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"YOU CAN LEAD A HORSE TO WATER ...": THE SUPREME COURT'S REFUSAL TO ALLOW THE EXERCISE OF ORIGINAL JURISDICTION CONFERRED BY CONGRESS

*Donald L. Doernberg**

IN THE EARLY days of the republic, controversy about the federal judiciary and the extent of its power abounded. At the Constitutional Convention, the major debate concerned whether there should be any inferior federal courts, and if so, what powers they should have.¹ When the Constitution was circulated among the states for ratification, Alexander Hamilton devoted considerable

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I gratefully acknowledge the benefits I have reaped from the invariably thought-provoking suggestions of my colleagues Professors Michael B. Mushlin and Donald H. Zeigler, and my wife Cynthia A. Pope. I am also indebted to Diane White, my research assistant, a member of the Class of 1992.

1. See, e.g., M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 79-80 (1913):

That there should be a national judiciary was readily accepted by all. Nor was there any controversy over the jurisdiction of such courts as might be established; indeed, the clauses of the original resolution indicating the subjects of jurisdiction were unanimously struck out "in order to leave full room for their organization." There was also only a slight discussion over the appointment of the judges. . . . The most serious question was that of the inferior courts. The difficulty lay in the fact that they were regarded as an encroachment upon the rights of the individual states. It was claimed that the state courts were perfectly competent for the work required, and that it would be quite sufficient to grant an appeal from them to the national supreme court. The decision that was reached was characteristic . . . the matter was compromised: inferior courts were not required, but the national legislature was *permitted* to establish them.

See also *id.* at 154-55 (noting the argument made at the Constitutional convention that inferior federal courts should be court of appeal from state court decisions); J. Madison, *NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787* 71-73 (1966) (noting that the discretionary power the Constitution gives Congress to establish inferior courts replaced a resolution at the Constitutional convention requiring mandatory establishment of such courts).

time to discussing the proposed federal judiciary, dwelling particularly on its limitations and how difficult it would be for the judiciary to usurp power.² Despite Hamilton's arguments, however, in the first decades under the new Constitution questions concerning the extent of judicial power revolved around assertions or perceptions that the judiciary had exceeded its proper scope.³ Chief Justice Marshall's penchant for expansive readings of the Constitution to facilitate the scope and exercise of federal judicial power unquestionably fueled such controversies.⁴

It would no doubt shock Chief Justice Marshall to know that today the federal courts routinely refuse to accept cases that are within the scope of the constitutional grant of power to the judiciary,⁵ and for which Congress has authorized original jurisdiction

2. See generally THE FEDERALIST Nos. 78-84 (A. Hamilton) (discussing the composition, appointment, tenure and partition of authority in the federal judiciary).

3. For example, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), initially drew fire on the theory that the assertion of the power of judicial review was a usurpation by the federal judiciary for as President Thomas Jefferson noted:

Nothing in the Constitution has given [the Supreme Court] a right to decide for the Executive, more than to the Executive to decide for them. The opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature and Executive also, in their spheres, would make the judiciary a despotic branch.

Letter from Thomas Jefferson to Mrs. Adams (Sept. 11, 1804), *quoted in* E. CORWIN, COURT OVER CONSTITUTION 69-70 (1950). Professor Corwin notes that Jefferson's attack was echoed in 1832 by President Jackson. *Id.* at 70-71; see also 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 143-45 (1910) (while Jefferson, concerned about reelection and strengthening his party, did not openly criticize Marshall's assertion of judicial power in *Marbury*, his resentment of this position remained with him throughout his life).

In the decade after *Marbury*, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), involved Virginia's assertion that the Supreme Court lacked the authority to review the judgments of state courts. Even today, Congress routinely grapples with suggestions that the federal courts are too powerful and should be restrained by congressional control of their jurisdiction. See, e.g., P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 377-79 (3d ed. 1988) (providing examples of the more than one hundred proposals introduced in Congress since 1940 that sought to eliminate or restrict the Federal Courts' jurisdiction); Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager's "Court-Stripping" Polemic*, 44 OHIO ST. L.J. 611, 618 (1983) ("Current assaults on the long-recognized congressional power are without historical or judicial warrant. . ."). But see Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 155 (1981) (arguing that legislative restrictions on jurisdiction are "too plainly unconstitutional to even be arguably legitimate, and in any event much too dangerous to be worth trying").

4. See generally J. THAYER, JOHN MARSHALL 54-59, 82-101 (1901) (discussing Marshall's constitutional opinions and the debates they provoked).

5. U.S. CONST. art. III, § 2, cls. 1-2:

in the district courts.⁶ The Supreme Court has engendered this refusal in two primary ways. First, it has narrowly construed some statutes involving jurisdiction, most notably the federal question jurisdiction statute⁷ and the Declaratory Judgment Act.⁸ In such circumstances, the Court simply denies the existence of jurisdiction. Second, the Court has developed an assortment of abstention doctrines⁹ under which the federal judiciary refuses to adjudicate

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; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

6. In some circumstances, the authorization is arguably unclear, as in the case of the well-pleaded complaint rule. *See infra* notes 33-51 and accompanying text. In most cases, however, particularly those involving judge-made abstention doctrines, the authorization is entirely unambiguous. *See infra* notes 89-114 and accompanying text.

7. Federal question jurisdiction is governed by 28 U.S.C. § 1331 (1988), which provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

8. Federal declaratory judgments are governed by 28 U.S.C. §§ 2201 (1988), and 2202 (1988):

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other 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.

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

9. The Court has created five categories of federal abstention, each known by the name of the primary case with which it is associated: *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (abstention to conserve judicial resources by avoiding parallel federal and state proceedings); *Younger v. Harris*, 401 U.S. 37, 49 (1971) (refusal to enjoin pending state criminal prosecution); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959) (abstention in eminent domain proceeding to allow state to construe ambiguous state statute); *Burford v. Sun Oil Co.*, 319 U.S.

cases clearly within the ambit of both constitutional and statutory jurisdictional provisions.

