Summer 1981

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Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts:
A Hierarchical Analysis†

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The judicial power of the United States extends to cases "arising under" federal law.1 Despite this deceptively simple formula two centuries of judicial interpretation and reinterpretation have left the contours of this category of federal judicial power problematic.2 Although a variety of tests has been suggested for determining what cases arise under federal law,3 none has been satisfactory.

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1 U.S. CONST. art. III, § 2, cl. 1.
2 E.g., D. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL 101 (1976).
3 Various tests have been proposed, the first of which was Chief Justice Marshall’s federal ingredient test. See notes 73-82 & accompanying text infra. It has been applied only sporadically. See, e.g., Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921); Pacific R.R. Removal Cases, 115 U.S. 1 (1885); Kansas Pac. R.R. v. Atchison, T. & S.F. Ry., 112 U.S. 414 (1884); Ames v. Kansas ex rel. Johnston, 111 U.S. 449 (1884). A distinction, seldom recognized in cases in which Chief Justice Marshall’s test was applied, is that “arising under” may have a different and broader meaning in the Constitution, which Chief Justice Marshall was construing, than in the jurisdictional statute, 28 U.S.C. § 1331 (1976). See note 9 infra; cf. note 86 infra (statutory basis of jurisdiction in Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738 (1824)).

Another formulation, taken from the language of the Judiciary Act of 1875, ch. 137, 18 Stat. 470, is that a case must “really and substantially” involve a dispute or controversy over federal law. It is not clear what the test comprises, or, indeed, whether it is a test at all as opposed to being merely a qualification of some unarticulated general principle. It appears to have begun as the latter and become the former. Until about the turn of this century the Supreme Court dismissed cases under the “really and substantially” formulation when, although a plaintiff asserted a case arising under the federal law, his claim was seen to be frivolous. See, e.g., Minnesota v. Northern Sec. Co., 194 U.S. 48, 65-66 (1904); Newburyport Water Co. v. Newburyport, 193 U.S. 561 (1904); cf. Bailey v. Patterson, 369 U.S. 31 (1962) (per curiam) (three-judge court not required if constitutional question is in-
Because litigants should not be subjected to protracted litigation merely to determine the proper forum for adjudicating their rights, a coherent theory of the arising under jurisdiction of the federal courts is necessary. Few questions in American jurisprudence, however, are as bound up in principles of federalism as is the question of the appropriate limits on the power of federal courts, and, as a result, any proposed theory must take into account the balance of power between the federal government and the states.

A sound theory of arising under jurisdiction must reflect the constitutional purposes underlying this jurisdiction. The Supreme Court's appellate jurisdiction over state court judgments in cases arising under federal law provides an authoritative tribunal whose decisions are binding on state and lower federal courts, thereby assuring uniformity. The Court, however, shares with the federal courts of original jurisdiction an additional function: the protection of federal interests from state hostility, substantial); Ex parte Poresky, 290 U.S. 30 (1933) (same). The "really and substantially" formulation is still used in this sense, see, e.g., Goosby v. Osier, 409 U.S. 512 (1973) (three-judge court not required if constitutional question is insubstantial), although whether substantiality is a proper ground for dismissal for lack of jurisdiction has been questioned, see Hagans v. Lavine, 415 U.S. 528, 536-38 (1974) (same); Rosado v. Wyman, 397 U.S. 397, 404 (1970) (same); cf. Bailey v. Patterson, 369 U.S. 31 (1962) (per curiam) (three-judge court not required where defense that statute not unconstitutional is frivolous).

As a test of exclusion from federal judicial power, at least, the elements looked towards are whether the claims involved are substantial and whether there is an actual dispute. Although the test has been applied to foreclose consideration of cases in which the asserted federal claim was frivolous or insubstantial, this may have been another way of saying there was no real dispute over the federal issue, see, e.g., Weber v. Freed, 239 U.S. 325 (1915), or, more problematically, it may have been a way of saying that the resolution of the federal issue was so well-established as to be beyond dispute, see, e.g., Levering & Garrigues Co. v. Morrin, 289 U.S. 103 (1933); G. & C. Merriam Co. v. Syndicate Pub'g Co., 237 U.S. 618 (1915). It has also been used in those cases in which the federal issue was not actually disputed. See, e.g., Shulthis v. McDougal, 225 U.S. 561 (1912) (where it was less than clear that the right was disputed). But see The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913) (defendant disputed nothing because it defaulted). Justice Holmes proposed in American Well Works Co. v. Layne and Bowler Co., 241 U.S. 257 (1916), that a suit arises under the law that "created the cause of action." Id. at 260. That "test," too, has served more as a rule of exclusion than as a standard for inclusion. See, e.g., Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974) (per curiam).

A final formulation for determining whether a case arises under federal law asks whether the question of federal law is "basic" or "necessary" to the decision of the case. Gully v. First Nat'l Bank in Meridian, 299 U.S. 109 (1936). Gully purportedly only synthesizes or reframes the traditional requirements for jurisdiction, and the test propounded seems to be a federal right test, id. at 114-16, with an overlay of the "really and substantially" formulation, id. at 114. See notes 88-99 & accompanying text infra.

4 See, e.g., The Federalist Nos. 80-82 (A. Hamilton). Compare note 6 infra (purpose of federal judiciary) with note 243 infra (purpose of limits on federal judicial power).

provincialism and error.  

The constitutional grant of power must be broad enough to permit Congress to confer jurisdiction on the federal courts when it perceives a need for such protection.  

Congress may then be left to adjust the jurisdiction to reflect that need.  

Thus, a relatively broad reading of the constitutional language is necessary to achieve its purpose.  

Congress may narrow the scope of federal judicial power to reflect changing needs. At the same time, the constitutional limitations on the power of the federal courts, designed to safeguard the legitimate sovereignty interests of the states, demand recognition.  

The search is for the appropriate balance between these needs.

A case does not arise under federal law within the meaning of article III unless a federal interest may be defeated by an erroneous adjudication. The problem is to identify cases in which the exercise of federal judicial power may be necessary to protect federal interests. The purpose of this article is to provide an approach, applicable to Supreme Court review of state court judgments as well as to the original jurisdiction of the federal courts, to guide that inquiry. This approach is based upon a structural analysis of the elements of a case. All cases share certain analytic elements, including jurisdiction over the subject matter and the parties, capacity of the parties, the claim and the defense. A more refined analysis discloses several subelements; a claim, for example, may involve demonstrating the source, existence and breach of duty, causation and injury. The law, federal or nonfederal, determines the necessary elements of a particular case. When federal law governs an element it reflects a

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6 See, e.g., THE FEDERALIST No. 80 (A. Hamilton); THE FEDERALIST No. 81, at 509-10 (A. Hamilton) (B. Wright ed. 1961); J. MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 73 (A. Koch ed. 1966) (Madison, on the need for inferior federal courts, in debate in Committee of the Whole); id. at 319 (Randolph, on the need for inferior courts: "Courts of the States cannot be trusted with the administration of the National laws").

7 Cases not within article III cannot be brought within the jurisdiction of the federal courts. Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

8 Legislative authorization has been held necessary to vest the lower federal courts with jurisdiction of cases within article III. See, e.g., Palmore v. United States, 411 U.S. 389, 400-02 (1973); Lockerty v. Phillips, 319 U.S. 182, 187 (1943); Kline v. Burke Constr. Co., 260 U.S. 226, 233-35 (1922); Sheldon v. Silis, 49 U.S. (8 How.) 441, 448-49 (1850); Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845). With one shortlived exception, see Midnight Judges Act, ch. 4, 2 Stat. 89 (1801) (repealed 1802), it was not until 1875 that Congress authorized original jurisdiction over cases arising under federal law, Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470.

Although the current statute, 28 U.S.C. § 1331 (1976), and the relevant phrase in article III are in haec verba, the statute has been construed more narrowly. Consequently, not all cases that could be brought within the constitutionally permissible arising under jurisdiction have been brought. Romero v. International Terminal Operating Co., 358 U.S. 354, 379 n.51 (1959); see, e.g., note 218 infra (declaratory judgments); notes 233-34 infra (federal defenses).

9 Cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.) ("[I]t is a constitution we are expounding.").

10 See note 243 infra.
federal concern; when state law governs an element it reflects state concern and a corresponding absence of federal interest. In many cases, some elements will be governed by federal law and others by nonfederal law. These are the cases which present problems of arising under jurisdiction.

The relationships among these elements, and between each of them and the case, form the case's structure. This structure is hierarchical; some elements analytically antecede others. These antecedent elements must be addressed before one proceeds further through the hierarchy.

The theory of this article is that the 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.

After adumbrating this theory in the context of the appellate jurisdiction of the Supreme Court over state court judgments and the original jurisdiction of the federal district courts, the article examines two particular problems of arising under jurisdiction—the abstention doctrine and the well-pleaded complaint rule—to demonstrate that the difficulties in resolving the jurisdictional questions in both instances result from the premature invocation of federal judicial power. The invocation of this power is premature because the federal element is merely potential and thus it is uncertain whether it will be necessary for decision of the case.

**Supreme Court Review and the Nonfederal Ground**

*Martin v. Hunter's Lessee* established the Supreme Court's power to review state court determinations of questions of federal law. When a

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11 See notes 15-66 & accompanying text infra.
12 See notes 67-139 & accompanying text infra.
13 See notes 140-214 & accompanying text infra.
14 See notes 215-67 & accompanying text infra.
15 14 U.S. (1 Wheat.) 304 (1816).
state court has decided a case on both federal and state law grounds, the Court may review the former but not the latter determination.\textsuperscript{17} When review of the federal determination cannot affect the outcome of the case—that is, when the state court's determination is said to rest on an adequate and independent state ground—the Court lacks power to review the determination of federal law,\textsuperscript{18} for the case could not then be one arising under federal law.


\textsuperscript{17} The doctrine predates Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Given \textit{Erie}, however, it follows that the Supreme Court is without power to review the judgments of state courts on questions of state law. Moreover, to the extent that \textit{Erie} is constitutionally compelled, it is doubtful whether Congress could confer such power on the Court. According to \textit{Erie}, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State" whether declared by its legislatures or by its highest court. \textit{Id.} at 78. The Court is bound to accept the view of the state's highest court on state law, and if the law has been expressed in the case before it reaches the Court, there is scarcely room for "interpretation" of it. \textit{Cf.} Note, Judicial Federalism: Rights of the Accused in New Jersey, 28 RUTGERS L. REV. 530, 560-65 (1969) (state court "interpretation" of Supreme Court decisions).

Thus, on questions of state law, the determination of the state court is final and binding. McBride v. Hoey's Lessee, 36 U.S. (11 Pet.) 167, 172 (1837). Given the probable lack of power in the Supreme Court to review findings of fact in such a case, see American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215, 231 (1974); \textit{cf.} Time, Inc. v. Firestone, 424 U.S. 448, 463 (1976) (dictum) (findings of state courts normally accorded deference even when Court reviewing constitutional claims); \textit{but cf.}, \textit{e.g.}, Thompson v. City of Louisville, 362 U.S. 199 (1960) (Supreme Court will review lower court judgments when due process questions presented are substantial); Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 279 U.S. 737 (1929) (limited review of findings concerning state law in some circumstances); 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, supra note 16, at § 4033 (same, generally), such findings, too, would be insulated from the Court's appellate review, \textit{but cf.} Time, Inc. v. Firestone, 424 U.S. at 461 ("Nothing in the Constitution requires that assessment of fault in a civil case tried in a state court be made by a jury, nor is there any prohibition against such a finding being made in the first instance by an appellate, rather than a trial, court.").

\textsuperscript{18} There were early hints of this doctrine in McKinny v. Carroll, 37 U.S. (12 Pet.) 66, 70 (1838), and Neilson v. Lagow, 58 U.S. (12 How.) 98, 110 (1851). It was applied and the earlier cases discussed at some length in Klinger v. Missouri, 30 U.S. 257, 262-63 (1871). One of the most frequently cited cases is Murdock v. Memphis, 87 U.S. 590, 635-36 (1875), in which the Court took jurisdiction. The procedure in \textit{Murdock} was to determine whether the federal question was decided correctly and, if it was, to affirm; if the federal question was decided incorrectly but the judgment rested on an adequate and independent ground the judgment also was affirmed. The Court in Eustis v. Bolles, 150 U.S. 361 (1893), established the current practice of refusing to review the federal question when there was an adequate and independent ground to support it. See generally R. ROBERTSON & F. KIRKHAM, supra note 16, at §§ 89-103; R. STERN & E. GRESSMAN, supra note 16, at §§ 3.31-33; 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, supra note 16, at §§ 4019, 4020.

A state court determination that a particular state action violates state and federal constitutions, for example, is not reviewable by the Supreme Court. Should the Court decide that the state court erred in its determination of the federal issue, it could not disturb the decision, for it lacks power to review the resolution of the state constitutional question. A Supreme Court opinion as to the federal constitutionality of the action would be merely advisory because the state court’s reliance on nonfederal grounds rendered the federal question moot. The Court sits to correct erroneous judgments based on federal law, not to revise opinions of the state courts.

In contrast, the Court may review a state court decision upholding a challenged action as violating neither the state nor federal constitutions. If the Court were to find the state court’s resolution of the federal issue erroneous, it would reverse; the nonfederal ground would not be adequate to support the decision. Similarly, if the state court decides that the challenged action violates the state constitution because it violates the federal Constitution, the Court has held it has power to review the case. Presumably, once the state court’s error in determining the federal issue is explicated, it will reconsider its determination of the state issue that depended upon the erroneous federal determination. The state ground for decision is not independent.


24 Such at least is the traditional analysis, though the cases are not entirely harmonious and the principle is itself questionable. That the state may have chosen to be guided by federal law in making its determination does not actually convert a state law question into a federal one. Deciding the federal question under these circumstances is rendering an advisory opinion on a question of federal law not before the Court so that a state court can reconsider its own law in light of that opinion; in no real sense is the case one arising under federal law. See State Tax Comm’n v. Van Cott, 306 U.S. 511 (1939); Moore v. Chesapeake & Ohio Ry., 291 U.S. 205, 214-15 (1934); Flores v. Beto, 374 F.2d 225, 227 (5th Cir. 1967) (dictum). But see Flournoy v. Wiener, 321 U.S. 253 (1944). See generally Greene, Hybrid State Law in the Federal Courts, 83 HARV. L. REV. 289 (1969).

Similar problems concerning the appropriate treatment of cases in which state law incorporates federal law have arisen with respect to the exercise of original jurisdiction. Com-
The relevant inquiry is the state court's actual ratio decidendi; the possibility that some other ground could have formed the basis of decision is not relevant to appellate power in the Supreme Court. Thus, if the state court bases its decision on federal grounds, the fact that it could have based its decision on state law does not deprive the Supreme Court of jurisdiction. In this limited sense the state court may be said to have the power to confer jurisdiction on, or deny it to, the Supreme Court—a power exercised by electing one ground of decision over another.

An example of this is found in *Orr v. Orr* which involved a challenge to an Alabama statute providing that husbands, but not wives, could be required to pay alimony. Mr. and Mrs. Orr were divorced in 1974. The decree, which incorporated a stipulation between the parties, directed the payment of alimony. Two years after the decree Mrs. Orr brought a contempt proceeding against her former husband, alleging nonpayment. Mr. Orr defended on the ground that the statute authorizing the award violated the equal protection guarantee of the fourteenth amendment by discriminating on the basis of gender.

