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State Declaratory Judgment Actions "Arising Under" Federal Law: Franchise Tax Board v. Construction Laborers Vacation Trust

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CASE NOTES

State Declaratory Judgment Actions "Arising Under" Federal Law: *Franchise Tax Board v. Construction Laborers Vacation Trust*

In *Franchise Tax Board v. Construction Laborers Vacation Trust*,[1] the United States Supreme Court determined that a state declaratory judgment action commenced in California state court and removed to federal district court did not "aris[e] under the Constitution, laws, or treaties of the United States."[2] As a result, the Court denied federal question jurisdiction even though the main issue in the case was whether the federal Employment Retirement Income Security Act (ERISA)[3] preempted state authority to levy on the funds in an ERISA trust. The result in *Franchise Tax Board* highlights the inadequacy of the rules used to determine whether declaratory judgment actions are within the federal question jurisdiction of federal district courts.

I. *Franchise Tax Board*

Four associations of employers in Southern California established the Construction Laborers Vacation Trust (CLVT) as part of an employee welfare benefit plan governed by ERISA.[4] The Franchise Tax Board (Board) is a state agency charged with enforcing California's personal income tax laws. When three of CLVT's beneficiaries allegedly became delinquent in the payment of their personal state income tax, the Board sought to levy, pursuant to California law,[5] on the trust funds held for the

1. 103 S. Ct. 2841 (1983).

2. 28 U.S.C. § 1331 (Supp. V 1981). The section provides in full: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

3. 29 U.S.C. §§ 1001-1381 (1982).

4. *Franchise Tax Bd.*, 103 S. Ct. at 2843-44.

5. CAL. REV. & TAX. CODE § 18817 (Deering Supp. 1984).

taxpayers by CLVT. The trustees refused to comply with the levy, claiming that ERISA preempted the Board's authority to levy on the trust funds. In June 1980, the Board filed suit in California state court against CLVT and its trustees. The Board brought two causes of action seeking two remedies: (1) damages under California statute[6] for the trustees' failure to honor the levy, and (2) a declaration under the California Declaratory Judgment Act[7] that the trustees were obligated to honor all future levies by the Board. The issue in the declaratory action was whether ERISA preempted the California statute[8] authorizing the Board to levy on the trust funds.

CLVT removed the case to the United States District Court for the Central District of California. The Board moved to remand to state court, claiming that the district court lacked subject matter jurisdiction. The district court denied the motion but ruled in the Board's favor on the merits of the declaratory judgment action. On appeal, the Ninth Circuit reversed on the merits.[9] On a petition for rehearing, the Board renewed its argument that the district court lacked jurisdiction over the case, but the Ninth Circuit denied rehearing. The Board appealed the Ninth Circuit's reversal to the United States Supreme Court.

CLVT argued before the Supreme Court that the action arose under federal law because a federal claim formed an essential element of the Board's cause of action for declaratory relief. The federal claim asserted was that ERISA did not preempt the Board's statutory authority.[10] The Board countered with the rule from *Skelly Oil Co. v. Phillips Petroleum Co.*,[11] which is that "if, but for the availability of the declaratory judgment pro-

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6. CAL. REV. & TAX. CODE § 18818 (Deering 1975).

7. CAL. CIV. PROC. CODE § 1060 (Deering 1984).

8. CAL. REV. & TAX. CODE § 18817.

9. Franchise Tax Bd. v. Const. Laborers Vacation Trust, 679 F.2d 1307 (9th Cir. 1982).

10. *Franchise Tax Bd.*, 103 S. Ct. at 2848-49. CLVT also argued, based on the doctrine of Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 376 F.2d 337 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968), that the Board's claims were in essence federal claims because ERISA preempted state causes of action. The Court pointed out, without ruling on the issue of preemption of state authority to levy on the trust, that ERISA did not entirely preempt state causes of action as the Labor Management Relations Act, 29 U.S.C. § 301 (Supp. V 1981), had done in *Avco*. The Court held that the Board's claims were not federal claims, and, consequently, it rejected CLVT's second proposed basis for jurisdiction. *Franchise Tax Bd.*, 103 S. Ct. at 2853-55. This note discusses only the Court's treatment of CLVT's first argument for the existence of federal question jurisdiction.