Chief Justice Marshall's view of such judicial behavior is not difficult to divine:

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. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.¹⁰

In Marshall's terms, the courts of the United States commit treason every time they fail to exercise jurisdiction committed to the federal judiciary.¹¹

This Article will address primarily the lack of textual and historical support for the Court's narrow construction of jurisdictional provisions, that cause it to deny the existence of jurisdiction. In addition, the Article will briefly describe the lack of historical support for the Court's independent development of the abstention doctrines and their consequent illegitimacy. Both areas share democratic theory and institutional legitimacy concerns that Professor Redish will address, but let me respectfully suggest that these issues are best understood in light of the congressional thought underlying the Title 28 authorizations.¹²

315, 334 (1943) (abstention to avoid disruption of state administrative process); *Railroad Comm'n of Tx. v. Pullman Co.*, 312 U.S. 496, 500 (1941) (abstention to avoid "the friction of a premature constitutional adjudication"). The abstention doctrines refusals of jurisdiction will be discussed *infra* at notes 89-114 and accompanying text.

10. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

11. On rarer occasions, the Supreme Court has also committed treason by assuming jurisdiction where none may exist. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1044 (1983), in which the majority found federal jurisdiction proper in the absence of any clear showing that the state court decision was primarily based on an adequate and independent state ground; *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975), in which the Court articulated four categories of cases that it will review under 28 U.S.C. § 1257 (1988) as "final" judgments despite the fact that further state court proceedings remain. In two of those categories, further state court proceedings either may or will definitely cause the federal issue to disappear from the case. *Id.* at 481-83. Thus, the Court's doctrine causes it to review questions that it would otherwise lack the jurisdiction to reach if it waited for the conclusion of the state court proceedings.

12. *See generally* 28 U.S.C. §§ 1330-40, 1343, 1441 & 2283 (1988) (sections defining when the district courts have original jurisdiction).

I. A BRIEF HISTORY OF THE ARISING-UNDER TEST

Federal question jurisdiction has only been exercised by the district courts since 1875,¹³ but the full significance of Congress's decision to confer such jurisdiction is obscured by the lack of legislative history discussing it. A statement by Senator Carpenter of Maine, then serving as president *pro tempore* of the Senate, is the only indication in the Congressional Record of the intended scope of the new statute; he asserted that the statute was intended to go to the constitutional limits.¹⁴ Early cases of the Supreme Court of the United States took the same view.¹⁵ Chief Justice Marshall first described the constitutional authority for federal question jurisdiction in *Osborn v. Bank of the United States*,¹⁶ including within it any case containing a federal issue that, if contested, would be outcome-determinative.¹⁷ The Supreme Court recently endorsed *Osborn* in *Verlinden B.V. v. Central Bank of Nigeria*.¹⁸ Nonetheless, the statute conferring original federal question jurisdiction on the district courts has given rise to a much more complicated and narrow formulation of federal question jurisdiction.

The Court used several tests for statutory federal question jurisdiction in the early twentieth century. Although the well-

13. Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470.

The jurisdiction was briefly authorized at the beginning of the nineteenth century, but the grant did not survive the Jeffersonians' accession to power; see Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, *repealed by* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132.

14. "Senator Carpenter, recalling Justice Story's argument that Congress was constitutionally required to vest the full scope of federal judicial power in the inferior federal courts, declared, 'This bill does [vest such power]. . . . This bill gives precisely the power which the Constitution confers — nothing more, nothing less.'" Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 603 (1987) (footnotes omitted) (quoting 2 CONG. REC. 4986-87 (1874) (statement of Sen. Carpenter)).

15. See, e.g., *In re Hohorst*, 150 U.S. 653, 659 (1893) (federal jurisdiction is conferred over all controversies "arising under the Constitution or laws of the United States"); *Starin v. New York*, 115 U.S. 248, 257 (1885); *Ames v. Kansas ex rel. Johnston*, 111 U.S. 449, 471 (1884); *Railroad Co. v. Mississippi*, 102 U.S. 135, 140-41 (1880).

16. 22 U.S. (9 Wheat.) 738 (1824).

17. *Id.* at 823-24.

18. "The rule was laid down [in *Osborn*] that: 'it [is] a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law[s] of the United States, and sustained by the opposite construction.'" 461 U.S. 480, 492 (1983) (quoting *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822 (1824)).

The *Verlinden* Court did note that *Osborn* could be read to permit jurisdiction over cases where no federal issue was actually contested between the parties, but declined to decide whether such an interpretation of the Constitution was appropriate, since the question was not presented in *Verlinden*. *Id.* at 492-93.

pleaded complaint rule developed in stages from 1888 to 1908, when the Court decided *Louisville & Nashville Railroad v. Motley*,¹⁹ it was not until 1916 that Justice Holmes announced the first positive test for federal question jurisdiction. In *American Well Works v. Layne & Bowler Co.*,²⁰ he declared that "[a] suit arises under the law that creates the cause of action."²¹ By 1921, the Court moved to another formulation that harkened back to the *Osborn* test:

The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction. . . .²²

By 1936, when Justice Cardozo delivered the Court's opinion in *Gully v. First National Bank*,²³ a four-part test seemed to have developed:

To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto, . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for

19. 211 U.S. 149 (1908).

20. 241 U.S. 257 (1916).

21. *Id.* at 260. However, Justice Holmes's new formulation may be regarded as dictum to which at least three members of his majority did not subscribe. A strong argument can be made that the case could be, and was, decided on the basis of the well-pleaded complaint principle. See Doernberg, *supra* note 14, at 627-30 (suggesting that several members of the majority were in agreement merely because they believed the well-pleaded complaint principle was dispositive). Nonetheless, if so, it is at least dictum to which the Court refers with increasing emphasis. See, e.g., *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8-9 (1983); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 (1959).

22. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921). The new outcome-determinative test was obviously incompatible with Justice Holmes's test from *American Well Works*, as the Justice noted acidly in dissent. See *id.* at 215 (Holmes, J., dissenting).

23. 299 U.S. 109 (1936).

removal. . . .²⁴

Justice Cardozo suggested that the need to limit the volume of cases in the federal courts at least partially explained a restricted construction of jurisdictional statutes.²⁵ Others have echoed this as a critical consideration in the Court's federal question jurisprudence.²⁶

Finally, in *Merrell Dow Pharmaceuticals Inc. v. Thompson*,²⁷ the Court elaborated on the *Smith-Gully* test by adding "substantiality" as a requirement for federal question jurisdiction where the cause of action is state-created.²⁸ The Court seems now to insist not only that a well-pleaded federal issue be outcome-determinative, but also that it be of substantial importance in the greater

24. *Id.* at 112-13 (citations omitted).