The Alabama courts held the statute constitutional and entered judgment against Mr. Orr on that basis, even though the case probably could have been decided on state grounds. The Alabama courts could have found the constitutional challenge untimely because it was not forthcoming when the divorce decree, including the alimony provision, was issued, but only after the initiation of contempt proceedings. Alternatively, the alimony obligation may have arisen from the stipulation incorporated into the divorce decree. To the extent that the obligation was based upon the private contractual agreement of the parties, the unconstitutionality of the alimony statutes would leave that obligation unimpaired. Either basis would have left the Supreme Court without power to review. The

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Note: The text continues with references and citations to case law and statutes.
Alabama courts, however, did not rely on either of these nonfederal grounds; the only issue the state courts considered was the constitutionality vel non of the alimony statutes.  

Justice Brennan, writing for the Court, found that the state courts had decided the federal question without considering any state law issues, and held that the Court had jurisdiction to review:

"Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment. We cannot refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate nonfederal ground."

Justice Rehnquist dissented on the ground that the petitioner lacked standing because, if the equal protection challenge were to be viewed as based upon the unconstitutional burden appellant allegedly bore under it, the parties' stipulation precluded finding the necessary causal nexus between the statute and Mr. Orr's injury.

Justices Brennan and Rehnquist agreed that the appellant's obligation might continue without regard to the constitutionality of the alimony statute; it might well be binding upon him as a matter of state contract law. Their disagreement focused upon the effect of this "might" upon the Court's power to adjudicate the constitutional issue. The majority treated the state law issue as one "which we cannot and would not predict." Justice Rehnquist reasoned that so long as the appellant's obligation might continue without regard to the constitutionality of the alimony statute; it might well be binding upon him as a matter of state contract law.

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obligation might be enforced without regard to the statute, his standing to challenge that statute had not been established, and that because the appellant bore the burden of establishing that the injury was the result of the statute or that the requested relief would remove the harm, the failure to carry that burden was fatal to the Court's jurisdiction. Moreover, the parties' failure to raise, and the state courts' failure to consider, nonfederal grounds did not cure the jurisdictional defect, which was the existence vel non of nonfederal grounds for the appellant's obligation and the possibility that he lacked standing to litigate the federal issue.

If the state courts had determined that there was no ground other than the challenged statute upon which appellant's obligation could be based, standing would have existed. To suggest, as the Court did, that the obligation to pay alimony might continue regardless of the unconstitutionality of the statute is to treat the legal issues out of context. If both state and federal bases of a right are claimed, a judgment supporting the right may be based on either. If one is asserted and the other not, only the one asserted may be relied upon; if it is insufficient, the claimed right ought not to be upheld. Given that a party cannot be compelled to assert a particular theory of the case, if the failure to assert a claim or right in a timely manner and in the appropriate context bars its later assertion, a court may not rest its decision on grounds not raised by the parties.

440 U.S. at 275-76 & n.5, 283-84.

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1 E.g., RESTATEMENT (SECOND) OF JUDGMENTS §§ 45, 47, 48 (Tent. Draft No. 1, 1973); RESTATEMENT OF JUDGMENTS §§ 45-48 (1942). Perhaps the most obvious example is the barring of a claim by the running of an applicable statute of limitations, but other examples abound. E.g., Wolfe v. North Carolina, 384 U.S. 177 (1966); Michel v. Louisiana, 350 U.S. 91 (1955); Hedgebeth v. North Carolina, 334 U.S. 806 (1948); Richardson Mach. Co. v. Scott, 276 U.S. 128 (1928); cf. Henry v. Mississippi, 379 U.S. 443 (1965) (remanded for consideration whether failure to make timely objection to admission of evidence was knowing waiver). But see NAACP v. Alabama, 377 U.S. 288 (1964); Davis v. Wechsler, 263 U.S. 22 (1923); Rogers v. Alabama, 192 U.S. 226 (1904). See also FED. R. CIV. P. 8(e), 12(h), 13(a); FED. R. EVID. 103(a); notes 50, 244-46 & accompanying text infra.
To paraphrase Justice Rehnquist, courts are not commissioned to roam at large, vindicating unclaimed rights. Thus, in a suit for alimony in which the only defense raised is the unconstitutionality of the statute authorizing the award, the failure of that defense should leave the defendant liable even if some other defense might have been raised.

The theory underlying the Supreme Court's lack of power to review a state court judgment resting on adequate and independent nonfederal grounds is that the federal case has been mooted by the state judgment, and a Supreme Court decision would constitute an advisory opinion. At least in the absence of collusion to create jurisdiction, however, parties may concede or stipulate that liability is entirely dependent upon the resolution of a single question, thereby waiving all other claims or defenses. It is difficult, then, to see how resolution of the only remaining issue can call for an advisory opinion. As a matter of policy, the rationale underlying the case or controversy requirement, the presence of a concrete and adverse stake in the outcome sufficient to assure full argument and presentation of the case is likely to be satisfied when a party has placed all his eggs in the federal basket. That there may have been nonfederal grounds available is not relevant so long as they are not available at the time the Court is called upon to review a state court decision resting exclusively on federal grounds. If a party waives all nonfederal grounds by failing to assert them, the alternative grounds are foreclosed just as though they had been asserted and determined adversely to the claimant. As a general rule, even after a reversal and remand such nonfederal grounds will be unavailable because of the failure to raise them in the prior state adjudication.
Similarly, to suggest, as Justice Powell did in Orr, that the Court should “abstain from reaching ... the constitutional questions at the present time”\(^5\) is to misconceive the relationship between the federal issue that the Court is called upon to decide and whatever state law grounds might once have been relied upon to avoid the necessity of that decision. As the majority noted, the abstention doctrine is inapplicable in those situations in which “the state court to be deferred to has ... previously examined the case.”\(^5\) Abstention would allow the litigant an opportunity to litigate state law grounds for relief which he or she failed to assert in the initial state proceeding. The difficulty with Justice Powell’s position is that the state court to which he would defer has—albeit implicitly—already determined the nonfederal issues adversely to the party seeking review.

Something akin to abstention is appropriate only when the decision is ambiguous with respect to the grounds on which relief was granted or denied. In such cases, it is the determination of the state court in that case that requires elucidation. When it is unclear whether the state court’s decision rests on adequate and independent nonfederal grounds,\(^5\) and hence whether the Supreme Court possesses the power to review, the Court may take any of several approaches. It may dismiss for want of jurisdiction because the decision below might rest upon adequate and independent nonfederal grounds;\(^5\) it may grant review because the decision below might not rest upon adequate and independent nonfederal grounds;\(^5\) it may retain the case and seek the state court’s clarification of the basis of its decision;\(^5\) or it may vacate the judgment rendered below.

\(^5\) Id. at 285 (Powell, J., dissenting).
\(^5\) Id. at 278 n.8 (majority opinion).
\(^5\) The most obvious difficulty occurs in cases in which the state court has issued no opinion, e.g., Dixon v. Duffy, 344 U.S. 143 (1952); Woods v. Nierstheimer, 328 U.S. 211 (1946); Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934); Bachtel v. Wilson, 204 U.S. 36 (1907); Johnson v. Risk, 137 U.S. 300 (1890), but even if an opinion is issued, the grounds for decision may not be clear, e.g., Department of Motor Vehicles v. Rios, 410 U.S. 425 (1973); California v. Krivda, 409 U.S. 33 (1972); Department of Mental Health v. Kirchner, 380 U.S. 194 (1965); notes 58-61 infra.
\(^5\) Konigsberg v. State Bar, 353 U.S. 252 (1957); Williams v. Kaiser, 323 U.S. 471 (1945); Neilson v. Lagow, 53 U.S. (12 How.) 98 (1851); C. Wright, supra note 33, § 107, at 547-48. In Williams and Neilson, in which the state grounds were unclear, the Court refused to find “untenable” (that is, wrong) state grounds by implication. Williams v. Kaiser, 323 U.S. at 478; Neilson v. Lagow, 53 U.S. (12 How.) at 110-11. The Court in Konigsberg may have been doing the same thing, but its language is similar to that in those cases in which state procedural grounds have been found inadequate to support the judgment. At least arguably within this category are the compulsion-of-federal-law cases such as Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), in which the state ground might not have been independent.
and remand for clarification. One leading scholar has been able to discern no pattern with respect to the approach the Court has adopted in past cases.

The Supreme Court may decide whether the appealed decision rests on federal or nonfederal grounds. Such a decision would rest on the Court's interpretation of the basis of the state court's decision. That the Court may do so does not suggest that it must or even that it should. As Justice Jackson said: "It seems consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended." Apart from "respect," it would be more sensible, in terms of arriving at a correct result, for the court rendering a decision to determine its basis than for some other court to do so. The possibility that the state court's ambiguous decision rests on a nonfederal

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42 C. Wright, supra note 33, § 107, at 548; 16 C. Wright, A. Miller, E. Cooper & E. Grossman, supra note 16, § 4032, at 769; see Note, Supreme Court Treatment of State Court Cases Exhibiting Ambiguous Grounds of Decision, 62 Colum. L. Rev. 822, 842, 847 (1962).

43 Black v. Cutter Laboratories, 351 U.S. 292, 298 (1956); Lovell v. Griffith, 303 U.S. 444, 450 (1938); Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 98-99 (1938); Honeyman v. Hanan, 300 U.S. 14, 18-19 (1937). In addition, in Irvin v. Dowd, 359 U.S. 394 (1959), a federal habeas case, the Court decided the state court decision was based on constitutional grounds although the state court discussed state and federal issues and specifically stated its decision of the federal issue was not necessary.


45 Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941), held the federal courts were without power under the anti-injunction statute, Judicial Code, ch. 231, § 285, 36 Stat. 1162 (1911) (amended 1948), to enjoin relitigation in state courts of matters settled in actions in federal courts. In 1948 the statute was amended to permit injunctions by the federal courts "to protect or effectuate its judgments," Act of June 25, 1948, ch. 155, 62 Stat. 968 (codified at 28 U.S.C. § 2283 (1976)). According to the reviser's notes, the only legislative history of the provision, P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1237 (2d ed. 1973), the phrase was intended to overrule Toucey. 28 U.S.C. § 2283 note (1976). Under the amended statute a federal court which has determined a case is not barred from enjoining relitigation in state court. E.g., Jackson v. Carter Oil Co., 179 F.2d 524 (10th Cir. 1950). One advantage of the revision is that it enables the deciding court to determine what was decided—that is, whether res judicata is to be applied to the subsequent state proceedings. Perhaps unfortunately, the scheme is not the same with respect to state court power to enjoin relitigation in federal
ground may be sufficient for the Court to postpone decision until its jurisdiction is affirmatively demonstrated. Prior to that time the assertion of jurisdiction would be premature because it would be uncertain whether the case was one arising under federal law. 

OSBORN, ORIGINAL JURISDICTION AND THE POTENTIAL NONFEDERAL GROUND

Although the judicial power of the United States extends to all cases arising under federal law—either originally or on review of a state court judgment—the differences between original and appellate jurisdiction and the different statutory bases on which they rest require that the test for determining the existence of the jurisdiction be applied differently in the two contexts. For appellate review of state court judgments it is sufficient that some question of federal law be presented, the answer to which may affect the outcome of the case. The jurisdiction, however, extends

Id. at 532 (citations omitted). See also Secretary of the Navy v. Avrech, 418 U.S. 676 (1974) (per curiam) (jurisdictional question whether statutory provision that decisions of courts-martial are final and not reviewable except by military appeals courts precluded district court challenge to constitutionality of section of Code of Military Justice under which plaintiff was convicted by court-martial); United States v. Augenblick, 393 U.S. 348 (1969) (Court of Claims jurisdiction over suit for back pay challenged on similar basis). But cf. Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960) (court of appeals in diversity case should have decided preliminary state question before reaching constitutional question).

The Supreme Court's power to review the judgments of state courts is given by 28 U.S.C. § 1257 (1976). The original jurisdiction of the federal courts over cases arising under federal law is conferred by id. § 1331, although many statutes also confer original jurisdiction over more specialized subject matter, see, e.g., id. § 1337 (commerce and antitrust); id. § 1338 (patent, copyright, trademark); id. § 1339 (postal matters); id. § 1343 (civil rights). See generally Note, The Outer Limits of "Arising Under," 54 N.Y.U. L. Rev. 978, 989-90 (1979).

See, e.g., Honeyman v. Hanan, 300 U.S. 14, 18 (1937); Murdock v. City of Memphis, 87 U.S. 590, 630-31, 635 (1875); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, supra note 16, § 4006; notes 18-20 supra (basis of "adequate and independent" state ground notion is that answer to federal question does not, or need not, affect outcome of case).
no further than to that federal question. The presence of some federal ingredient or issue of federal law is not sufficient to confer original federal jurisdiction. In this sense, original jurisdiction is narrower than appellate jurisdiction. Original jurisdiction extends, however, not only to the federal issue, but to the entire cause. In this sense, original jurisdiction is broader than appellate jurisdiction.

The first significant judicial examination of the original arising under jurisdiction was Osborn v. Bank of the United States. Subsequent analyses are rooted in the opinions of Chief Justice Marshall for the Court and of Justice Johnson in dissent.

At the very least, invocation of the arising under jurisdiction requires "that the title or right set up by the party, may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction." Chief Justice Marshall's "federal ingredient" test is uniformly recognized as the fullest permissible extension of federal judicial power. Upon closer analysis,
however, Osborn does not stand for so broad a proposition; on the facts of the case, Chief Justice Marshall’s opinion does not necessarily preclude the destruction of jurisdiction by the presence of nonfederal issues. At issue in Osborn were the rights of the Bank of the United States under a contract. The bank was wholly a creature of federal law. Its existence and capacity to enter contracts and to sue and be sued were entirely dependent on federal law. The argument against jurisdiction was that unless the federal law that created the bank and granted it its power was challenged, no question of federal law was presented and the case could not be one arising under the Constitution or laws of the United States.

Chief Justice Marshall observed that the mere presence of nonfederal issues could not be enough to deprive the national courts of jurisdiction. Justice Johnson, who dissented, agreed with the Chief Justice on this point. Chief Justice Marshall then declared that, apart from those cases over which the Supreme Court is given original jurisdiction by the Constitution, there are no cases over which the Supreme Court has appellate jurisdiction that are constitutionally precluded from being heard originally in the inferior federal courts. Here, too, Justice Johnson agreed. The two jurists differed in the application of these principles to the case of the bank.


Much of the discussion and analysis engaged in Osborn was inapplicable to that case. The bank’s suit to enjoin enforcement of a state tax on federal constitutional grounds was, under any rational approach, a case arising under the Constitution or laws of the United States. The Osborn analyses were applied to the problem discussed in the text in a companion case, Bank of the United States v. Planter’s Bank, 22 U.S. (9 Wheat.) 904 (1824), in which recovery was sought on negotiable notes made by a state bank. Here the conventional, though historically inaccurate, style is used to avoid confusion.

Osborn is hardly unique among Chief Justice Marshall’s opinions in being read more expansively than might be required by the issue before the Court, perhaps because of the legendary stature of the Chief Justice. See, e.g., Strawbridge v. Curtis, 7 U.S. (3 Cranch) 267 (1806) (interpreted to require complete diversity whether parties’ interests are joint or several despite opinion’s express limitation to joint interests); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (read as standing for broad power of judicial review although it is not impermissible to find Marbury determining only power of Court to strike down legislation aimed at judicial branch and requiring that branch to do that which Constitution prohibits); 2 Crosskey, Politics and the Constitution in the History of the United States 1007 (1953) (judicial review limited to “judiciary prerogatives”). See generally Strong, Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes, 55 N.C. L. REV. 1 (1976).


