompanying note 282.
478. Oneida, 414 U.S. at 667 (emphasis added).
479. 177 U.S. 505, 507 (1900) ("[I]t was well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under [federal law] . . .") (interpreting Blackburn v. Portland Gold Mining Co., 175 U.S. 571 (1900) (emphasis added). Blackburn and Rutter are discussed supra in the text accompanying notes 197-205.
the outcome in *Merrell Dow*, a separate, independent, federal ejectment claim did exist herein:

[T]he complaint asserted a current right to possession conferred by federal law, wholly independent of state law. The threshold allegation required of such a well-pleaded complaint—the right to possession—was plainly enough alleged to be based on federal law. The federal law issue, therefore, did not arise solely in anticipation of a defense.

This, of course, was sufficient to establish that the claim was federal in “nature.” But in a lengthy exegesis, the Court went on to explain why the federal claim to possession could not be said “to be so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court.”

Now, the conjunction of Cardozo’s propositions 7 and 8, and the comments adduced above concerning both, could take on a new vitality; this observation finds support in the Court’s express distinction of the *Gully* facts: “[T]his is not a case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation, as was the case in *Gully*.”

Taken to this point, however, *Oneida* would not necessarily control the outcome of *Graham*. Pursuant to the “master of the complaint” approach, the *Oneida* plaintiff had invoked original federal jurisdiction pursuant to a federal claim which the Court found to exist; the Tax Commission, plaintiff in *Graham*, pled exclusively state tax law in its state court petition. But Justice White, writing for a unanimous Court in *Oneida*, went further, invoking *United States v. Forness*, which sustained original federal jurisdiction in an ejectment

480. See supra text accompanying note 435.
481. *Oneida*, 414 U.S. at 666 (emphasis added).
482. See id. at 667-78.
483. Id. at 666. See also id. at 677.
484. Supra text accompanying notes 282, 286.
485. Supra text accompanying notes 283-86.
486. *Oneida*, 414 U.S. at 675 (emphasis added).
488. See supra text accompanying notes 22-26.
489. 125 F.2d 928 (2d Cir.), cert. denied, 316 U.S. 694 (1942).
suit brought by the United States on behalf of the Seneca Nation, for additional critical and expansive propositions as well:

"[S]tate law does not apply to the Indians except so far as the United States has given its consent." There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law; and, absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law.490

Given the first quoted sentence, it could be maintained that, in Graham, the underlying federal law did more than provide the Tribe with a federal defense; rather, it provided the state with whatever authority it had to sue an unconsenting Tribe at all; this, by itself, would at least result in the classification of Graham as a federal "origin" suit. Equally promising was the Court's rejection, for federal question purposes, of an arbitrary distinction between suits based on federal statutes and those based on federal common law, and its application of the latter to questions of American Indian law.

Of potentially even greater significance was the interpretation which subsequent case law was to place on Oneida. As has been noted, Franchise Tax Board v. Construction Laborers Vacation Trust491 provided the definitive interpretation of the complete preemption doctrine; its formulation was cited approvingly by a unanimous Court in Metropolitan Life Insurance Co. v. Taylor.492 Immediately following the oft-quoted complete preemption formulation, the Court dropped a footnote to Oneida:

To similar effect is [Oneida], in which we held that—unlike all other ejectment suits in which the plaintiff derives its claim from a federal grant—an ejectment suit based on Indian title is within the original "federal question" jurisdiction of the district courts, because Indian title creates a federal possessory right to tribal lands, "wholly apart from the

490. Oneida, 414 U.S. at 674 (citation omitted) (footnote omitted).
492. Id. at 23. See generally text accompanying note 348 (quoting Franchise Tax Bd.'s complete preemption exegesis).
application of state law principles which normally and sepa-
ately protect a valid right of possession.\footnote{494}

Since \textit{Oneida} was not a removal jurisdiction case, the
complete preemption doctrine was not in issue therein; the
"to similar effect" language, however, strongly suggested that
complete preemption could be invoked should tribal title is-

This was not isolated obiter. In \textit{Caterpillar Inc. v. Wil-
liams},\footnote{496} on the basis of which the first Supreme Court re-
mand in \textit{Graham} occurred, the Court was perhaps even more
express regarding the applicability of \textit{Oneida} in the complete
preemption context. This time, the Court dropped a footnote
immediately after quoting the \textit{Metropolitan Life} formulation
of the complete preemption doctrine; the footnote simply
cited \textit{Metropolitan Life}, \textit{Oneida}, and \textit{Avco}.
\footnote{497} The two cases
between which \textit{Oneida} was sandwiched, of course, were the
only Supreme Court cases in history to apply the complete
preemption rule.

A decade following \textit{Oneida}, the Court, in \textit{National Farm-
ers Union Insurance Cos. v. Crow Tribe},\footnote{498} again directly ad-
dressed the federal question issue in the context of American
Indian law. \textit{National Farmers} involved a tribal court suit by a
tribal member against a school district for injuries sustained
at a school which, though state owned, was located in Indian
country.\footnote{499} Subsequent to the entry of judgment against them
in the tribal trial court, the school district and its insurer, Na-
tional Farmers, brought an original federal action seeking in-
junctive relief. The federal district court granted relief, find-
ing that the tribal court had no jurisdiction in a civil case

\footnote{494. \textit{Franchise Tax Bd.}, 463 U.S. at 23 n.25 (quoting \textit{Oneida}, 414 U.S. at 677)
(citations omitted).

495. Of course, should a tribe ever be \textit{sued} in state court concerning its right to
possession of land (the only context in which \textit{Oneida} could be \textit{directly} relevant in a
removal jurisdiction context), it would have the benefit of tribal sovereign immunity
with respect to both the state court suit and the resulting federal suit on removal.
But the absence of available federal relief poses no barrier to the operation of the
complete preemption doctrine. \textit{Caterpillar Inc. v. Williams}, 482 U.S. 386, 391 n.4


497. \textit{Id.} at 393 n.8.


499. \textit{See generally} cases cited \textit{supra} note 4 ("Indian country" definition).}
against a non-Indian. The Ninth Circuit reversed, finding that the district court itself had no jurisdiction over National Farmers’ suit.

The Tribe, of course, is not a “citizen,” negating any possibility of diversity jurisdiction. On the federal question side, the Ninth Circuit first noted that the Bill of Rights, inapplicable to the Tribe, could furnish no basis for federal jurisdiction. The Indian Civil Rights Act of 1968, which does bind the tribes, contains only a habeas corpus remedy not relevant herein. And since “[t]he judicial recognition of a cause of action arising under federal common law is an unusual course, to be approached cautiously,” and the remedy sought, thought the Ninth Circuit, was one which Congress had rejected in this context, it declined to find the requisite federal question in federal common law theory.

But the Supreme Court unanimously reversed, finding a federal common law claim concerning the alleged overextension of tribal court jurisdiction. It deemed the permissibility of finding federal questions in federal common law to be “well settled,” and concluded that a federal common law suit attacking tribal court jurisdiction was sufficiently grounded in federal law to satisfy even Justice Holmes’ test. As in Oneida, the reasoning of National Farmers, taken to this

501. National Farmers, 736 F.2d at 1324.
505. National Farmers, 736 F.2d at 1323.
507. On the merits, the Court concluded, in a holding analogous to the “abstention” holding of Younger v. Harris, 401 U.S. 37 (1971), that exhaustion of tribal court remedies was required before National Farmers’ claim could be entertained by federal courts. National Farmers, 471 U.S. at 853-57. This analysis was later extended in Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987), which applied a principle analogous to full faith and credit or comity in determining that tribal court substantive determinations could not be federally reviewed if the tribal court was acting within its jurisdiction. Id. at 19. See generally Arrow, supra note 409, at 487-94 (explicating National Farmers, Iowa Mutual, and their consequences).
509. Id. at 850-51 (quoting American Well Works v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) (“A suit arises under the law that creates the cause of action.”)).
point, would not ipso facto control the result in *Graham*; as in *Oneida*, and pursuant to the "master of the complaint" approach.\(^{510}\) National Farmers had invoked federal jurisdiction pursuant to a federal claim which the Court found to exist, while the Tax Commission in *Graham* had relied wholly on Oklahoma tax law in its state court complaint.\(^{511}\) But as Justice White, writing for a unanimous Court, went further in *Oneida*\(^{512}\) (and was supported in so doing by subsequent case law), Justice Stevens, writing for a unanimous Court in *National Farmers*, did the same, and did so in a similar vein:

> [T]he power of the Federal Government over the Indian tribes is plenary. Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial, and political rights of the Indian tribes . . . .

This Court has frequently been required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians. We have also been confronted with a series of questions concerning the extent to which a tribe's power to engage in commerce has included an immunity from state taxation. In all of these cases, the governing rule of decision has been provided by federal law. . . . Assuming that the power to resolve disputes arising within the territory governed by the Tribe was once an attribute of inherent tribal sovereignty, the petitioners, in essence, contend that the Tribe has to some extent been divested of this aspect of tribal sovereignty.

. . . Because petitioners contend that federal law has divested the Tribe of this aspect of sovereignty, it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference. They have, therefore, filed an action "arising under" federal law within the meaning of § 1331.\(^{513}\)

It occurred to tribal counsel in *Graham* that each of the italicized passages was directly applicable to the facts of *Gra-*

512. See *supra* text accompanying notes 489-90.
ham, that the same could be said of Justice White's Oneida language quoted above,\textsuperscript{514} and that the reasoning of that case had been cited as directly applicable to removal jurisdiction, and, more particularly, the complete preemption doctrine.\textsuperscript{515} It also occurred to tribal counsel that given the timing of the Tax Commission's original state court complaint,\textsuperscript{516} a powerful "artful pleading" argument could be made, and that if federal questions did not inhere in a state court complaint brought by a state agency against a federally recognized Tribe in a non-Public Law 280 state\textsuperscript{517} to enforce an aspect of state sovereignty (taxation) at the expense of tribal sovereignty, there was little content left in the "inherent in the complaint" approach and Cardozo's propositions 7, 8, A, B, and C.\textsuperscript{518} He assumed that these arguments would be buttressed by the fact that the Tribe did not contest either a single fact or a single question of state law.

It did not occur to counsel that in Graham, which presented the possibility for application of every well-pleaded complaint rule avoidance device yet conceived, these arguments would not garner a single vote for avoidance device ap-

\textsuperscript{514} Supra text accompanying note 490.
\textsuperscript{515} See supra text accompanying notes 491-97.
\textsuperscript{516} In Oklahoma ex rel. May v. Seneca-Cayuga Tribe, 711 P.2d 77 (Okla. 1985), the Oklahoma Supreme Court, while carefully and correctly deciding other relevant issues, took a manifestly wrong turn regarding the tribal sovereign immunity doctrine. Contrary to established Supreme Court precedent, see supra note 29, it held that such immunity was subject to a balancing test. The court's immunity analysis has been uniformly criticized, e.g., Arrow, supra note 409, at 549-50, 579-80 n.729, and the manifest error in the approach caused further proceedings in that case later to be federally enjoined. Seneca-Cayuga Tribe v. Oklahoma ex rel. May, No. 85-C-639-B (N.D. Okla. June 5, 1986), quoted in Brief in Opposition to Petition for Certiorari at A-33 to 54, Graham, 109 S. Ct. 1519 (No. 88-266), aff'd sub nom. Seneca-Cayuga Tribe v. Oklahoma ex rel. Thompson, 874 F.2d 707 (10th Cir. 1989).
\textsuperscript{517} See supra note 28 and accompanying text. The consequences of this status include an absence of state civil (subject matter) jurisdiction over Indian activities in Indian country—let alone civil jurisdiction over an unconsenting federally recognized tribe.
\textsuperscript{518} Supra text accompanying notes 282, 286, 292, 295-96.
plication (or a finding that the "claim" was federal), or that the resolution of these issues would be achieved in a single page of reasoning.

