Notre Dame Law Review

Volume 84
Issue 5 *Federal Courts, Practice & Procedure*

Article 6

7-1-2009

Federal Question Jurisdiction and Justice Holmes

Ann Woolhandler

Michael G. Collins

FEDERAL QUESTION JURISDICTION AND JUSTICE HOLMES

Ann Woolhandler & Michael G. Collins†*

INTRODUCTION

A recurring issue in the study of federal courts is what cases arise under federal law for purposes of § 1331.[1] The general rule is clear enough. The federal issue must arise on the face of the plaintiff's well-pleaded complaint. There are two categories of such cases. One consists in causes of action created by the Constitution or federal law, such as rights of action under the antitrust laws. Another category comprises state causes of action with substantial and contested federal ingredients. The late Paul Bator referred to these categories respectively as "Proposition A" and "Proposition B" cases, terminology that was incorporated into the third edition of Hart & Wechsler's federal courts text.[2]

Proposition B cases, even if not without defenders,[3] have always been considered more problematic than Proposition A cases. In

* William Minor Lile Professor of Law, University of Virginia.

† Joseph M. Hartfield Professor of Law, Roy L. and Rosamund Woodruff Morgan Research Professor of Law, University of Virginia. Our thanks to John Jeffries, Jody Kraus, Jonathan Nash, Caleb Nelson, George Rutherglen, Fred Schauer, and Steve Walt.

1 28 U.S.C. § 1331 (2006).

2 *See* PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 995 (3d ed. 1988).

3 *See, e.g.*, William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 906 (1967) (favoring retention of hybrid cases where the case requires expertise in the construction of federal law and a sympathetic trial forum); Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 IND. L.J. 309, 344 (2007) (concluding that when a state claim with federal ingredients obtains federal question jurisdiction under § 1331, a centrality standard works fairly well in combination with the well-

American Well Works Co. v. Layne & Bowler Co.,[4] Justice Holmes famously stated, "A suit arises under the law that creates the cause of action."[5] And in *Smith v. Kansas City Title & Trust Co.*,[6] he dissented from the Court's opinion allowing federal jurisdiction over a state law fiduciary duty claim raising a federal constitutional issue.[7] Nearly fifty years ago, Judge Henry Friendly reinforced Holmes' position by referring to the majority opinion in *Smith* as a novelty—a "path-breaking opinion."[8] Friendly's view continues to have currency among modern scholars who treat Proposition B as both historically and currently idiosyncratic.[9] What is more, the modern reemphasis on the value of rules—particularly important in the jurisdictional context—has suggested to many that, perhaps, it is time to inter Proposition B altogether.[10]

---

pleaded complaint rule); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 570 (1985) (indicating that the federal courts should continue to have discretion in hybrid cases when there is an issue of "great federal moment"); *cf.* Patti Alleva, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After* Merrell Dow, 52 OHIO ST. L.J. 1477, 1498 (1991) (arguing that Congress' intent not to give a right of action under a statute does not indicate that Congress did not want courts to exercise their discretion in allowing federal question jurisdiction when the federal statutory standard is incorporated into a state cause of action); Luman N. Mulligan, *A United Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667, 1690 (2009) (providing a systematization of doctrine including state law actions with federal ingredients).

4 241 U.S. 257 (1916).

5 *Id.* at 260.

6 255 U.S. 180 (1921).

7 *See id.* at 201–02.

8 *See* T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964).

9 *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 881 (5th ed. 2003) ("*Hopkins v. Walker*, 244 U.S. 486 (1917), stands with *Smith* as one of the few Supreme Court decisions clearly upholding jurisdiction under the general federal question statute over a suit that averred no federal cause of action.").

10 *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 321 (2005) (Thomas, J., concurring) (suggesting that the Court reconsider its interpretation of § 1331 allowing for hybrid cases because of the need for clarity in jurisdictional rules); FALLON ET AL., *supra* note 9, at 886 ("Assuming that in some cases (like *Smith*) the recognition of the § 1331 jurisdiction is desirable, is the game worth the candle?"); *id.* at 132 (Supp. 2008) (questioning whether access to federal court should depend on state pleading conventions); Linda R. Hirshman, *Whose Law Is It, Anyway? A Reconsideration of Federal Question Jurisdiction over Mixed State and Federal Law*, 60 IND. L.J. 17, 63, 72 (1984) (recommending the Holmes approach in light of the ad hoc nature of looking to the federal quality of each dispute); Douglas D. McFarland, *The True Compass: No Federal Question in a State Law Claim*, 55 U. KAN. L. REV. 1, 41–47 (2006) (also arguing for the Holmes approach); Daniel J. Meltzer, Jurisdiction and Discretion *Revisited*, 79 NOTRE DAME L. REV. 1891, 1913–15 (2004) (doubting whether

The Supreme Court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*[11] seemed to indicate the end was near—at least for state causes of action incorporating federal statutory (as distinguished from constitutional) standards of care.[12] But the Court could not seem to pull the plug. In *Grable & Sons Metal Products Inc. v. Darue Engineering & Manufacturing*,[13] the Court allowed federal question removal of a state quiet title action that sought to undo a federal tax sale for failure to meet federal statutory notice requirements.[14]

This Article, by looking at the history of federal question jurisdiction, seeks to shed light on the persistence of Proposition B. Current § 1331 descended from the Judiciary Act of 1875, which provided for jurisdiction over cases "arising under the Constitution or laws of the United States."[15] For clues as to what contemporaries might have seen the 1875 statute as addressing, this Article looks at the pre-1875 application of provisions granting federal court jurisdiction for cases "arising under" particular sets of congressional laws, such as the revenue and patent laws. It also looks to the pre-1875 use of diversity jurisdiction as a means for raising federal constitutional issues. In addition, it evaluates early use of the 1875 Act. This history suggests that Proposition B cases were perhaps the paradigm "arising under" cases. Holmes' attempt to exclude Proposition B cases from federal courts represented a break with the past—one that perhaps resulted from his predictivist legal philosophy. What is more, it is uncertain whether Holmes' test represented the clear rule it is supposed to embody.