Id. at 884 (Johnson, J., dissenting).

Id. at 820 (majority opinion).

Id. at 884 (Johnson, J., dissenting).
Justice Johnson's view was that arising under jurisdiction requires that an issue of federal law be raised and litigated. Such jurisdiction could not attach to a case simply on the basis of plaintiff's complaint unless all the elements necessary to sustain the case were federal. In any other instance an assertion of federal law might or might not be disputed by the defendant. Consequently, any case in which one or more elements of plaintiff's claim rested on nonfederal ground could not be brought within the original arising under jurisdiction except by removal after it appeared that the parties were joining issue on a matter of federal law.\(^5\)

In contemporary terms, Justice Johnson's position was as follows: The case could have been brought in state court. If it had been, it would have been possible for the state court to decide the federal issue in favor of the bank, and still to decide that, as a matter of state contract law, the bank would not be entitled to recover. It might also be possible for the federal issue not to be raised and for the state court to hold against the bank as a matter of state contract law. In either event, the adequate and independent state ground would insulate the state court's decision from Supreme Court review.\(^6\)

Thus, if Congress may vest the inferior federal courts with original jurisdiction to hear only cases over which the Supreme Court might exercise appellate jurisdiction, it would be improper, in Justice Johnson's view, for a federal court of original jurisdiction to entertain a case unless some issue dependent on federal law was actually to be litigated, for only in that instance could the Supreme Court exercise appellate power:

The argument [of counsel for appellant] went to deny the right to assume jurisdiction on a mere hypothesis. . . . [U]ntil a question involving the construction or administration of the laws of the United States did actually arise, the casus federis was not presented, on which the constitution authorized the government to take to itself the jurisdiction of the cause. That until such a question actually arose, until such a case was actually presented, non constat, but the cause depended upon general principles, exclusively cognizable in the State Court. . . . And this doctrine has my hearty concurrence in its general application.\(^7\)

On the facts in Osborn, Chief Justice Marshall was correct in holding the exercise of original federal jurisdiction within the power conferred on the federal judiciary by article III.\(^8\) A proper application of Justice

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\(^{5}\) Id. at 885-89 (Johnson, J., dissenting).

\(^{6}\) But see Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932) (where the nonfederal ground is not substantial it will not preclude review); Abie State Bank v. Bryan, 282 U.S. 765 (1931) (same); Ward v. Board of Comm'ms, 253 U.S. 17 (1920) (same); cf. Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938) (discussed in note 118 infra).

\(^{7}\) 22 U.S. (9 Wheat.) at 884-85 (Johnson, J., dissenting).

\(^{8}\) It is less clear whether Chief Justice Marshall was correct in his view of the statutory basis of jurisdiction. The Court held that the Act of Congress incorporating the bank, Act
Johnson's position is limited to those situations in which it is possible to decide a case without relying—either explicitly or by necessary implication—on federal law. The elusive distinction is between those cases in which a federal ground of decision must exist and those cases in which it might exist. With respect to those cases that are incapable of being decided without the resolution or application of federal law the Chief Justice was correct; with respect to those cases in which, although it may become necessary to determine or apply federal law, the necessity is not present at the outset, federal jurisdiction exists coextensively with the federal ground. Osborn could not have been decided without reliance on the federal matter because the federal elements were analytically antecedent to all other issues in the case.

As Chief Justice Marshall analyzed it:

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

. . . [T]he validity of the contract [in this case] depends on a law of the United States . . . . The act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises.

The analysis may be illustrated by Gully v. First National Bank in Meridian. Gully was a suit by the state tax collector of Mississippi to
recover state, county and municipal taxes claimed to be owed by the respondent pursuant to an agreement between it and its predecessor in interest, a national banking association. The respondent was the grantee of the assets of the insolvent First National Bank of Meridian under a contract whereby it assumed the liabilities of its grantor. Alleged to be among those liabilities were taxes assessed against its grantor.90

State taxation of national banking associations was governed by federal statute;90 in the absence of a permissive statute the tax would have violated the principle of *McCulloch v. Maryland.*91 The question presented to the Court in *Gully* was whether the case arose under the statute permitting the state to tax the bank. The district court and the court of appeals had sustained federal jurisdiction.92 After reviewing the various tests that had been suggested for determining the existence of federal judicial power,93 the Supreme Court reversed, holding that it had no jurisdiction.94

Justice Cardozo's analysis is consistent with the views expressed by Chief Justice Marshall in *Osborn.* Both the court of appeals and the Supreme Court recognized that the existence of jurisdiction depended upon "whether the plaintiff count[ed] upon a federal right in support of his claim."95 The courts' mode of analysis was similar. The difference in result was based upon whether the federal permissive statute was found analytically anterior to the state's power to tax or whether the absence of such a statute merely provided the bank with a federal defense to an action to collect the tax. The court of appeals found that the statute was "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."96 Because the court of appeals found the federal element in the case—the permissive statute—analytically anterior to the state's power to tax, it upheld jurisdiction.

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

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90 *Id.* at 111.
91 17 U.S. (4 Wheat.) 316 (1819).
92 81 F.2d 502 (5th Cir. 1936); see 299 U.S. at 112.
93 299 U.S. at 112-14; see note 3 *supra.*
94 The Court was quite plainly construing the statutory rather than the constitutional basis of jurisdiction. 299 U.S. at 112. Indeed, *Osborn* was distinguished on this ground. *Id.* at 113. As a statutory matter, it was not significant that the federal jurisdiction was invoked by the defendant through removal rather than by the plaintiff originally; as a matter of constitutional analysis, however, that procedural element is critical. See notes 232-37 & accompanying text *infra.*
95 299 U.S. at 115; see 81 F.2d at 505.
96 81 F.2d at 505.
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. As was stated by Justice Cardozo: "A suit does not arise under a law renouncing a defense."

This analysis may furnish the answer to Justice Johnson's view that Osborn would permit jurisdiction over contracts or deeds or wills to be taken from the states and transferred to the federal courts. Justice Johnson suggested that Osborn would permit Congress to confer federal jurisdiction over suits involving documents required to bear federal tax stamps. Because Congress enjoys wide power to require such stamps, many cases otherwise governed by state law could be heard in the federal courts. The Gully analysis suggests, however, that because the right to contract, to convey property or to bequeath an estate is anterior to the government's power to tax those transactions, the absence of federal tax stamps might make a good defense to an action based on the document; analytically, however, it would not form a necessary element of the underlying right.

Unlike original jurisdiction, appellate review is a determination of the soundness of a decision already made; the legal issues are framed by a frozen record. The test for Supreme Court appellate jurisdiction is whether the judgment over which review is sought can be reversed on federal grounds. The question is one of mootness: Has the state's determination of its own law rendered the federal matter irrelevant? Original jurisdiction is not so limited and involves a determination of whether a decision based on federal ground will be required. In cases in which it will, original federal jurisdiction exists; in cases in which it will not, original federal jurisdiction does not exist. In cases in which it is unclear whether a decision based on federal ground will be made, original federal jurisdiction is problematic. Because the determination involves looking to the future, the question is akin to one of ripeness. The grounds presented for appellate jurisdiction usually are clear; original jurisdiction depends on matter that will be presented, and what that includes may be far from clear.

Cases such as Osborn that are inherently incapable of resolution without resort to federal law "arise under" federal law for jurisdictional purposes regardless of the presence of nonfederal matters. Jurisdiction exists because the prediction of federal issue involvement can be made with certainty. In contrast, a case containing no federal elements—one resting en-

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97 Cf. Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908) (arising under jurisdiction does not exist when plaintiff merely alleges that an anticipated defense to his complaint is invalid under Constitution); notes 215-67 & accompanying text infra.

98 299 U.S. at 116.

tirely on state law, for example—cannot be within the arising under jurisdiction. The prediction of the lack of federal issue involvement can be made with certainty.

Finally there are those cases in which the decision may rest entirely on nonfederal grounds or which may require a determination of federal matter. Deciding the jurisdictional question requires the courts to predict whether it will be necessary to determine the federal matter. When the court can say with some confidence that it will be necessary, jurisdiction should be sustained. When this necessity is not anticipated, the court should deny jurisdiction, at least until the necessity is demonstrated. Until that time the invocation of the jurisdiction is premature.

Cases presenting federal and nonfederal matter may be of three types. First, the federal matter may be threshold to the nonfederal matter. Second, federal and nonfederal grounds for decision may be parallel. And third, the nonfederal matter may be threshold to the federal matter.

When determination of the federal matter must be made in limine to the nonfederal matter, arising under jurisdiction always exists. It is

100 On the question of the party bearing the burden of establishing jurisdiction, see note 128 infra.


102 This is true, at least, as a constitutional matter. The preliminary federal matter may be sufficiently remote from the interests represented in the litigation or the federal interest may be so unlikely to be affected in any significant way, that a legislative determination to withhold federal judicial power would be appropriate. E.g., 28 U.S.C. § 1349 (1976). See notes 6-9 & accompanying text supra. Somewhat more problematic are the cases in which the Court, without explicit legislative sanction, reaches a similar result, often by interpreting more general statutory language. See, e.g., Shulthis v. McDougal, 225 U.S. 561 (1912); Metcalf v. Watertown, 128 U.S. 586 (1888); T.B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir. 1964).

The problem often arises in cases in which the federal law relied upon incorporates state law by reference. For example, Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900), was a suit involving competing mining claims to minerals on United States land under patents for such claims authorized by federal statute, Revised Statutes of the United States, ch. 6, § 3235, 18 Stat. 428-29 (1874). A federal statute declared the right of possession determinable by "local customs" insofar as these were "applicable and not inconsistent with the laws of the United States." Id. § 3239, 18 Stat. at 427. The Court denied arising under jurisdiction on the theory that there was no call for no determination of federal law. 177 U.S. at 513; accord, Blackburn v. Portland Gold Mining Co., 178 U.S. 571 (1900). Yet, in Desylva v. Ballentine, 351 U.S. 570 (1956), in which the question was whether an illegitimate child of an author was entitled to share in the benefits of copyright renewal by "children," the Court ruled on the merits, with no mention of any jurisdictional problem, despite holding that the meaning of the word "children" was to be determined by reference to state law.

That the federal courts are to look to state law for a rule of decision may be taken as some evidence that the federal interest is insufficient to warrant the assertion of jurisdiction. That interest may be greater, however, in a case such as Desylva, as demonstrated by the exclusivity of federal jurisdiction in cases arising under the copyright law. 28 U.S.C. § 1338 (1976). But cf. T.B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir. 1964) (no jurisdiction to determine copyright ownership). The converse situation—state incorporation of federal law—is treated at note 24 supra. For an analysis of the same problem in the context of Supreme Court review of state court judgments, see id.
critical to distinguish here between the necessity of deciding a federal issue and the necessity for relying on federal law in deciding a case. It is the latter which is significant in determining the existence of original jurisdiction. In Osborn, for example, whether or not the parties made an issue of the bank's capacity, it was a necessary element of the claim and depended on federal law. To the extent that federal law must furnish an ingredient of the case, the case may be said to arise under that law, regardless of whether its meaning or application is disputed. The failure to observe that distinction is the weakness of Justice Johnson's dissent in Osborn.

The court may not address the federal predicate explicitly, either because the parties do not dispute it or because resolution of the nonfederal matter is more easily dealt with in a manner that disposes of the case, yet avoids the federal matter. In Osborn, for example, it might be plain that, as a matter of state law, no contract right of the bank had been violated, while, as a matter of federal law, the bank's power to enter a contract might be difficult to determine. The court's option to bypass the federal issue of the bank's power does not place the case without the jurisdiction; whether that question would be resolved in favor of the bank's power or against it, it still would be resolved as a matter of federal law. If jurisdiction is not dependent upon the outcome of a particular decision, the failure to make the decision does not deprive the court of jurisdiction. Such a course is analytically impermissible, however.

Similarly, that the court does not explicitly address the threshold federal matter because the parties do not dispute it does not deprive the court of jurisdiction. Despite the popular misnomer, the original federal jurisdiction is not "federal question" jurisdiction. Justice Johnson's position notwithstanding, the fact that it is not necessary to resolve a federal question is not determinative of a federal court's original jurisdiction; so long as it is necessary to consider the federal ground in order to decide the case, as it is in the bank's suit on a contract, original federal jurisdiction exists.

In such cases original jurisdiction is necessary to fulfill the constitu-
tional purpose of protecting the federal interest from the possibility of subversion by hostile state courts. Supreme Court review of state judgments against the bank might well be insufficient protection if a state court were to clothe its decision in state law. Thus, were Congress prohibited from authorizing the federal courts to adjudicate cases to which the bank was a party, it would be unable to protect the bank from a perceived danger of hostile state judicial action. Unlike cases in which nonfederal matter is presented in limine to federal, the presence of a federal interest is not merely potential.

When federal and nonfederal grounds provide parallel bases for resolution of a case or controversy, a court may rest its decision on either ground. For example, a plaintiff claiming that some action or inaction by a defendant violates a right given the plaintiff by state as well as federal law may prevail without the court's reliance on any federal matter, or on the basis of the federal claim or on both grounds, or the defendant may prevail on both grounds. It is important to note that for the defendant to prevail the court must reach both grounds, while if state and federal law are favorable to the plaintiff, the court may be free to select between alternative grounds of decision and need not rely on federal matter to resolve the case. Thus, the party seeking a federal forum to vindicate a right allegedly guaranteed by federal law cannot be denied that forum unless the underlying right is vindicated as a matter of state law.

A case brought on two parallel theories, analytically though not factually unrelated, comprises two separable claims. Although the two claims may be treated as presenting a single constitutional "case," they also can be treated as distinct. In either event, there is jurisdiction over the federal claim. If, however, the claim is of constitutional magnitude—and, perhaps, even if it is not—a court might, to avoid unnecessary federal litigation, treat the case not as one presenting parallel federal-nonfederal

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109 Note 84 & accompanying text supra.
110 See notes 7-10 & accompanying text supra.
111 Notes 118-21 infra.
112 See text accompanying note 180 infra.
115 Id. at 725-26 (discretion to hear pendent claim).
116 On the question whether and in what circumstances the parallel (pendent) state claim should be adjudicated in the federal court, see generally 13 C. WRIGHT, A. MILLER & E. COOPER, supra note 76, § 3557; C. WRIGHT, supra note 33, § 19.

The frequency with which the policy is expressed and applied is not matched by the adum-
bases for decision, but rather as one belonging to the next category—cases requiring determination of nonfederal matter in order to reach federal matter.

When a determination of nonfederal matter must be made in limine to federal matter, a court is not free to select among alternative grounds of decision. If the nonfederal matter supports the existence of the federal claim, the court must consider the federal matter; if the nonfederal matter does not, the court is precluded from considering the federal matter. Whether the case arises under federal law depends upon the resolution of the preliminary nonfederal matter. For example, a complaint alleging that a particular state statute is federally unconstitutional does not present a claim arising under federal law if the challenged statute is inapplicable to the plaintiff as a matter of state law. In that situation the plaintiff would lack the requisite standing to adjudicate the claim of

Interesting and extraordinarily complex analytic difficulties arise when the source of law for resolving the matter preliminary to the claimed federal matter is not clearly federal or nonfederal. The problem arises in cases in which federal law does not of itself define the content of some necessary element of a claim otherwise federally protected.