11. 339 U.S. 667 (1950).

cedure, the federal claim would arise only as a defense to a state-created action, jurisdiction is lacking."[12]

In *Franchise Tax Board* the Court did not reach the merits of the preemption controversy. Instead, the Court extended the *Skelly Oil* rule, previously applied only to actions brought under the federal Declaratory Judgment Act,[13] to state declaratory judgment actions.[14] The Court noted that had the suit been brought as a coercive action,[15] that is, had the declaratory judgment procedure been unavailable, the federal district courts would have had original jurisdiction.[16] Nevertheless, the Court determined that the Board's causes of action did not arise under federal law. Consequently, the Court held that, absent diversity of citizenship, the suit could not be removed to federal district court. The Court vacated the Ninth Circuit's judgment and instructed that the case be remanded to California state court.

Franchise Tax Board marks a change in the application of the *Skelly Oil* rule. This note argues that: (1) the Supreme Court rejected the outcome compelled by the traditional interpretation of *Skelly Oil,* and (2) the reasons given by the Court for its holding do not adequately support its decision. Furthermore, the Court failed to advance any principles consistent with its decision that are useful for future interpretation of the "arising under" language of section 1331 of the Judiciary Act.

II. BACKGROUND

Although the exact limits of the "arising under" jurisdiction of federal courts have been the subject of considerable discus-

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12. 10A C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2767 at 744-45 (2d ed. 1983), *quoted in Franchise Tax Bd.*, 103 S. Ct. at 2850.

13. The Act provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and otber legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201 (Supp. V 1981).

14. *Franchise Tax Bd.*, 103 S. Ct. at 2851-52.

15. A "coercive action" in this context is loosely defined as any action not seeking a declaratory judgment.

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

sion,[17] they have long defied a precise and fully acceptable definition.[18] The federal question jurisdiction of the federal district courts is authorized by the Constitution[19] and is conferred by the Judiciary Act of 1875.[20] Although the Constitution and the Act employ nearly identical language, the meaning of the phrase "arising under" is interpreted differently in each. Section 1331 of the Judiciary Act has been interpreted as a more narrow grant of jurisdiction than that authorized by the Constitution.[21]

In *American Well Works Co. v. Layne & Bowler Co.*,[22] the United States Supreme Court held that a suit for damages to business caused by a threat to sue under federal patent law did not arise under the patent law. Justice Holmes, writing for the Court, stated that "[a] suit arises under the law that creates the cause of action."[23] This test proved acceptable for cases in which federal law expressly created the cause of action. However, the test was not an acceptable basis for denying federal jurisdiction over cases that turned on determinations of federal law but that

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17. *See, e.g.*, AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 169-70 (1969); Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17 (1947); Aycock, *Introduction to Certain Members of the Federal Question Family*, 49 N.C.L. REV. 1 (1970); Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639 (1942); Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890 (1967); Forrester, *The Nature of a Federal Question*, 16 TUL. L. REV. 363 (1942); Forrester, *Federal Question Jurisdiction and Section 5*, 18 TUL. L. REV. 263 (1943); Fraser, *Some Problems in Federal Question Jurisdiction*, 49 MICH. L. REV. 73 (1950); Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 395 (1976); London, *"Federal Question" Jurisdiction—A Snare and a Delusion*, 57 MICH. L. REV. 835 (1959); Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953); Trautman, *Federal Right Jurisdiction and the Declaratory Remedy*, 7 VAND. L. REV. 445 (1954); Comment, *Federal Jurisdiction over Declaratory Suits Challenging State Action*, 79 COLUM. L. REV. 983, 984 (1979); Comment, *Proposed Revision of Federal Question Jurisdiction*, 40 ILL. L. REV. 387 (1945).

18. *See Franchise Tax Bd.*, 103 S. Ct. at 2846. Justice Brennan states:

> Since the first version of § 1331 was enacted, . . . the statutory phrase "arising under the Constitution, laws, or treaties of the United States" has resisted all attempts to frame a single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district court.

19. The United States Constitution states: "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." U.S. CONST. art. III, § 2.

20. 28 U.S.C. § 1331 (Supp. V 1981).

21. *See, e.g.*, Verlinden B.V. v. Central Bank of Nigeria, 103 S. Ct. 1962, 1972 (1983).