25. In some of the most famous language in any procedural case, Justice Cardozo expressed the need for common-sense judgment similar to that used in the treatment of causation problems:

One could carry the search for causes backward, almost without end. Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

Id. at 117-18 (citations omitted).

26. See, e.g., *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950) (observing the possibility of unduly swelling the amount of litigation in federal courts); Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 673 (1942) (criticizing the cluttering of state courts to keep the federal dockets clear); Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 906 (1967) (pointing out the fear of significantly adding "to the workload of an overburdened federal judiciary"); Forrester, *The Nature of a "Federal Question"*, 16 TUL. L. REV. 362, 379 n.61 (1942) (describing the restriction of federal court jurisdiction to decrease case load); London, *"Federal Question" Jurisdiction — A Snare and a Delusion*, 57 MICH. L. REV. 835, 839 (1959) (commenting that the Supreme Court would understandably be reluctant to construe a statute in a way that would increase the workload of the federal courts).

27. 478 U.S. 804 (1986).

28. See *id.* at 814. The Court has implied that the substantiality requirement is satisfied if the cause of action is created by federal law, since Congress would then have determined that federal jurisdiction should extend to the case: "[C]ongressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Id.* (footnote omitted).

scheme of things.²⁹ To be sure, it is not entirely clear that the Court thought it was altering the test for federal question jurisdiction, but the majority opinion in *Merrell Dow*, denying jurisdiction, did not explain its result on the ground that *Smith-Gully* compelled it. Rather, the Court engaged in an exegesis of the reasons underlying federal question jurisdiction.³⁰

The *Merrell Dow* Court made one other change in the interpretative technique applicable to federal question cases. Noting that Congress intended no federally-created cause of action to exist under the Food, Drug and Cosmetic Act (FDCA), the Court inferred that Congress also intended to exclude from federal question jurisdiction state-created claims dependent upon constructions or interpretations of the Act.³¹ Thus, the Court credited the 1938 Congress that passed the FDCA with an unspoken intention to place a gloss on the interpretation of a different statute in a different title of the United States Code, and this with no affirmative evidence that Congress ever contemplated the effect of the FDCA on federal question jurisdiction. Nonetheless, it now seems that when a state-created claim incorporates some provision of substantive federal law, one must ask whether the Congress that passed the law simultaneously but silently contemplated a change in the scope of federal question jurisdiction.³²

II. THE WELL-PLEADED COMPLAINT RULE

Of the four elements Justice Cardozo articulated in *Gully*, the best-known limiting construction by the Supreme Court is the "well-pleaded complaint" rule, which is most often associated with *Louisville & Nashville Railroad v. Mottley*.³³ Under that rule, a case does not arise under federal law unless the plaintiff must plead the federal matter in order to state a claim upon which relief may be granted.³⁴ Thus, cases in which important federal issues are raised first in defense, even if the federal issue is the only contested matter, cannot be heard in the inferior federal courts.

29. See *id.* at 814 n.12 (suggesting that the nature of the federal interest involved will be evaluated).

30. See *id.* at 813-17 (noting the importance of Congressional determination, the need for uniform statutory construction, and the novelty of the federal issue presented).

31. See *id.* at 814.

32. This view also presents the structural difficulty of allowing Congress effectively to amend a statute without sending the amendment through the normal legislative process.

33. 211 U.S. 149 (1908).

34. *Id.* at 153.

Given the Supreme Court's limited ability to accept cases for review, such cases may never be reviewed by any federal court.

It is more than difficult to find any textual basis or legislative historical support for the well-pleaded complaint rule. The wording of the federal question statute parallels the wording of the Constitution, and nothing in the text suggests that a different meaning was intended. Indeed, the intuitive presumption is that the same words were used because the same meaning was intended.³⁵ Therefore, in looking for a different meaning, the text is not illuminating. Moreover, the legislative history offers no help. It is only a slight exaggeration to say that there is no legislative history for the federal question statute. Only Senator Carpenter's statement in the records of Congress breaks the silence.³⁶

Silence may not be without its significance, however, and some have asserted that Congress's repeated recodifications of the federal question statute since the announcement of the well-pleaded complaint rule represent anything from congressional acquiescence to congressional endorsement of the rule.³⁷ There are at least three problems with such an assertion. First, with all respect to Simon and Garfunkel, the sounds of silence are very difficult to interpret accurately; silence may connote different things to different people. Second, construing congressional silence following judicial announcement of law as acquiescence effectively reverses the proper functioning of the legislative and judicial branches, raising substantial separation-of-powers concerns that Professor Redish has noted.³⁸ Third, since the judiciary's test for federal question jurisdiction has changed over time, to which version should Congress be considered to have subscribed?

For example, after the Court had announced the well-pleaded complaint rule, Congress recodified the federal question jurisdic-

35. I am sensitive to the fact that the words were used by different groups of legislators, the constitutional provision having been drafted by the framers and the statute being the creation of a Congress nearly a century later. Nonetheless, Congress obviously was aware of the constitutional language, and made a remarkably poor choice of words if, in fact, a different meaning was intended.

36. See *supra* note 14 and accompanying text.

37. See Doernberg, *supra* note 14, at 659 n.270.

38. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) [hereinafter Redish, *Abstention*]. If one takes the position that Congress in fact intended as broad a jurisdictional sweep as Senator Carpenter suggested, then continued adherence to the well-pleaded complaint rule may be viewed as a form of abstention.

tion statute in 1911.³⁹ That recodification might be taken to represent congressional approval of the rule, though it might also betoken congressional inattention. There was no recodification between *American Well Works*⁴⁰ and the outcome-determinative test announced in *Smith*,⁴¹ so Congress cannot be understood to have commented silently on the Holmes formulation.⁴² Following *Smith* and *Gully*,⁴³ however, the federal question statute was recodified in 1948,⁴⁴ 1958,⁴⁵ 1976,⁴⁶ and 1980.⁴⁷ If those recodifications are to be taken as endorsements of the Court's interpretation of the statute in *Smith* and its subsequent restatement of that interpretation in *Gully*, then does not the Court's new interpretation of the statute in *Merrell Dow Pharmaceuticals v. Thompson*⁴⁸ fly in the face of those supposed congressional endorsements of the Court's prior treatment of the statute, thereby presenting significant separation-of-powers problems? Certainly, if Congress had specifically enacted the *Gully* test, it would be grossly improper for the Court to add elements to it because the Court thought the congressional standard overbroad or under-inclusive. As the Court has often advised:

Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.

. . . .