For example, to establish a claim that the obligation of a contract has been impaired in violation of the Constitution, U.S. Const. art. I, § 10, cl. 1, requires that the existence of a contractual obligation be established before consideration is given to whether the federal right to be free from impairment has been violated. The predicate matter, however, apparently is not determinable by federal constitutional standards. See Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827); D. Currie, Federal Courts 200 (2d ed. 1975). However, state court determinations of this issue do not bind the Supreme Court as they would were the matter governed by state law. E.g., Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938) (reversal of state court determination of no contractual obligation); United States Mortgage Co. v. Matthews, 293 U.S. 232 (1934) (reversal of state court determination of contractual obligation).

Thus, the source of law for determining the existence of the underlying claimed contractual obligation is obscure. Similar difficulties arise in many cases in which federal law has been held to "incorporate" state law. See note 102 supra. Compare DeSylva v. Ballentine, 351 U.S. 570 (1956) (federal jurisdiction upheld), with Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900) (federal jurisdiction found not to exist). The converse situation, incorporation of federal law by the state, is analyzed in note 24 supra.

unconstitutionality. The applicability of the challenged statute is an issue governed exclusively by state law. If the statute is inapplicable to the plaintiff, the federal court is without jurisdiction. In these circumstances, the nonfederal matter is a jurisdictional fact that must be determined before a federal court may properly entertain the case.

In the context of Supreme Court review of a state court judgment that the statute does not apply to the plaintiff, jurisdiction would be lacking because the judgment would rest on an adequate nonfederal ground. Moreover, in that context, such a conclusion would be based on a definitive, binding determination of the jurisdictional fact which would render the federal issue moot.

In the context of original jurisdiction, by contrast, there may be no definitive, binding determination of nonfederal questions. State law may be unsettled; the question may be one of first impression. The court has the power to decide the preliminary nonfederal matter as a question of jurisdictional fact. Nevertheless, there may be considerable risk of the federal court's deciding its jurisdiction erroneously, based upon its determination of the unclear preliminary nonfederal matter.

The court may determine that the party seeking to invoke federal jurisdiction has failed to meet the burden of proving the "facts" necessary to support jurisdiction. Indeed, the party seeking to invoke the jurisdiction

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110 See note 178 infra.

111 For example, in Wooley v. Maynard, 430 U.S. 705 (1977), plaintiffs sought injunctive and declaratory relief against enforcement of a New Hampshire statute making it a misdemeanor to obscure the figures or letters of a license plate. N.H. Rev. Stat. Ann. § 262:27-c (1978) (amended 1979). They claimed that enforcement of the statute against them for covering the state's motto, "live free or die," N.H. Rev. Stat. Ann. § 263:1 (1978) (amended 1979), on their license plate violated their constitutional rights. Before proceeding to the merits of the claim, the Court found it necessary to note that "[t]he term 'letters' [in the statute] has been interpreted by the State's highest court to include the state motto." 430 U.S. at 707.

112 See notes 15-66 & accompanying text supra.

113 Where the state court's interpretation of state law is influenced by its view of federal law, however, the Supreme Court has asserted jurisdiction. See note 24 supra.


116 Federal courts, of course, have jurisdiction to determine their jurisdiction, a notion Professor Dobbs has called "incipient jurisdiction," Dobbs, Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment, 51 Minn. L. Rev. 491, 497 (1967); see United States v. United Mine Workers, 330 U.S. 258, 289-93 (1947) (alternative holding); id. at 310. (Frankfurter, J., concurring); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

117 Cf. Notes 63-66 & accompanying text supra (Supreme Court review).


It is by no means clear that the burden of proof has always rested on the plaintiff. The
holding in McNutt, the leading case on burden of proof, was based on interpretation of the
Judiciary Act of 1875, ch. 137, § 5, 18 Stat. 470, 472, which provided:
[If ... it shall appear to the satisfaction of [t]he ... [circuit court], at any time ...
[that a] suit does not really and substantially involve a dispute or controversy
properly within the jurisdiction of said circuit court, ... the said [circuit court]
shall proceed no further therein, but shall dismiss the suit or remand it to the
court from which it was removed....

The authority vested in and the duty imposed on the court by the statute to inquire into
jurisdiction at any stage of the proceeding was contrary to earlier ideas that jurisdiction
could be sustained on the basis of only the plaintiff's allegations and that the party asserting
jurisdiction could be relieved of the burden of showing it, whenever required to, by
procedural formalities. McNutt v. General Motors Acceptance Corp., 298 U.S. at 189. Thus,
the Court held that the statute mandated that the burden of proof of jurisdiction be on
the plaintiff. Id. at 188-89.

The procedural formalities seemed to place the burden of proof on the party challenging
jurisdiction. The federal courts were governed initially by common law pleading rules,
modified somewhat because they were courts of limited jurisdiction. Under these rules, the
plaintiff was required to allege facts showing jurisdiction, e.g., Brown v. Keene, 33 U.S.
(8 Pet.) 112, 116 (1834). If he did not, his case could be dismissed at any stage for want of
jurisdiction, upon suggestion of either the defendant, Jackson v. Ashton, 33 U.S. (8 Pet.)
148 (1834); Bingham v. Cabot, 3 U.S. (3 Dall.) 382, 384 (1798); see Scott v. Sandford, 60 U.S.
(19 How.) 393, 402 (1856), or even the plaintiff himself, Capron v. Van Noorden, 6 U.S. (2
Cranch) 126 (1804).

Jurisdictional challenges not apparent on the face of the pleadings had to be raised by
the defendant by plea of abatement, the required means for raising objections to both per-
(1849); D'Wolf v. Rabaud, 28 U.S. (1 Pet.) 476, 498 (1828). If it was not filed, or if it was
not filed before a plea to the merits, objection to jurisdiction was foreclosed. DeSobry v.
Nicholson, 70 U.S. (3 Wall.) 420, 423 (1865); Sheppard v. Graves, 55 U.S. (14 How.) 505, 510
(1852).

If jurisdiction was challenged by plea in abatement, the burden of proof was said to be
on the movant to establish lack of jurisdiction. Whether the burden of proof referred to
was a burden of persuasion or only a burden of production is not clear. In a context clearly
referring to burden of persuasion, Chief Justice Hughes, reviewing the earlier cases cited in
McNutt, stated that the burden of proof was on the movant. 298 U.S. at 189. Dicta in
Sheppard v. Graves, 55 U.S. (14 How.) 504, 510 (1852), often cited for the proposition that
the burden of proof rests on the movant, also seem to refer to the burden of persuasion.
The Court in Sheppard may have been talking only about a burden of production or going
forward, since the defendant in that case introduced no evidence to support his contention
that there was no diversity of citizenship. See also DeSobry v. Nicholson, 70 U.S. (3 Wall.)
at 423.

The Conformity Act of 1872, ch. 256, 17 Stat. 196, 197, changed procedure in the federal
courts to follow the procedures of the states in which they were located. If a state permitted
jurisdictional objections to be raised by means other than the plea of abatement, the
plaintiff could have been required to file before a plea to the merits, objection to jurisdiction was foreclosed. DeSobry v. Nicholson, 70 U.S. (3 Wall.) 420, 423 (1865); Sheppard v. Graves, 55 U.S. (14 How.) 505, 510 (1852).

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McNutt, stated that the burden of proof was on the movant. 298 U.S. at 189. Dicta in
Sheppard v. Graves, 55 U.S. (14 How.) 504, 510 (1852), often cited for the proposition that
the burden of proof rests on the movant, also seem to refer to the burden of persuasion.
The Court in Sheppard may have been talking only about a burden of production or going
forward, since the defendant in that case introduced no evidence to support his contention
that there was no diversity of citizenship. See also DeSobry v. Nicholson, 70 U.S. (3 Wall.)
at 423.

The effect on federal procedure, particularly the burden of proof, of the Judiciary Act of
1875 was not settled until McNutt. Language in some decisions had indicated that the
statute changed the method by which the objection to jurisdiction could be raised; apparently
the plea in abatement was no longer necessary. In Farmington v. Pillsbury, 114 U.S. 138,
144 (1885), for example, the Court said that the old rule was changed and "the courts were
given full authority to protect themselves against the false pretenses of apparent parties."
This language can and probably should be read to mean only that a judge was now entitled
to inquire into jurisdiction in all cases even in the absence of objection, not necessarily that
a party could raise a jurisdictional objection at any time. See Mexican Cent. Ry. v. Pin-
ckney, 149 U.S. 194, 200 (1893); Hartog v. Memory, 116 U.S. 588, 591 (1886). But see Steigleder
See also Deputron v. Young, 134 U.S. 241, 251 (1890).

Although the methods by which one could challenge jurisdiction were relaxed, the burden
was apparently still on the movant to prove lack of subject matter jurisdiction. Hunt v.
tion frequently denies the existence of the federal claim by alleging that the state action whose constitutionality is being challenged is, as a matter of state law, inapplicable to him. Alternatively, the court may conclude that it is unable to determine the preliminary nonfederal question and dismiss the case without prejudice to its reinstitution after a definitive determination of the preliminary nonfederal question at a time when the federal claim will have matured. Or the court may conclude that it is unable to determine the preliminary nonfederal question, yet hold the case while seeking or directing the parties to seek a definitive state court

New York Cotton Exch., 205 U.S. 322, 333 (1907). In Chase v. Wetzlar, 225 U.S. 79 (1912), however, the Court held that the burden of proving personal jurisdiction, at least where it rested on jurisdiction in rem, was on the plaintiff, distinguishing the cases in which the burden of proof as to subject matter jurisdiction was placed on the defendant. Id. at 85. In this case, since the statute provided that where jurisdiction was in rem, the judgment could only affect the property by reason of which jurisdiction was obtained, the presumption of jurisdiction could not apply and the burden of proof had to rest on the plaintiff. Id. at 87.

Although the Chase Court came to the anomalous result that a defendant challenging subject matter jurisdiction had the burden of proof, while one challenging personal jurisdiction, at least where jurisdiction in rem was involved, did not, it did raise the question whether the rule placing the burden of proof on the movant in the former case was consistent with the statute requiring the court to dismiss on its own motion if subject matter jurisdiction was found not to exist. Id. at 85-86. That inconsistency was not resolved until McVutt.


A court may dismiss in a second situation. Where abstention would be the proper course but a state court has ruled it cannot decide a case still pending in federal court, the federal court will dismiss in order to obtain an adjudication of the state issues. Harris County Comm'r's Court v. Moore, 420 U.S. 77, 88 & n.14 (1975).

The court may itself seek the determination of state law in jurisdictions in which certification of questions of law to the highest state court is permitted. See Uniform Certification of Questions of Law Act § 1, 12 UNIFORM LAWS ANN. 52 (1975) (providing that the highest court of a state may answer questions certified to it by the Supreme Court, a United States court of appeals or district court when there are questions of state law that may be determinative of the case and there are no controlling precedents). The provisions of the Act have been adopted, with some variations, in 23 states. Table of Adopting Jurisdictions, Uniform Certification of Questions of Law Act, 12 UNIFORM LAWS ANN. 17 (Supp. 1981).


E.g., Reetz v. Bozanich, 397 U.S. 82 (1970); Harrison v. NAACP, 360 U.S. 167 (1959);
determination.

Finally, the court may simply proceed to a decision of the federal matter without an explicit determination of the preliminary nonfederal question.\(^{133}\) The preliminary nonfederal matter might not be raised by the parties who join issue only on the federal matter.\(^{134}\) That is, in the example above, the parties may not dispute the applicability of the statute to the challenging party, but may dispute only its federal constitutionality. This is tantamount to the parties' stipulation of the jurisdictional fact.\(^{135}\) To the extent that this is the basis for the court's assertion of jurisdiction, it entails the implicit determination of the state law issue, at least for purposes of the case.\(^{136}\)

It may be that the parties contest the nonfederal matter, but the court chooses to bypass the issue,\(^{137}\) when, for example, the state law issue is not free from doubt and the court is confident of the resolution of the federal issue. Such action by the court is impermissible: If the party asserting the federal right is to prevail, the court must determine the predicate state matter in a way that will permit it to reach the federal matter. A federal court may not bypass a contested question of state law in order to reach federal matter that may be determined only if the nonfederal predicate has been established. To consider the question of unconstitutionality without a prior determination that the statute injures the plaintiff is to determine a case on the merits without first establishing jurisdiction to do so.\(^{138}\) It is to fail to recognize the analytic hierarchy of the case.\(^{139}\)

Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); cf. Procunier v. Martinez, 416 U.S. 396 (1974) (situation when abstention is not appropriate); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (same); Baggett v. Bullitt, 377 U.S. 360 (1964).\(^{133}\) See Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 8-9 (1978); Irving Trust Co. v. Day, 314 U.S. 556 (1942) (Supreme Court assumed a contract and proceeded to impairment question); Sterling v. Constantin, 287 U.S. 378 (1932) (Supreme Court assumed challenged action permissible under state constitution and decided federal question); cf. note 66 supra (Supreme Court review). But see Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960) (court of appeals wrong in deciding constitutional question without deciding preliminary state questions, but fact that jurisdiction based on diversity may have been significant). See also notes 268-70 & accompanying text infra.\(^{134}\)


E.g., Public Util. Comm'n v. United Fuel Gas Co., 317 U.S. 456 (1943) (whether state law gave commission power to fix rates retroactively); Siler v. Louisville & N.R.R., 213 U.S. 175 (1909) (semble); cf. Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960) (circuit court decided due process question without deciding preliminary question whether state statute applied); Sterling v. Constantin, 287 U.S. 378 (1932) (Court bypassed question whether governor had authority under state constitution to issue challenged orders, even though three-judge panel had enjoined enforcement on that basis).\(^{137}\) See notes 268-70 & accompanying text infra. But cf. note 66 supra (Supreme Court review).\(^{138}\)

Note 270 & accompanying text infra.\(^{139}\)

312 U.S. 496 (1941).\(^{140}\) See notes 155-75 & accompanying text infra.
Thus, if the defendant prevails on the nonfederal issue—the applicability to the plaintiff of the challenged statute—the court must consider plaintiff's claimed federal right. If, on the other hand, the plaintiff prevails on the nonfederal issue the federal question never arises: the plaintiff is free of the challenged statute's operation without resort to federal law. The so-called abstention doctrine perhaps best illustrates the application of these principles.

ABSTENTION AND THE POTENTIAL NONFEDERAL GROUND

In a long line of cases, the best known of which is undoubtedly Railroad Commission v. Pullman Co., the federal courts have formulated a doctrine of abstention which rests on no stated satisfactory conceptual base. Pullman is the paradigm case. It arose when the Texas Railroad Commission promulgated a regulation requiring any sleeping car operating on any line in the state to be in the charge of a Pullman conductor. Theretofore the practice had been that trains having only a single sleeping car were in the charge of a porter, while trains having two or more such cars were in a conductor's charge. Pullman conductors were white; Pullman porters were not.