B. Graham

As has been noted, the Tax Commission's Graham petition made reference solely to state tax laws. It alleged no basis for state jurisdiction and no waiver or abrogation of tribal sovereign immunity. It failed to mention that the defendant Chickasaw Nation was a federally recognized Tribe and that the operations of the Chickasaw Motor Inn were conducted wholly on land held by the United States in trust for the Tribe. In point of fact, the words "Indian" and "tribe" appear nowhere in the complaint.519

Prior to approaching the merits, the Tribe could have invoked what seemed to be two obvious and dispositive points in state courts. First, since Oklahoma is a non-Public Law 280 state, its courts lack civil (subject matter) jurisdiction over Indian activities in Indian Country. Second, since the Chickasaw Nation is a federally-recognized Tribe, since Supreme Court case law has long recognized that "'without congressional authorization,' the 'Indian Nations are exempt from suit,'"520 and since the only congressional abrogations of the Tribe's sovereign immunity were irrelevant herein,521 it could have asserted that immunity as well. But in Oklahoma ex rel. May v. Seneca-Cayuga Tribe,522 the Oklahoma Supreme Court had permitted suit against a tribe notwithstanding the categorical nature of the above two doctrines; relatively certain523 that

519. Supra note 516.
521. See Act of June 28, 1898, § 2, 30 Stat. 495, held to be a limited abrogation of tribal sovereign immunity in Adams v. Murphy, 165 F. 304 (8th Cir. 1908); Act of Apr. 26, 1906, § 18, 34 Stat. 137, 144, held to be a limited abrogation in United States Fidelity & Guar. Co., 309 U.S. at 513; Pub. L. No. 93-195, § 2, 87 Stat. 769 (1973) (limited abrogation of tribal sovereign immunity, not relevant herein).
these critical federal precepts would not be enforced, the Tribe removed to federal court.

At the Supreme Court level, aware that a literal application of the “master of the complaint” approach, the Holmes test, and the rational federalism-ignoring approach of Louisville & Nashville Railroad v. Mottley could be fatal to its position, the Tribe attempted to channel its avoidance doctrine (and federal “claim”) arguments into areas in which the Court could formulate a narrow holding. In this context, it was aided by Justice White’s opinion in Oneida, which had distinguished Taylor v. Anderson and other cases as involving “individual Indians, not an Indian tribe; and the suit concerned lands allocated to individual Indians, not tribal rights.” Certainly, no impeachment of the rule that federal question jurisdiction does not obtain “merely because an Indian . . . is a party or because property or contracts of Indians are involved” was required to sustain the Tribe’s position; that Pandora’s box could be left secured. And, as will become apparent, assertions of state sovereignty at tribal expense (the taxation question), tribal sovereign immunity, and the non-Public Law 280 character of the state offered additional stopping points as well.

Initially, judicial notice could be taken of the federally-recognized status of the Chickasaw Nation; a quick look at the Federal Register would suffice for this purpose. And judicial

524. At oral argument in Graham, tribal counsel forthrightly informed the Court that this was one of the factors which influenced the tribal decision to remove. Transcript of Oral Argument at 28-30, Graham, 109 S. Ct. 1519 (No. 88-266).
527. 211 U.S. 149 (1908) (federal question jurisdiction deniable even where only federal issues will actually be litigated in the case).
528. 234 U.S. 74 (1914). See generally supra text accompanying note 474 (Oneida Court’s explication of Taylor).
529. Oneida, 414 U.S. at 676 (emphasis added).
531. See generally text accompanying notes 304-22 (describing source and contemporary use of the “judicial notice” approach as a well-pleaded complaint rule avoidance doctrine).
notice could equally be taken of the non-Public Law 280 character of the state.\textsuperscript{532}

Second, in light of both the nature of the Tax Commission's complaint and its timing,\textsuperscript{533} the Tribe invoked the "artful pleading"\textsuperscript{534} rule in an attempt to persuade the Court to look to the removal petition if need be.\textsuperscript{535}

Third, even assuming both a rigid application of the well-pleaded complaint rule and the absence of an apposite avoidance device, the Tribe urged that, in the unique context of a suit against an unconsenting tribe (perhaps especially in the courts of a non-Public Law 280 state), a complaint is not well-plead absent a jurisdictional allegation. Here, it took its cue from \textit{Ramey Construction Co. v. Apache Tribe of the Mescalero Reservation},\textsuperscript{536} a Tenth Circuit original federal jurisdiction case which held that since sovereign immunity is jurisdictional, its waiver or abrogation must "affirmatively appear" on the face of a \textit{federal} complaint.\textsuperscript{537} Equally jurisdictional, of course, is Public Law 280 (where Indian country Indian activities are involved). From the standpoints of both rational federalism and judicial economy, the Tribe therefore maintained that, in the situation where an unconsenting tribe was sued in the courts of a non-Public Law 280 state regarding its activities in Indian Country, a state district court should be regarded as sitting as a court of \textit{limited}, not \textit{general}, original jurisdiction, since by virtue of federal common law (and preemptive statutes) a state cannot grant such jurisdiction to itself.\textsuperscript{538} Either of two alternative conclusions would flow from this analysis: either the complaint would not have been well pleaded as a matter of federal law (which would reveal more


\textsuperscript{533} See \textit{supra} note 516.

\textsuperscript{534} See \textit{supra} text accompanying notes 341-74.

\textsuperscript{535} Chickasaw Brief, \textit{supra note} 74, at 15-19. \textit{See also Five Tribes Brief, supra note} 74, at 19 n.8.

\textsuperscript{536} 673 F.2d 315 (10th Cir. 1982).

\textsuperscript{537} \textit{Id.} at 318.

clearly the federal "nature" of the suit), or, if the suit were still deemed only a federal "source" suit, removal could be more easily justified pursuant to Cardozo's propositions 7 and 8 (as further supported by proposition B).

Fourth, the Tribe urged that federal questions (if not apparent from the face of the complaint, which named the "Chickasaw Nation" as a party defendant) were inherent therein. Here, it invoked the "federal common law" approach taken by Oneida and National Farmers and noted that the "line" drawn by Gully between complaints as to which only the source was federal, and those which were federal in nature (in modern terminology, a federal claim), was a fine one in this context. At this point, the Cardozo battle was fought in earnest, with the Tax Commission invoking propositions 1, 3, 4, 5, 9, 10, and 11, and the Tribe invoking propositions 2, 6, 7, 8, and the expansive lan-

539. See supra text accompanying note 287 (quoting Cardozo's proposition 9).
540. Supra text accompanying notes 282, 286.
541. Supra text accompanying note 295.
542. See generally supra text accompanying notes 323-40 (describing uses of the "inherent in the complaint" approach).
543. Chickasaw Brief, supra note 74, at 7-15.
544. Supra text accompanying note 490.
545. Supra text accompanying note 513.
547. Chickasaw Brief, supra note 74, at 13-14. See generally supra text accompanying notes 263, 281-82, 286 (quoting propositions 2, 6, 7, and 8).
548. Five Tribes Brief, supra note 74, at 12.

During oral argument, the Court seemed equally perplexed about what to do with Gully. During the "nature/source" questioning, the following colloquy occurred between the Chief Justice and tribal counsel:

QUESTION: The general rule surely is under the well pleaded complaint doctrine that the plaintiff sets forth its basis for recovery. And if that involves only state law, then it's not removable.
MR. RABON: That is one test.
QUESTION: Well, what other test is there?
MR. RABON: Well, in the case of Gulley [sic] versus First National Bank, the Court, Justice Cardoza [sic], said that there were other criteria, standards for removal . . . jurisdiction that you look to, such as the probable course of the trial, the real substance of the case. He said that . . . a suit to enforce a right or rights with origins under—with their origins in federal law may not necessarily be federal unless it really and substantially involves a dispute or controversy respecting the validity, construction or
guage of Oneida and National Farmers as well. On the Cardozo front, the Tax Commission numerically prevailed, seven propositions to six; no one seemed to know what to do with proposition A, although it appears that, unlike in Graham, where no state law questions were in dispute, such issues could have affected the Gully result.

The Tribe’s complete preemption argument was its lengthiest one and was developed extensively at oral argument. Despite the Court’s twice-unanimous citation of Oneida as akin to a complete preemption case, the vigor with which the Tribe defended its complete preemption argument, and the narrowness of the context in which the Tribe proffered its applicability, the argument drew not a sentence by way of reply in the Court’s Graham opinion. But the argument warrants exploration.

The Tribe initially realized that even if Oneida could be invoked as a complete preemption case, its direct applicability was limited to tribal title questions, not in issue in

\[\text{effect of such law upon which the determination of which the result depends.}
\]

QUESTION: Well, Gulley [sic] was decided in 1936, and in cases as recently as . . . Caterpillar, which are maybe one or two years old, certainly we’ve talked and talked only really about the well pleaded complaint doctrine.


In the Court's Graham opinion, it cited Gulley for the proposition that “the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law.” 109 S. Ct. at 1521. See generally supra text accompanying note 290 (quoting Cardozo’s proposition 11).

549. Supra text accompanying note 490.
550. Supra text accompanying note 513.
551. Supra text accompanying note 292.
552. See Gulley, 299 U.S. at 115.
553. See Chickasaw Brief, supra note 74, at 15-26. See also Five Tribes Brief, supra note 74, at 16-21.
555. See supra text accompanying notes 494, 497.
556. The Tribe maintained that, at a minimum, state court suits by a state against unconsenting federally recognized tribes to enforce aspects of state sovereignty at the expense of tribal sovereignty, where such suits were brought in the courts of non-Public Law 280 states, were completely preempted pursuant to Franchise Tax Board’s interpretation of Avco and Oneida.
557. See supra text accompanying notes 494-97.
558. See supra text accompanying note 495.
Graham. Cognizant that, to prevail on its complete preemption argument, it would need to develop that doctrine more broadly in the field of American Indian law, it began with what Franchise Tax Board established as the core criterion for its applicability:

The necessary ground of decision [in Avco] was that the preemptive force of § 301 [of the Labor Management Relations Act] is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301.559

Metropolitan Life further explained, "[o]ne corollary of the well-pleaded complaint rule developed in the case law . . . is that Congress may so completely pre-empt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character."

Thus, the apposite doctrinal standards established two tasks for the Tribe: first, to define exactly what the "particular area" preempted was, and second, to establish that congressional preemption in that area was so complete, and that federal interests were "so powerful," as to require federal recharacterization of purported state-law suits. The latter problem, of course, was compounded by the common law nature of part of the tribal preemption claim,661 and by Justice Brennan's Metropolitan Life concurrence which emphasized the Court's requirement (articulated by the majority opinion in that case) that for complete preemption to apply, Congress must have "'clearly manifested an intent to make causes of action . . . removable to federal court.'"662

The Tribe attempted to deal with the last problem first, noting that both Oneida and National Farmers involved cognizable federal common law claims and that Oneida had been twice cited as akin to a complete preemption case.663 It urged that any requirement of an express congressional statement to

559. Franchise Tax Bd., 463 U.S. at 23 (emphasis added) (footnote omitted).
560. Metropolitan Life, 481 U.S. at 63-64 (emphasis added).
561. See supra text accompanying notes 405-11.
562. Metropolitan Life, 491 U.S. at 68 (emphasis in original) (citation omitted).
563. See supra text accompanying notes 494, 497.
completely preempt in a field so dominated by federal common law would be both arbitrary and unrealistic, not supportive of a rational federalism approach. It maintained that the federal statute/federal common law dichotomy was irrelevant to making the sensitive federalism judgments inherent in sections 1331 and 1441, that impossible complete preemption requirements should therefore not be imposed in federal common law cases, and that the requirement emphasized by Justice Brennan in *Metropolitan Life* should be tempered by the Court's recognition of *Oneida* as analogous to a complete preemption case.