While the historical and Holmesian support for excising Proposition B cases from federal court may be weaker than many suppose, there may be other reasons for limiting Proposition B cases' access to federal courts. Rules for allocating jurisdiction are desirable. In addition, judicial and congressional assumptions that federal law will be enforced through general or state law remedies have faded—particu-

---

the courts can establish a coherent framework for determining which state cases with federal ingredients should obtain an original federal forum, and suggesting that Holmes' approach might be preferable even if a few cases like *Smith* were excluded from lower federal court jurisdiction); Rory Ryan, *It's Just Not Worth Searching for Welcome Mats with a Kaleidoscope and a Broken Compass*, 75 TENN. L. REV. 659, 669–72, 687–88 (2008) (urging congressional displacement of "the second branch" of federal question jurisdiction).

11 478 U.S. 804 (1986).

12 *Id.* at 816–18.

13 545 U.S. 308 (2005).

14 *Id.* at 312–14.

15 Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470. The amount in controversy had to exceed $500. *Id.* § 2, 18 Stat. at 470.

larly for federal statutory law. We briefly sketch a possible resolution in the distinction arguably suggested by *Merrell Dow*—excluding Proposition B actions based on statutes while including those based on the Constitution.[16]

I. PRIMARY AND REMEDIAL RIGHTS

A. *Hart and Sacks*

In his famous 1954 article, *The Relations Between State and Federal Law*, Henry Hart stated:

> [L]egal problems repeatedly fail to come wrapped up in neat packages marked "all-federal" or "all-state." . . .
>
> The complexities thus created are greatly enhanced by the circumstance, of enormous significance in American federalism, that state courts are regularly employed for the enforcement of federally-created rights . . . while federal courts are employed for the enforcement of state-created rights . . . . In so enforcing substantive rights and duties created by the other system, each of the two systems of courts employs its own rules of procedure and to some extent its own remedial concepts. To the problems of disentangling federal substantive law from state substantive law are thus added problems of disentangling substantive law, state or federal as the case may be, from federal or state procedural and remedial law.[17]

Hart's discussion appears to be informed by a distinction between remedial rights and duties on the one hand, and primary rights and duties on the other. In *The Legal Process*, Hart and Albert Sacks explained that a primary duty is "an authoritatively recognized obligation . . . not to do something, or to do it, or to do it if at all only in a prescribed way."[18] A primary duty is often one with respect to others,

16 *Merrell Dow* did not in terms call for this result, but it might often follow from its holding that Proposition B actions should normally stay in state court if Congress deliberately forwent creating a federal cause of action. *Cf.* FALLON ET AL., *supra* note 9, at 883 (suggesting that after *Merrell Dow* the *Smith* rule would be primarily of use in the unusual situation where the plaintiff elects to sue on a state law claim when a federal law claim was also available).

17 Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 498 (1954). States, he opined, would necessarily have to give "the last-ditch remedy of defense" for constitutional violations. But, for the most part, "[t]he states, it is plain, are free to give such remedies as they choose for violations of federal rights by state officials, provided only that the remedies do not conflict with any provision, express or implied, of federal law." *Id.* at 523.

18 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 130 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); *see also id.* ("The duty . . . is the central conception of regulatory law . . . ."); *cf. id.* at 127–28 n.4 (reproducing Professor Hohfeld's tables of jural opposites and jural correlatives).

who have primary rights. For example, a person may have a primary duty not to cause injury to the property of another, who has a primary right.

When a person breaches a primary duty, his breach "may or may not give rise, by operation of law," to a remedial duty—a duty to provide a remedy to the person whose primary rights were violated and who now has a remedial right.[19] Remedial rights take the form of remedial rights of action.[20] Thus the person whose primary right not to be injured by another was violated may have a tort action—a remedial right—against the violator.

Although primary rights and duties often have corresponding remedial rights and duties, Hart and Sacks saw the concepts as sufficiently separate that one could not merely reason back from remedial rights to primary rights.[21] For example, a remedial duty may be merely "to do what you were supposed to do in the first place,"[22] such as paying required wage rates under the Fair Labor Standards Act.[23] On the other hand, the addition of an equal amount of liquidated damages under the Act does not match the primary duty. In addition, a private party may have primary rights for which only government officials have remedial rights.[24]

B. Predecessors to Hart and Sacks

Hart and Sacks' terminology was somewhat familiar to nineteenth century lawyers, and the distinction would play a role in Holmes' thought (as discussed more fully below).[25] John Austin referred to primary rights and to sanctioning (or secondary) rights, which were consequences of violations of primary rights.[26] For Austin the command of the sovereign backed by "[b]eing liable to evil . . . if I comply

19 *Id.* at 137.

20 *Id.*

21 *Id.* at 138.

22 *Id.* at 137.

23 29 U.S.C.A. § 206 (West 1998 & Supp. 2008).

24 *See* HART & SACKS, *supra* note 18, at 138.