The Pullman Company and the affected railroads brought suit in federal district court to enjoin enforcement of the regulation; Pullman porters intervened as complainants and Pullman conductors supported the regulation. A three-judge district court granted the injunction and the defendants appealed directly to the Supreme Court. The complainants attacked the validity of the regulation on several grounds, including the power of the commission, under Texas law, to issue it, as well as its constitu-

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142 The discussion that follows is limited to what frequently has been referred to as Pullman-type abstention. The "abstention" doctrines of Younger v. Harris, 401 U.S. 37 (1971), and its progeny, in which the federal courts are asked to interfere with state judicial proceedings, present related but distinct issues. See generally note 171 infra. Other cases sometimes included within the abstention doctrine, but in which the basis of jurisdiction is other than a claim that the case arises under federal law, e.g., Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) (diversity of citizenship jurisdiction); see C. Wright, supra note 33, § 52, are beyond the scope of this analysis, as are those cases in which, despite the existence of constitutional and statutory bases of jurisdiction, the federal court simply dismisses, e.g., Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951) (challenge to state regulatory commission order); Markham v. Allen, 326 U.S. 490, 494 (1946) (dictum) (probate); Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1859) (dictum) (divorce); cf. Hernstadt v. Hernstadt, 373 F.2d 316 (2d Cir. 1967) (alternative holding) (child custody).

All of the cases in which the federal courts decline to exercise jurisdiction in the absence of statutory authority to do so implicate values closely associated with the power of the state qua sovereign. See note 173 infra.

143 312 U.S. at 497.
144 Id.
145 Id.
tionality under the commerce clause, the due process clause and, apparently, the equal protection clause. The opinion of the district court rested entirely on the ground that under Texas law the commission was without power to issue the challenged order. The court cited no federal authority and expressly declined to consider the constitutionality of the regulation, finding such a determination "unnecessary."

Justice Frankfurter, writing for the Supreme Court, found that the equal protection claim of the Pullman porters tendered a substantial constitutional issue. Nonetheless resolution of that issue by the federal judiciary could be avoided if, under the law of Texas, the commission were without power to issue the challenged order. It was on this ground that the lower court had enjoined enforcement of the order. Rather than refusing to adjudicate the alternative nonfederal issue, however, Justice Frankfurter declared a doctrine of abstention under which the federal courts were to retain jurisdiction of the case but were not to adjudicate it until and unless the state court determined the threshold issue of state law in a way that required adjudication of the constitutional question.

Justice Frankfurter's reference to the substantiality of the constitutional issue makes it apparent that the Court believed the district court had had jurisdiction to adjudicate the case and that the Court could, therefore, properly hear the appeal. As Chief Justice Marshall, speaking for the Court in *Cohens v. Virginia*, had declared:

> It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. . . . With whatever doubts, with whatever difficulties, a case may be

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147 Although the Court referred to challenges based on the commerce clause, U.S. Const. art. I, § 8, cl. 3, and the due process clause, id. amend. XIV, § 1, the only claim characterized as presenting "a substantial constitutional issue," 312 U.S. at 498, was that based upon the equal protection clause of the fourteenth amendment. That issue was neither addressed nor noted in the per curiam opinion of the district court, 33 F. Supp. at 675.

148 33 F. Supp. at 676.

149 312 U.S. at 498.

150 See id.; note 117 supra.

151 33 F. Supp. at 677. Given the disposition of the case on nonconstitutional grounds, the Supreme Court could have found itself without jurisdiction to review the decision of the district court on direct appeal. Cf. Louisville & N.R.R. v. Garrett, 231 U.S. 298, 303-04 (1913) (three-judge court not required when state statute challenged on state constitutional grounds).


153 See note 3 supra.

154 19 U.S. (6 Wheat.) 264 (1821).
attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.\textsuperscript{155}

The \textit{Pullman} case appears to violate this principle, and has been criticized on this ground\textsuperscript{156} as well as for the waste of scarce judicial resources that its duplicative scheme undoubtedly engendered.\textsuperscript{157} The cost of abstention is often dear.\textsuperscript{158} The Court has defended the doctrine, claiming that it "does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise."\textsuperscript{159} In \textit{Pullman}, Justice Frankfurter found justification for the practice in the notion that a suit for injunctive relief, being equitable in nature, was an appeal to the wise discretion of the chancellor;\textsuperscript{160} the desirability of avoiding a choice between adjudicating a constitutional issue that might not require adjudication and determining a question of unclear state law erroneously, tentatively and in a context in which it might be displaced by a different state court interpretation counseled that that discretion be exercised on the side of restraint.

Thus, much of the \textit{Pullman} rationale appeared to be based on the discretion of a court of equity.\textsuperscript{161} The opinion, however, misconceived the appropriate exercise of discretion. The historical power of the chancellor to determine the adequacy of possible legal remedies, and to remit the parties to the law side on that basis, is, as Justice Frankfurter later noted,
simply inapposite when the question is not one of legal as opposed to equitable forum, but rather one of state as opposed to federal forum. To suggest that the remedy in state court is adequate is anomalous because the basis of providing for federal judicial power in the first instance is the lack of confidence in the adequacy of the state forum to which the case is to be remitted.

Moreover, although Justice Frankfurter's opinion appears to have been based on some sort of equitable discretion, the Pullman doctrine is applied even when federal judicial power is sought to be invoked "on the law side."

The abstention cases have been read as standing for the proposition that the federal courts have "discretion" to refuse to adjudicate cases apparently within the arising under jurisdiction until a state court determination of an issue of unclear state law has been made, if such a determination might render the determination of the federal question on which federal jurisdiction is based unnecessary. Three justifications have been advanced for the practice of abstention: first, the avoidance of deciding

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162 "An 'adequate remedy at law,' as a bar to equitable relief in the federal courts, refers to a remedy on the law side of federal courts." Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341, 359 (1951) (Frankfurter, J., concurring). "[I]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it." Id. at 361 (Frankfurter, J., concurring; see Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 28 (1959).


165 See supra.

166 Abstention has been applied in cases in which only a declaratory judgment was sought, Askew v. Hargrave, 401 U.S. 476 (1971) (per curiam); Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 (1942), although whether a declaratory judgment can be considered a legal remedy is questionable, see Field, The Abstention Doctrine Today, 125 U. PA. L. REV. 590, 596 & n.30 (1977). It also has been ordered in damage actions involving constitutional questions, in at least two cases in which refusal to abstain was upheld, the Court stated that the lower court had not "abused its discretion," Gibson v. Berryhill, 411 U.S. 564, 580 (1973); Harman v. Forssenius, 389 U.S. 528, 534 (1967), seeming to use "abuse of discretion" in the usual sense. Compare the discretion to certify questions of state law in diversity cases discussed in Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974).
unnecessary federal or constitutional questions;\textsuperscript{164} second, the avoidance of friction between the federal judiciary and the states;\textsuperscript{165} and third, the avoidance of error in determining state law.\textsuperscript{170} None of the three traditional justifications is satisfying.

The problem of error is present in any case. With respect to state law, it is unlikely to be significantly greater for federal judges, who are typically trained in local law, than it is for state judges.\textsuperscript{171} A court's refusal to decide a case properly before it on the ground that it may decide it erroneously is judicially irresponsible.

Avoiding friction between the federal judiciary and the states is a laudable goal. Unfortunately, the invocation of that talismanic justification often serves as a substitute for analysis of the underlying issues. Whether framed in terms of "Our Federalism,"\textsuperscript{172} "comity"\textsuperscript{173} or some equal-

Traditionally, the "discretion" label describes a heavier burden on a party seeking to overturn a particular ruling in a higher court within the same judicial system: an abuse of discretion must be shown. With regard to abstention, the "discretion" label describes systemic leeways, i.e., the decisionmaking freedoms of a particular court system unbound by hard rules. It describes not the relationship of a higher to a lower court within the same system on resolution of a particular issue, but rather the relationship of the system to the mode of resolution of a given issue. Hence, to overturn a lower court's exercise of "discretion" in situations such as \textit{Pullman} and Younger v. Harris, 401 U.S. 37 (1971), it is not necessary to show abuse of discretion, but simply that the court below reached the wrong result. \textit{But cf.} Will v. Calvert Fire Ins. Co., 437 U.S. 655, 662-64 (1978) (district court's exercise of discretion was not permitted to be overridden by writ of mandamus). On the meanings of "discretion," see generally Dworkin, \textit{The Model of Rules}, 35 U. Chi. L. Rev. 14, 32-36 (1967).

\textsuperscript{164} E.g., Kusper v. Pontikes, 414 U.S. 51, 54 (1973); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944); Railroad Comm'n v. Pullman Co., 312 U.S. at 498; Bezanson, supra note 157, at 1134; Note, \textit{Justice Frankfurter's Doctrine}, supra note 161, at 617-19. \textit{But see} Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 629 (1974) ("We are in general accord, of course, with the dissent's view of the importance of . . . constitutional decision-avoidance principles. . . . But those standards are susceptible of misuse."); Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 214 (1960) (Black, J., dissenting) (deploring "automatic application of 'canons of constitutional adjudication' so absolute that a federal court can never under any circumstances or conditions decide a constitutional question if there is any possibility of turning a case away on other grounds").


The same considerations of deference to the states, or nonintervention, at least in cer-
ly convenient catchphrase, it does no more than state a result. If the anticipated friction arises from a federal court's determination of state law, it is difficult to perceive why that friction is any greater than in the vast number of cases in which federal courts must determine and apply local law. Similarly, if the anticipated friction arises from the possibility of federal intervention between the state and the citizen based upon federal law, it is difficult to perceive why that friction is any greater than in those cases in which federal courts are called upon to enforce claimed federal rights or duties over the opposition of the state. It is for this very purpose, in the latter instance, that a federal forum is made available. Among the justifications for the arising under jurisdiction is the protection of federal rights against the potential hostility of state courts. One would think this protection most appropriate in cases in which the claimed federal right is antagonistic to state interests.

The mere avoidance of unnecessary constitutional adjudication is a spurious justification for Pullman-type abstention. A federal court avoids constitutional adjudication by deciding a case on lesser grounds, not by remitting the parties to some other court.

This ground of abstention is a valid basis, however, for a doctrine that maintains the appropriate balance between the exercise of state and federal judicial power. If it is truly unnecessary to adjudicate the federal claims pressed by the parties originally invoking the federal jurisdiction, it may be said that the case is not one that arises under federal law. A case does not arise under a corpus of law that the adjudicating tribunal need not or cannot apply. Moreover, in Pullman and like cases, the party seeking entry to federal court is the party who is claiming that he is entitled to a favorable disposition on the basis of state law. Thus, the party seeking to invoke the federal judicial power denies, on the face of the complaint, the propriety of its exercise.

The typical case is a challenge to the constitutionality of a state statute, presenting two issues: first, the meaning, interpretation or application of certain matters, underlie the other "abstention" doctrines, e.g., Younger v. Harris, 401 U.S. 37, 43-45 (1971); Martin v. Creasey, 360 U.S. 219, 224 (1959); Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 29 (1959); Burford v. Sun Oil Co., 319 U.S. 315, 327-34 (1943); see note 142 supra. The Court has noted that comity underlies the various doctrines, although often by grouping the other types of cases with Pullman under the broad rubric "abstention." E.g., Zwickler v. Koota, 389 U.S. 241, 249 & n.11 (1967); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959); Louisiana Power & Light Co. v. Thibodaux, 360 U.S. at 27-29. In Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), the Court indicated that a federal action should be dismissed although neither the policy of avoiding constitutional decisions nor concerns of comity, in its various manifestations, were involved. The Court noted the vital interests of the states in husbanding and controlling a scarce but critical natural resource. Id. at 804, 820.

114 Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341, 359 (1951) (Frankfurter, J., concurring in result); ALI STUDY, supra note 75, at 163; Currie, supra note 76, at 316-17; see note 6 supra.

115 See ALI STUDY, supra note 75, at 286-87.
the statute and, second, its constitutionality. It should be obvious that the second question cannot be determined until after resolution of the first; it is absurd to consider the validity of a measure without knowing its meaning. Thus, the federal question—the constitutionality of the state enactment—is predicated on the state law question—the proper interpretation of the enactment.

Cases conforming to this analytic model may be presented to a court in several related, though distinct, manifestations. For example, a statute regulating speech may be challenged as vague and overbroad; yet, the statute may be subject to a narrowing interpretation that will obviate the challenge. Similarly, whether a state statute challenged on federal grounds is, as a matter of state law, applicable to the party seeking to have it struck down is a question that must be determined before the court can resolve the issue of the statute’s validity. If the statute is not properly applicable to the party challenging it, he or she may lack standing to adjudicate its validity. In any event, a determination of the meaning

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118 E.g., Town of Hillsborough v. Cromwell, 336 U.S. 620, 629 (1946); Siler v. Louisville & N.R.R., 213 U.S. 175, 193 (1909); ALI Study, supra note 75, at 286. But see Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. 471, 477 (1977) (upholding a refusal to abstain but noting, “We follow the proper course for federal courts by considering first whether abstention is required, then whether there is a statutory ground of resolution, and finally, only if the challenge persists, whether the statute violates the Constitution.” (emphasis supplied)).

In certain cases, however, there may be no construction of the statute that would avoid the constitutional question. The challenge may be that the statute is vague, not because a particular plaintiff cannot tell whether it applies to him, but because it does not make clear what conduct is prohibited, e.g., Baggett v. Bullitt, 377 U.S. 360 (1964); see Procunier v. Martinez, 416 U.S. 396 (1974). The statute also may be challenged for overbreadth. E.g., Kusper v. Pontikes, 414 U.S. 51 (1973); Zwickler v. Koota, 389 U.S. 241 (1967). See also Wisconsin v. Constantineau, 400 U.S. 433 (1971) (statute providing for public posting of alcohol ban against individual unconstitutional on its face because it made no provision for notice and hearing).


Compare the different problem of the plaintiff to whom a statute applies and who is clearly injured, seeking to invalidate it on ground not applicable to him. Such a plaintiff has met the constitutional requirements for standing, e.g., Craig v. Boren, 429 U.S. 190, 194 (1976), but faces the additional obstacle of qualifying to assert the constitutional rights of others, see id. at 195-97.

The abstention doctrine also can be analogized to ripeness, with which standing often overlaps. E.g., Duke Power Co. v. Carolina Envt’l Study Group, Inc., 438 U.S. at 81; Note, Justice Frankfurter’s Doctrine, supra note 161, at 612-13, 618-19.
of the statute is essential to a proper formulation of the constitutional question.

In cases such as these the propriety of exercising federal judicial power depends upon a determination of state law. The resolution of that threshold question may terminate the litigation without resort to federal law. Where that is true, the case is determinable on adequate and independent nonfederal grounds and there is no justiciable controversy arising under federal law. In such cases the exercise of federal judicial power is unnecessary to protect the party who first sought to invoke it. If the federal issue is foreclosed by the determination of state law—if the case is determinable on adequate nonfederal grounds—the interest sought to be vindicated by the invocation of federal judicial power will be vindicated without resort to that power.179 Just as a state court decision that a statute challenged on federal constitutional grounds does not apply to the party challenging it would bar Supreme Court review,180 so an analogous determination renders the exercise of original federal jurisdiction improper. In neither instance is the case one that arises under federal law, for in neither is there occasion to rely on federal matter to resolve the controversy. Further, in neither case is the party claiming the federal right injured by any illegitimate exercise of state power.