Given the nature and historical evolution of American Indian law, it would be difficult if not impossible to point to a specific federal statute "clearly manifesting an intent" to make one of its specific areas "removable to federal court." Moreover, if that is a sine qua non of the complete preemption test, then there is no complete preemption doctrine at all, for such a statute would be indistinguishable from a specific removal statute but for its exclusion from title 28 of the United States Code. But the Court, in *Avco* and *Metropolitan Life*, spared complete preemption jurisprudence from the bromide that "the right of removal . . . is statutory" and candidly admitted that that doctrine had been "developed in the case law."

Be that as it may, the Tribe went on to describe three specific "areas" in which it urged that the federal interest is "so powerful" as to require recharacterization of purportedly state-law claims. These areas were defended in the alternative; any one would have been dispositive in *Graham*.

The Tribe first maintained that the "area" of state taxation of Indian country tribal activities was completely preempted by federal common law, federal statutes, and treaties. Regarding the common law aspect of this position, the *Oneida* Court had held that "state law does not apply to the

564. See, e.g., Arrow, supra note 409, at 469 ("unique amalgam of constitutional, common law, statutory, and international legal principles").
568. Chickasaw Brief, supra note 74, at 6-12.
Indians except so far as the United States has given its consent,'" and National Farmers had noted that the Court has frequently been confronted with state tax immunity questions involving Indian country, and that "[i]n all of these cases, the governing rule of decision has been provided by federal law." Moreover, the Tribe noted, apart from the overarching federal common law of state taxation immunities, Congress has taken an active interest in legislating interstitially in the field. And as to congressional action specifically regarding the Chickasaw Nation, the Tribe invoked the provisions of treaties signed in 1830, 1832, 1834, and 1866 and

569. Oneida, 414 U.S. at 674 (citation omitted) (quoting United States v. For- ness, 125 F.2d 928, 932 (2d Cir.), cert. denied, 316 U.S. 694 (1942)).
572. E.g., Act of Oct. 17, 1988, Pub. L. No. 100-497, 102 Stat. 2467 (regulating, inter alia, state taxation of Indian gaming enterprises); Act of June 20, 1910, Pub. L. No. 61-219, ch. 310, § 2, 36 Stat. 557, 559 (provision of New Mexico Statehood Enabling Act stating, with conditions, that "nothing herein . . . shall preclude the said State from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian").
573. Chickasaw Brief, supra note 74, at 9-11.
574. Treaty of Dancing Rabbit Creek, Sept. 27, 1830, United States-Choc-taw Na-tion, art. IV, 7 Stat. 333-34 (1831) (emphasis added):

The Government and people of the United States are hereby obliged to secure the said Choc-taw Nation of Red People the jurisdiction and govern-ment of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choc-taw Nation for their descendants . . . .

When the Chicksaws were removed, they were settled on lands previously ceded to the Choc-taw Nation by virtue of this treaty; an 1837 treaty provided that their settlement on Choc-taw lands was to be pursuant to the same terms as applied to the Choc-taws. Treaty Between the Choc-taws and the Chicksaws, Jan. 17, 1837, Choc-taw Na-tion-Chicksaw Nation-United States, art. I, 11 Stat. 573 (1837).
575. Treaty of Ponti-tok Creek, Oct. 20, 1832, United States-Chicksaw Nation, preamble, 7 Stat. 381 (1833) (emphasis added) ("The Chicksaw Nation find themselves oppressed in their present situation; by being made subject to the laws of the States in which they reside.").
576. Treaty of Peace and Friendship, May 24, 1834, United States-Chicksaw Nation, art. II, 7 Stat. 450 (1834) (emphasis added) ("[T]he United States, hereby consent to protect and defend [the Chicksaws] against the inroads of any other tribe
the "disclaimer" provisions of the Oklahoma Statehood Enabling Act.\textsuperscript{577} Although recognizing that some of the treaty guarantees had been abrogated by the Curtis Act,\textsuperscript{579} the Tribe argued that its provisions had been modified by the Five Civilized Tribes Act\textsuperscript{580} and invoked Muscogee (Creek) Nation v. Hodel\textsuperscript{581} in support of the proposition that the Oklahoma Indian Welfare Act\textsuperscript{582} had repealed the Curtis Act. Based on this analysis, the Tribe felt secure that it had shown at least that federal law (including federal common law) "ordinarily"\textsuperscript{583} preempted the field of determining when—and if—state taxes relating to its activities in Indian country could be imposed.\textsuperscript{584}

But the complete preemption doctrine further requires that federal interests, in the area subject to its sweep, be "so powerful"\textsuperscript{585} as to require federal recharacterization of purportedly state-law, state court suits. In this context, the Tribe initially noted the inherent tension involved in permitting the courts of one sovereign—the state—to sit in judgment of its

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577. Treaty with the Choctaw and Chickasaw Indians, Apr. 28, 1866, United States-Choc*taw Nation-Chickasaw Nation, art. XXXIII, 14 Stat. 769, 778 (1866) (emphasis added) ("All lands selected ... shall be the common property of the Choctaw and Chickasaw nations, ... subject to the joint control of their legislative authorities."). See also id., art. XXXIX (emphasis added):

\[No license shall be required to authorize any member of the Choctaw or Chickasaw nations to trade in the Choctaw or Chickasaw country who is authorized by the proper authority of the nation, nor to authorize Choctaws or Chickasaws to sell flour, meal, meat, fruit, and other provisions ... brought from the United States into the said country.\]

578. Act of June 16, 1906, ch. 3335, §§ 1, 3, 34 Stat. 267-68, 270 (preserving plenary federal control over Indian lands and rights in Oklahoma).


583. See generally supra text accompanying notes 380-92 (distinguishing "ordinary" from "complete" preemption).


own sovereignty vis-a-vis that of another sovereign. 586 Citing United States v. Kagama 587 and pointing to the "jingoistic tone" of the Tax Commission's brief, 588 it asserted that the protections against the states furnished by federal law to Indian tribes were anything but outdated. And it invoked the federal trust responsibility, 589 and the continuing judicial recognition that it is for Congress to determine how that trust should be fulfilled, 590 to illustrate the necessity and potency of the federal interest in preventing unauthorized state tax incursions into Indian country. In short, since Congress has taken an active interest in Indian country state taxation, and since such interest (against the backdrop of federal common law) is essential to fulfillment of federal trust obligations, the federal interests in controlling Indian country state taxation are powerful indeed.

Alternatively, the Tribe maintained that the "area" of tribal sovereign immunity is completely preempted by federal law; 591 again, it relied on both federal common law and statutes.

As to the former, the Tribe first turned to recent and powerful language in Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 592 which evidenced both the common law nature of, and the potency of the federal interest in, tribal sovereign immunity:

[North Dakota's] requirement that the Tribe consent to suit in all civil causes of action before it may again gain access to state court as a plaintiff also serves to defeat the Tribe's federally conferred immunity from suit. The common law sovereign immunity possessed by the Tribe is a


587. 118 U.S. 375, 384 (1886) ("Because of the local ill feeling, the people of the States where [Indians] are found are often their deadliest enemies.").

588. Chickasaw Brief, supra note 74, at 41. See also supra note 72. But cf. supra note 18 (general absence of recent hostility in Oklahoma courts, legislature, and other executive departments).

589. See supra note 460.


591. Chickasaw Brief, supra note 74, at 22-26. See also Five Tribes Brief, supra note 74, at 16-20.

necessary corollary to Indian sovereignty and self-governance. . . . [T]his aspect of tribal sovereignty, like all others, is subject to plenary federal control and definition. Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.

. . . The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian . . . may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances, much in the same way that the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted.593

If this were not enough, the Chickasaw Nation noted that Congress has taken a specific interest in its sovereign immunity (abrogating portions of it selectively and for limited purposes no less than three times since 1898),594 further evidencing its intent to occupy this field.595 And since Three Affiliated Tribes recognized the essentiality of tribal immunity to “Indian sovereignty and self-governance,”596 and other cases have recognized that important federal policies (pursuant to the trust responsibility) concerning tribal self-determination, economic development, and cultural autonomy also necessitate such immunity,597 the Tribe felt that the federal

594. See supra note 521.
596. Supra text accompanying note 593.
597. See generally California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216-19 (1987) (describing federal goals); United States v. Oregon, 657 F.2d 1009, 1013 & n.9 (9th Cir. 1981) (citing cases supporting proposition that “Indian tribes enjoy immunity because they are sovereigns predating the constitution, and immunity is thought necessary to preserve autonomous tribal existence”).

interests involved were sufficiently "powerful" to require shielding tribal immunity from inconsistent state court adjudications by subjecting state court suits against unconsenting tribes to the complete preemption rule. Cumulating this conclusion with its first complete preemption argument, the Tribe urged that this was especially true where a state was the plaintiff and the suit was brought to enforce state sovereignty against a tribe.

The third complete preemption contention focused on the plenary nature of federal authority over state court subject-matter jurisdiction relating to activities within Indian country. While federal common law provides the relevant historical backdrop for this issue, Congress has, by statute, assumed total control of the field in recent years.

In the civil jurisdiction context relevant here, Congress has enacted state-specific, tribe-specific, and generic federal statutes; the latter are contained in Public Law 280 and its 1968 amendments.

"Ordinary" preemptive effect was given to the tribe-specific statutes in Bryan v. Itasca County. In Kennerly v. District Court, the Court found the civil jurisdiction provisions of Public Law 280 to be "illustrative of the detailed regulatory scrutiny which Congress has traditionally brought to bear on

Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the Court refused to imply any abrogation other than the one Congress had specifically provided.

In the Indian Self-Determination Act, Pub. L. No. 93-638, tit. I, § 110, 88 Stat. 2206, 2213 (codified at 25 U.S.C. § 450n (1982)), Congress again addressed the question of tribal sovereign immunity, providing that nothing therein should be construed as diminishing or impairing "the sovereign immunity from suit enjoyed by an Indian tribe."

98. See supra note 516.


602. See supra note 28.


the extension of state jurisdiction, whether civil or criminal, to actions to which Indians are parties arising in Indian country" and went on to hold that that Act provided the sole method by which Indian country state civil jurisdiction could be extended. In Three Affiliated Tribes, the Court was equally express in its (ordinary) preemption analysis, finding that Public Law 280 "was intended to replace the ad hoc regulation of state jurisdiction over Indian country with general legislation." And the 1968 amendments, which conditioned subsequent state jurisdictional extensions on tribal consent, are equally preemptive.

Pursuant to complete preemption requirements, the Tribe maintained that the federal interest in regulating state civil jurisdiction in Indian country was "so powerful" as to require federal recharacterization of state court suits in non-Public Law 280 states, asserting state civil jurisdiction over Indian country Indian activities therein. The congressional preemptive intent, it maintained, could scarcely have been more clear; the Court, in Three Affiliated Tribes, expressly recognized that "[t]he impetus for the addition of a consent requirement in the 1968 amendments was congressional dissatisfaction with the involuntary extension of state jurisdiction over Indians who did not feel they were ready to accept such jurisdiction, or who felt threatened by it." In the context of complete preemption, Justice Rehnquist, concurring in Oneida, had noted the "continuing solicitude" of the federal government for the tribal rights at issue there, and had relied on that fact in concluding that "the Indians' right to possession . . . is based not solely on the original grant of rights in the land but also on the Federal Government's subsequent guarantee;" Three Affiliated Tribes took notice of the fact that "the 1968 amendments to Pub. L. 280 pointedly illustrate

605. Id. at 424 n.1.
606. See id. at 426-30.
607. Three Affiliated Tribes, 476 U.S. at 884.
608. See, e.g., id. at 886.
609. See supra text accompanying notes 559-60.
610. Chickasaw Brief, supra note 74, at 22-26. See also Five Tribes Brief, supra note 74, at 20-21.
611. 476 U.S. at 892.
612. 414 U.S. at 684 (Rehnquist, J., concurring) (emphasis in original).
the continuing congressional concern over tribal sovereignty.” Finally, the Tribe noted the obvious fact that fulfillment of federal trust obligations would be frustrated by permitting non-Public Law 280 states to rule on their own civil jurisdiction (regarding Indian country Indian activities) in the face of manifest federal preemption. Along these lines, it could further be maintained that the very necessity for a tribal defense against such a suit was obstructive of federal policy. Again, the Tribe maintained that in the context of Graham’s specific facts, this complete preemption argument was reinforced by the other two.