25 See *infra* Part IV for further discussion on this topic.

26 *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, at xxiii (London, John Murray 1832) [hereinafter AUSTIN, PROVINCE]; 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 760–65 (Robert Campbell ed., London, John Murray 5th ed. 1885) [hereinafter AUSTIN, LECTURES]. Austin modified Jeremy Bentham's and certain German jurists' categorizations of substantive and adjective law. 2 AUSTIN, LECTURES, at 761–62; *see also* WILLIAM B. HALE, HANDBOOK ON THE LAW OF TORTS § 1, at 3 n.3 (St. Paul, West Publ'g Co. 1896) (discussing Austin's modification of Bentham's categories).

not" was the source of all legal duties and rights.[27] He therefore stated, "In strictness, my own terms, 'primary and secondary rights and duties,' do not represent a logical distinction. For a primary right or duty is not of itself a right or duty, without the secondary right or duty by which it is sustained; and *e converso*."[28] Austin nevertheless found the distinction between primary and sanctioning rights useful for systematizing law.[29]

In the latter half of the nineteenth century, John Norton Pomeroy, in his treatises *Remedies and Remedial Rights* and *Equity Jurisprudence*, adverted to the primary/sanctioning terminology, but preferred primary/remedial.[30] He used these concepts, among other things, to address whether equity merely provided additional remedial rights for the same primary rights as those vindicated at common law or instead vindicated additional primary rights.[31] Pomeroy's treatises helped to give the terminology some currency in American cases and legal thought.[32]

While useful for positivists such as Austin, the primary/remedial distinction also corresponded to the preexisting, nonpositivist common law distinction between right and remedy. Nineteenth century lawyers and judges often saw traditional rights of property and person, as well as rights to have contracts performed, as existing apart from the remedies that might enforce them. Courts therefore frequently treated statutes of limitations on bringing common law actions as affecting merely the remedy and not the right, such that a time-barred action might be brought if the statute of limitations were repealed.[33]

---

27 AUSTIN, PROVINCE, *supra* note 26, at 7; *id.* at 5–6 ("Every *law* or *rule* . . . is a *command*."); *id.* at 7 ("Command and duty are, therefore, correlative terms . . . wherever a duty lies, a command has been signified.").

28 2 AUSTIN, LECTURES, *supra* note 26, at 768; *see also* 1 *id.* at 410 ("[T]he party who lies under a duty is bound or obliged by a *sanction*.").

29 *See, e.g.*, 2 *id.* at 770–71.

30 *See* JOHN NORTON POMEROY, REMEDIES AND REMEDIAL RIGHTS § 1, at 1 (Boston, Little, Brown, & Co. 1876) [hereinafter POMEROY, REMEDIES]; 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 91, at 76 (San Francisco, A.L. Bancroft & Co., 1881) [hereinafter POMEROY, EQUITY JURISPRUDENCE].

31 *See* POMEROY, REMEDIES, *supra* note 30, § 45, at 51; 1 POMEROY, EQUITY JURISPRUDENCE, *supra* note 30, § 97, at 80–84.

32 *See, e.g.*, 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 8A.10, at 67, § 8A.27, at 84 (1935) (discussing primary and remedial rights); HALE, *supra* note 26, § 1, at 3 n.3 (citing Pomeroy, Austin, and Bentham in discussing the primary/remedial distinction).

33 *See, e.g.*, Campbell v. Holt, 115 U.S. 620, 628–29 (1885) (finding no constitutional infirmity with the statutory revival of an expired debt claim). For a discussion of *Campbell*, see Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1039–40 (2006).

Similarly, legislatures could retroactively validate ultra vires municipal bonds, "by clothing them with forms which are essential to their enforcement, but not to their existence."[34]

Using these concepts, Proposition B cases may be characterized as those in which at least part of the primary duties being enforced are federal (and are properly alleged in the complaint), but the remedial rights take the forms of state law. For example, a state law action to remove a cloud on title might determine which of two rivial claimants had better title from the federal government.[35] Because the history of Proposition B cases starts in the pre-*Erie* world, we also consider general common law actions in federal courts that enforced federal primary rights as within the ambit of potential Proposition B cases. For example, we include general law assumpsit actions to determine if federal customs officials were entitled to exact duties on particular goods. It is appropriate to see such general law actions raising federal statutory and constitutional issues as Proposition B predecessors because the Court itself distinguished such nonstatutory actions from causes of action that federal statutes explicitly created.[36] Post-*Erie*, the Court would recharacterize some of the nonstatutory actions as entirely federal law actions—for example, equity actions raising constitutional issues. But to the nineteenth and early twentieth centuries, such actions were hybrids,[37] and one would understate the significance of Proposition B cases were one to exclude these mixed actions from consideration.

II. THE SCOPE OF EARLY JURISDICTIONAL GRANTS TO THE FEDERAL COURTS

It is often assumed that the absence of general federal question jurisdiction before 1875 meant that there were few federal question cases in the lower federal courts.[38] But when Congress legislated in

34 *See* Read v. City of Plattsmouth, 107 U.S. 568, 575 (1883). For a discussion of *Read*, see Woolhandler, *supra* note 33, at 1038 & n.139.

35 *See, e.g.*, Hopkins v. Walker, 244 U.S. 486 (1917).

36 *See infra* Part II.A.

37 *See* John Harrison, Ex parte *Young*, 60 STAN. L. REV. 989, 1014 (2008) (stating that the cause of action in *Ex parte* Young, 209 U.S. 123 (1908), did not derive from the Constitution and would likely not have been considered federal).