The remaining question concerns the appropriate forum for determining the meaning, interpretation or application of state law when that is necessary in order to determine the question of federal jurisdiction. There is power in the federal courts to make the determination.181 Given the existence of this power, why should a court “abstain” from its exercise? Unlike most other jurisdictional determinations, the question of federal jurisdiction in these cases is inextricably intertwined with the state question on the merits. From the federal perspective the state law determination is peripheral to the merits of the case; viewed from the state perspective, however, that determination may be the decision on the merits. The state’s interest in the proper resolution of its own law substantially outweighs any federal interest that might exist at this point. Indeed, it is perhaps not too much to say that the federal interest does not come to fruition unless and until the state law question has been resolved against the party who claims federal protection. The only federal judicial interest existing precedent to such a resolution is that against the unnecessary exercise of federal judicial power.182

179 See text accompanying note 112 supra.
180 See notes 18-19 & accompanying text supra.
181 See note 126 & accompanying text supra.
182 See note 243 infra. That is not to say, of course, that the federal court confronted with a Pullman situation should dismiss for want of jurisdiction. The retention of jurisdiction based upon the need to protect the potential federal interest is justified and often desirable. The doctrinal basis for retaining the case until the state court has determined the predicate
In determining whether to exercise the power to decide predicate questions of state law, given the powerful state interest in correct resolution of such questions, an additional factor must be evaluated: the societal interest in efficient allocation of scarce resources. The litigiousness of American society makes a process requiring a great expenditure of judicial time and energy undesirable. It is sensible that one tribunal, rather than two, hear and dispose of related state and federal issues.\(^{183}\) In cases in which it is necessary to reach the federal issue that one tribunal is federal; in cases in which it is not, state. The difficulty is in determining, at the time federal jurisdiction is invoked, into which category a particular case falls.

An appropriate calculus for this determination must take several factors into account.\(^{184}\) The likelihood that the case cannot be finally determined without resort to federal law increases the value of having the federal court determine the case initially because this advances the goal of a single adjudication. Thus, one factor to be considered is the adequacy and availability of a state court proceeding to determine the predicate issue of state law;\(^{185}\) an already pending state court proceeding involving the same or similarly situated parties or interests is a factor favoring abstention.\(^{186}\) Because the state's interest is in the correct determination of its own law, the more confident the federal court is of its ability to vindicate that interest—that is, the greater the clarity of the state law—the less reluctant it should be in deciding the predicate state question.\(^{187}\)

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issue of state law is the notion of jurisdiction to determine jurisdiction, note 126 supra. If the state court's determination is inadequate to protect the party invoking jurisdiction without resort to federal law, the federal court should then dismiss. Until that point is reached, however, the lack of certainty on the jurisdictional question warrants continuing federal judicial presence. "That a favorable decision in the state court might moot the plaintiff's constitutional claim brought to the federal court was never thought to create any jurisdictional impediment." United States v. Michigan Nat'l Corp., 419 U.S. 1, 4 (1974) (emphasis added). \(\text{But cf.} \) Harris County Comm'r's Court v. Moore, 420 U.S. 77, 88 & n.14 (1975) (dismissal where state court held it could not decide case pending in another court); note 60 supra (Court vacates where state court will not clarify ruling while case pending in Supreme Court).

\(^{183}\) Cf., e.g., United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (pendent jurisdiction); notes 113-16 & accompanying text supra (same).


\(^{185}\) E.g., Township of Hillsborough v. Cromwell, 326 U.S. 620 (1946).


\(^{187}\) That it is the state's interest that the doctrine protects is suggested in Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. 471 (1977), in which the Court noted that the state had voluntarily submitted to the federal forum. \(\text{Cf.} \) Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) (noting that neither party had requested abstention); Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958) (federal courts properly ruled on validity of unambiguous city ordinance without awaiting determination by state courts). \(\text{But cf.} \) Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. CHI. L. REV. 1, 76-77 (1964) (noting and criticizing inability of state to waive protection Congress intended to provide it by enacting three-judge court requirement).
Finally, the particular federal interest, and the time and money necessary to its vindication resulting from abstention, must be considered.188

Cases in which the state law claim is parallel to, rather than a predicate of, the federal claim189 are only slightly more difficult. Although in such cases resolution of the state claim is not necessary for consideration of the federal claim, a court may be warranted in treating it so.190 This treatment depends on the strength of the policy of avoiding constitutional or federal adjudication.191

Cases in which no claim based on state law is made, though such a claim could be made, are more problematic.192 In such cases the question is whether a federal court may, *sua sponte*, determine that relief may be had without resort to federal law, despite the absence of other than federal claims, and remit the case to state court. In cases in which a potential state ground which was not contained in the pleadings is predicate rather than parallel to the alleged federal claim the answer should be in the affirmative, for in such cases the federal court may be entirely without jurisdiction. For example, a case challenging the validity of a state statute on federal constitutional grounds, with no accompanying claims for relief under state law, may nevertheless be appropriate for abstention if the applicability of the statute to the challenging party is questionable. If the statute does not apply to the federal plaintiff as a matter of state law, that plaintiff cannot be injured by it and thus may lack standing to

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190 Commentators have suggested, however, that abstention is not proper for the parallel claim, at least if avoidance of duplication of effort is the goal. Field, supra note 184, at 1099 nn.108 & 111; *Note, Justice Frankfurter's Doctrine, supra* note 161, at 616-17. They reason that if such cases involve a state constitutional provision that is identical to a federal one, and is so interpreted, then the state decision is necessarily a decision on a federal issue. *Cf.* cases cited note 24 supra (state incorporation of federal law). *But cf.*, *e.g.*, Janokovich v. Indiana Toll Rd. Comm'n, 379 U.S. 487 (1955) (such provision is adequate and independent state ground).

191 *Note* 117 & accompanying text supra.

challenge its constitutionality. In the absence of standing the federal court
would be without power to proceed. Consequently, as with other
questions of subject matter jurisdiction, the federal court should consider
\textit{sua sponte} the effect of the predicate nonfederal ground even in the
absence of a claim for relief based thereon.

This situation should be contrasted with the assertion of appellate
jurisdiction by the Supreme Court over the decisions of state courts. If
the state court's determination is unambiguously based on federal
grounds, there can be no predicate nonfederal ground, though the state
court could have chosen nonfederal bases of decision. For example, the
Supreme Court is not without jurisdiction to review on constitutional
grounds a state criminal conviction because the defendant might have
claimed that the statute he was convicted of violating was, as a matter
of state law, inapplicable to him. That defense, while perhaps originally
available, is no longer cognizable. The state seems to have taken the posi-
tion that the statute did apply to the defendant's activities. By failing
to challenge that position, the defendant has conceded its validity.
Moreover, the state court, by entering a judgment of conviction, has
necessarily, though implicitly, so held. In the typical case involving the
invocation of original jurisdiction, if the applicability of the state statute
to the federal plaintiff is unclear, his failure to raise that ought not to
preclude the federal court from considering it \textit{sua sponte}, for the state
may not attempt to apply the challenged statute to the federal plaintiff.

In cases in which it \textit{is} clear that any predicate state law issue will be
resolved in a manner requiring adjudication of the federal issue, however,
abstention would be inappropriate.

Cases in which a potential state law ground which is not pleaded is
parallel rather than predicate to the alleged federal claim present greater
difficulty. Again, the typical case might involve a challenge to a state
statute on only federal constitutional grounds. The federal court may
determine that the validity of the statute on \textit{state} constitutional grounds

\footnotesize{\textsuperscript{193} E.g., Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379 (1884). See generally note 243 infra.}
\footnotesize{\textsuperscript{194} See notes 15-66 & accompanying text supra.}
\footnotesize{\textsuperscript{195} See notes 44-54 & accompanying text supra.}
\footnotesize{\textsuperscript{196} See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 474 (1975).}
\footnotesize{\textsuperscript{197} See, e.g., Younger v. Harris, 401 U.S. 37, 41-42 (1971); cf. International Longshoremen's Local 37 v. Boyd, 347 U.S. 222 (1954) (determining validity of legislation before it adversely affects individual is improper exercise of judicial function).}
\footnotesize{\textsuperscript{198} E.g., Wooley v. Maynard, 430 U.S. 705 (1977); Steffel v. Thompson, 415 U.S. 452 (1974). See also Younger v. Harris, 401 U.S. 37, 42 (1971) (dictum) (“If [plaintiffs] had alleged that they would be prosecuted for the conduct they planned to engage in, and if the District Court had found this allegation to be true . . . then a genuine controversy might be said to exist.”).}
\footnotesize{\textsuperscript{199} See American Trial Lawyers Ass'n v. New Jersey Supreme Court, 409 U.S. 467 (1973) (per curiam); Askew v. Hargrave, 401 U.S. 476 (1971) (per curiam) (another case pending in state court attacking same statute as violative of state constitution; district court asked to abstain).}
is questionable, despite the failure of the plaintiff so to allege. Whether the federal court should adjudicate the constitutional question in such a case depends upon whether the policy of avoiding constitutional adjudication outweighs the plaintiff's election of a federal rather than a state claim. The question is whether a plaintiff is entitled to waive all but his federal claims or whether all claims for relief under state law must be exhausted before a plaintiff will be permitted to resort to a federal forum for adjudication of the federal claim. The answer may depend upon the intimacy of the relationship between the federal claims and exercises of state sovereign power or concern for important state interests. If an immediate adjudication of a claimed federal right would interfere with the state's administration of its criminal laws, the integrity of its welfare system, a detailed administrative program, the regulation of scarce natural resources or a state tax system, federal reluctance to intervene might be expected. If, however, there will be significant injury to the alleged federal right in the absence of immediate federal intervention, the court may well overcome its reluctance. The calculus of interests is similar to that governing the abstention question generally.

In any event, the circumstances in which it is most clear that it is proper for the federal court to remit the case to state court are those cases in which one count of the plaintiff's complaint—that based on state law (for example, the inapplicability of the challenged statute)—denies the power of the federal court to adjudicate the case. Although the validity of pleading alternative, even inconsistent, grounds of relief is not here

200 See notes 51 & 117 supra.

201 See notes 51 & accompanying text supra.

202 See notes 142 & 173 & accompanying text supra.


208 See notes 142 & 173 supra.


challenged, it is submitted that a theory of relief which denies the basis of the court's power to proceed based on the face of the complaint justifies the court's refusal to adjudicate the case unless and until jurisdiction has been demonstrated. The rule has been that unless the basis of jurisdiction affirmatively appears on the face of the complaint a federal court is without power to proceed. It also has been held that the later emergence of a federal ground of decision will not cure the original defect. The next section is an examination of that rule and its implications for the theory of this article.

The Well-Pleaded Complaint Rule, Federal Defense Removal and the Potential Nonfederal Ground

For a party to invoke the original arising under jurisdiction of the federal courts, the federal matter upon which the jurisdiction is based must appear on the face of the plaintiff's well-pleaded complaint. It is obvious that if the complaint relies wholly on nonfederal matter, the case cannot be one arising under federal law. It is somewhat less obvious, but equally true, that if the complaint implicates federal matter unnecessary to plaintiff's claim, the federal matter is to be disregarded in determining the jurisdictional question. It is plaintiff's well-pleaded complaint, rather than the complaint actually filed, on which the determination of jurisdiction is to be made. Allegations that defendant will rely on federal matter or that plaintiff will rely on federal matter in reply to an anticipated defense are insufficient to confer jurisdiction. If reliance on federal matter is not necessary to entitle the pleader to relief, the case is not one arising under federal law.

212 See Dobbs, supra note 126, at 507-21.
214 E.g., id.
215 Id.; C. Wright, supra note 33, at § 18.
218 Compare Hopkins v. Walker, 244 U.S. 486 (1917) (jurisdiction to remove cloud on title because necessary to allege federal invalidity of defendant's claim), with Marshall v. Desert Properties Co., 103 F.2d 551 (9th Cir.), cert. denied, 308 U.S. 563 (1939) (no jurisdiction to quiet title because federal nature of adverse claim need not be pleaded). But see Texas & Pac. Ry. v. Cody, 166 U.S. 606 (1897) (defendant's right to removal on federal question not defeated by plaintiff's pleading errors).

The well-pleaded complaint rule has presented especially difficult problems in suits for declaratory judgments. E.g., Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950). The difficulty stems from the notion that the Declaratory Judgment Act, 28 U.S.C. § 2201 (1976), "is procedural only," Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937), and was not intended to enlarge the jurisdiction of the federal courts. Thus, if the declaratory
Although not the source of the rule, the case most frequently cited in support of it is Louisville & Nashville Railroad v. Mottley. The now familiar tale began in 1871 with the Mottleys' receipt of a free pass, renewable annually during their lives, from the Louisville & Nashville Railroad in settlement of a tort claim. In 1906 Congress enacted a statute that forebade free passes. On January 1, 1907, the railroad refused to renew the passes and the Mottleys brought suit in federal court. Their complaint alleged that the railroad had breached its agreement with them in reliance on the federal statute, that the statute was inapplicable and that, if the statute did apply, it unconstitutionally impaired the obligation of contract. The litigants raised no jurisdictional issues. The trial court found for the Mottleys and the railroad sought review in the Supreme Court.

The Court, raising the issue sua sponte, held federal jurisdiction lacking. Despite the presence in the case of two questions of federal law that had been fully litigated below, the case did not arise under that law because "[i]t is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States." "[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based

plaintiff could not have initiated an action absent the Declaratory Judgment Act—for example, where he seeks a declaration of the validity of a federal defense to an anticipated action—jurisdiction is problematic. The leading case on the question, Skelly Oil, does little to resolve the difficulties. In that case it is unclear whether the Court held that jurisdiction is to be determined on the basis of the well-pleaded complaint for declaratory relief or the well-pleaded hypothetical complaint for coercive relief, although most authorities have interpreted the case as requiring the latter. E.g., ALI STUDY, supra note 75, at 170; 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2767 (1973); Cohen, supra note 76, at 894 n.26; Currie, supra note 76, at 269-70; Trautman, Federal Right Jurisdiction and the Declaratory Remedy, 7 VAND. L. REV. 445, 465-68 (1954). But see 6A J. MOORE FEDERAL PRACTICE § 57.23 (2d ed. 1980). Language in Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 248 (1952), supports this construction. To make matters more obscure, it is uncertain in Skelly Oil that either complaint, properly analyzed, relied or would rely on federal matter. See Cohen, supra note 76, at 909-10; Mishkin, supra note 5, at 183-84; Trautman, supra, at 466-67.

The question is one of the proper interpretation of the Declaratory Judgment Act: there is no constitutional difficulty with predicating jurisdiction on the allegations of the well-pleaded complaint for declaratory relief for the same reasons that there is no constitutional infirmity in permitting a defendant to remove a case from state to federal court based upon a defense which relies upon federal matter, see notes 232-36 & accompanying text infra. Moreover, in terms of public policy, all of the reasons supporting federal defense removal are applicable here. See notes 237-39 & accompanying text infra. A thorough discussion of the problem is beyond the scope of this article.

219 See note 226 & accompanying text infra.
220 219 U.S. 149 (1908).
221 Ch. 3591, 34 Stat. 584 (1906) (codified at 49 U.S.C. § 1(7) (1976)).
223 Id. at 152.
upon those laws or that Constitution." Perhaps because of the subsequent history of the litigation between the Mottleys and the railroad, the case appears to present the well-pleaded complaint rule as an inefficient and capricious limitation on the exercise of federal judicial power. The Court offered no analysis of or justification for the rule; it simply announced it as "the settled interpretation" and applied it, citing a dozen and a half cases in support.