The Court, rejecting (or ignoring) all of the tribal arguments, denied the existence of a jurisdictionally cognizable federal question and reversed the Tenth Circuit for a second time. It invoked the holding of Caterpillar for whatever support that case could provide and characterized tribal immunity as a federal defense. Stating flatly that “[t]he presence or absence of federal question jurisdiction is governed by the ‘well-pleaded complaint’ rule,”

613. Three Affiliated Tribes, 476 U.S. at 892 (emphasis added).
614. See generally Hamm v. City of Rock Hill, 379 U.S. 306, 311 (1964) (recognizing immunity from prosecution based on Civil Rights Act of 1964); Georgia v. Rachel, 384 U.S. 780, 804-05 (1966) (immunity from prosecution recognized by Hamm ipso facto warrants removal of state prosecution pursuant to civil rights removal statute, 28 U.S.C. § 1443(1) (1982)). Such an argument would be based on the premise that the policy of immunizing tribes from civil suits in non-Public Law 280 states (whose civil jurisdiction manifestly has been federally preempted) proceeds from similar policy sources, of similar strength, to the policy prohibiting state court prosecutions regarding civil rights activities specifically authorized by federal law. The argument would be enhanced by the presence of the federal trust responsibility.

615. See supra note 556 (resulting tribal contention). See also supra notes 574-76 (further reinforcement provided by treaties to Tribe’s third complete preemption argument); supra notes 578, 580, 582 (support provided by other federal statutes regarding same).
616. Graham, 109 S. Ct. at 1521.
617. See supra text accompanying notes 58-61.
618. Graham, 109 S. Ct. at 1521.
619. Id.
620. Id. Compare id. with Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (complete preemption “corollary”); Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 808 (1986) (after invoking well-pleaded complaint rule, noting that case may also arise under federal law “where the vindication of a right under state law necessarily turned on some construction of federal law”); Federated Dep’t Stores v. Moitie, 452 U.S. 394, 397 n.2 (1981) (“artful pleading” exception); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-10 (1983) (well-
Court—appropriately, from the standpoint of its intended result—cited *Mottley*, which held that federal question jurisdiction could be denied even where only federal issues were at issue in the case. Despite earlier perplexity, the Court cited *Gully* for a premise approximating Cardozo's proposition 11. It concluded by citing the statutes in which Congress had statutorily provided for removal of suits against foreign sovereigns and suits against federal officers acting under color of federal law, and finding that "[n]either the parties nor the courts below have suggested that Congress has statutorily provided for federal court adjudication of tribal immunity notwithstanding the well-pleaded complaint rule." The Court made no reference in its opinion to any of the Tribe's complete preemption arguments or its artful pleading contention, and its analysis of *Gully* and the Tribe's corresponding "inherent in the complaint" (federal claim) analysis was limited to the citations to *Mottley* and *Gully* described above.

V. RETRIEVING THE OPPORTUNITY MISSED: TOWARD A "RATIONAL FEDERALISM" APPROACH

No major restructuring of in-place federal question doctrine would have been necessary to a finding of jurisdictionally cognizable federal questions in *Graham*, which was devoid of a single contested state-law issue. No less than half of Cardozo's Fourteen Points could have supported a finding that, at bottom, the Tax Commission's complaint stated a federal claim, a conclusion which could be avoided only by the Court's sub silentio reliance on Holmes' test (though it had

pleaded complaint rule "severely limits the number of cases in which state law 'creates the cause of action' that may be initiated in or removed to federal district court"). See also Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921).

621. See supra note 548.

622. *Graham*, 109 S. Ct. at 1521 ("[T]he existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law."). See generally supra text accompanying note 290 (quoting proposition 11).


626. See supra text accompanying notes 547-52.

627. Supra text accompanying note 218.
recently and unanimously rejected that test as an exclusionary rule). And the complete preemption argument (which should properly work in conjunction with the artful pleading rule), narrowly framed, could have easily carried the day in light of both the dominance of federal substantive law and the presence of powerful federal interests in effectuating the federal trust responsibility unencumbered by inconsistent state court adjudications.

But as Justice Holmes himself recognized, "hard cases make bad law," and Graham, which involved federal common law, statutes, and treaties in a highly complex and specialized field, may have been, even among cases at the frontier of federal question jurisdiction, a harder case than most. Nevertheless, the Court's terse opinion reveals either a difficulty in confronting the panoply of jurisdictional theories presented therein or a serious retreat into the formalism of per se rules whose operation is wholly independent of rational federalism concerns. Either hypothesis warrants doctrinal reevaluation.


629. E.g., Note, supra note 77, at 653. See generally supra notes 352-72 and accompanying text; infra text accompanying notes 752-66 (proper application of artful pleading rule).

630. See supra note 556.


632. For example, the Court's statement that "Congress has expressly provided by statute for removal when it desired federal courts to adjudicate defenses based on federal immunities," Graham, 109 S. Ct. at 1521, was reminiscent of its 1877 statement that "the right of removal . . . is statutory," Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 201 (1877), and glosses over, inter alia, its more recent observation that the complete preemption doctrine is a judge-made rule. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987). Moreover, given the difficulties of applying—either favorably or unfavorably—the complete preemption doctrine to cases sounding in federal common law, see supra text accompanying notes 406-11, 562-65, the Court may have simply elected, by ignoring the issue, to avoid further ossification of a field already strewn with conflicting absolutes.

633. The Court's invocation of Mottley, and its selective citation of Gully, see supra note 622, may point in this direction. See also supra note 548 (quoting Transcript of Oral Argument in Graham).
A. Ruminations on a New Beginning

As has been noted, this Article is not the first to plumb the doctrinal depths, nor will it be the first (or last) to proffer major modifications in the federal question approach. In 1942, the seminal work of Professors Chadbourn and Levin took note of the impossibility of ascertaining the existence of a controversy regarding federal law from the plaintiff's complaint alone and suggested that the article III "federal ingredient" approach which Justice Marshall articulated in Osborn should control interpretation of the jurisdictional statute, with courts employing section 5 of the 1875 Act to justify dismissal or remand should no substantial federal dispute actually occur.

The following year, Professor Forrester went further, urging that the jurisdictional statute be interpreted, unless modified, pursuant to the "federal ingredient" test of Osborn, without the limiting section 5 analysis suggested above. That section, he suggested, simply "requir[ed] the courts to investigate, sua sponte, to be certain the federal jurisdiction does exist in fact."

In any event, the section 5 debate was mooted by its elimination in the 1948 revision of the Judicial Code; the same year, in his commentary on that revision, Professor Wechsler, while rejecting the practical adequacy of "federal ingredient" analysis as a statutory interpretation test, offered salient observations in the area of removal jurisdiction. He first noted the consequences of the well-pleaded complaint rule and Union & Planters' Bank:

Though the plaintiff who puts forth the federal claim is content to seek its vindication in the state tribunals, the defendant may insist upon an initial federal forum. When, on

634. See supra note 77.
635. See supra text accompanying notes 98-106.
636. Supra text accompanying note 116.
638. Forrester II, supra note 77, at 275, 287.
639. Id. at 269.
640. See supra note 300.
641. Wechsler, supra note 77, at 218. See also, e.g., Cohen, supra note 77, at 891; Mishkin, supra note 77, at 161-62.
the other hand, the plaintiff's reliance is on state law and the defendant claims a federal defense, neither party may remove. . . . Nor is there either original jurisdiction or removal where both the initial claim and the defense rest on state law but the plaintiff contends that the defense put forth is nullified by federal law. 642

Articulating rational federalism concerns, he suggested that

[i]t would . . . be far more logical to shape the rule precisely in reverse, granting removal to defendants when they claim a federal defense against the plaintiff's state-created claim and to the plaintiff when, as the issues have developed, he relies by way of replication on assertion of a federal right. . . . [T]he reason for providing the initial federal forum is the fear that state courts will view the federal right ungenerously. . . . If in any case the reason can be present, it is only in the situations where removal is denied. 643

Equally relevant for present purposes is his observation that “[n]o formulae for jurisdiction can reflect with full resiliency the complicated values of our federalism . . . . However well devised the general standards, correctives will be needed in particular situations that are not readily articulated in a statutory rule.” 644

Two decades later, Professor William Cohen's persuasive Article again criticized the well-pleaded complaint approach, observing that it operates independent of rational federalism concerns. 645 Noting that “unusual, novel, [or] atypical” claims present the serious jurisprudential problems, 646 he found, with respect to such claims, little more guidance from Cardozo

642. Wechsler, supra note 77, at 233.

643. Id. at 233-34. Cf. Fraser, supra note 77, at 78 (“[T]here is nothing to show that there is more likely to be prejudice if the federal question is raised by the plaintiff than by the defendant.”).

644. Wechsler, supra note 77, at 218.

645. See Cohen, supra note 77, at 894. Professor Cohen, of course, was willing to concede that formulas such as the one devised by Justice Holmes have limited utility for purposes of jurisdictional inclusion and exclusion. Nevertheless, he found that even in the areas in which such formulas have their greatest value, “they tend to obscure the pragmatic considerations which may govern decisions” in such cases. Id. at 911-12. Moreover, the well-pleaded complaint rule may be analytically unsalvageable, as it finds its bedrock in “pleading rules which have lost all other significance under modern procedure.” Id. at 915. See also Currie, supra note 77, at 269 & n.233.

646. Cohen, supra note 77, at 906.
than he did from Holmes: Gully, he rightly observed, "tells us no more than that a pragmatic stopping place has to be located somewhere... [It] does not teach us how to draw the line." And the requirement that a case be federal in nature rather than solely in source (in Cohen's terminology, the requirement that a case arise "directly" under federal law), which he laid at Gully's door, is, he argued, a "broken compass," incapable of directing us out of Cardozo's jurisdictional maze. Eschewing Cardozo's compass, Cohen offered us a map. Recognizing the irreducibly pragmatic nature of the federal question (and correlative federalism) conundrum, he suggested pragmatic standards for its resolution:

A novel claim of mixed federal and state law ought to qualify as "arising under" federal law only if it exhibits those features which justify the need for federal trial court jurisdiction of federal question cases. A case that requires expertise in the construction of the federal law... and a sympathetic forum for the trial of factual issues related to the existence of a claimed federal right, ought to fall within federal jurisdiction. On the other hand, a federal court should not be compelled to accept federal question jurisdiction over a class of suits which typically neither involves actual contested issues of federal law nor requires the protective jurisdiction of a sympathetic federal trial forum.

He then applied this analysis to reconcile cases with as great a facial doctrinal deviation as Smith v. Kansas City Title & Trust Co. and Shoshone Mining Co. v. Rutter, with the additional advantage of avoiding the conflicting doctrinal absolutes which emerged from dictum in those cases. He con-
trasted the result of applying his approach to those cases with the denouement of *American Well Works Co. v. Layne & Bowler Co.* 654 (wherein Justice Holmes announced his rigid per se rule), 655 the application of Holmes' test in that case was effectively reversed in little more than twenty years time 656 based on rational federalism concerns.