22. 241 U.S. 257 (1916).

23. *Id.* at 260.

were brought as causes of action created by state law. The Court eventually decided that state-created causes of action involving a construction of federal law could arise under the federal law being construed.[24] Consequently, the Court abandoned the Holmes test as an exclusionary principle.[25]

The well-pleaded complaint rule is the oldest test for determining whether state-created causes of action arise under federal law.[26] The rule requires that the existence of jurisdiction be determined solely from the plaintiff's complaint.[27] Justice Cardozo articulated a familiar formulation of the rule: "[A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."[28] The well-pleaded complaint rule causes results not readily apparent from the language of section 1331.[29]

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24. *See, e.g.*, Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921); Hopkins v. Walker, 244 U.S. 486 (1917); T.B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir. 1964).

25. This test is still used as an "inclusionary principle" to find jurisdiction over cases in which federal law creates the cause of action. *E.g., Franchise Tax Bd.*, 103 S. Ct. at 2846, 2848. However, such cases also qualify under the well-pleaded complaint rule. Thus, the well-pleaded complaint rule appears to have swallowed up the Holmes test.

26. The well-pleaded complaint rule was applied in the first Supreme Court case construing the Judiciary Act of 1875 and is still applied today. *See* Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 202-04 (1977).

27. *E.g.*, Taylor v. Anderson, 234 U.S. 74, 75-76 (1914), *quoted in Franchise Tax Bd.*, 103 S. Ct. at 2846. A companion principle to the well-pleaded complaint rule is the requirement that the question of federal law forming an element of the plaintiff's cause of action actually be in dispute. Shulthis v. McDougal, 255 U.S. 561, 569 (1912).

28. Gully v. First Nat'l Bank, 299 U.S. 109, 112 (1936).

29. The well-pleaded complaint rule is often criticized for its connection to common-law pleading rules no longer used in practice.

> [The well-pleaded complaint rule] bars access to federal court on the basis of allegations which are not required by nice pleading rules. Thus where title to land is in doubt because of some matter of federal law, there is federal jurisdiction to entertain a bill to remove a cloud on title, *Hopkins v. Walker*, 244 U.S. 486 (1917), but not a suit to quiet title, *Shulthis v. McDougal*, 225 U.S. 561 (1912), since allegations as to the nature of the cloud are proper in the first action but improper in the second. . . .
>
> It would be very surprising if this ancient lore as to the forms of action should correspond to any functional justification for federal question jurisdiction.

AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 169-70 (1969).

One rationale for requiring the existence of federal question jurisdiction to be determined from the plaintiff's initial pleadings, unaided by any allegations in the nature of anticipation of defenses, stems from a conceptual notion of the powers of courts. The argument has been advanced that, unless the court has jurisdiction over the case, the court has no power to require a responsive pleading. *See* C. WRIGHT, HANDBOOK ON THE LAW OF FEDERAL COURTS 69 (3d ed. 1976); Comment, *Federal Jurisdiction over Declaratory Suits Challenging State Action*, 79 COLUM. L. REV. 983, 984 (1979). Thus, the juris-

Because of the well-pleaded complaint rule, "it does not suffice for jurisdiction that the answer raises a federal question."[30] Neither can jurisdiction over state-created actions be based on the complaint's allegation that federal law deprives the defendant of a defense[31] or that a federal defense is not sufficient to defeat the complaint.[32]

The enactment of the federal Declaratory Judgment Act[33] set the stage for reconsideration of the well-pleaded complaint rule. The Declaratory Judgment Act specifies that the remedy is available in a "case or controversy" but only upon the filing of appropriate pleadings.[34] The party seeking the declaration is required to state in his complaint "facts showing an immediate, specific, actual controversy."[35] Thus, in a case in which the only controversy concerns what would be a federal law defense in a coercive action, the federal defense will appear on the face of the complaint. Furthermore, it will be an essential element of the plaintiff's cause of action.[36] Absent an exception to the well-pleaded complaint rule, such a case would arise under federal law.