. . . [I]n our constitutional system the commitment to the

39. Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091.

40. *American Well Works v. Layne & Bowler Co.*, 241 U.S. 257 (1916); *see supra* notes 20-21 and accompanying text.

41. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); *see supra* note 22 and accompanying text.

42. This may be an overstatement. Perhaps Congress's failure to repudiate Justice Holmes's formulation represents acquiescence. This, however, is even more slender a reed on which to base such a conclusion than is recodification. Moreover, enough of a question has been raised about whether Holmes's formulation was holding or dictum to make reliance on congressional inaction in this instance quite suspect. *See supra* note 21.

43. 299 U.S. 109 (1936); *see supra* notes 23-25 and accompanying text.

44. Act of June 25, 1948, ch. 646, § 1331, 62 Stat. 869, 930.

45. Act of July 25, 1958, Pub. L. No. 85-554, § 1331(a), 72 Stat. 415.

46. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 733(2), 90 Stat. 2721.

47. 28 U.S.C. § 1331 (1988).

48. 478 U.S. 804 (1986); *see supra* notes 27-31 and accompanying text.

separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal." Our Constitution vests such responsibilities in the political branches.⁴⁹

Recently, a majority of the Court argued strongly against inferring legislative ratification from congressional silence: "Congress' failure to overturn a statutory precedent is [not] reason for this Court to adhere to it. It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation."⁵⁰ Thus, the argument that subsequent congressional silence is an endorsement of the Court's interpretation of the jurisdiction statutes may prove too much.⁵¹ Treason to the Constitution is insidious.

III. DECLARATORY JUDGMENT CASES

The Court's convoluted method of determining whether there is jurisdiction over complaints seeking declaratory relief is well-known, though not well-liked.⁵² Writing for the Court in *Skelly*

49. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-95 (1978).

50. *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2372 n.1 (1989) (quoting *Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting)). The Court went on to express its concern about "the danger of placing undue reliance on the concept of congressional 'ratification.'" *Id.* The Court's warning in that instance was addressed to Justice Brennan's argument in his concurring and dissenting opinion that congressional action on statutes other than the one then under consideration (28 U.S.C. § 1981 (1982)) might reflect on the proper interpretation of § 1981. The majority apparently felt that legislation only tangentially related to the statute being construed could not bear on the statute's proper construction. The Court thus implicitly (and probably unwittingly) condemned the method of statutory interpretation that it had used in *Merrell Dow* when it focused on Congress's passage of the FDCA in 1938 as reflecting on the proper interpretation of the federal question jurisdiction statute passed in 1875. *See supra* notes 27-31 and accompanying text.

51. One might hypothesize that congressional acquiescence implicitly includes license to the courts to continue to make jurisdictional law, but this, too, raises institutional limitation problems akin to those arising in the area of federal common law in cases where a jurisdictional grant is taken as a command from Congress for the federal courts to create common law. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), is probably the most prominent example of that phenomenon, but the propriety of such a congressional delegation, whether express or implied, has been sharply questioned. *See, e.g., Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

52. As the American Law Institute noted: "If no other change were to be made in federal question jurisdiction, it is arguable that [the Court's method of handling declaratory judgment cases] should be repudiated." AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 171 (1969).

Oil Co. v. Phillips Petroleum Co.,⁵³ Justice Frankfurter used a syllogism to arrive at the technique now used by the federal courts.⁵⁴ The major premise was that Congress, in passing the Declaratory Judgment Act,⁵⁵ intended no expansion of federal question jurisdiction.⁵⁶ The minor premise was that to evaluate a declaratory judgment complaint on its face, as any other complaint is evaluated, would allow some cases to come into the federal courts that could not have been brought there without the Declaratory Judgment Act. The Court therefore concluded that a complaint seeking declaratory relief should not be evaluated on its face. Instead, *Skelly* directed that the jurisdictional analysis be performed on a hypothetical coercive complaint that the plaintiff would have had to file in the absence of the Declaratory Judgment Act.⁵⁷ If there would have been jurisdiction over the hypothetical coercive action, then the declaratory judgment action is deemed also to satisfy the test for federal question jurisdiction. In this manner, the Court reasoned, only cases that could have been heard in federal court without the Declaratory Judgment Act can be heard under its aegis, depriving it of any jurisdiction-expanding effect.⁵⁸

The Court continues to adhere to the *Skelly* method and the well-pleaded complaint rule despite Justice Brennan's admission in *Franchise Tax Board v. Construction Laborers Vacation Trust*, that "[t]he rule . . . may produce awkward results."⁵⁹ There, the Court reaffirmed *Skelly*'s vitality and, in fact, extended *Skelly*'s method of analysis to cases brought under state declaratory judgment acts.

One must plumb the depths of *Franchise Tax Board* fully to

53. 339 U.S. 667 (1950).

54. Justice Frankfurter apparently forgot Oliver Wendell Holmes's observation: "[T]he law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism." O. HOLMES, *THE COMMON LAW* 36 (1881).

55. Act of June 14, 1934, ch. 512, 48 Stat. 955 (current version at 28 U.S.C. §§ 2201-2202 (1988)).

56. "[T]he operation of the Declaratory Judgment Act is procedural only.' . . . Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil*, 339 U.S. at 671 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937)).

57. *Skelly Oil*, 339 U.S. at 673-74.

58. The details of the Court's reasoning are set out in Doernberg & Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. REV. 529 (1989) [hereinafter Doernberg & Mushlin, *The Trojan Horse*].

59. 463 U.S. 1, 12 (1963).

understand how strange a case it is. California's Franchise Tax Board filed a two-count complaint in state court because the Construction Laborers Vacation Trust refused to honor tax levies directed at the assets of three of its members. The first count of the complaint sought damages for the Trust's refusal to honor the levies. The second count, responding to the Trust's position that the Employees Retirement Income Security Act (ERISA)⁶⁰ commanded refusal, sought a declaration that ERISA did not preempt the levies.⁶¹ Consistently with *Skelly*, the Court looked to the coercive complaint (count one) underlying the declaratory judgment action (count two) and declared both counts not to arise under federal law, since the Trust's ERISA argument would arise in defense to the Franchise Tax Board's attempt to collect the taxes.⁶²

That analysis seems straightforward enough, and it certainly conforms to the analytical pattern that the Court had prescribed in *Skelly Oil*. The picture is complicated however, because the Court recognized⁶³ that federal law allowed the Trust to bring its own coercive action to enjoin invasions of the ERISA-qualifying fund.⁶⁴ Moreover, the statute makes the cause of action exclusively federal.⁶⁵ Thus, if the Trust had sued for an injunction, the action would have had to be maintained in federal court. In addition, if the Trust had brought an action seeking declaratory relief, under the *Skelly* analysis that case would have arisen under federal law. Such a result is anomalous because both the Franchise Tax Board and the Trust would have been seeking an answer to the same declaratory judgment question: "Does ERISA preempt?"⁶⁶ For the characterization of a question as federal or not

60. Employees Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1988).

61. *Franchise Tax Board*, 463 U.S. at 4.