Not unaware of the gravitational attraction of employing "technical rules . . . easy of comprehension and application" 657 (due, in part, to the non-waivability of federal jurisdictional defects), 658 Professor Cohen confronted the stability and predictability issues directly. Alluding to the types of traps into which courts have been drawn by the conflicting formulas of cases like *Rutter* and *Smith* (let alone Cardozo's Fourteen Points), he suggested that a "frank recognition of the pragmatic nature of the decision-making process would . . . reduce the danger that a judge would be beguiled by one of the numerous analytical tests into reaching an indefensible result." 659 As a historical matter, he maintained, application of the often parallel but conflicting standards which currently obtain has itself failed to produce "consistent and predictable results in hard cases." 660 Moreover, since most federal cases are not "hard" ones, no wholesale systemic disruption would result from the renewal of a pragmatic federalism approach,

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655. *Supra* text accompanying note 218.
656. E. Edelmann & Co. v. Triple-A Specialty Co., 88 F.2d 852 (7th Cir.), *cert. denied*, 300 U.S. 680 (1937) (construing *Declaratory Judgment Act* to create a federal declaratory judgment claim by an alleged patent infringer to declare a patent invalid). Significantly, the Court recently stated that

[t]aking jurisdiction over this type of suit is consistent with the dictum in *Public Service Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952) . . . in which we stated only that a declaratory judgment plaintiff could not get original federal jurisdiction if the anticipated lawsuit by the declaratory judgment defendant would not "arise under" federal law.

Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 19 n.19 (emphasis added) (emphasis in original deleted). *See generally* *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 673-74 (1950) (declaratory judgment action may be brought in federal court only if a coercive action by the declaratory judgment defendant relating to the same dispute could have been brought in federal court).

660. *Id.* at 908.
and the resulting quasi-common law process of case-by-case adjudication would be capable of taking care of the rest.661

Against this background, the American Law Institute (ALI) promulgated its comprehensive study of federal jurisdiction in 1969. In the context of general federal question jurisdiction, since it found existing law to present a "crazy quilt that defies any purely logical explanation,"662 it proposed a completely rewritten version of the current jurisdictional scheme.663 Most relevant for present purposes are its exposition of the federalism concerns which underlie federal question jurisdiction, and the specific reflections of those concerns which are manifest in its original and removal jurisdiction proposals.

The basic federalism concerns, of course, include uniformity in the application of federal law, prompt vindication of national rights, and the need to "protect litigants relying on federal law from the danger that the state courts will not properly apply that law, either through misunderstanding or lack of sympathy."664 But the first of these concerns might lead to denying the parties the opportunity to elect a state forum in any federal question case; thus, the study concludes, the national interest is thought to be sufficiently protected by providing a federal forum in cases brought by665 or against (in most cases)666 the United States. In other cases, the primary interests are felt to be those of the litigants themselves.667 The primary interests which Congress sought to advance through the grant of federal question jurisdiction, therefore, are the interests in prompt vindication of federal rights,668 unencumbered by state court misunderstanding of or lack of sympathy with respect to those rights.

661. Id. at 908-09.
662. ALI STUDY, supra note 77, at 478.
663. Id. at 24-28.
664. Id. at 168.
667. ALI STUDY, supra note 77, at 477.
668. See generally supra text accompanying notes 178-81 (inadequacy of Supreme Court review of state court decisions to adequately perform this function).
Based on this analysis, the study proposed the following original jurisdiction statute:

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction without regard to amount in controversy of all civil actions, including those for a declaratory judgment, in which the initial pleading sets forth a substantial claim arising under the Constitution, laws, or treaties of the United States. 668

In 1980, Congress followed the study’s lead 670 and removed the amount-in-controversy requirement from 28 U.S.C. § 1331. 671 Noteworthy among the other textual changes proposed by the study are the recodification of the “substantiality” requirement, 672 the repudiation of the Skelly Oil Co. v. Phillips Petroleum Co. 673 declaratory judgment rule, 674 and the codification of the well-pleaded complaint rule itself.

The draconian impact of the well-pleaded complaint rule (in its more rigid incarnations) was, however, blunted by the study’s general removal jurisdiction recommendation, which provided, inter alia, for removal

[i]f the amount in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, 678 by any defendant,

669. ALI Study, supra note 77, at 24.

670. See generally id. at 172-76 (providing rationale for suggested deletion of amount-in-controversy requirement).


672. See generally supra text accompanying note 116 (quoting section 5 of Judiciary Act of 1875); supra text accompanying note 131 (engrafting of section 5—without statutory reference—to the “case arising” definition); supra text accompanying notes 263-68 (quoting and explicating Cardozo’s proposition 2); supra text accompanying notes 636-39 (commentators’ section 5 debate); supra note 300 (deletion of section 5 in 1948 revision as “unnecessary”). The commentary to the study’s proposed statute states that the requirement “indicates only that the federal claim must be one fairly arguable on the merits.” ALI Study, supra note 77, at 177.


674. Id. at 673-74. See supra note 656 (describing Skelly Oil rule, related case, and subsequent approving reference by the Court). See generally ALI Study, supra note 77, at 170-72 (describing reasons for abolition of the rule).

675. When Congress removed the amount-in-controversy requirement from 28 U.S.C. § 1331, see supra note 671, it did not, as recommended by the study, add a jurisdictional amount to the removal statute, 28 U.S.C.A. § 1441 (West Supp. 1989), which refers back to and is based upon § 1331.
or any plaintiff, by or against whom, subsequent to the initial pleading, a substantial defense arising under the Constitution, laws, or treaties of the United States is properly asserted that, if sustained, would be dispositive of the action or of all counterclaims therein. ... 676

The study was no more impressed with the logic of Tennessee v. Union & Planters' Bank7 than other scholarly works have been;78 the immediate impact of the ALI proposal would be to effectuate the outright reversal of that case. Moreover, it would permit removal by a plaintiff where the defendant has raised a federal defense to a state-law claim without removing, or where a defendant's state-law defense to a state-law claim was urged by the plaintiff to be preempted or unconstitutional. This would, of course, move removal jurisdiction jurisprudence in the direction first charted by the Judiciary Act of 1875,79 but the move is qualified by various exceptions80 to the broad general rule.

A lengthy rehearsal of the ALI's comprehensive work is unnecessary for present purposes. Nevertheless, one of the exceptions to its broad removal proposal has implications with respect to Graham and the field of American Indian law in general: the exception precludes removal, inter alia, of "[a]ctions brought by a State or a subdivision thereof, or an officer or agency of a State or subdivision thereof, to enforce the constitution, statutes, ordinances, or administrative regulations of such State or subdivision."81 The adoption of this approach would have clearly rendered Graham non-removable, since that case was brought by the Oklahoma Tax Commission to enforce state tax laws against the Tribe.

676. ALI Study, supra note 77, at 25 (emphasis added). Compare id. with supra text accompanying note 643 (Professor Wechsler's similar 1948 analysis).
677. 152 U.S. 454 (1894) (discussed supra in the text accompanying notes 171-91).
678. E.g., Chadbourn & Levin, supra note 77, at 673-74; Collins, supra note 77 passim; Frankfurter, supra note 77, at 500, 514; Fraser, supra note 77, at 73; Wechsler, supra note 77, at 233-34.
680. See ALI Study, supra note 77, at 26-27.
681. Id. at 26.
But substantial evidence exists that the sui generis sovereignty and federalism problems which flow from the federal-tribal-state relationship were not considered by the ALI in adopting this proposal. As the commentary to the proposed removal exception notes, the provision was added in response to suggestions made at the 1965 ALI annual meeting. That meeting considered a tentative draft which included language similar to the broad general removal provision quoted above, and further language permitting removal in cases in which the defendant is a present or former federal officer or agent acting under color of such authority and in civil rights situations now covered by 28 U.S.C. § 1443. At the meeting, when the suggestion was made that all actions brought by a state as sovereign be expressly made non-removable (except for the federal officer and civil rights circumstances described above), Associate Reporter Charles Alan Wright responded that “we doubt if it can be drafted in all-inclusive terms; that we cannot simply except [federal officer and civil rights cases] and say that all other actions maintained by a state are not removable.” And John Frank, who made the first suggestion regarding nonremovability of cases brought by states, characterized his own proposal as involving “routine matters of state law enforcement.” This formulation of the exception’s goal was carried forward verbatim in the study’s final commentary.

State court suits against federally-recognized tribes regarding their activities in Indian country do not involve “routine matters of state law enforcement,” and no indication ex-

682. Id. at 201.
683. The 1965 tentative draft contained no jurisdictional amount and contained other textual deviations not relevant herein. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 6 (Tent. Draft No. 3) (1965).
684. Id. at 6, 7.
686. Id.
687. Id.
688. Id. at 130.
689. ALI STUDY, supra note 77, at 201 (“As a matter of policy, ... proper respect for the states suggests that they should be allowed to use their own courts for routine matters of law enforcement.”).
ists that the drafters of the study gave any consideration to the issue. Nevertheless, with this exception, the study (together with the other scholarly commentaries noted) recognized both the need to rekindle lost federalism concerns in the federal question field and the inability of conflicting historical doctrines to furnish a basis for the necessary pragmatic analysis. In fact, with one exception, all the modern scholar-

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690. This should not be surprising, since in 1965, when the issue was considered, the doctrinal explosion which was later to occur in American Indian law was only dimly on the horizon. See generally C. Wilkinson, American Indians, Time and the Law 123-32 (1987) (cataloging modern Supreme Court American Indian law decisions).

691. Along these lines, the study commented:

The requirement that the reliance on federal law be "direct" is not here proposed as a part of the statutory test. It requires a strained construction of "direct" to hold that it covers such a case as Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921), where jurisdiction was held to exist in a suit by stockholders to enjoin a bank from investing in government bonds which were allegedly unconstitutional. Yet the desirability of providing a federal forum where, as in the Smith case, the complaint discloses a need for determining the meaning or application of federal law, seems clear.

It would be possible to draft this subsection in analytical terms and to provide that jurisdiction exists either where federal law expressly creates the remedy—or where federal law imposes the duty and the remedy must be inferred from that duty—or where, as in the Smith case, both the right and the remedy are state-created, but an important question of federal law is an essential element in the case. It is not clear, however, that casting the statute in such a form would be helpful. Pragmatic considerations must be taken into account. Cohen, The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law, 115 U. Pa. L. Rev. 80 (1967).

ALI STUDY, supra note 77, at 178-79 (citations omitted).

692. Professor Alan Hornstein has recently engaged in a commendable but unsuccessful attempt to find a unifying formula. See supra note 99. His theory, offered as a "guide" to the jurisdictional inquiry, Hornstein, supra note 77, at 565, is based, in part, on the following observations:

All human knowledge is hierarchical in structure. Some concepts are analytically antecedent to other concepts. Recognition of the former is required for legitimate use of the latter. Thus, as a body of knowledge, law is hierarchical: Legal principles may range from primitive to sophisticated, from basic to collateral, from fundamental to trivial.

Id. at 613 (footnotes omitted).

The claim is that all knowledge is hierarchical, and that (assumedly by definition) some concepts are logically prior to others. The latter proposition is trivially true, and the former, epistemologically and phenomenologically corrupt. Regarding the latter, for example, one might with some propriety claim that an understanding of Aristotle's concept of distributive justice requires an understanding of proportionality, while an understanding of such justice is not required for an understanding of proportionality. ARISTOTLE, THE NICOMACHEAN ETHICS 177-79 (J. Thomson trans. rev. ed. 1976).
ship has recognized the impossibility of reconciling the com-

But the first claim, that all knowledge is hierarchical, is largely unsupported. Does a dislike for pain require some antecedent concept of pain and an antecedent concept of its dislike? The claim either fails to account for the reactions of infants to pain or entails casting out such experience from the epistemological realm altogether. Even if we are willing so to do, we must concede that rational adults, as an epistemological matter, are possessed of knowledge that, as a general matter, they are certain about their dislike of pain. Is it intuitively clear that such certainty rests upon some hierarchy? Is it even rationally demonstrable? Assuming arguendo that it is, what about knowledge that a certain experience is painful? Is this also to be excluded as a matter of "knowledge," since behaviorally it might be argued that the mental state of pain perception is shared by assumedly nonrational beings (for example, nonhuman animals)?