In *Skelly Oil Co. v. Phillips Petroleum Co.*,[37] the plaintiffs sought a declaration under the federal Declaratory Judgment Act that certain contracts between the plaintiffs and the defendant were binding despite the defendant's purported termination under the contract's termination clause. Federal law was relevant only because the defendant's power to terminate the

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dictional evaluation must take place before the answer is to be filed. Consequently, a defense concerning federal law is not in issue at the crucial time when the existence of jurisdiction must be determined. Furthermore, if jurisdiction could be predicated on allegations concerning a defense not yet asserted, then jurisdiction initially could be found proper based on the complaint's statement that a federal defense is involved, even though the defendant may never raise the federal defense. Some commentators recommend dealing with this problem by granting jurisdiction but then dismissing the action if the federal defense is not asserted. *See* Chadbourn & Levin, *supra* note 17, at 665; Trautman, *supra* note 17, at 460; Comment, *Proposed Revision of Federal Question Jurisdiction*, 40 ILL. L. REV. 387, 398-99 (1945).

30. C. WRIGHT, *supra* note 29, at 69.

31. *See, e.g.*, Taylor v. Anderson, 234 U.S. 74 (1914); Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

32. *See* Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894).

33. 28 U.S.C. § 2201 (Supp. V 1981).

34. *Id.*

35. O'Hair v. United States, 281 F. Supp. 815, 819 (1968); *see also* International Longshoremen's Union, Local 37 v. Boyd, 347 U.S. 222 (1954); Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237 (1952).

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

37. 339 U.S. 667 (1950).

contract was conditioned on the Federal Power Commission's issuance of certain certificates.

The Court emphasized that "[t]he operation of the Declaratory Judgment Act is procedural only"[38] and characterized the Act as creating a remedy rather than extending the jurisdiction of federal courts.[39] Relying on precedent from nondeclaratory judgment cases, the Court stated that "[w]hatever federal claim [the plaintiff] may be able to urge would in any event be injected into the case only in anticipation of a defense to be asserted" by the defendant. Additionally, "[t]he plaintiff's claim itself must present a federal question 'unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.' "[40] Thus, the Court attributed no significance to the fact that the federal claim appeared on the face of the plaintiff's complaint.[41] Rather than looking to the complaint, the Court examined the plaintiff's claim and denied jurisdiction over the case.[42]

In *Public Service Commission v. Wycoff Co.*,[43] the Court held that a suit brought in federal district court, seeking a declaration that the plaintiff's transportation of films between points in Utah constituted interstate commerce, was not a justiciable controversy within the requirements of the Declaratory Judgment Act and the Constitution. In dictum, Justice Jackson, writing for the majority, discussed the *Skelly Oil* issues presented by an action for declaratory judgment.

> In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to estahlish a defense against a cause of action which the declaratory defendant may assert in the [state] courts. . . . Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal

38. *Id.* at 671 (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937)).

39. *But see* Goldberg, *supra* note 17, at 443-47.

40. 339 U.S. at 672 (quoting Taylor v. Anderson, 234 U.S. at 75-76 (1914)).

41. *Id.*

42. For an argument that *Skelly Oil* did not present a federal claim at all, see Mishkin, *supra* note 17, at 183-84.

43. 344 U.S. 237 (1952).

> law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action.[44]

The *Wycoff* dictum emphasized that jurisdiction over a declaratory judgment action in which the complaint asserts a federal claim in the nature of a defense is determined by examining whether a hypothetical coercive action would arise under federal law. The rule stated in *Skelly Oil* and later discussed in *Wycoff* has been refined and rephrased by the commentators to read: "[I]f, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state-created action, jurisdiction is lacking."[45] Therefore, the *Skelly Oil* rule, as qualified by the *Wycoff* dictum, requires the court to determine (1) what coercive action would have been brought absent the declaratory judgment mechanism, (2) which party would have brought the action, and (3) whether the action would have been created by federal law or would have qualified for original jurisdiction under the well-pleaded complaint rule.

The *Skelly Oil* rule has been strongly criticized.[46] Some

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44. *Id.* at 248.

45. 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 12, § 2767 at 744-45.

46. *See, e.g.*, AMERICAN LAW INSTITUTE STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 170-71 (1969); Goldberg, *supra* note 17, at 412-13.