38 *See, e.g.*, Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1517–18 (indicating that the framers of the 1789 Judiciary Act desired to reassure Antifederalists, with the result that "the restrictions on the national judicial power in the Act vastly outweighed its expansiveness"); *id.* at 1485 (noting that among the reassuring restrictions, "[f]ederal question cases must be tried in state courts," with review only to the Supreme Court);

certain substantive areas, it frequently provided federal court jurisdiction.[39] In addition, diversity actions were intended to provide, and often did provide, a vehicle for raising federal questions as between citizens of different states.

A. "Arising Under" Provisions

Of interest in evaluating the 1875 general federal question statute are pre-1875 provisions for federal court jurisdiction for actions "arising under" specific statutes. While some such provisions found their main use in supporting jurisdiction for claims more or less explicitly authorized by statute, others typically supported jurisdiction for non-statutory actions—state or general common law actions with federal ingredients.

1. Statutorily Derived Actions

Patent and copyright were in the category where "arising under" provisions largely supported statutory actions. Early federal laws provided for infringement actions to be brought as "actions on the case," and beginning in 1793 such actions could be brought in the federal circuit courts without regard to diversity or amount in controversy.[40] In 1819, after questions arose as to whether injunctions could be

---

see also William R. Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control over Federal Jurisdiction*, 7 CONST. COMMENT. 89, 93 (1990) (indicating that the 1789 Judiciary Act excluded a number of federal question cases from federal jurisdiction, including many significant cases arising under the Treaty of Paris); *cf.* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 65 (1928) (stating that it was only with the 1875 Act that the federal courts "ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States"); Alleva, *supra* note 3, at 1498 (stating that "section 1331 represented a startling advance for the lower federal courts").

39 *Cf.* David E. Engdahl, *Federal Question Jurisdiction Under the 1789 Judiciary Act*, 14 OKLA. CITY U. L. REV 521, 521 (1989) (arguing that under the Judiciary Act of 1789, ch. 20, 1 Stat. 73, federal question jurisdiction "was fully vested" (if one includes Supreme Court appellate jurisdiction), and that lower federal court jurisdiction was more extensive than many have appreciated); *id.* at 526, 532 (claiming that the provision for jurisdiction for "'all suits for penalties and forfeitures incurred, under the laws of the United States,'" allowed private actions to enforce federal statues, e.g., for violation of the patent laws (quoting Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77)).

40 *See* Act of Feb. 21, 1793, ch. 11, § 5, 1 Stat. 318, 322 (providing for circuit court jurisdiction in cases of violations of patent rights); *see also* Act of Apr. 17, 1800, ch. 25, § 3, 2 Stat. 37, 38 (same). For a discussion of both Acts, see Donald Shelby Chisum, *The Allocation of Jurisdiction Between State and Federal Courts in Patent Litigation*, 46 WASH. L. REV. 633, 635–39 (1971) (examining the early statutes granting federal jurisdiction to cases involving patent rights).

entered against infringement absent diversity,[41] Congress legislated that the circuit courts "shall have original cognisance, as well in equity as at law, of all actions, suits, controversies, and cases, arising under" the patent and copyright laws.[42]

The Court apparently saw the infringement suits brought under this statute and similar superseding provisions as taking their origins in statutes. Justice Johnson, in his dissent in *Osborn v. Bank of the United States*,[43] referred to a patent action as in the category that "'live, move and have its being,' in a law of the United States."[44] Justice Thompson, on Circuit, stated "Copyright was formerly considered to be founded on common law, but it can now only be viewed as part of our statute law."[45] What is more, the Court early distinguished infringement actions from actions based on licensing contracts, the latter not "arising under" the patent statutes, but rather from the voluntary agreement of the parties.[46]

---

41 *See* Livingston v. Van Ingen, 15 F. Cas. 697, 698 (C.C.D.N.Y. 1811) (No. 8420) (holding that there was no jurisdiction to issue an injunction for violation of the patent laws); *cf.* Stearns v. Barrett, 22 F. Cas. 1175, 1179 (C.C.D. Mass. 1816) (No. 13,337) (holding that an action was in the nature of a common law writ of scire facias, and stating, "[w]hether a more convenient, as well as more effectual remedy, might not have been obtained by a bill in equity, to set aside a patent for fraud or imposition, it is not the province of a judicial tribunal to consider or decide"). For an examination of the cases, see Engdahl, *supra* note 39, at 538 & n.79.

42 Act of Feb. 15, 1819, ch. 19, 3 Stat. 481, 481. Later statutes used similar language. *See* Chisum, *supra* note 40, at 638–39.

43 22 U.S. (9 Wheat.) 738 (1824).

44 *Id.* at 887–88 (Johnson, J., dissenting); *cf.* United States v. Am. Bell Tel. Co., 159 U.S. 548, 552, 553–54 (1895) (stating "[n]ow, actions at law for infringement, and suits in equity for infringement, for interference and to obtain patents, are suits which clearly arise under the patent laws, being brought for the purpose of vindicating rights created by those laws," in discussing why Court of Appeals' decisions would not be appealable of right to the Supreme Court under provisions making the decisions of the Courts of Appeals final "in all cases arising under patent laws").