Much of what passes, at least in ordinary language, for "knowledge," must be characterized as something else in order to save Professor Hornstein's first claim. But assuming that as a matter of epistemology and phenomenology, but cf., e.g., H.L.A. Hart, Punishment and Responsibility 90-112 (rev. ed. 1982) (criticizing Austin's tripartite view of intention), it can be agreed that all knowledge is, in fact, hierarchical, and that this insight is of consequence for federal question analysis, the question remains as to what that consequence is.

It is perhaps not too controversial to see law in general as an attempt to coherently order the relations of men. So conceived, the notion of some concepts as anterior to others reveals itself as a matter of politics or morality, and not as a matter of logic. The question of what is prior, therefore, is a question that can only be answered relatively. Cf. W. Bishin & C. Stone, Law, Language, and Ethics 1-5 (1972) (quoting, in part, Max Brod's postscript to the first edition of Franz Kafka's The Trial) (difficulty of determining issue hierarchy compounded by subjectivity of issue definition). Natural law has been attacked, in its manifold incarnations, for failure to accurately or completely identify the nature from which it proceeds. Even contemporary positivists have been taken to task for similar failings. See, e.g., N. MacCormick, H.L.A. Hart 98 (1981) (criticizing completeness of H.L.A. Hart's catalogue of core characteristics of "human condition"). Given the social and political nature of law, it is not surprising that timeless jurisprudential questions involve substantial debate as to what is foundational in law.

The same can be said, even more strongly, in regard to law at more specific and concrete levels. In constraining statutes, for example, what is the hierarchical ordering regarding legislative intent, statutory text, and the judge's understanding of his or her jurisdiction's political history and theory? At both the descriptive and prescriptive levels, there are fundamental disagreements regarding this question. See, e.g., R. Bork, The Tempting of America 143-265 (1990); R. Dickerson, The Interpretation and Application of Statutes (1975); R. Dworkin, Law's Empire 45-86, 313-54 (1986); H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1144-1416 (tent. ed. 1958); Alienikoff, Updating Statutory Interpretation, 87 Mich. L. Rev. 20 (1988); Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985); Posner, Statutory Interpretation—in the Classroom and the Courtroom, 50 U. Chi. L. Rev. 800 (1983); Tribe, Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence, 57 Ind. L.J. 515 (1982). Even so, at the epistemological level, can it validly be assumed that what is anterior (more "fundamental") is necessarily of greater significance? At the jurisprudential level, can it be assumed that what is epistemologically
plex federalism concerns inherent in federal question analysis in any rigid formula.

This Article continues that tradition, with the sole benefit of the historical perspective provided by the evolution in quasi-common law federal question doctrines since the giants of the field first wrote. But this advantage is not an insignificant one, given the ever-increasing complexity of the federalism problems which have been presented in the interim, and the Court’s (occasional) doctrinal insights and innovations in recent years.

The text of the general original and removal jurisdiction statutes is only slightly more confining than constitutional phrases like “due process,” “equal protection,” and “unreasonable searches and seizures.” Thus, despite the Court’s sporadic insistence that the jurisdiction of the lower federal courts is statutory, and its sporadically articulated unwillingness to revisit fundamental jurisdictional principles absent further statutory directives, few genuine obstacles to such re-evaluation exist. This Article proceeds initially from that premise.

Keeping in mind the purposes of the jurisdictional grants, certain conclusions may be drawn without great difficulty. Certainly, federal jurisdiction should not be recognized where no federal right may be lost through erroneous adjudication. Employing this conclusion as a premise, it is clear that fundamental is necessarily more legally fundamental? From the standpoint of rational federalism, why, exactly, would the uncontested state tax law issues in *Graham* be either anterior to, or of greater legal significance than, the multifarious federal questions presented therein?

The point here is not that legal argument does not proceed from premises to conclusions or ignores questions of priority. It is instead that this, in large part, is what legal discourse is all about, that from the most general to the most specific levels, dispute surrounds the fundamentality of the concepts in dispute.


694. One notable exception, of course, is the limitation of the power of removal to defendants. 28 U.S.C.A. § 1441 (1982).

695. *See supra* text accompanying notes 664-68.
recognition of federal jurisdiction based solely on the status of federal incorporation has been well and rightly buried.

Second, it is obvious that certiorari cannot function on a quantitative basis; unless there are identifiable areas in which the Court is willing to grant review virtually as a matter of right (perhaps state suits against Indian tribes will emerge as the first such area), the Court should refrain from invoking 28 U.S.C. § 1257 as any justification whatsoever for denying a party a federal trial forum.

Third, it is also obvious that federal judicial resources are limited. It is at this point that difficult policy choices, reflective of the practical demands of our federalism, must be made.

Since some jurisdictional options are statutorily foreclosed, and since this Article is concerned solely with doctrinal modifications which can be effectuated absent congressional participation, no argument will be presented for permitting removal by a plaintiff where the defendant presents a federal defense to a state-law claim but fails to remove, or where a plaintiff offers a federal rejoinder to a state-law defense to a state-law claim.

Articulable federalism concerns should be employed as a guide through the remaining policy options. One such concern takes cognizance of a fundamental raison d'etre of federal question jurisdiction: “The federal courts do not sit to give material for law review articles. Their business is the vindication of the rights conferred by federal law.” At the same time, however, scarce federal judicial resources, as a practical matter, limit the number of “rights conferred by federal law” which can actually be federally enforced. Cumulating the

696. See supra text accompanying notes 151-54. See generally Chadbourn & Levin, supra note 77, at 656 (criticizing Pacific R.R. Removal Cases, 115 U.S. 1 (1885)).

697. E.g., Transcript of Oral Argument at 28, Graham, 109 S. Ct. 1519 (No. 88-266).


699. See supra note 694.

700. But cf., e.g., Wechsler, supra note 77, at 233-34 (defending rationality of such an approach); supra text accompanying note 676 (ALI Study suggesting same).

701. Wechsler, supra note 77, at 225.
above analysis with then-Professor Frankfurter's observation that state court jurisdiction is most appropriate in dominantly local transactions which readily lend themselves to state remedies, a number of conclusions may be drawn.

First, federal jurisdiction over federal claims (in Justice Stone's terminology, where the nature of the claim is federal, not merely its source) should be retained, as a generally inclusionary principle, even where only questions of fact are actually in issue in the case. Any doctrinal uncertainty with regards to such cases results from the mischief wreaked by uncritical citation to Gold-Washing & Water Co. v. Keyes, which engrafted the "real and substantial dispute or controversy" language of the 1875 Act onto the general federal question test. Cardozo's proposition 2, for example (which cited Starin v. New York, which cited Gold-Washing), requires that the federal right be supported if federal laws "are given one construction or effect, and defeated if they receive another." As long as the hypothetical Osborn approach to "construction" is the point of reference, no doctrinal problem obtains; but a literal reading of proposition 2 would foreclose jurisdiction over all federal claims in which only factual issues are in dispute. This result is untenable from the standpoint of rational federalism, since "[t]he violation of federal interests may take place . . . in the trial of factual issues as well as in the trial of issues of law." As Professor Cohen rightly observed,

Congress has not invested the inferior federal courts with general jurisdiction to hear cases arising under federal law merely because these courts are presumed to be more expert

702. See Frankfurter, supra note 77, at 517.
703. See supra text accompanying note 234 (quoting Puerto Rico v. Russell & Co., 288 U.S. 476, 483 (1933)).
704. See generally supra note 219 (quoting Court's rejection of Holmes' test, later refined by Stone, as an exclusionary rule).
705. 96 U.S. 199, 201 (1877).
706. Supra text accompanying note 116.
707. 115 U.S. 248 (1885).
708. Id. at 257.
709. Supra text accompanying note 263.
710. Supra text accompanying note 204.
711. Forrester II, supra note 77, at 287 (emphasis in original deleted). See also Mishkin, supra note 77, at 172.
than the state courts in the interpretation of questions of federal law. The inferior federal courts can, in addition, be expected to be more sympathetic to the enforcement of federal rights claimed by the plaintiff. Potential antagonism in the state courts to the enforcement of the plaintiff's federal right may adversely color findings of fact as well as rulings on issues of law.  

Such an effect, of course, is even less susceptible to correction on certiorari than erroneous state court rulings on federal legal issues. The conclusion should therefore be drawn that Gold-Washing's "substantial controversy" requirement should be generally inapposite in this context; given both rational federalism concerns and the scarcity of federal judicial resources, however, its applicability to cases which "readily lend themselves to state remedies" should be preserved. One such example involves quiet title cases based on federal title, 713 in which a plaintiff could contend that a federal claim was presented since the source of title could properly be pled in the complaint. 714 Another might involve certain government contract suits; 715 consistent with the pragmatic and nonformularistic approach suggested herein, the list is not intended to be exclusive, and should be entrusted to the quasi-common law process, informed by rational federalism concerns.

Second, consideration must be given to the implications of the well-pleaded complaint rule itself. The rule, in its modern incarnation, has three consequences: it prohibits a plaintiff from invoking original federal jurisdiction by anticipating a federal defense, 716 it prohibits a plaintiff from invoking orig-

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712. Cohen, supra note 77, at 892-93.
714. See Cohen, supra note 77, at 895. Cf. Marshall v. Desert Properties Co., 103 F.2d 551 (9th Cir. 1939), cert. denied, 308 U.S. 563 (1940) (rejecting federal jurisdiction over suit to quiet title to certain mining claims). But cf. Chadbourn & Levin, supra note 77, at 664 (arbitrary and formalistic nature of Court's distinction of Hopkins v. Walker, 244 U.S. 486 (1917), which upheld jurisdiction over analogous controversy couched in terms of removing a cloud on title); ALI Study, supra note 77, at 170 (same); Comment, supra note 77, at 398 & n.59 (same).
715. See, e.g., Mishkin, supra note 77, at 162.
inal jurisdiction on the basis of allegations which are not re-
quired by "nice pleading rules,"717 and it precludes removal
where such removal is based wholly on a federal defense.718

At the threshold, it has already been observed that the
well-pleaded complaint rule, in conjunction with Gold-Wash-
ing's requirement of a "real and substantial controversy," ren-
ders original federal jurisdiction a logical impossibility since
the existence of a controversy cannot be deduced from a sin-
gle pleading.719 While a return to Osborn's hypothetical ap-
proach to "controversies"720 could resolve this conflict, the
scarcity of federal judicial resources precludes employing Os-
born as anything more than a sine qua non in the federal stat-
utory test.721

The analytic underpinnings of the well-pleaded complaint
rule are further obscured by the imprecise usage of "case (or
'suit') arising," "federal question," and "federal controversy"
as interchangeable terms; they are, however, three distinguish-
able concepts. If the "case (or 'suit') arising" terminology is
employed as the point of departure, then the well-pleaded
complaint rule, devoid of its "substantial controversy" bag-
gage, can be easily reconciled with Holmes' test.722 But ra-
tional federalism, as the Court itself has recognized, requires
more than this.723 If departure is taken from the "federal
question" formulation, then application of Osborn (an equally
defective approach)724 is necessary to effect such a reconcile-

717. ALI STUDY, supra note 77, at 169-70; Gold-Washing & Water Co. v. Keyes,
96 U.S. 199, 202-04 (1877) (citing an unspecified edition of J. Chitty, TREATISE ON
PLEADING). See generally supra text accompanying notes 127-28 (discussing this as-
pact of Gold-Washing).