Skelly Oil imposes the requirements of the well-pleaded complaint rule on declaratory judgment actions. Application of the well-pleaded complaint rule to coercive actions is justified by conceptual limitations on court powers. *See supra* note 29. However, differences between coercive actions and declaratory judgment actions make this justification inapplicable to actions for declaratory relief. When the real issue in a declaratory judgment action is federal preemption, preemption is an essential element of the declaratory complaint even though it would be only a defense to a coercive action. *See supra* text accompanying notes 34-36. In this situation, the court's jurisdiction can be determined up front based on the federal preemption claim that is properly included in the complaint. "The Court [in *Skelly Oil*] could have reasoned that the 'well-pleaded' complaint rule is satisfied by a federal question appearing in a properly pleaded complaint for declaratory relief." Goldberg, *supra* note 17, at 412; *see also* First Fed. Sav. and Loan Assoc. v. McReynolds, 297 F. Supp. 1159, 1160 (W.D. Ky. 1969); Mishkin, *supra* note 17, at 178. While the conceptual argument that justifies the refusal to base jurisdiction on federal defenses is compelling when applied to coercive actions, it is not persuasive in the declaratory judgment context.

The declaratory judgment plaintiff is required to make a showing that a real controversy exists. *See supra* text accompanying note 36. Therefore, when a federal claim forms the heart of the controversy, the Declaratory Judgment Act requires that the claim be asserted in the complaint. "There is no danger in such situations comparable to the risk in a coercive action that the defendant will not raise a federal defense anticipated by the plaintiff, thereby removing the sole federal issue from the litigation." Goldberg *supra*

commentators recommend that the existence of federal question jurisdiction be determined from the face of a well-pleaded complaint for declaratory relief without regard to the threatened coercive action.[47] The rule has also been derided for not allowing federal jurisdiction over an action for declaratory judgment when a federal claim forms the heart of the action.[48]

III. Analysis of *Franchise Tax Board*

A. The Court's Reasoning

In *Franchise Tax Board*,[49] the Court's starting point was the standard for removal of an action from state to federal court. In interpreting the removal statute,[50] Justice Brennan stated that "the propriety of removal turns on whether the case falls within the original 'federal question' jurisdiction of the United States district courts: 'The district courts shall have [original] jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.' "[51]

Noting past difficulty in precisely defining the phrase "arising under," the Court reviewed different interpretations applied in the past. Justice Brennan referred to the well-pleaded complaint rule[52] as a powerful doctrine that avoids potentially serious federal-state conflicts. He emphasized that " '[a] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.' "[53]

The Court quickly disposed of the Board's first cause of action by applying the well-pleaded complaint rule. The Court held that because federal law was relevant to the action to en-

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note 17, at 480.

In *Franchise Tax Board*, Justice Brennan acknowledged arguments advanced by critics of *Skelly Oil* but stated, "[a]t this point, any adjustment in the system that has evolved under the *Skelly Oil* rule must come from Congress." *Franchise Tax Bd.*, 103 S. Ct. at 2851 n.17.

47. *See, e.g.*, Goldberg, *supra* note 17, at 479-80; Trautman, *supra* note 17, at 468.

48. *See* Goldberg, *supra* note 17, at 480.

49. 103 S. Ct. 2841 (1983).

50. The statuta provides: "[A]ny civil action brought in State court of which the district courts of the United States have original jurisdiction may be removed by the defendant . . . to the district court of the United States . . . ." 28 U.S.C. § 1441(a) (1982).

51. *Franchise Tax Bd.*, 103 S. Ct. at 2845 (quoting 28 U.S.C. § 1331 (Supp. V 1976)).

52. *See supra* notes 26-32 and accompanying text.

53. *Franchise Tax Bd.*, 103 S. Ct. at 2847 (quoting *Gully*, 299 U.S. at 112).

force the tax levy only as a defense, the claim did not arise under federal law.[54] However, preemption was an essential element of the second cause of action, the declaratory judgment action. The California Declaratory Judgment Act[55] empowers persons with a right or interest in property to bring an action for a declaration of rights and duties with respect to the property "upon a showing that there is an 'actual controversy relating to the respective rights and duties' of the parties."[56] The Court noted that the only existing controversy concerned "the rights and duties of CLVT and its trustees under ERISA."[57] Without an interpretation of the preemptive effect and constitutionality of ERISA, the Board could not obtain the declaration it sought.