62. *Id.* at 10.

63. *Id.* at 19-20.

64. 29 U.S.C. § 1132(a)(3), (e)(1) (1988).

65. 29 U.S.C. § 1132(e)(1) (1988).

66. Adherence to the *Skelly* analysis creates one more possible anomaly in the situation where the Trust gets to the courthouse first. Irrespective of the fact that Congress elected to allow ERISA trustees to maintain actions to establish the inviolability of trust funds, ERISA's pre-emption is nonetheless a defense to actions seeking to invade trust funds. Many such actions, and certainly the one in *Franchise Tax Board*, are state-created and do not arise under federal law. Only two years after *Skelly*, and two decades before *Franchise Tax Board*, the Court had held:

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

to depend only upon the identity of the questioner is bizarre.

The Court attempted to rationalize the result in *Franchise Tax Board* by referring back to *Skelly Oil*, arguing that "fidelity to its spirit leads us to extend it to state declaratory judgment actions as well."⁶⁷ The Court did not explain how presumed congressional intent not to have the federal Declaratory Judgment Act expand federal jurisdiction was at all served by limiting the ambit of state declaratory judgment procedures.⁶⁸ Nonetheless, *Franchise Tax Board* clearly confirms that the hypothetical coercive complaint is the indispensable ingredient in the jurisdictional analysis of any complaint seeking declaratory relief.

Unfortunately, the major premise of Justice Frankfurter's syllogism is unsupportable. Congress specifically contemplated that the Declaratory Judgment Act would expand federal question jurisdiction with respect to at least two, and possibly three, cate-

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. This is dubious even though the federal 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.

Public Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 248 (1952). Thus, under *Wycoff's* theory, the Construction Laborers Vacation Trust's declaratory action should not be heard in the federal courts. *Wycoff* and *Skelly Oil* seem thus to be in conflict. On the other hand, "[i]t is not beyond the power of Congress to confer a right to a declaratory judgment in a case or controversy arising under federal law . . . without regard to *Skelly Oil's* particular application of the well-pleaded complaint rule." P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, *supra* note 3, at 1033 n.17.

67. 463 U.S. at 17-18. The anomalies presented by *Franchise Tax Board* merely serve to illustrate that forays into the spirit world are perilous at best, and, with apologies to Marshall McLuhan, suggest that whatever medium the Court consulted returned with the wrong message.

68. State statutes often expand federal question jurisdiction. For example, at least prior to *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), if a state cause of action incorporated federal law, the incorporation served as a predicate for federal jurisdiction. See, e.g., *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). The *Merrell Dow* majority asserted that *Smith* is undisturbed. 478 U.S. at 814 n.12. Even if *Merrell Dow* has modified the *Smith-Gully* jurisdictional test as previously suggested, see *supra* notes 27-31, it clearly does not preclude state-created causes of action incorporating federal law as a standard of decision, thus qualifying cases for federal question jurisdiction. Therefore, the way is still open for the states to expand federal question jurisdiction by creating new causes of action.

For example, if a state explicitly created a private right of action for individuals who were subject to police surveillance while engaged in political activities protected by the first amendment, U.S. CONST. amend. I, a complaint for relief would have to contain an allegation that the police activity complained of violated the plaintiff's first amendment rights. The federal matter would be well-pleaded, and the case would qualify for jurisdiction under 28 U.S.C. § 1331 (1988).

gories of cases:⁶⁹

- (1) a "mirror-image" case, in which the party seeking the declaratory judgment would have been the defendant in a traditional federal-question coercive action but has not yet been sued;
- (2) a "federal-defense" case, in which the defendant asserts a federal defense to the plaintiff's nonfederal coercive action; and
- (3) a "federal-reply" case, in which both the complaint and answer would include only state claims but where the plaintiff's reply would raise a federal issue.⁷⁰

Congresses considered a declaratory judgment bill and held hearings in 1922,⁷¹ 1926,⁷² and 1928.⁷³ In 1928, the Senate heard from then-Chief Judge Cardozo, who argued that the device was "a useful expedient to litigants who would otherwise have acted at their peril, or at best would have been exposed to harrowing delay,"⁷⁴ and from Professor Edwin Borchard of Yale,⁷⁵ who "describ[ed] categories of cases in which, without the declaratory judgment, the parties must undergo great risks without knowledge of the parties' respective entitlements, and conclud[ed] that the declaratory judgment 'removes all that peril.'"⁷⁶ Representative Gilbert also highlighted the usefulness of the device: "Under the

69. The legislative history of the 1934 Act is misleading:

"There were no debates or hearings held in either the House or the Senate on the 1934 Bill. The consideration by each chamber was limited to a brief summary of the Bill by its sponsors, followed by a voice vote. 78 Cong. Rec. 10564-65, 10919 (1934) (consideration of the Bill by the Senate); 78 Cong. Rec. 8224 (1934) (consideration of the Bill by the House)."

Doernberg & Mushlin, *The Trojan Horse*, *supra* note 58, at 561 n.151. However, the Declaratory Judgment Act was the product of a fifteen-year battle for federal adoption of declaratory judgment, and there is extensive legislative history, including detailed testimony from many legal scholars and representatives of the bar about why the act was needed and what it was contemplated to do. For a detailed discussion of that history, see *id.* at 547-73.

70. *Id.* at 548 (footnotes omitted).

71. *Hearings on H.R. 1043 Before the House Comm. on the Judiciary*, 67th Cong., 2d Sess. (1922).

72. *Hearings on H.R. 5365 Before the House Comm. on the Judiciary*, 69th Cong., 1st Sess. (1926).

73. *Hearings on H.R. 5623 Before a Subcomm. of the Senate Comm. on the Judiciary*, 70th Cong., 1st Sess. (1928) [hereinafter 1928 *Senate Hearings*].