718. Tennessee v. Union & Planters Bank, 152 U.S. 454 (discussed supra in the
text accompanying notes 171-91).

719. Supra text accompanying notes 188-91.

720. See supra text accompanying note 104.

721. See, e.g., Cohen, supra note 77, at 891. But cf. Chadbourn & Levin, supra
note 77, at 665 (suggesting application of Osborn as statutory federal question test,
with remand or dismissal under section 5 of 1875 Act should no real and substantial
federal controversy arise).


723. See, e.g., supra text accompanying notes 355-414 (Supreme Court applica-
tions of artful pleading and complete preemption approaches).

724. See supra text accompanying notes 713-15; Cohen, supra note 77, at 891;
Mishkin, supra note 77, at 161-62; Weschler, supra note 77, at 218; Comment, supra
note 77, at 397.
tion. If the (real and substantial) "federal controversy" formulation of Gold-Washing is employed, no such reconciliation can be achieved.

Apart from the logical conundrums, rational federalism concerns counsel abdication of all three aspects of the well-pleaded complaint rule as exclusionary principles. As now-Professor Richard Levy has written, the rule "withdraws from original federal jurisdiction a large number of cases that eventually do turn on the validity of a federal defense, and such cases are within the purposes of federal question jurisdiction." And the operation of its first two consequences, though superficially simplifying original federal question jurisdiction analysis, does not do so completely, and to the extent that the test is applied mechanistically through rigid

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725. See supra text accompanying notes 703-15.
726. Supra text accompanying notes 188-91.
727. Note, supra note 77, at 639.
728. See, e.g., Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) (recognizing original federal question jurisdiction over shareholder suit to enjoin respondent from investing in bonds of federal land banks on grounds of unconstitutionality of establishment of those banks). In Smith, the Court, invoking Cohens and Osborn, see supra text accompanying notes 93, 101-04, stated:

The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision.


The purpose of this exegesis of Smith is not to criticize it (it is, in fact, a practical and useful response to rational federalism concerns), but rather to illustrate that the Court has itself historically recognized exceptions to the rigid well-pleaded complaint approach. See also, e.g., supra text accompanying notes 355-414 (discussing Court's approaches to artful pleading and complete preemption). See generally supra text accompanying note 277 (quoting Cardozo's proposition 5, violated by the result in Smith). But cf. Note, supra note 77, at 642-43 ("[S]trict adherence to the Gully language-of-the-complaint requirement would make the jurisdictional inquiry a very simple one, since the court need consider only a single document."). But see id. at 643-44 (simplicistic application of master-of-the-complaint approach undermined by pleading limitations, and administrability of rule not enhanced by Union & Planters' Bank approach).
pleading rules which have lost all other relevance in modern federal practice, does so at great cost to rational federalism concerns.

The third implication of the rule, concerning removal jurisdiction, is even more pernicious. In his persuasive dissent in Union & Planters' Bank (in which the majority opinion invented the rule precluding removal based on a federal defense), Justice Harlan noted both the absence of statutory support for that result and one of its more obvious consequences—that federal jurisdiction thus becomes contingent on the party suing first. Since it cannot be maintained that the federal rights of defendants are inherently less likely to be prejudiced by state court adjudication than those of plaintiffs, no rational federalism policy known to the present author is promoted by this result. As Professors Chadbourn and

729. See, e.g., Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) (rejecting original federal jurisdiction over breach of contract claim, where it was apparent that railroad's sole defense was based upon federal statute, and plaintiffs' rejoinders to that defense would be its inapplicability or unconstitutionality).

730. See e.g., Cohen, supra note 77, at 894.

731. See generally supra note 678 (citing scholarly critiques).

732. See generally supra text accompanying notes 171-95 (discussing Union & Planters' Bank).

733. Union & Planters' Bank, 152 U.S. at 465-72 (Harlan, J., dissenting); see also supra text accompanying notes 183-87.

734. Union & Planters' Bank, 152 U.S. at 471 (Harlan, J., dissenting).

735. Of course, the "federal case-law explosion," see, e.g., R. Posner, supra note 87, at 58-166; Newman, Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System, U. Chi. L. Rev. 761, 761-70 (1989), may generate an argument in rebuttal to the proposition adduced; several responses to such a contention may be made.

As an empirical matter, since it is only the atypical cases which present the serious analytical problems, see, e.g., Cohen, supra note 77, at 905-06, the quantitative impact of authorizing federal defense removal is subject to serious doubt. Based on admittedly now-outdated statistics, for example, the ALI Study concluded that federal removal cases accounted for less than 1 percent of the total federal question cases litigated in federal courts. ALI Study, supra note 77, at 192. While it is undeniable that overruling Union & Planters' Bank would increase that proportion, employment of the limiting criteria suggested infra in the text accompanying notes 737-46 would substantially ameliorate the quantitative burden. Moreover, any such federal burden could be neutralized by relegating to state courts additional diversity cases, which are "dominantly local and readily lend themselves to state remedies," cf. Frankfurter, supra note 77, at 517 (supporting quoted standard). This, of course, is not the first time that such a suggestion has been made. See, e.g., Cohen, supra note 77, at 912; Wechsler, supra note 77, at 238-39. See also Chadbourn & Levin, supra note 77, at 641. But cf. id. at 642 (historical justification for diversity jurisdiction);
Levin argued a half-century ago, "Harlan's is one of those dissenters of yesterday which deserve to become the law of today."\textsuperscript{736}

This is not to say, however, that any federal defense, no matter how implausible, should furnish a basis for removal; the replacement of one rigid, per se, and \textit{a priori} rule with another is not the sole available alternative. Limiting principles, rather, should be constructed, with an eye to both rational federalism and then-Professor Frankfurter's admonition that

\[\text{[t]he force and dangers of parochial attachments, the effectiveness and limitations of a centralized judiciary . . . , the dependability of state courts, the convenience of suitors, shifting economic and political sentiments,--such influences, with varying incidence, have shaped the accommodations of authority . . . between the national judiciary and the state courts. The present jurisdiction cannot rely on tradition. Always have the accommodations been temporary. The only enduring tradition represented by the voluminous body of congressional enactments governing the federal judiciary is}\]

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Bank of the United States \textit{v.} Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) (same). In any case, rational federalism is not promoted by arbitrarily assigning more cases, for its own sake, to state courts; to the extent that the federal burden is weighted heavily in the jurisprudential equation, the \textit{Union & Planters' Bank} rule promotes a "parochial policy to keep federal dockets clear at the expense of cluttering state dockets." Chadbourn \& Levin, \textit{supra} note 77, at 673. In short, more state cases do not better federalism make, from either the federal or the state perspective.

Finally, any evaluation must consider the federal judicial resources expended on the appellate, as well as the trial, level. In this context, it is ironic that federal appellate courts were required to take subsequent corrective action with regard to two of the leading cases supporting a rigid, formularistic, \textit{a priori} approach. After the Supreme Court's denial of federal question jurisdiction in Louisville \& Nashville R.R. \textit{v.} Mottley, 211 U.S. 149 (1908), the Kentucky courts rejected the federal defense proffered by the railroad as the sole issue in that case. Louisville \& Nashville R.R. \textit{v.} Mottley, 133 Ky. 652, 118 S.W. 982 (1909). This result was reversed in Louisville \& Nashville R.R. \textit{v.} Mottley, 219 U.S. 467 (1911). It will hopefully not be maintained that the Supreme Court's time is of less value than that of the district courts, and the premise that the lower federal courts, with their greater familiarity with and sympathy toward federal rights, would have been less likely to fall into error lies at the foundation of federal original and removal jurisdiction. \textit{E.g.,} ALI \textit{StudRY, supra} note 77, at 168. The denouement of \textit{American Well Works}, in which Justice Holmes announced that a suit "arises under the law that creates the cause of action," has already been described. See \textit{supra} note 656 and accompanying text.
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\textsuperscript{736} Chadbourn \& Levin, \textit{supra} note 77, at 673.
the tradition of questioning and compromise, of contemporary adequacy and timely fitness.737

Thus informed, although some conclusions flow relatively easily, other consequences can now only dimly be perceived. At the forefront, of course, should be the proposition that removal should be permitted where the whole record, including the removal petition and rejoinders, indicates clearly that the decision actually depends on a construction of federal law. Given the strength of the federal interest in facilitating the enforcement of federal rights,738 no approach can be considered adequate which rejects federal jurisdiction where a federal statute, federal common law, or treaties furnish a sine qua non of the plaintiff's case—whether that case is federal in nature or in source—and defendant's sole defense is to invalidate the applicability of that law.739 Cardozo's propositions 2740 and 3,741 in short, should be employed as inclusionary principles for purposes of federal defense removal.742

It would be possible to limit the approach even further, for example, by invoking Cardozo's propositions 2 and 3 as exclusionary rather than inclusionary federal defense removal principles,743 or by constructing a list of non-removable situations or a list of non-removable federal defense situations.744 But in light of the fact that even the ALI apparently failed to consider the implications of one of its exceptions for the field

738. But cf. supra text accompanying note 667 (primary interests in federal question cases not involving the United States or its agents as parties is that of the litigants themselves).
740. Supra text accompanying note 263. See generally supra text accompanying notes 264-68 (examining historical background and content of proposition 2).
741. Supra text accompanying note 269. While the consequences of this proposition (in tandem with the well-pleaded complaint rule) for original jurisdiction have been criticized, supra text accompanying note 270, the employment suggested herein manifestly immunizes it from that attack.
743. E.g., ALI Study, supra note 77, at 189; Fraser, supra note 77, at 83-84.
744. E.g., ALI Study, supra note 77, at 26-27.
of American Indian law, this Article's tabula rasa proposal will forego the opportunity to construct another Napoleonic code and entrust the issue to the quasi-common law process, informed by rational federalism concerns.

B. Building on the Rubble

The objection may be made that it is simply too late in the day for the Court, even given the limited nature of the statutory impediments, to write on a clean slate in the federal jurisdictional field. Such an observation has pragmatic attraction, though the temptation to urge that future federal question decisions be rendered with minimal citation to past cases, and their inconsistent historical accretions, also has great appeal. Eschewing citation to Gully for any proposition whatsoever might be taken as an important first step. But recognizing the unlikelihood that the Court will cite this Article in lieu of its post-1876 caselaw, more modest doctrinal modifications, based on avoidance doctrines which the Court has accepted in principle, will now be proposed.

Although the "judicial notice" approach finds sporadic support in both early and modern caselaw, it has the potential to consume the well-pleaded complaint rule by itself. It is unlikely, therefore, that its application would be seriously considered unless the Court is prepared to revisit in toto the underpinnings of the well-pleaded complaint rule. This Article at this point proceeds from the premise that it is not.

745. See supra text accompanying notes 681-89.
746. Cf. J. Bentham, Of Laws in General (H.L.A. Hart ed. 1970) (concluding that laws which do not impose obligations or duties or provide sanctions for them are not "complete laws," but only parts of laws); U.C.C. § 1-103 (employability of "principles of law and equity" unless "displaced by the particular provisions of this Act"); R. Hillman, J. McDonald, & S. Nickles, Common Law and Equity Under the Uniform Commercial Code (1985) (utility of extrinsic equity principles).
747. See supra text accompanying notes 693-94.
748. See generally, e.g., Collins, supra note 77, at 773 (suggesting congressional reconsideration).
749. See supra text accompanying notes 246-47. But see supra notes 249-50 (early adverse precedent).
750. See supra text accompanying notes 306-20.
751. See supra note 548 (quoting transcript of oral argument in Graham).
But the “artful pleading” rule, which is of ancient lineage, has received recent support from the Court (although its scope and implications remain unclear) and is supportive of vital rational federalism concerns. *Bock v. Perkins* provides a paradigmatic potential application of the rule. *Bock* extended the rule of *Feibelman v. Packard* to trespass suits, resulting in federal jurisdiction where such suits were brought against federal marshals concerning activities undertaken within the scope of their federal duties. But

[w]hen Bock sued Perkins he alleged, so far as appears from the record in the case, nothing but his ownership of the property in question and its seizure by the defendant. It does not appear that in his complaint he even alleged that the defendant was an United States marshal . . . . [T]he case does not even show that any allegation was made therein to the effect that any act of congress was to be construed . . . .