The Board urged that the rule from *Skelly Oil* foreclosed original jurisdiction over the complaint for declaratory judgment. While *Skelly Oil* had previously been applied only to actions brought under the federal Declaratory Judgment Act, the Court extended *Skelly*'s application to state declaratory judgment actions. Had the rule not been extended, it would have been possible to avoid the *Skelly Oil* rule's bar to jurisdiction simply by bringing the actions in federal district court under a state declaratory judgment act.[58]

Applying this extended rule[59] to the instant case, the inquiry was whether *Skelly Oil* would have permitted federal question jurisdiction had the action been brought under the federal Declaratory Judgment Act. The Court noted that federal courts regularly take "arising under" jurisdiction over declaratory judgment actions in which, had the declaratory judgment defendant brought a coercive action, the action would necessarily have presented a federal question. The Court further noted that in ERISA Congress specifically granted a cause of action for injunctive relief to trustees of plans like CLVT whenever their rights and duties under ERISA were at issue.[60] Justice Brennan

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54. *Franchise Tax Bd.*, 103 S. Ct. at 2848-49.

55. CAL. CIV. PROC. CODE § 1060 (Deering 1983 & Supp. 1984).

56. *Franchise Tax Bd.*, 103 S. Ct. at 2849 (quoting CAL. CIV. PROC. CODE § 1060).

57. *Franchise Tax Bd.*, 103 S. Ct. at 2849.

58. *Id.* at 2851.

59. The rule as extended by the Court reads: "[F]ederal courts do not have original jurisdiction . . . when a federal question is presented by a complaint for a state declaratory judgment, but *Skelly Oil* would bar jurisdiction if the plaintiff had sought a federal declaratory judgment." *Id.*

60. *Id.* at 2851-52.

also stated that such actions are governed exclusively by federal law.[61]

In determining whether *Skelly Oil* would have permitted jurisdiction over the Board's suit, Justice Brennan phrased the issue as follows: "If CLVT could have sought an injunction under ERISA against application to it of state regulations that require acts inconsistent with ERISA, does a declaratory judgment suit by the State 'arise under' federal law?"[62] Surprisingly, the Court responded: "We think not."[63]

The Court characterized the Board's action as a suit by a state "to declare the validity of [its] regulations despite possibly conflicting federal law"[64] and gave two reasons why the federal courts should not entertain such actions. First, states are not significantly prejudiced by an inability to litigate such actions in federal courts. Justice Brennan argued that a variety of means other than injunctive suits are available to the states for enforcing their own laws in state court.[65] The Court concluded that the states do not suffer if the preemption issues raised are tested in state court.[66] Second, the congressional grant of jurisdiction found in ERISA[67] is limited to actions brought by certain parties, among them trustees like those in this case. Congress did not provide for exclusive federal jurisdiction of actions brought against such parties when they do not choose to sue. Justice

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61. *Id.*

62. *Id.* at 2852. It is unclear whether the Tax Injunction Act, 28 U.S.C. § 1341 (1976), would have prevented CLVT from suing in federal district court under ERISA to enjoin a state tax levy. *See* California v. Grace Brethren Church, 457 U.S. 393 (1982). The Court recognized the existence of the issue and noted that to get past the Tax Injunction Act a party seeking an injunction would have to show "either that state law provided no 'speedy and efficient remedy' or that Congress intended § 502 of ERISA to be an exception to the Tax Injunction Act." *Franchise Tax Bd.*, 103 S. Ct. at 2852 n.21. The Court expressed no opinion on this question.

63. *Franchise Tax Bd.*, 103 S. Ct. at 2852; *cf.* Shaw v. Delta Air Lines, 103 S. Ct. 2890 (1983). The Court in *Shaw* stated:

> The Court's decision today in *Franchise Tax Board v. Construction Laborers Vacation Trust* . . . does not call into question the lower courts' jurisdiction to decide these cases. *Franchise Tax Board* was an action seeking a declaration that state laws were *not* pre-empted by ERISA. Here, in contrast, companies subject to ERISA regulation seek injunctions against enforcement of state laws they claim *are* pre-empted by ERISA, as well as declaration that those laws are pre-empted.

Shaw, 103 S. Ct. at 2899 n.14 (emphasis in original).

64. *Franchise Tax Bd.*, 103 S. Ct. at 2852.