45 Clayton v. Stone, 5 F. Cas. 999, 1000 (C.C.S.D.N.Y. 1829) (No. 2872).

46 *See* Wilson v. Sandford, 51 U.S. (10 How.) 99, 102 (1851) (characterizing the suit as one on the contract and the rights of which "depend altogether upon common law and equity principles," for purposes of determining whether appellate review would lie from the lower federal court without regard to amount in controversy for a case that arose under the patent law); *see also* Hartell v. Tilghman, 99 U.S. 547, 553–54 (1879) (in a suit between nondiverse parties, rejecting the plaintiff's attempt to treat the claim as one of infringement rather than contract); Brown v. Shannon, 61 U.S. (20 How.) 55, 56 (1858) (concluding that the Court only had appellate jurisdiction if there were over $2000 in controversy, because the bill "must be regarded and treated as a proceeding to enforce the specific execution of the contracts . . . and not as one to protect the complainants in the exclusive enjoyment of a patent right"); Goodyear v. Union India Rubber Co., 10 F. Cas. 726, 727 (C.C.S.D.N.Y. 1857) (No. 5586) ("If, in the use of the thing granted, the licensee does not perform his covenants, although

These cases therefore provide some early historical support for treating "arising under" cases as directed to actions explicitly provided for by statutes.[47] They also suggested a well-pleaded complaint rule, because the federal courts looked to the plaintiff's complaint to assess jurisdictional sufficiency.[48]

2. Nonstatutory "Arising Under" Actions

While cases arising under the patent and copyright laws typically took the form of statutorily based infringement actions, "arising under" language in other statutes tended to encompass state and general law remedial rights used to vindicate federal primary rights. This was particularly evident in cases of nonstatutory review of government action—that is, common law and equity actions challenging official behavior.[49]

---

there is, by such performance, a violation of the rights of the patentee, such violation is not a violation of the rights of the patentee as secured by a law of the United States, but a violation of his rights as secured by the covenants."); Pulte v. Derby, 20 F. Cas. 51, 51–53 (C.C.D. Ohio 1852) (No. 11,465) (holding that the suit arose on a contract rather than under the copyright laws). For a discussion of the pleaders' options in whether to allege a contract or an infringement claim, see Chisum, *supra* note 40, at 646–48.

47 *See* T.B. Harms Co. v. Eliscu, 339 F.2d 823, 826–28 (2d Cir. 1964) (Friendly, J.) (noting that the Holmes "creation" test explains many copyright and patent cases, although also noting some cases that fell outside of it); *see also supra* text accompanying note 8.

48 *See* Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1854–55 & n.108 (2007) (stating that patent litigation "offer[ed] a clear foreshadowing of the well-pleaded complaint rule"); *cf.* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 801–03, 808 (2004) (arguing that the ingredient language in *Osborn* referred to an essential component of the cause of action).

49 For discussions of the concept of nonstatutory review, see Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 321–23 (1967) (providing a description of nonstatutory review that includes common law damages and equity actions which may be based on specific statutes or general statutes such as 28 U.S.C. § 1331 as well as 28 U.S.C. §§ 1337 and 1339, conferring original jurisdiction on civil actions "arising under" the acts of Congress regulating commerce and relating to the postal service, respectively); *cf.* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 121–26 (1998) (arguing that the federal courts were granted power under the 1875 Act to administer a federal common law of equity that justified nonstatutory review in cases such as *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), but that such powers should contract with the advent of the Administrative Procedure Act).

a. Revenue Cases

Claims by citizens against co-citizen federal customs collectors (as distinguished from enforcement actions by the collectors) at first could not be brought in federal courts,[50] but only in state courts with the possibility of Supreme Court review under section 25 of the 1789 Judiciary Act.[51] South Carolina's resistance to federal tariffs of 1828 and 1832 in the Nullification Crisis led to Congress' passage of the Force Act in 1833,[52] providing "[t]hat the jurisdiction of the circuit courts of the United States shall extend to all cases, in law or equity, arising under the revenue laws of the United States, for which other provisions are not already made by law."[53]

These provisions did not so much establish or create any particular federal right of action; rather, the Force Act authorized state and general common law actions to be brought in federal courts.[54] Plaintiffs, without regard to diversity or amount in controversy, could now file assumpsit actions for duties paid under protest in federal courts in the first instance; such cases "arose under" the revenue laws.[55] These

50 This is true at least absent diversity and the amount in controversy, or possibly admiralty jurisdiction. *Cf. Ex parte* Davenport, 31 U.S. (6 Pet.) 661, 664 (1832) (holding that in a suit in federal court on a customs bond, the taxpayers can make ordinary merits defenses).

51 *See* Ins. Co. v. Ritchie, 72 U.S. (5 Wall.) 541, 542–43 (1867) (stating that prior to the 1833 Act, actions by citizens against collectors had to be brought in state court, but that with the 1833 Act, many actions were removed (citing Elliott v. Swartwout, 35 U.S. (10 Pet.) 137 (1836); Bend v. Hoyt, 38 U.S. (13 Pet.) 263 (1839))).

52 Act of Mar. 2, 1833, ch. 57, 4 Stat. 632.

53 *Id.* § 2, 4 Stat. at 632. The Act also allowed customs officers to bring actions for damages in federal courts against persons who harmed them:

> [A]nd if any person shall receive any injury to his person or property for or on account of any act by him done, under any law of the United States, for the protection of the revenue or the collection of duties on imports, he shall be entitled to maintain suit for damage therefor in the circuit court of the United States in the district wherein the party doing the injury may reside, or shall be found.

Id., 4 Stat. at 632–33.