74. *Id.* at 16.

75. Professor Borchard was the prime mover in the enactment of a federal declaratory judgment provision. See Doernberg & Mushlin, *The Trojan Horse* *supra* note 58, at 551 n.93. He has been described by the Supreme Court as "a principal proponent and author" of the Act. *Steffel v. Thompson*, 415 U.S. 452, 468 n.18 (1974).

76. Doernberg & Mushlin, *The Trojan Horse*, *supra* note 58, at 562 n.154 (citing 1928 *Senate Hearings*, *supra* note 73, at 34-35).

present law you take a step in the dark and then turn on the light to see if you stepped into a hole. Under the declaratory judgment law you turn on the light and then take the step."⁷⁷

At the 1928 Senate Hearings, "the testimony focused on providing a federal forum for parties who had already been accorded one in state court."⁷⁸ For example, Congress specifically contemplated a new class of actions in the federal courts for alleged patent infringers who, rather than waiting to be sued by the patentees, wanted an early determination of the parties' rights and liabilities. This would have enabled the alleged infringers to determine whether they could proceed with their business activity in safety, without the fear of damages piling up until the patentee decided to sue.⁷⁹

The Supreme Court's approach to such cases has been schizophrenic. It has endorsed the reasoning and result of *American*

77. 69 CONG. REC. 2030 (1928).

78. Doernberg & Mushlin, *The Trojan Horse*, *supra* note 58, at 563 n.155. More recently, no less an advocate of limited federal jurisdiction than Justice Rehnquist noted: [T]he legislative history of the [Act] suggests that its primary purpose was to enable persons to obtain a definition of their rights before an actual injury occurred. . . . Congress was apparently aware at the time it passed the Act that persons threatened with state criminal prosecutions might choose to forego the offending conduct and instead seek a federal declaration of their rights. *Steffel v. Thompson*, 415 U.S. 452, 478 (1974) (Rehnquist, J., concurring).

79. Doernberg & Mushlin, *The Trojan Horse*, *supra* note 58, at 564, 570-71. *American Well Works* fits this mold, but there the alleged infringer declined to wait for the patentee to act, instead asserting a state-created claim for trade libel and seeking damages of its own by reason of the patentee's threats to sue and statements to American Well Works' customers and potential customers. *American Well Works v. Layne & Bowler Co.*, 241 U.S. 257, 258-59. In *American Well Works*, despite the fact that patent questions clearly would dominate the litigation, the Court ruled that the case was not federal because state law had created the cause of action. *See supra* text accompanying notes 20-21. The presence of patent questions in a state court case presented no problem. "[S]tate courts routinely adjudicate cases containing patent questions but not brought under the patent laws." Doernberg & Mushlin, *The Trojan Horse*, *supra* note 58, at 577 n.214 (citing *Pratt v. Paris Gas Light & Coke Co.*, 168 U.S. 255 (1897)); *see also, e.g.*, *Geni-Chlor Int'l, Inc., v. Multisonics Dev. Corp.*, 580 F.2d 981 (9th Cir. 1978); *Diematic Mfg. Corp. v. Packaging Indus., Inc.*, 381 F. Supp. 1057 (S.D.N.Y. 1974), *appeal dismissed*, 516 F.2d 975 (2d Cir.), *cert. denied*, 423 U.S. 913 (1975); *American Harley Corp. v. Irvin Indus. Inc.*, 27 N.Y.2d 168, 263 N.E.2d 552, 315 N.Y.S.2d 129 (1970), *cert. denied*, 401 U.S. 976 (1971).

Although Justice Holmes's formulation of the test for federal question jurisdiction was not the dominant test for long, *see supra* notes 20-22 and accompanying text, even under the formulation adopted by the Court in *Smith and Gully*, there would have been no jurisdiction in *American Well Works*. *See Doernberg*, *supra* note 14, at 627-28, 630. On either view of the proper jurisdictional test, however, it is no exaggeration to regard the Declaratory Judgment Act to have been intended, in part, to overrule the decision in *American Well Works*.

Well Works, in which the alleged patent infringer was held not to have a federal question action for damages.⁸⁰ It has also reaffirmed the theory and reasoning of *Skelly Oil*.⁸¹ Finally, having approved Justice Frankfurter's major premise that the Declaratory Judgment Act was intended to have no effect on federal question jurisdiction, the Court has also approved *E. Edelman Co. v. Triple-A Specialty Co.*,⁸² a case identical in pattern to *American Well Works*, but one in which the plaintiff sought declaratory instead of coercive relief.⁸³ That the Court did all of this in the same case merely highlights the discontinuity in its thinking.

To be sure, commentators voiced substantial jurisdictional concerns during the fifteen-year battle to get a federal declaratory judgment provision. Those concerns, however, did not involve the scope of the federal question jurisdiction statute. Instead, they centered around the case-or-controversy clause,⁸⁴ and the Court has implicitly acknowledged as much:

[The Declaratory Judgment Act's] enabling clause was narrower than that of the Uniform Act adopted in 1921 by the Commissioners on Uniform State Laws, which gave comprehensive power to declare rights, status and other legal relations. The federal Act omits status and limits the declaration to cases of actual controversy.

This Act was adjudged constitutional only by interpreting it to confine the declaratory remedy within conventional "case or controversy" limits.⁸⁵

80. See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8-9 (1983).

81. *Id.* at 15-18.

82. 88 F.2d 852 (7th Cir.), *cert. denied*, 300 U.S. 680 (1937).

83. *Franchise Tax Bd.*, 463 U.S. at 19 n.19. The incompatibility of these three cases is discussed extensively in Doernberg & Mushlin, *The Trojan Horse*, *supra* note 58, at 573-79. The Court had explicitly endorsed the analytical method exemplified by *Edelman*, but without citation to the case, in *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952) (dictum). See *supra* note 66.

84. U.S. CONST. art. III, § 2. For a discussion of the debate centering around the case-or-controversy clause, see Doernberg & Mushlin, *History Comes Calling: Dean Griswold Offers New Evidence About the Jurisdictional Debate Surrounding the Enactment of the Declaratory Judgment Act*, 37 UCLA L. REV. 139 (1989) [hereinafter Doernberg & Mushlin, *History Comes Calling*]; Doernberg & Mushlin, *The Trojan Horse*, *supra* note 58, at 566-73.