65. *Id.*

66. *Id.*

67. 29 U.S.C. § 1132(a), (e) (1982).

Brennan stated that, as to parties not listed in ERISA's jurisdictional grant, "Congress presumably determined that a right to enter federal court was [not] necessary to further the statute's purposes."[68]

B. The Court Did Not Follow Skelly Oil

A close examination of the *Wycoff* dictum demonstrates that the outcome reached by the Court in *Franchise Tax Board* is contrary to the result one would expect based on the reasoning of *Skelly Oil* and *Wycoff*.

> In this case, as in many actions for declaratory judgment, the *realistic position of the parties is reversed.* The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the [state] courts. . . . Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. *If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim.*[69]

The *Wycoff* dictum implies that if, as in *Franchise Tax Board,* the action threatened by the declaratory defendant does arise under federal law, then the declaratory judgment action that asserts the declaratory defendant's federal claim also arises under federal law. The Court cites the *Wycoff* dictum with apparent approval in *Franchise Tax Board.* Justice Brennan expressly noted that the *Wycoff* dictum is consistent with the federal courts' regular practice of taking jurisdiction over declaratory judgment suits in which the declaratory judgment defendant's coercive action would necessarily present a federal question.[70] However, in *Franchise Tax Board* the Court reached a result that contradicts the dictum's logical conclusion. This result modifies the *Skelly Oil* rule.

In *Franchise Tax Board,* the Court appears to hold that ju-

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68. *Franchise Tax Bd.,* 103 S. Ct. at 2852.
69. *Wycoff,* 344 U.S. at 248 (emphasis added).
70. *Franchise Tax Bd.,* 103 S. Ct. at 2851 n.19.

risdiction over a declaratory judgment action will be denied if other factors independent of the jurisdictional test militate against jurisdiction. The Court's holding applies even if the action would arise under federal law within the traditional interpretation of *Skelly Oil*. Justice Brennan alluded to the factors militating against jurisdiction when he stated that "[t]here are good reasons why the federal district courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law."[71] As reasons for denying jurisdiction over this case, the Court's "good reasons" are not persuasive.

C. The "Good Reasons" Are Not Good

The Court's first reason supporting its denial of jurisdiction was that, because questions of federal preemption may be pursued in state courts, "[s]tates are not significantly prejudiced by an inability to come to federal court for a declaratory judgment in advance of a possible injunctive suit by a person subject to federal regulation."[72] This "reason" does not affirmatively support the result in this case. Rather, it merely emphasizes that the Court's decision does not cause a specified inequity. The decision cannot be said to "avoid" prejudice to the state because the state would not have been prejudiced if jurisdiction had been found under the *Skelly Oil* rule. Certainly, there would be no prejudice to the state from litigating its federal law issues in a federal court. Furthermore, so long as the competence and integrity of state courts are unquestioned, it could be said of any party asserting issues of federal law that he would not be prejudiced by being forced to litigate his federal claims in state court.[73]

The Court emphasized the lack of prejudice to the state but seemed to ignore the possibility of prejudice to the removing defendant. The removal statute confers on defendants the ability to remove from state court any civil action "of which the district courts of the United States have original jurisdiction."[74] Under the *Skelly Oil* rule, the Board's declaratory judgment action fell

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71. *Id.* at 2852.

72. *Id.*

73. The opportunity to obtain Supreme Court review of state court decisions, whether by appeal or certiorari, further supports this proposition by allowing parties to gain relief from "incorrect" state court decisions.

74. 28 U.S.C. § 1441(a) (1982).

within the original jurisdiction of the federal district courts. Therefore, the statute entitled CLVT, the defendant, to remove the action to federal court. The lack of prejudice to the plaintiff is irrelevant to the question of removal by the defendant. The argument that states are not prejudiced by having their claims heard in state courts does not justify denying the defendant the right to remove. Thus, lack of prejudice is not a valid basis for denying federal question jurisdiction.[75]

The second reason advanced by the Court in support of its decision is that:

> The express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties as to whom Congress presumably determined that a right to enter federal court was necessary to further the statute's purposes. It did not go so far as to provide that any suit *against* such parties must also be brought in federal court when they themselves did not choose to sue.[76]

The jurisdictional grant the Court refers to is the grant of exclusive jurisdiction. In conferring exclusive federal jurisdiction over actions brought by certain, listed parties, Congress did not change the rules for "arising under" jurisdiction over actions brought by unlisted parties. A state's action that arises under federal law, independent of the exclusive jurisdictional grant, is not barred by the fact that states were excluded from ERISA's grant of jurisdiction.