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752. See, e.g., supra text accompanying note 116 (reverse implications of the approach applied by section 5 of 1875 Act); supra note 335 (reverse implications in declaratory judgment cases); supra text accompanying notes 220-24 (cases involving artful joinder of parties to evade federal jurisdiction). In diversity cases, this aspect of the artful pleading rule is still of substantial vitality. In that context, Justice Frankfurter early on observed: “Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary ‘collision of interests’ exists, is therefore not to be determined by mechanical rules. It must be ascertained from the ‘principal purpose of the suit,’ and the ‘primary and controlling matter in dispute.’” Indianapolis v. Chase Nat’l Bank, 314 U.S. 63, 69-70 (1941) (citations omitted). Thus, a plaintiff cannot defeat removal on diversity grounds by the “fraudulent joinder” of a nondiverse defendant against whom the plaintiff has no real cause of action. See Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921). And when an allegation of fraudulent joinder has been made by the defendant, a court may pierce the complaint to see whether “the joinder, although fair upon its face, may be shown by a petition for removal to be only a sham or fraudulent device to prevent a removal.” Id. (emphasis added).

753. See supra text accompanying notes 355-74 (discussing Federated Dep’t Stores v. Moitie, 452 U.S. 394 (1981)).

754. See supra notes 371, 373; text accompanying notes 370-74.

755. 139 U.S. 628 (1891).

756. 109 U.S. 421 (1883), discussed supra in note 158 and accompanying text.

757. Willard, supra note 77, at 386-87. But cf. Bock v. Perkins, 28 F. 123 (1886), aff’d, 139 U.S. 628 (1891) (stating the defendants to be “Perkins, U.S. Marshal, and others” in the caption of the case). For the purpose of the illustration adduced, it is assumed that Willard’s description is correct.
Bock was a pre-Union & Planters' Bank case, and the Court had little difficulty in finding federal jurisdiction by reference to the whole record in the case.\textsuperscript{758} But assuming arguendo the relevance of the marshal’s status to the existence of federal question jurisdiction, rational federalism concerns would counsel reference to the removal petition for purposes of defeating artful (if not fraudulent)\textsuperscript{759} attempts to frustrate federal policy.\textsuperscript{760} Federalism considerations have preserved a coherent and specific manifestation of the artful pleading rule in diversity cases;\textsuperscript{761} \textit{Federated Department Stores v. Moitie}\textsuperscript{762} has recognized that such concerns, as a general matter, are of no less consequence in the federal question arena.\textsuperscript{763} This Article will attempt a specification of the appropriate consequences of the artful pleading approach in federal question cases.

As with “judicial notice” analysis, “artful pleading,” as a linguistic matter, contains no internal limitation to prevent it from becoming the avoidance doctrine which consumes the well-pleaded complaint rule. This Article again presumes Supreme Court unwillingness to permit such a consequence to occur. But if it is to do anything at all, the artful pleading approach must permit reference to the removal petition;\textsuperscript{764} the question remains, however, as to the propositions which that petition should be permitted to demonstrate.

At a minimum, matters such as an interstate commerce impact or the status of a party (where such status is relevant

\textsuperscript{758} Bock, 139 U.S. at 630.

\textsuperscript{759} As has been noted, the dividing line between artfulness and fraudulence is a fine one in this context. See supra note 224. In Rose v. Giamatti, No. C-2-89-0577, slip op. at 18 (S.D. Ohio July 31, 1989) (memorandum and order), \textit{petition for interlocutory appeal denied}, Rose v. Giamatti, No. 89-8328 (6th Cir. Aug. 17, 1989), the court, while finding a “fraudulent joinder,” was careful to note that that term “is a term of art and is not intended to impugn the integrity of a plaintiff or plaintiff’s counsel.” See also, e.g., Nobers v. Crucible, Inc., 602 F. Supp. 703, 706 (W.D. Pa. 1985).

\textsuperscript{760} See generally supra text accompanying notes 341-54 (other uses of artful pleading rule in federal question cases).

\textsuperscript{761} Supra note 752.

\textsuperscript{762} 452 U.S. 394 (1981). See generally supra note 364 (indeterminacy of Court’s holding from the artful pleading perspective).

\textsuperscript{763} See supra text accompanying notes 355-74 (discussing Moitie).

\textsuperscript{764} Supra note 373.
to federal question analysis) should be demonstrable from the removal petition. Thus, if extrinsic federal question doctrine were to confirm its relevance to the jurisdictional determination, a federally-recognized Indian tribe should be permitted to demonstrate that it does, in fact, enjoy such status, just as Perkins should be permitted to evidence that he is, in fact, a federal marshal. But the doctrine, a procedural one, should be given a broader sweep, and should be permitted to operate in conjunction with whichever substantive avoidance doctrine is formally adopted as the doctrine of choice of the Court. Currently, two such choices are most readily available.

The “inherent in the complaint” approach is one. But the notion that federal questions inhere in certain unenumerated types of claims, to quote Professor Ely (perhaps only slightly) out of context, “can get pretty scary.” But this, of course, is what results from complete preemption, the other (and apparently, the Court’s preferred) avoidance device. It is to that doctrine that attention will now be directed.

That opening the Pandora’s box remains scary, no matter the doctrinal key, is evidenced by the Court’s insistence on tying complete preemption to specific federal statutes. But the fatal analytic defect in such an approach, as has been noted, lies in the fact that insistence on a statute “clearly manifest[ing] an intent to make causes of action . . . removable to federal court” as a sine qua non of complete preemp-

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766. “Substantive,” in this context, is employed to distinguish avoidance doctrines such as the “inherent in the complaint” approach, and the “complete preemption” “corollary,” which go to the heart of the meaning of the “civil action arising” statutory language, from doctrines such as the “judicial notice” approach and the “artful pleading” rule, which provide courts with a procedure for piercing artfully (or incompletely, or misleadingly) drafted complaints. See generally Note, supra note 77, at 653 (relation of artful pleading to complete preemption).

767. See supra text accompanying notes 323-40.


769. See supra text accompanying note 400.

tion removal renders the complete preemption doctrine very little avoidance doctrine at all, since such a statute would be little different from a specific removal statute but for its exclusion from title 28 of the United States Code. Moreover, since such a statute will be impossible to find in virtually any area replete with federal common law, including not only American Indian law but other fields as well, an artificial distinction, unsupported by history, extrinsic caselaw, or rational federalism concerns would result. The employment of the lower federal courts to protect federal programs is no less essential than their use to protect specific federal rights. Rational and realistic federalism therefore requires that the potency of the federal interest, not the existence of a federal quasi-removal statute, must lie at the doctrinal core, and that complete preemption should be reevaluated from this perspective. Any lesser reform perpetuates the ossified and arbitrary approach of a hundred years ago, confounded by conflicting and equally arbitrary historical accretions.

VI. CONCLUSION

To quote Sir Winston Churchill (quite a bit) out of context, general federal question jurisdiction has been, from its inception, "a riddle wrapped in a mystery inside an enigma." Although its modern genesis may have been more or less accidental, its utility in promoting essential federal interests was recognized by both the Framers of article III and

771. See Arrow, supra note 409, at 469.
772. See, e.g., Friendly, supra note 409, at 405-22.
773. 1 W. CROSSKEY, supra note 407, at 621-33.
775. See supra text accompanying notes 406-11.
776. See Mishkin, supra note 77, at 196.
779. See Chadbourn & Levin, supra note 77, at 643.
the drafters of the Judiciary Act of 1789. But the federalism concerns which should lie at the doctrinal core have long been obscured by the evolved focus on technical pleading rules, and both Gully and modern case law have struggled in vain to reconcile the resultant doctrinal ambivalence. Worse, this ambivalence has resulted in conflicting guidance, but "[n]either in theory nor in practice can a self-contradictory dogma decide a case." While it might be thought that rigid adherence to the well-pleaded complaint rule would resolve the contradictions, that rule is itself not internally unproblematic, and its enshrinement as an absolute rule would sacrifice rational federalism to form. This, the Court has thus far been unwilling to do formally, although the outcome in Graham clearly points in that direction as an escape from Cardozo's maze. This false step cannot be righted by reference to the quantitatively insignificant remedy of certiorari, or by the Court's occasional observation that it "cannot . . . presume that state courts will not follow both the letter and the spirit of our decisions in the future." Apart from the obvious fact that state courts, whether from lack of sympathy with federal rights or unfamiliarity with federal law, do occasionally get it wrong, such analysis tends to undermine the very basis of federal question jurisdiction, essentially proving too much.

In the field of American Indian law, rigid adherence to the well-pleaded complaint rule elevates form over substance

780. See Engdahl, supra note 81 passim.
781. See supra text accompanying notes 260-97.
782. See, e.g., supra text accompanying notes 421-36, 442-54; supra note 548.
783. Chadbourn & Levin, supra note 77, at 671.
784. E.g., supra note 548.
785. E.g., supra text accompanying notes 146, 188-91, 208, 218; supra note 219. The judicial recognition of the "artful pleading" and "complete preemption" doctrines bear further witness to this fact.
787. See supra text accompanying notes 178-81.
789. See ALI Study, supra note 77, at 168.
790. E.g., Ramah, 458 U.S. at 846 (state courts "gave short shrift" to principle of Indian self-determination and Supreme Court pronouncements in the area); Cohen, supra note 77, at 894 n.23 (aftermath of Mottley); Hornstein, supra note 77, at 604 n.25 (same).
in a most egregious manner, and the Court’s unwillingness to even consider the complete preemption avoidance device in *Graham* further exacerbates the problem of obliviousness to rational federalism concerns. In this field, dominated unlike most by federal common law, insistence of a federal quasi-removal statute is both unrealistic and unjust;\textsuperscript{791} moreover, as in other contexts, a fundamental ambivalence between pragmatic federalism and formalism persists.\textsuperscript{792}

This Article has proposed a forthrightly pragmatic standard for resolution of the federal question conundrum which focuses on the core of the question presented to a court for resolution, and which is not inherently tied to rigid pleading formulas, other concerns extrinsic to rational federalism, or the fortuity of the party suing first. Such a standard does not interfere with settled jurisprudence in typical federal question cases, yet is designed to provide necessary flexibility at the margins. Given the nature of the quasi-common law process which would inevitably commence upon its adoption,\textsuperscript{793} no loss in predictive value would occur,\textsuperscript{794} and the cause of judicial economy in both the state and federal systems would ultimately be promoted. Great principles of law are not susceptible to simplistic or formulaic resolution,\textsuperscript{795} and no less truth inheres in this general statement when applied to the complex problems of our federalism.\textsuperscript{796} Forthright recognition of this fact would improve and rationalize federal question jurisprudence, both within and without the field of American Indian law.

\textsuperscript{791} See supra text accompanying notes 406-11, 770-77.
\textsuperscript{792} Compare supra text accompanying notes 493-97 (Metropolitan Life and Caterpillar invoking Oneida as akin to a complete preemption case) with *Graham*, 109 S. Ct. at 1521 (Court’s unwillingness to consider tribal complete preemption contention absent federal quasi-removal statute).
\textsuperscript{793} See, e.g., Currie, supra note 77, at 277-78; Frankfurter, supra note 77, at 514.
\textsuperscript{794} See, e.g., Cohen, supra note 77, at 907-10.
\textsuperscript{795} See *Carter v. Carter Coal Co.*, 298 U.S. 238, 327 (1936) (Cardozo, J., dissenting).
\textsuperscript{796} See Wechsler, supra note 77, at 218.