54 *Id.*

55 *See* Rankin v. Hoyt, 45 U.S. (4 How.) 327, 327 (1845) (entertaining an assumpsit action on writ of error to the Circuit Court of the United States for the Southern District of New York); Swartwout v. Gihon, 44 U.S. (3 How.) 110, 110 (1845) (holding, on writ of error to the Circuit Court for the Southern District of New York, that verbal notice of protest would suffice); *see also Ritchie*, 72 U.S. (5 Wall.) at 543 ("Under that act [the 1833 Act] citizens of the same State might sue each other for causes arising under the revenue laws. A citizen injured by the proceedings of a collector might have an action against him for the injury, though a citizen of the same State with himself.").

common law actions were similar to those brought in state courts and removed under the Force Act's revenue officer removal provisions.[56]

These assumpsit actions enforced both state law or general law primary rights (the right to property and not to have it taken without legal justification) and federal primary rights (the presence or absence of federal legal justification). As the Court stated,

> The law as laid down by this court with respect to collectors of revenue . . . is precisely that which is applicable to agents in private transactions between man and man, viz: that a voluntary payment to an agent without notice of objections will not subject the agent who shall have paid over to his principal; but that payment with notice, or with a protest against the legality of the demand, may create a liability on the part of the agent who [s]hall pay over to his principal in despite of such notice or protest.[57]

A plaintiff would typically allege a collector's demand for a tax, that the collector's demand was not justified under the federal law, and that the plaintiff had protested before payment that the demand was illegal.[58] The absence of federal authority thus was part of the complaint. Like the patent and copyright cases, then, the assumpsit cases suggested the existence of a well-pleaded complaint rule.

The common law nature of these taxpayer remedies was reflected in Congress' reaction to the Supreme Court's decision in *Cary v. Curtis*.[59] In *Cary*, the Court held that an 1839 federal statute[60] that pro-

---

56 Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632, 633 (allowing officers to remove "for . . . any act done under the revenue laws of the United States, or under colour thereof, or . . . under any such [revenue] law" and also providing habeas for such officers); *Elliott*, 35 U.S. (10 Pet.) at 138 (recognizing assumpsit action against collector for excess duties paid under protest in action removed from state court).

57 Cary v. Curtis, 44 U.S. (3 How.) 236, 239–40 (1845).

58 *Cf.* Spreckels Sugar Ref. Co. v. McClain, 192 U.S. 397, 417 (1904) (holding that a suit for money paid under protest arose under the general federal question provision because the plaintiff's demand claimed that the act under which the defendant proceeded to collect the taxes was repugnant to the Constitution and also arose under a statute providing for internal revenue). Similarly, in *Elliott*, the Court upheld removal, reciting in the statement of the case (and possibly indicating what was in the complaint):

> The action was assumpsit, to recover from the defendant the sum of thirty-one hundred dollars and seventy-eight cents, received by him for duties, as collector of the port of New York, on an importation of worsted shawls . . . and worsted suspenders . . . . The duty was levied at the rate of fifty per centum ad valorem, under [a congressional act] as manufactures of wool, or of which wool is a component part.

35 U.S. (10 Pet.) at 138.

59 44 U.S. (3 How.) 236 (1845); *see also id.* at 246 (referring to *Elliott*, the Court stated, "[i]t was, unquestionably, decided upon principles which may be admitted in

vided for certain administrative remedies had impliedly superseded the previously available assumpsit action.[61] Congress reacted by restoring the previously available action, but in language indicating that the assumpsit against the collector was a preexisting common law action rather than a statutorily created one: "[N]othing contained in the [Act of March 3, 1839] shall take away, or be construed to take away or impair, the right of any person" who had paid under written protest "to maintain any action at law against such collector."[62]

The assumpsit actions for customs collection were largely, although not completely,[63] displaced by administrative remedies with specific judicial review provisions in 1864.[64] The court stated with reference to the 1864 Act, that

> it is apparent that the common-law action recognized as appropriate by the decision in *Elliott v. Swartwout* has been converted into an action based entirely on a different principle—that of a statutory liability, instead of an implied promise—which, if not originated by the act of Congress, yet is regulated, as to all its incidents, by express statutory provisions.[65]

In 1864, however, a federal statute extended the 1833 Force Act's jurisdictional provisions to "all cases arising under the laws for the

---

ordinary cases of agency" that were dependent on the agent's ability to retain the money); *id.* at 237 (argument of counsel) (arguing that the assumpsit was allowable "[b]ecause this right existed at common law, and the statute does not express a clear intent" to abrogate it); *id.* at 254 (Story, J., dissenting) ("Now, how stands the common law on this very subject? It is, that an action for money had and received lies in all cases to recover back money which a person pays to another in order to obtain possession of his goods from the latter, who withholds them from him upon an illegal demand, or claim, *colore officii*, and thus wrongfully receives and withholds the money.").

60 Act of Mar. 3, 1839, ch. 82, § 2, 5 Stat. 339, 348.

61 *Cary*, 44 U.S. (3 How.) at 252.

62 Act of Feb. 26, 1845, ch. 22, 5 Stat. 727. The protest had to be in writing. *Id.*

63 *See infra* text accompanying notes 135–36.

64 Act of June 30, 1864, ch. 171, §§ 14–15, 13 Stat. 202, 214–15. This Act required exhaustion of certain administrative remedies, with a possibility of a suit for recovery within ninety days of the decision of the Secretary of the Treasury. *Id.* § 14, 13 Stat. at 214. The Act of June 10, 1890, ch. 407, § 15, 26 Stat. 131, provided a different system of administrative appeals, with court review of the decision of the board of appraisers. *Id.* § 15, 13 Stat. at 214. No action against the collector was allowed for matters that might be appealed under the Act. *Id.* Matters outside the Act were still subject to common law actions. *See infra* notes 135–36 and accompanying text.