85. *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 241-42 (1952) (footnote omitted). The Court continued:

In *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, . . . the Court said, "The Act of June 14, 1934, providing for declaratory judgments, does not attempt to change the essential requisites for the exercise of judicial power" which

Thus, to assert as Justice Frankfurter did in *Skelly Oil* that the Declaratory Judgment Act was intended to have no jurisdictional effect,⁸⁶ confuses the issue because of the imprecision of the word "jurisdiction."⁸⁷ Case-or-controversy problems in individual cases can be handled without eliminating whole classes of disputes from the statutory jurisdictional grant to the federal courts.⁸⁸ When the Declaratory Judgment Act was passed, Congress and the Court focused on case-or-controversy problems and decided that they could be surmounted.

Review of the legislative history of the Declaratory Judgment Act permits one to say with fair assurance that Congress did intend to expand the federal question jurisdiction of the federal courts. Thus, the Supreme Court's refusal to accept the grant constitutes an additional instance of the federal courts' failure to exercise their jurisdiction, and one that directly contravenes congressional intent. Treason to the Constitution becomes bolder.

IV. JUDGE-MADE ABSTENTION DOCTRINES

Abstention by its nature is a refusal to exercise jurisdiction.⁸⁹ If jurisdiction does not exist, one never reaches the question of whether to abstain. Federal abstention has two sources: acts of Congress and the decisions of the Supreme Court. Congress has directed abstention, *inter alia*, in the Johnson Act of 1934,⁹⁰ the

still was to be tested by such established principles as that "the judicial power does not extend to . . . abstract questions" and that "claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention."

In *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, . . . Mr. Chief Justice Hughes used the whole catalogue of familiar phrases to define and delimit the measure of this new remedy . . . It applies, he points out, only to "cases and controversies in the constitutional sense" of a nature "consonant with the exercise of the judicial function" and "appropriate for judicial determination." Each must present a "justiciable controversy. . . ."

Id. at 242.

86. See *supra* note 56 and accompanying text.

87. Ironically, Justice Frankfurter himself was well aware of the word's fuzzy boundaries and meanings. Doernberg & Mushlin, *The Trojan Horse*, *supra* note 58, at 570 & n.188.

88. See, e.g., Doernberg & Mushlin, *History Comes Calling*, *supra* note 84, at 143-44.

89. See C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 52, at 303 (4th ed. 1983) (describing abstention as "circumstances under which a federal court may decline to proceed though it has jurisdiction under the Constitution and the statutes").

90. Ch. 283, 48 Stat. 775 (1934) (current version at 28 U.S.C. § 1342 (1988)).

Tax Injunction Act of 1937,⁹¹ and the Anti-Injunction Act of 1948,⁹² each of which directs the federal courts to refrain from exercising jurisdiction in specified situations. For its part, the Supreme Court has sought to improve on Congress's work by creating five abstention doctrines of its own, known as *Pullman*, *Burford*, *Thibodaux*, *Younger*, and *Colorado River* abstentions.⁹³ Thus, federal jurisdiction is eschewed either because Congress has specifically directed or because the Court, despite an unambiguous congressional grant of jurisdiction, refuses for its own policy reasons to exercise the jurisdiction. Therefore, the Court rejects what it implicitly construes as a congressional "offer" of jurisdiction. To do so effectively ignores the important institutional question of whether it is an offer that cannot be refused.⁹⁴

Of the abstention doctrines created by the Court, the doctrine of *Younger v. Harris*⁹⁵ may present the clearest example of jurisdictional abdication by the federal courts. The doctrine originally prohibited federal courts from interfering with pending state criminal prosecutions,⁹⁶ but it has been extended since *Younger* to in-

91. Ch. 726, 50 Stat. 738 (1937) (current version at 28 U.S.C. § 1341 (1988)).

92. Ch. 646, 62 Stat. 869 (1948) (current version at U.S.C. § 2283 (1988)). "[S]tatutorily-dictated abstention is [also] found in . . . the since-modified Three-Judge Court Act, 28 U.S.C. § 2284 (1982); and the exhaustion requirement in habeas corpus, 28 U.S.C. § 2254(b) (1982)." Redish, *Abstention*, *supra* note 38, at 74 n.18. Congress passed the original Anti-Injunction Act in 1793, Act of March 2, 1793, ch. 22 § 55, 1 Stat. 334, and made only modifications to it between 1793 and 1948.

93. For a discussion of the abstention doctrines, see *supra* note 9. Brief discussions of the history and elements of each of these doctrines may be found in M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 281-304, 337-74 (2d ed. 1990), and C. WRIGHT, *supra* note 89, § 52-52A, at 302-30.

94. It may not stretch the point too much to borrow from the well-known maxim of statutory construction and suggest that Congress, in creating some abstention doctrines, has implicitly excluded the propriety of the existence of others. "*Expressio unius est exclusio alterius*," which means "[T]he expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

95. 401 U.S. 37 (1971). Although the doctrine is today known as *Younger* abstention, its origins can be traced to *In re Sawyer*, 124 U.S. 200 (1888). See Zeigler, *An Accommodation of the Younger Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266, 269-71 (1976) [hereinafter Zeigler, *Accommodation*].

96. Intervention was permitted if the plaintiff could demonstrate that there was no adequate remedy at law and that the plaintiff would suffer great, immediate, and irreparable harm unless the federal court intervened. See *Younger*, 401 U.S. at 45 ("[Federal courts] have power to enjoin state officers from instituting criminal actions . . . where the danger of irreparable loss is both great and immediate." (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926))). The Court specifically noted that "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution [was not irreparable harm within the meaning of the doctrine.]" *Id.* at 46.

clude technically civil proceedings "in aid of and closely related to criminal statutes,"⁹⁷ actions seeking reform of state executive practices,⁹⁸ state-initiated civil actions,⁹⁹ state administrative proceedings,¹⁰⁰ and private civil actions involving enforcement of state judgments.¹⁰¹

The *Younger* doctrine is the best example of judicial refusal of jurisdiction because of its close relation to actions brought under the Civil Rights Act of 1871,¹⁰² and the relationship of these actions to congressionally-directed abstention. Since most cases involving the *Younger* abstention doctrine are brought under the Civil Rights Act of 1871, "[v]irtually every major Supreme Court case dealing with *Younger* abstention involves allegations of state violation of federal constitutional rights."¹⁰³ Civil rights cases also frequently involve plaintiffs' requests for some form of federal interference with state judicial proceedings, whether in the form of an injunction against a pending prosecution,¹⁰⁴ a declaration that a statute on which a pending state prosecution is based violates federal constitutional rights,¹⁰⁵ or an order suppressing ev-

97. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975).