15\[Id.\]

Part of the irony of the case is that the Supreme Court ultimately decided the federal issues on the merits, Louisville & N.R.R. v. Mottley, 219 U.S. 467 (1911). After the Court's jurisdictional dismissal, plaintiffs brought their suit in state court. The railroad made the expected federal defense and the Mottleys the expected federal reply. The state courts rendered judgment for the Mottleys, 133 Ky. 652, 118 S.W. 982 (1909), as had the original federal trial court, 150 F. 406 (C.C.W.D. Ky. 1907). The Supreme Court reversed, deciding the federal issues in favor of the railroad.

211 U.S. at 154. The Court relied principally on Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894), a case more significant for its application of the rule to the problem of removal jurisdiction, see notes 232-36 infra.

The rule's source is to be found in the opinion of the first Justice Harlan in Metcalf v. Watertown, 128 U.S. 586 (1888). Plaintiff had brought suit in a Wisconsin federal court as assignee of a federal judgment. The defense was the Wisconsin statute of limitations, Wis. Rev. Stat., ch. 138, §§ 1, 14, 15, 16 (1858); Wis. Rev. Stat., ch. 177, §§ 4206, 4219, 4220, 4221 (1878), which provided a 10-year period within which an action to enforce a judgment of any state or federal court was to be brought and a 20-year period for such suits if founded on a judgment rendered by a Wisconsin state court of record. Plaintiff contended that it was beyond the constitutional power of the state to provide a shorter limitation period for federal judgments than for the judgments of its own courts. The Court held the case not within the arising under jurisdiction. That the judgment sought to be enforced had been rendered by a federal court was found insufficient to make the suit one arising under federal law. Cf. Fairfax Countywide Citizens Ass'n v. County of Fairfax, 571 F.2d 1299 (4th Cir. 1978) (no jurisdiction to enforce agreement settling federal case). But cf. Aro Corp. v. Allied Witan Co., 531 F.2d 1368 (6th Cir.) (jurisdiction to enforce agreement settling federal case), cert. denied, 429 U.S. 862 (1976). The judgment was characterized as "an ordinary right of property" the source of which was irrelevant to plaintiff's claim. Cf. 28 U.S.C. § 1349 (1976) (federal incorporation of party insufficient to sustain jurisdiction). But cf. Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738 (1824) (federal incorporation sufficient under Constitution to sustain jurisdiction of case in which corporation is party); notes 101-09 & accompanying text supra. Moreover, Justice Harlan distinguished the cases that had upheld jurisdiction on the basis of federal matter raised for the first time by way of defense on the ground that they were all cases in which jurisdiction was sought through removal. 128 U.S. at 589.

Eight of the other cases cited in Mottley dealt with original jurisdiction, either directly or in the context of Supreme Court review of the decisions of the courts of appeals, and eight dealt with removal. Of particular interest, in light of the federal interests clearly present, are two removal cases, Chappell v. Waterworth, 155 U.S. 102 (1894), and Walker v. Collins, 167 U.S. 37 (1897). They are among the more extreme examples of the operation of the well-pleaded complaint rule to preclude federal jurisdiction of cases that clearly belong in federal courts.

Chappell was an ejectment action brought in Maryland state court for possession of land located on the Patapsco River. The defendant, Waterworth, was in possession of a portion of the land claimed by plaintiff as the keeper of a lighthouse built by the federal government, and his defense to the action was that the land was owned by the United States. The Court held removal improper, relying on Union & Planters' Bank, because the complaint was framed as an ordinary ejectment action between individuals, showing neither a right claimed by either party under federal law nor a claim by the United States or any
Analytically, a rule denying federal judicial power unless the need for its exercise is demonstrable at the time jurisdiction is sought to be invoked follows from the purposes underlying the limitations on federal jurisdiction. In cases in which the plaintiff seeks to invoke federal jurisdiction to litigate a claim for relief founded entirely on nonfederal bases, the prediction of the necessity for relying on federal matter can be made with certainty as of the time the jurisdictional determination must be made; no federal matter can form a ground for decision. When a plaintiff merely anticipates a federal defense, there is no federal matter involved in the case at the time the jurisdiction is sought to be invoked. If the defendant does not answer and a default judgment is rendered, reversal would be required because the record shows a lack of jurisdiction to render any judgment. Until it can be demonstrated that federal matter must be relied upon in disposing of the case, the court lacks power even to compel an answer.

Thus, it would seem that in Mottley the plaintiffs' lack of reliance on any federal matter should have resulted in the jurisdictional dismissal of their complaint, for under any view of the case the court lacked power to proceed on the basis of that complaint. It has been suggested, however, that by the time the jurisdictional issue was raised and decided, it was clear that the critical questions in the case were entirely matters of federal concern, and that the original jurisdictional defect should have been held cured by the subsequent reliance of both parties on federal matter. This position appeals to efficiency, but is difficult to reconcile with judicial pronouncements on the question. Nevertheless, the obvious benefits of such a result make it worth achieving in the absence of some constitutional bar. There is scholarly support for the proposition that no such bar exists; analytical support for the validity of that proposition is overwhelming.

third party to rights in the land. 155 U.S. at 107.

Walker was an action for unlawful seizure of goods. Defendants were the United States Marshal and deputy marshals for the District of Kansas; their defense was that the seizure was made on an attachment issued by the Circuit Court for the District of Kansas. Relying on Chappell, the Court held removal improper, 167 U.S. at 59, even though after the state court's initial denial of defendants' removal petition, the plaintiff had joined in the request for removal. The case seems more compelling than Chappell, in which, if the identity of the landowner is ignored, only issues of state real property law were involved.

277 See note 243 & accompanying text infra.


279 Chadbourn & Levine, supra note 76, at 665; see Fraser, Some Problems in Federal Question Jurisdiction, 49 Mich. L. Rev. 73, 76-84 (1950). But see C. Wright, supra note 33, § 18, at 69; Bergman, Reappraisal of Federal Question Jurisdiction, 46 Mich. L. Rev. 17, 43-44 (1947); Cohen, supra note 76, at 894; Comment, Proposed Revision of Federal Question Jurisdiction, 40 Ill. L. Rev. 387, 399 (1945).

280 See, e.g., supra note 75, at 190; Mishkin, supra note 5, at 164; see C. Wright, supra note 33, § 18, at 69.

281 See, e.g., 1A J. Moore, Federal Practice ¶ 160, at 184 n.12 (2d ed. 1981); Chadbourn & Levine, supra note 76, at 665; Fraser, supra note 229, at 76-81.
The starting point of analysis is the constitutional propriety of federal defense removal. The Court in *Tennessee v. Union & Planters’ Bank* held, over Justice Harlan’s dissent, that a defendant was precluded by statute from removing a case from state to federal court on the basis of federal matter properly raised for the first time as a defense to a plaintiff’s state law claim for relief. There was no suggestion that the decision rested on the Constitution. Prior to the passage of the statute, the effect of which

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223 152 U.S. 454 (1894).
224 Act of March 3, 1887, ch. 373, 24 Stat. 552.
225 Even with respect to the statutory question, the majority’s position is less than compelling. Justice Harlan, the author of the opinion in *Metcalf v. Watertown*, 128 U.S. 586 (1888), which formed the basis of the decision in *Union & Planters’ Bank*, agreed that federal matter raised in defense could not support original jurisdiction, but dissented from that portion of the decision that construed the removal statute to preclude removal jurisdiction based on a federal defense. Prior to the decision in *Union & Planters’ Bank*, Congress had amended the jurisdictional statute, Act of March 3, 1887, ch. 373, 24 Stat. 552. Under the amendment the jurisdictional amount necessary to invoke the original jurisdiction of the federal courts was raised to $2,000. The section relevant to removal jurisdiction provided that any suit arising under federal law of which there was original jurisdiction was removable. Because plaintiffs were not entitled to invoke original federal jurisdiction on the basis of an anticipated federal defense, the majority concluded that federal matter raised in defense could not support original arising under jurisdiction and hence could not support removal jurisdiction. Justice Harlan (with whom Justice Field joined) construed the removal statute to prohibit federal defense removal only in cases that did not meet the new jurisdictional amount requirement; that is, he read the phrase permitting removal of cases “arising under federal law of which the . . . Courts of the United States are given original jurisdiction” to permit removal of cases arising under federal law at the time removal was sought because of federal matter raised by the removing defendant, in which the value of the matter in dispute was sufficient to confer original jurisdiction.

The legislative history of the statute is sketchy, and it is unclear whether Congress intended to change existing law on federal defense removal, except by restricting removal to defendants. The statute was passed by the 49th Congress on March 3, 1887, the last day of the final legislative session, and amended to correct punctuation errors in Act of August 13, 1888, ch. 866, 25 Stat. 433. The legislation was introduced in the House by Representative David B. Culberson of Texas, who had introduced similar legislation in the three previous Congresses. The bill introduced provided that suits arising under federal law of which the circuit courts had original jurisdiction could be removed by a defendant from state court whenever it appeared from his petition that “his . . . defense depends in whole or in part upon a proper construction of the Constitution of the United States.” Of this provision Representative Culberson said,

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

18 CONG. REC. 614 (1887). Although the language of the statute refers to a suit arising under federal law, Representative Culberson’s remarks would indicate that removal was to be permitted only when plaintiff’s claim (if cause of action is a term of art and not merely a synonym for case) involved a federal question and the defendant’s defense did as well. Without further clarification, this language would seem to contemplate removal when the defense depends on construction of the federal law on which plaintiff’s claim is based or when the defense depends on construction of a federal law other than the one on which plaintiff’s claim is based.
was at issue in the case, federal defense removal was granted routinely.

Support for the position that the bill was not intended to do away with federal defense removal can be derived from the fact that neither the House Judiciary Committee nor Representative Culberson, in summarizing the major changes in existing law effected by the bill, noted a change in that respect. H.R. Rep. No. 1076, 49th Cong., 1st Sess. (1886).

Representative Culberson's remarks in connection with § 10 of the bill, which repealed § 640 of the Revised Statutes of the United States, ch. 7, § 640, 18 Stat. 114 (1874), also support this view. Section 640 permitted a federally chartered corporation to remove a case from state court upon its suggestion that its defense arose under federal law. The problem sought to be corrected was that the incorporation statute had been interpreted to provide a sufficient basis for removal, although all issues to be decided in the case were ones of state law. The repeal did not, according to Representative Culberson, foreclose a federal corporation's removal on the basis of any federal defense, for it provided, "whenever a corporation, or any one else, is sued in a State court and the defense of such corporation or individual depends upon a right construction of the laws of Congress, or of the Constitution of the United States, then such cause may be removed." 18 Cong. Rec. 614 (1887).

In House proceedings on two prior versions of the bill, in both of which the pertinent language was identical to the one finally passed in 1887, the same point was made as to repeal of the federal corporation removal provision, see 10 Cong. Rec. 723 (1880) (remarks of Rep. Willits); id. at 724 (remarks of Rep. Culberson); id. at 814 (remarks of Rep. New); 14 id. at 1248 (1883) (remarks of Rep. Culberson); but the same "cause of action" language was also used in connection with one version, id. at 1247-48 (remarks of Rep. Culberson).

Proceedings in the Senate shed no additional light on interpretation of the 1887 act. The Senate Judiciary Committee made several changes in the House version, see 18 Cong. Rec. 2168 (1887), all of which were passed without discussion. Id. at 2542. The committee made no written report. It would, for instance, be very helpful to know why the Senate deleted "whenever it is made to appear from the application of such defendant or defendants that his or their defense depends in whole or in part upon a correct construction of [federal law]" from § 2. Id. at 2168. The deletion of the language precludes the interpretation, based on the language alone, that the defendant could remove when plaintiff's claim was federal and his defense was based on another federal law. It is the deleted language that supports the idea that removal could be based on a federal defense, and it is that language to which Representative Culberson was apparently referring in his statements that support federal defense removal based on defendant's allegations. Moreover, the statute then in force, which had been consistently interpreted as permitting federal defense removal, is consistent with the deletion of this language. Judiciary Act of 1875, ch. 137, 18 Stat. 470.

It seems that the phrase "of which the circuit courts are given original jurisdiction" in the statute was intended to do no more than refer back to the jurisdictional amount in the first section, but if the phrase "suits . . . arising under" meant "cause of action" in the sense of plaintiff's claim, the majority's interpretation of the statute as doing away with defense removal is sound, particularly absent the language deleted by the Senate. But see Railroad Co. v. Mississippi, 102 U.S. 135, 142-43 (1880) (Miller, J., dissenting) (interpreting the word "suit" in the prior statute to preclude federal defense removal). It is also possible, however, particularly given Representative Culberson's other remarks, that he was using the phrase "cause of action" to mean case or suit, rather than in the technical sense of elements of plaintiff's claim. The Senate may have deleted the language in question either because it thought it unnecessary or to avoid imposing a requirement that the defendant do more than allege the federal defense in his petition for removal.

In any event, whatever may be said of who came closer to divining the "true" meaning of the amendments, the statute read as a whole and in light of its legislative history will bear the meaning imputed to it by Justice Harlan. As a matter of policy, that meaning is far more agreeable than one that would deny a litigant access to a federal forum to vindicate a federal right. ALI Study, supra note 75, at 188-89; Currie, supra note 76, at 270; Fraser, supra note 229, at 78. Moreover, it may be that prohibiting removal based upon a federal defense does nothing more than stimulate a race to the federal courthouse—at least since enactment of the Declaratory Judgment Act, 28 U.S.C. § 2201 (Supp. III 1979). If the party who would be the defendant in a coercive suit can obtain federal jurisdiction
In Metcalf v. Watertown,\textsuperscript{223} which established the well-pleaded complaint rule, Justice Harlan, writing for the Court, distinguished the cases cited in support of upholding jurisdiction on the basis of a federal defense on the ground that those cases were all instances of removal in which the defendant sought to invoke the jurisdiction.\textsuperscript{224} The constitutional vitality of those cases was not questioned. Thus, the case law supports the constitutionality of federal defense removal.