65 Arnson v. Murphy, 109 U.S. 238, 243 (1883) (citation omitted) (holding that it was therefore improper to bar the action under the New York statute of limitations when the importer had brought the action within ninety days of the Secretary of Treasury's decision as required by the statute).

collection of internal duties, stamp duties, licenses, or taxes."[66] This provision allowed co-citizen assumpsit actions against internal revenue collectors (as distinguished from customs collectors) to be brought originally in the federal courts.[67] In 1866, however, Congress passed a removal provision specific to internal revenue[68] and simultaneously repealed the cross reference to the 1833 Force Act.[69] This repealing provision meant that co-citizen assumpsits could not be filed originally in federal court,[70] although virtually all of them could be removed from state courts. The Court opined that disallowing the original federal court actions did not make a lot of sense.[71] And with the passage of the general federal question act in 1875, plaintiffs who could meet the amount in controversy returned to filing assumpsit cases in the lower federal courts against internal revenue officers.[72]

---

66 *See* Act of June 30, 1864, ch. 173, § 50, 13 Stat. 223, 241, *repealed by* Act of July 13, 1866, ch. 184, § 68, 14 Stat. 98, 172. The 1866 Act provided for broad removal. § 67, 14 Stat. at 171. Congress had passed internal revenue laws to meet expenses of the Civil War, and uncertainty had existed as to whether the Force Act's provisions should be interpreted to extend to these laws. *See* City of Philadelphia v. Collector, 72 U.S. (5 Wall.) 720, 721–22 (1867).

67 *See, e.g.*, Assessor v. Osbornes, 76 U.S. (9 Wall.) 567, 573 (1870) (noting that the assumpsit against the collector could undoubtedly have been maintained under the 1864 Act, but was not longer available); Ins. Co. v. Ritchie, 72 U.S. (5 Wall.) 541, 544 (1867) (noting that, although the suit had been brought while the 1864 Act was in force, and no question of jurisdiction would have arisen had that Act remained in force, the Act of July 13, 1866, 14 Stat. at 172, repealed such original jurisdiction, although possibly Congress had not intended this result given that the 1833 Act giving original jurisdiction in customs cases was not affected).

68 *See* Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171.

69 *See id.* § 68, 14 Stat. at 172.

70 Assumpsits contesting other exactions continued by removal or by original jurisdiction where there was jurisdiction. *See, e.g.*, Dunlap v. United States, 173 U.S. 65, 70–76 (1899) (involving assumpsit originating in the Court of Claims); Hamilton v. Dillin, 88 U.S. (21 Wall.) 73, 74 (1875) (involving assumpsit filed originally in federal court by those who had paid to the surveyor of the port of Nashville for permits to ship cotton during the war to loyal states, in which the court approved such charges as within the war power).

71 *See Ritchie*, 72 U.S. (5 Wall.) at 541–45 (opining that there was no reason to discriminate between actions under the internal revenue laws and the customs laws, for which the 1833 Act was still in force); *see also* Hornthall v. Collector, 76 U.S. (9 Wall.) 560, 565–66 (1870) (reiterating that an original action against the internal revenue collector could not be brought originally in federal court, although it could be removed); *cf.* Stewart v. Barnes, 153 U.S. 456, 464 (1894) (involving assumpsit against collector removed from state court).

72 *See, e.g.*, Patton v. Brady, 184 U.S. 608, 611–23 (1902) (holding that general federal question jurisdiction was proper for an action to recover taxes paid under protest, and raising the constitutionality of the federal law under which the collector acted); *see also* Spreckels Sugar Ref. Co. v. McClain, 192 U.S. 397, 405–17 (1904)

b. Mandamus

Mandamus provided another example of a state or common law action that could arise under federal law prior to 1875. In cases in which a disappointed land claimant sought to force a federal land official to issue a final certificate of purchase, the Marshall Court had held that neither federal,[73] nor state courts[74] had been given authority to issue mandamus to a federal official. In *Kendall v. United States*,[75] however, the Court reached a contrary result as to the District of Columbia Circuit Court.[76] Postal contractors had secured passage of a congressional statute providing that the Postmaster General should abide by an award to the contractors by the Solicitor of the Treasury.[77] When the Postmaster refused to credit the Solicitor's full award, the contractors sought mandamus, and the Supreme Court held that the D.C. Circuit Court could grant mandamus in the case.[78]

The Court attributed the ability to issue mandamus partly to the fact that the D.C. Circuit Court inherited preexisting Maryland law; the Supreme Court concluded that Maryland courts had power to issue the common law writ of mandamus when Congress created the D.C. Circuit Court in 1801.[79] But given the Court's prior denial to state courts of the ability to issue mandamus to federal officers, the D.C. Circuit Court's receiving Maryland law alone would not have sufficed to uphold that court's power to issue the writ in *Kendall*. The Court therefore also relied on a congressional statute giving the D.C. court "all the powers by law vested in the circuit courts and the judges

(determining, in resolving issue of the proper court in which to seek review of the assumpsit action from a lower federal court, that the action arose both under the revenue laws as well as the Constitution).

73 M'Intire v. Wood, 11 U.S. (7 Cranch) 504, 506 (1813) (holding that Congress had not given the lower federal courts mandamus jurisdiction). The courts could grant mandamus when necessary to exercise the jurisdiction acquired by some other grant. *See id.*; *see also* Byse & Fiocca, *supra* note 49, at 311–12 (discussing limitations on mandamus).

74 M'Clung v. Silliman, 19 U.S. (6 Wheat.) 598, 604 (1821) (holding that state courts lacked power to issue mandamus to federal officials).