98. *See, e.g., Rizzo v. Goode*, 423 U.S. 362, 371 (1976) (action seeking structural reform of police disciplinary procedures); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (action seeking injunctive relief against state judicial officers).

99. *See, e.g., Moore v. Sims*, 442 U.S. 415, 418 (1979) (child abuse action initiated by state authorities); *Trainor v. Hernandez*, 431 U.S. 434, 435 (1977) (civil action brought by Illinois Department of Public Aid to retrieve fraudulently concealed assets).

100. *See, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 621 (1986) (private action seeking injunction against state administrative proceeding).

101. *See, e.g., Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (action seeking to enjoin state court from exercising its judgment pending appeal to state appellate court).

102. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1982)).

103. Telephone interview with Donald H. Zeigler, professor of law at New York Law School (Sept. 15, 1989). Professor Zeigler has argued forcefully that the *Younger* doctrine is supported neither by history nor by sound policy. *See Zeigler, Federal Court Reform of State Criminal Justice Systems: A Reassessment of the Younger Doctrine from a Modern Perspective*, 19 U.C. DAVIS L. REV. 31, 32 (1985) (arguing that the *Younger* doctrine be should abandoned); Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 988 (arguing federal courts' refusal to exercise equitable jurisdiction contravenes congressional intent in adopting the fourteenth amendment and in enacting section 1983); Zeigler, *Accommodation*, *supra* note 95, at 269 (suggesting a compromise between adherence to the *Younger* doctrine and federal protection of a criminal defendant's constitutional rights.).

104. *See, e.g., Younger v. Harris*, 401 U.S. 37, 39 (1971) (appellee sought to enjoin district attorney from prosecuting him in violation of his first and fourteenth amendment rights).

105. *See, e.g., Samuels v. Mackell*, 401 U.S. 66, 67 (1971) (appellant sought declaration that state criminal anarchy statute was unconstitutional).

idence alleged to have been seized in violation of the fourth amendment.¹⁰⁶

In the Anti-Injunction Act, Congress commanded federal courts to refrain from enjoining state proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of [the courts'] jurisdiction, or to protect or effectuate [the courts'] judgments."¹⁰⁷ However, *Mitchum v. Foster*¹⁰⁸ held that the first exception includes actions brought under section 1983.¹⁰⁹ Thus, the Court concedes that Congress intended the federal courts to continue to grant the full range of relief in civil rights cases, even at the cost of interfering with the state courts.¹¹⁰

As demonstrated by the mounting number of cases in which *Younger* abstention is ordered, the federal courts have refused to accept either the original congressional grant of jurisdiction¹¹¹ or Congress's implicit declaration in the first exception to the Anti-Injunction Act, as interpreted by *Mitchum v. Foster*,¹¹² that civil rights actions are of such importance that they should be heard in federal court even if the price of doing so is, in the words of the Act, "an injunction to stay proceedings in a State court"¹¹³ Thus, the Supreme Court refuses not one but two congressional directives in allowing the federal courts to proceed in civil rights cases. Indeed, under the Court's abstention doctrine, it is even possible for a civil rights case to begin in the federal courts when no state proceeding is pending, only to be aborted when a state criminal proceeding is subsequently brought.¹¹⁴ As a result of *Younger* abstention, large numbers of cases qualifying under any test for federal question jurisdiction, and that Congress has chosen not to foreclose through the Anti-Injunction Act, nonetheless will not be heard by the federal courts. Treason to the Constitution is rampant.

106. See, e.g., *Perez v. Ledesma*, 401 U.S. 82, 85 (1971) (suppression order reversed because it violated the *Younger* doctrine).

107. 28 U.S.C. § 2283 (1988).

108. 407 U.S. 225, 231-38 (1972).

109. 42 U.S.C. § 1983 (1988).

110. *Mitchum*, 407 U.S. at 242.

111. Jurisdiction over actions brought under 42 U.S.C. § 1983 (1988) can be invoked under 28 U.S.C. §§ 1331 & 1343 (1988).

112. *Mitchum*, 407 U.S. at 243; see *supra* text accompanying note 108.

113. 28 U.S.C. § 2283 (1988).

114. *Hicks v. Miranda*, 422 U.S. 332, 348-49 (1975).

CONCLUSION

The Supreme Court has flatly refused to permit the exercise of jurisdiction over whole classes of cases committed to the federal judiciary by Congress. Ironically, the Court recently excoriated a district judge who remanded a diversity case to the state courts for the understandable, if not legally justifiable, reason that the federal court's docket was too crowded to permit efficient disposition.¹¹⁵ Indeed, the Court has regularly expressed the thought, though in terms less dramatic than Chief Justice Marshall's, that federal courts may not decline to adjudicate individual cases within their jurisdiction.¹¹⁶ But the Court's own invention of the well-pleaded complaint rule, its method of dealing with declaratory judgment actions, and the proliferation of abstention doctrines not created by Congress result in the rejection of federal jurisdiction over large blocks of cases. It is apparently permissible to do wholesale what cannot be done retail. Treason to the Constitution is a volume business.

There is little or no textual or historical support for the ways in which the Supreme Court has directed the federal judicial system to refuse parts of its jurisdiction. Thus, there is no positive doctrine counseling such refusal that is anchored in anything other than the Court's predilections for how the federal system ought to work. The Court's repeated refusals of jurisdictional grants raise important questions of democratic theory and institu-

115.

[A]n otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason. . . . [C]ases properly removed from state to federal court within the federal court's jurisdiction may not be remanded for discretionary reasons not authorized by the controlling statute.

Thermtron Prods. v. Hermansdorfer, 423 U.S. 336, 344 & 345 n.9 (1976) (citations omitted).

116. "It, therefore, appeared . . . that the Circuit Court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This, it has been steadily held, a Federal court may not do." *McClellan v. Carland*, 217 U.S. 268, 281 (1910) (citing *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893)). In *Chicot*, the Court held that:

"[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. . . . This principle has been steadily adhered to by this court."

Chicot County, 148 U.S. at 534 (citations omitted).

tional legitimacy in the Constitutional system. Those questions echo Chief Justice Marshall's warning about treason to the Constitution. For that discussion, we turn to Professor Redish.