Moreover, reason and policy strongly support permitting a defendant to invoke federal jurisdiction to litigate a defense that rests on federal law. The existing law allows a plaintiff to invoke jurisdiction based upon his own federal claim; it does not permit the plaintiff to invoke jurisdiction based upon the adverse party’s anticipated defense. The defendant’s right to invoke jurisdiction through removal stands common sense on its head: A defendant may remove a case from state to federal court only if the case originally was cognizable there. The effect is to permit a defendant to invoke the jurisdiction based upon the federal nature of plaintiff’s claim, while denying him the right to invoke the jurisdiction on the basis of the federal nature of his own defense to that claim. Surely it makes far greater sense to allow the party seeking the federal adjudication to invoke the power of the federal courts based upon his reliance on federal matter.\textsuperscript{225} Many commentators have supported such a position\textsuperscript{226} and the

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\textsuperscript{223} 128 U.S. 586 (1888).
\textsuperscript{224} Id. at 589.
\textsuperscript{225} This position also resolves the difficulty, posed by enactment of the Declaratory Judgment Act, 28 U.S.C. § 2201 (Supp. III 1979), that the Court believed was presented by Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950), see note 218 supra. One reading of the case would require that federal jurisdiction over a suit for declaratory relief be determined on the basis of the hypothetical complaint for coercive relief in order to avoid expanding federal jurisdiction. If, however, either party to the litigation may invoke the federal judicial power based upon his own reliance on federal matter, a court need not seek to determine whether any of the elements of a hypothetical complaint for coercive relief rests on federal matter. If the hypothetical coercive defendant may invoke the jurisdiction on the basis of a federal defense, it would be immaterial that he does so in the first instance as a declaratory plaintiff. A court would need to look only to the declaratory complaint actually filed in making the jurisdictional determination. The potential “race to the courthouse” that might otherwise result from determining jurisdiction on the basis of the allegations of the actual declaratory complaint without providing for federal defense removal would be eliminated. See notes 218 & 234 supra.
\textsuperscript{226} Chadbourn & Levine, supra note 76, at 673; Fraser, supra note 229, at 82-84; Wechsler, \textit{Federal Jurisdiction and the Revision of the Judicial Code}, 13 \textit{Law & Contemp. Probs.} 216, 233-34 (1948); see ALI STU\textit{dy}, supra note 75, at 191-92; 1A J. Moore, \textit{Federal Practice}, supra note 75, ¶ .160, at 184 n.12; Comment, supra note 229, at 399.
American Law Institute agrees, at least in part.\textsuperscript{239} Once the defendant's right to invoke the federal judicial power on the basis of the defensive use of federal matter is established, it is easy to conclude that a dismissal for lack of subject matter jurisdiction on facts such as those in \textit{Mottley} is inappropriate. The jurisdictional dismissal in \textit{Mottley} occurred through the \textit{sua sponte} action of an appellate court after the railroad's federal defense had been raised and adjudicated in the lower federal courts. It appears that both the defendant and the plaintiff desired a federal adjudication; at least one may infer from defendant's failure to object to the court's assertion of jurisdiction that it was not dissatisfied with it.

The parties to a case cannot waive defects in subject matter jurisdiction.\textsuperscript{240} A court of original jurisdiction should retain the power to dismiss a case on its own motion where the well-pleaded complaint does not reveal that the case arises under federal law. Of course, such a case should be dismissed on defendant's motion. The power should not survive a defendant's election of the federal forum based upon a federal defense. That is, in cases in which the court has not ordered a jurisdictional dismissal and the defendant answers raising a federal defense and electing the federal forum, the original jurisdictional defect should be held cured. To do otherwise (again, assuming the propriety of federal defense

\textsuperscript{239} \textsuperscript{240} ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS §§ 1311, 1312 (Tent. Draft No. 6, 1968). See generally Currie, supra note 76, at 271-74.


Nor is a party, by asserting jurisdiction, estopped from later denying it. American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951); Capron v. Van Noorden, 6 U.S. (2 Cranch) 126 (1804). But see Baggs v. Martin, 179 U.S. 206 (1900); DiFrischia v. N.Y. Cent. R.R., 279 F.2d 141 (3d Cir. 1960).

On the other hand, a party may admit a fact upon the existence of which subject matter jurisdiction depends. Railway Co. v. Ramsey, 89 U.S. (22 Wall.) 322, 327 (1874); The Confiscation Cases, 87 U.S. (20 Wall.) 92, 108 (1873) (alternative holding); cf. California v. LaRue, 409 U.S. 109, 113 n.3 (1972) (pretrial stipulation by declaratory plaintiffs that they had offered performances proscribed by challenged liquor board rules and by board that it would take disciplinary action against violators; later stipulation of intent to enforce sufficient for present and concrete controversy within meaning of statute and Constitution).

Two bases underlie the notion that parties cannot confer subject matter jurisdiction by consent. The first, applicable to all courts, is historical fetishism, see Dobbs, The Decline of Jurisdiction by Consent, 40 N.C.L. Rev. 49 (1961). The second, limited to the federal courts, is based upon the relationship of the states to the national union, see note 243 infra.
removal) would lead to a bizarre scenario: first, plaintiff files a complaint in federal court raising no federal matter but anticipating a federal defense; second, defendant answers, raises the anticipated defense, does not move to dismiss but elects to proceed in the federal forum; third, later in the litigation—perhaps as late as appellate review after full initial adjudication—the case is dismissed because plaintiff's complaint does not rest on federal matter; fourth, plaintiff refiles his complaint in state court; fifth, defendant answers making the same federal defense and removes the case to federal court which now has jurisdiction. The federal court must relitigate the matter since res judicata is inapplicable to prior proceedings over which the original tribunal lacked jurisdiction.\footnote{Aspden v. Nixon, 45 U.S. (4 How.) 467 (1846) (alternative holding); see Montgomery v. Samory, 99 U.S. 482, 488 (1878) (applying Louisiana law); Hopkins v. Lee, 19 U.S. (6 Wheat.) 105, 113-14 (1821) (general rule stated; court rendering prior adjudication found to have had jurisdiction).} Such a course is manifest nonsense.\footnote{A similar anomaly exists under present law. In cases exclusively within the federal jurisdiction but erroneously brought by a plaintiff in state court, a defendant's petition for removal to federal court will be denied. Though the case is exclusively within federal competence, the federal court is said to have no jurisdiction. The rationale is that removal jurisdiction is derivative; if the state court lacked jurisdiction, the federal court to which removal is sought cannot obtain jurisdiction. This is so even if the reason the state court lacked power is that only the federal court possessed such power. See Minnesota v. United States, 305 U.S. 382, 389 (1939); General Inv. Co. v. Lake Shore & M.S. Ry., 260 U.S. 261, 288 (1922); Lambert Run Coal Co. v. Baltimore & O.R.R., 258 U.S. 377, 382 (1922).}

The federal court has constitutional power to adjudicate the federal defense. The plaintiff simply does not have the right to compel the defendant to submit to the exercise of that power. Consequently, the purpose of treating subject matter jurisdiction as "nonwaivable" is not applicable.\footnote{The federal courts are courts of limited jurisdiction for the same reason that congressional power is limited: to protect the states from national incursion on their sovereignty. See, e.g., Scott v. Sandford, 60 U.S. (19 How.) 393, 401 (1856); id. at 466 (Curtis, J., dissenting); The Federalist No. 82 (A. Hamilton); Note, supra note 113, at 654; cf. Dobbs, supra note 125, at 529 (insuring for federal courts to try cases belonging to state courts). Because the interest of state sovereignty in a federated union is the object of the protection afforded by jurisdictional limitations, cf. Ohio Bureau of Emp. Serv. v. Hodory, 431 U.S. 471, 479-80 (1977) (state's legitimate activities may not be unduly interfered with), it would be irrational to permit private litigants to thwart those limitations by agreement. In cases in which the consenting party is not the beneficiary of the protection he or she is attempting to waive, waiver is not permitted. Cf. Sherrr v. Sherrr, 334 U.S. 343, 356, 358 (1948) (Frankfurter, J., dissenting) (parties should not be permitted to thwart state's interest in marriage relationships by consensual divorce in different jurisdiction).}

and should be similarly treated.\textsuperscript{246} If the party with the right to call upon the federal judicial machinery to resolve a dispute within its competence desires or is satisfied with a federal forum, the adverse party's making the initial demand ought not to preclude the assertion of jurisdiction.

Thus far the analysis has proceeded from removal jurisdiction on the basis of a federal defense to invocation of the jurisdiction on the basis of that defense under circumstances in which the defendant could not be compelled to litigate in a federal forum. It is a short step from that notion to one precluding an appellate court from raising the issue of jurisdiction in cases like \textit{Mottley}. Given the recognition that a defendant relying on federal law may choose either a state or federal forum, one need only draw the implication from silence to acquiescence.\textsuperscript{247} That implication is easier to draw here than in most instances in which a party is bound to a particular decision by silence. Many, if not most, litigants presented with the choice of a federal or state forum choose the former.\textsuperscript{248} This is even more likely to be true for litigants relying on federal law; the federal courts presumably would be more sympathetic to such claims or defenses.\textsuperscript{249} The policy against relitigation and favoring conservation of scarce judicial resources applies here. Indeed, it may apply with even greater force since relitigation may take place in the very same forum if the validity of federal defense removal is recognized.\textsuperscript{250}

If federal matter relied upon by a litigant does not depend upon the establishment of some predicate nonfederal matter, the constitutional demand that the case arise under federal law is satisfied. When a defendant relies on federal law to resist on the merits a claim under state law, federal matter is introduced that is not predicated on the establishment of nonfederal bases. The pleadings of the parties frame the issues on which the trial will proceed; this is the reason for the well-pleaded complaint rule. Disregarding dilatory pleas,\textsuperscript{251} a defendant's plea to the merits may

\textsuperscript{246} See note 46 & accompanying text supra.
\textsuperscript{247} See notes 46, 50 & 244-45 & accompanying text supra.
\textsuperscript{250} See text accompanying note 241 supra. What is suggested here is not the complete abrogation of the well-pleaded complaint rule. Such a suggestion would raise profound constitutional difficulties for reasons advanced earlier, notes 228 & 243 & accompanying text supra. Permitting a defendant to invoke federal jurisdiction by removal presents no such constitutional difficulties; otherwise the Supreme Court might be incapable of reviewing the decisions of state courts on questions of federal law that had not appeared at the outset of the case—in the well-pleaded complaint; see notes 67-139 & accompanying text supra.
\textsuperscript{251} Although the Federal Rules of Civil Procedure have long departed from the common law system of pleading, some matters raisable under rules 9 and 12(b), see Fed. R. Civ. P. 9(a), 12(b)(1), (2) & (7), for example, would have been dilatory pleas. To the extent that rule
take any of three forms:252 denial,253 demurrer,254 or confession and avoidance.255 Of these three pleas to the merits only one—confession and avoidance—can introduce federal matter as a defense to a complaint wholly based on state law. Neither the denial nor the demurrer raises any new matter. If the complaint rests on state law, the denial challenges merely the existence of the facts necessary to support the claim; the demurrer challenges the legal sufficiency of the allegations of the complaint as a matter of state law. An affirmative defense, on the other hand, does introduce new matter into the case. If the defense is federal in nature, the new matter introduced is federal and is sufficient, as a constitutional matter, to sustain removal if not predicated on nonfederal grounds.

Under such circumstances there is no nonfederal predicate which might bar the invocation of jurisdiction. When the sole defense is a confession and avoidance, the introduction of the federal avoidance does not depend on the plaintiff's establishment of his prima facie case since that is admitted by that form of pleading. It is likely that in many cases a defendant will not rely solely on a confession and avoidance defense. Often the defendant may combine the affirmative federal defense with a denial of allegations of the complaint or with a demurrer to those allegations or both.256 The appropriate resolution of the jurisdictional issue in those cases should parallel that accorded the complaint that alleges both federal and nonfederal grounds for relief;257 in effect the defendant has filed a multicount answer alleging parallel bases of defense. The defendant is entitled to have one of those counts litigated in the federal courts; others are beyond this entitlement.

Here, as with multicount complaints alleging parallel grounds for relief, pendent jurisdiction supplies the analysis.258 Given the defendant's right to invoke federal judicial power to litigate the affirmative federal defense, the federal court must either split the defenses—retaining jurisdiction over the confession and avoidance while remanding the rest of the case

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12(b) permits, although it does not require, id. 12(b); but cf. id. 12(g) (if motion made certain defenses lost if not included), raising certain defenses by motion before answer, it bears some remote resemblance to a dilatory plea-plea in bar system.

252 S. COHN, supra note 211, at 47; see F. JAMES & G. HAZARD, CIVIL PROCEDURE 127-29 (1977). Despite the abrogation of common law pleading rules, the common law terminology is used here for the sake of clarity and simplicity. The four common law pleas that may be made by a defendant exhaust the field. Even under modern liberal pleading rules a defendant's answer can be characterized as falling into one or more of these.

253 Cf. FED. R. CIV. P. 8(b) (federal equivalent of denial).
254 Cf. id. 12(b)(6) (federal equivalent of demurrer).
255 Cf. id. 8(c) (affirmative defenses).
256 The federal rules, for example, require that a defendant do so, id. 12(b), except to the extent that a 12(b)(6) defense can be equated with a demurrer and can be raised by preliminary motion, id.
257 See notes 112-17 & accompanying text supra.
258 See notes 113-15 supra.
to state court—or litigate the entire case in federal court. In cases in which the principles of pendent jurisdiction support litigating the entire case before one court, the nonfederal elements may be litigated in federal court; one would expect that in the typical case defenses would satisfy the test for exercising pendent jurisdiction.

Finally, the affirmative defense itself may comprise federal and nonfederal elements. Invocation of jurisdiction should be permitted when a plaintiff in similar circumstances would be permitted to invoke it. Jurisdiction should be upheld when the federal component of the defense is predicate to the nonfederal matter. Jurisdiction is more complex when nonfederal matter is predicate to federal. As the earlier discussion indicated, the existence of jurisdiction is directly related to the probability that the nonfederal matter will be determined in a way that requires the court to reach the federal matter. As with the complaint containing a federal claim predicated on nonfederal matter the validity of which is uncertain, the court (properly or improperly) may proceed to decision of the federal matter without an explicit determination of the preliminary nonfederal matter; it may determine that the defendant seeking removal has failed to establish as a matter of jurisdictional fact the nonfederal elements on which the federal defense is predicated and deny removal; or it may remand pending a binding determination by the state court of the nonfederal matter. In short, the federal tribunal may treat the petition to remove based on a federal defense in the same way as it would treat a plaintiff's complaint under similar circumstances.

CONCLUSION

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.

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259 See note 116 & accompanying text supra.
260 See notes 112-17 supra.
261 See notes 100-39 & accompanying text supra.
263 See text accompanying note 188 supra.
264 See notes 133-38 & accompanying text supra.
265 See note 128 & accompanying text supra.
266 See notes 120-32 & accompanying text supra.
267 See notes 126-39 & accompanying text supra.
268 See H. Hazlitt, Thinking as a Science 26 (1916).
269 An example beyond those in the text is that a rule prohibiting the introduction of hearsay evidence, e.g., Fed. R. Evid. 802 (1975), rests upon an elaborate body of antecedent principles including the principle that evidence is required to decide certain questions. Failure to recognize the concept "evidence" would render the concept of "hearsay" meaningless.
This hierarchical structure is an attribute of legal principles and particular legal controversies as well. A court's decision on the merits of a case requires an antecedent affirmation, explicit or implicit, of its power to decide. The jurisdiction of a court is an element anterior to its consideration, much less resolution, of a case before it.\textsuperscript{270}

Determining whether a particular case arises under federal law requires analyzing the hierarchical structure of the elements of the case. If the federal element is sufficiently anterior to the other elements in the case so that decision of the merits requires reliance upon it, federal jurisdiction exists. Failure to recognize the principle of analytic priorities and to apply the structural analysis to which it leads to cases of questionable federal jurisdiction has created obscurity and inconsistency in an area of the law which should be characterized by clarity and simplicity.

\textsuperscript{270} E.g., Ex parte McCardle, 74 U.S. (7 Wall.) 506, 512 (1869); see Whedon v. Wheeler, 373 U.S. 647 (1963). But see Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). In addition to examples in the text, an instance of the hierarchy of claims is that a claim under the fourteenth amendment requires a finding that the challenged action is attributable to the state prior to consideration of the legitimacy of that action. The Civil Rights Cases, 109 U.S. 3 (1883); see generally J. Nowak, R. Rotunda & J. Young, CONSTITUTIONAL LAW 451-514 (1978). The question of legitimacy must be predicated on a finding of state action.