However, the Court did not conclude that the noninclusion of the states in ERISA's grant of jurisdiction barred the Board's action from federal court. Rather, the Court viewed the states' absence from the group of listed parties as evidence that Congress found it unnecessary, for the purposes of ERISA, that the

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75. By considering only the existence of prejudice to the party who originally brought the action, the Court turns the determination of jurisdiction into a race to the courthouse. It can be argued that the well-pleaded complaint rule also creates a race to the courthouse. However, in many cases the federal defense, which the rule bars as a basis of jurisdiction, would not amount to a cause of action; thus, one party may not file suit, and the race would be avoided. In essence, the declaratory judgment procedure made a defense in itself a complete cause of action by allowing either party to file suit. By making the determination of jurisdiction over a declaratory judgment action dependent on the nature of the underlying coercive action, the *Skelly Oil* rule, with all its drawbacks, does prevent the race from having an impact on the determination of jurisdiction. However, the court has reinstated the race by focusing on the lack of prejudice to the declaratory plaintiff in denying jurisdiction over a case that would have qualified under *Skelly Oil*.

76. *Franchise Tax Bd.*, 103 S. Ct. at 2852 (emphasis in original).

federal courts hear ERISA-related actions brought by the states.[77]

By granting *exclusive* federal jurisdiction over actions brought by listed parties concerning rights and duties under ERISA, Congress indicated that the *issues* presented in such actions should be decided in federal court. In *Franchise Tax Board,* as in many declaratory judgment actions, the alignment of the parties was reversed from what it normally would have been in a coercive action. Nevertheless, the action presented precisely the same federal preemption issue that would have been presented in a suit brought by CLVT, a listed party, in a coercive action under ERISA. Although the Board was not a listed party, the fact that Congress granted exclusive federal jurisdiction over suits that normally raise the issues presented by this case indicates that Congress determined federal court adjudication of the issues raised by *Franchise Tax Board* to be important for the purposes of ERISA.

The "good reasons" enunciated by Justice Brennan do not justify the Court's decision to deny jurisdiction. The Court did not argue that the reasons discussed above directly controlled the outcome of *Franchise Tax Board.* Rather, the Court proposed that "federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law."[78] When the reasons behind this proposition are examined,[79] it becomes clear that the Court has failed to explain adequately why federal courts should not entertain such suits. On this question, the Court's opinion sheds very little light.

Justice Brennan's language hinted that the Court's decision is motivated by notions of comity between state and federal courts. In a footnote, Justice Brennan wrote that "considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it."[80] Justice Brennan further alluded to other factors, not normally determinative of jurisdictional questions, that may have influenced the Court's decision.

> The situation presented by a State's suit for a declaration

77. *Id.* at 2852-53.
78. *Id.* at 2852.
79. *See supra* text accompanying notes 72-78.
80. *Franchise Tax Bd.,* 103 S. Ct. at 2852 n.22.

> of the validity of state law is *sufficiently removed from the spirit of necessity and careful limitation of district court jurisdiction* that informed our statutory interpretation in *Skelly Oil* and *Gully* to convince us that, until Congress informs us otherwise, such a suit is not within the original jurisdiction of the United States district courts. Accordingly, the same suit brought originally in state court is not removable either.[81]

Additional meaningful inquiry is precluded by the Court's scanty treatment of the rationale underlying the proposition that federal courts should not hear actions by states to declare the validity of state law.

IV. Conclusion

In *Franchise Tax Board,* the Supreme Court denied federal question jurisdiction over an action that a traditional application of the *Skelly Oil* rule, once extended to state declaratory judgment actions, would have allowed to be brought in federal district court. However, the Court failed to identify and adequately support any principles governing future departures from the *Skelly Oil* rule. Thus, *Franchise Tax Board* does not provide reliable standards against which the existence of federal question jurisdiction over declaratory judgment actions can be judged.

Steven Chidester

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81. *Id.* at 2852-53 (emphasis added).