75 37 U.S. (12 Pet.) 524 (1838).

76 *See id.* at 624–25.

77 *Id.* at 524; *see also* discussion in Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1671–72 (2008).

78 *Kendall*, 37 U.S. (12 Pet.) at 624–25.

79 *See id.* at 619–20. The Court in *M'Intire* had held that such mandamus powers as the first judiciary act conferred on the circuit courts were limited to issuance of the writ in aid of jurisdiction. *See id.* at 616.

of the circuit courts of the United States."[80] The circuit courts at the time of the act establishing the D.C. Circuit Court had jurisdiction for "all cases in law or equity, arising under the constitution and laws of the United States,"[81] under the short lived 1801 Judiciary Act. But the *Kendall* Court held that the D.C. court nevertheless retained "arising under" jurisdiction because its organic act had adopted by reference the powers under the 1801 Act. The D.C. Circuit Court thus had "arising under" jurisdiction that other federal courts lacked once the 1801 Act was repealed, and this grant provided part of the authority for that court's continued jurisdiction in mandamus.[82]

As was true in the assumpsit cases, a federal issue would normally arise on the face of a mandamus petition. The plaintiff would typically have to state that a federal officer had refused to perform a ministerial duty required by a statute.[83]

---

80 Act of Feb. 27, 1801, ch. 15, § 3, 2 Stat. 103, 105. The Act also provided for the circuit courts to have jurisdiction "of all cases in law and equity between parties, both or either of which shall be resident or be found within said district." *Id.* § 5, 2 Stat. at 106.

81 Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92; *see also Kendall*, 37 U.S. (12 Pet.) at 622, 625–26 (discussing the vast jurisdictional grant embodied in the Act of 1801); *see also* Susan Low Bloch, *The* Marbury *Mystery: Why Did William Marbury Sue in the Supreme Court?*, 18 CONST. COMMENT. 607, 614 (2001) (discussing the *Kendall* Court's reliance on the "arising under" jurisdiction of the 1801 Act); John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 380–82 (2006) (discussing *Kendall*).

82 *See* Byse & Fiocca, *supra* note 49, at 311 (stating that excepting some special statutes, "the mandamus powers of the federal district courts continued as established by the *M'Intire* and *Kendall* decisions" until 1962); *see also* Act of Mar. 3, 1863, ch. 91, §§ 1, 3, 12 Stat. 762, 763 (replacing the D.C. Circuit Court with the Supreme Court of the District of Columbia, "which shall have general jurisdiction in law and equity," and that "shall possess the same powers and exercise the same jurisdiction as is now possessed and exercised by the circuit court of the District of Columbia"). While the jurisdiction continued, the requirement of a ministerial, as opposed to a discretionary, duty meant that few of the early nineteenth century cases that made it to the Supreme Court were successful on the merits. *See, e.g.*, Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 514–15 (1840) (recognizing that the Circuit Court for Washington County in the District of Columbia had power to issue mandamus to an officer of the federal government, but holding that interpretation of the statutes under which Susan Decatur claimed pensions was a discretionary act).

83 *See, e.g., Decatur*, 39 U.S. (14 Pet.) at 498–99 (statement of the case) ("Mrs. Decatur applied by petition to the Circuit Court of the county of Washington, setting forth all the circumstances of the case, and asking from the Court a writ of mandamus, 'to be directed to the said James K. Paulding, Secretary of the Navy . . . commanding him, that he shall fully comply with, obey, and execute, the aforesaid resolution of Congress, of the 3d of March, 1837.'").

c. Postal Cases

Also suggestive that "arising under" provisions might be used for common law suits against federal officials was the Court's characterization of the state law tort claim in *Teal v. Felton*.[84] An 1845 postal law included a jurisdictional provision for cases "arising under" the postal laws.[85] But citizens apparently had fewer occasions to complain about federal postmasters than revenue collectors, and the provision seems to have got little use in its early years.[86]

In *Teal*, however, the Supreme Court affirmed a state court's grant of damages in a trover action against a postmaster.[87] The plaintiff sued for the sum of six cents after the postmaster withheld mail pending payment of first class postage, based on the presence of a single initial, and therefore a possible personal communication, on the wrapper of a periodical.[88] The postmaster challenged the state court's jurisdiction over the case on a variety of grounds,[89] but the Supreme Court upheld the state court's jurisdiction based on the general presumption of concurrency of state court jurisdiction for cases arising under federal law.[90] Later, in *Claflin v. Houseman*,[91] the Court characterized *Teal* as a case "against a postmaster for neglect of duty to deliver a newspaper under the postal laws of the United States" and thus an example of the ability of the state courts to take concurrent jurisdiction of suits arising under federal law.[92] Additionally, post-

84 53 U.S. (12 How.) 284 (1852).

85 Act of Mar. 3, 1845, ch. 43, § 20, 5 Stat. 732, 739.

86 Postal contractors, for the most part, presumably, had nonjudicial remedies available to them prior to the establishment of the Court of Claims in 1855. *See* FALLON ET AL. *supra* note 9, at 102–03.

87 *Teal*, 53 U.S. (12 How.) at 287, 293.

88 *See id.* at 289–92 (approving trover action in state court for damages for failure of the Syracuse postmaster to deliver mail without payment of first class postage due to a single initial being on the wrapper of a newspaper).

89 *Id.* at 287–88 (argument of counsel) (arguing that jurisdiction is not acquired by the state courts by reason of those courts' having jurisdiction in a particular kind of action, if the remedy depends on the statute law peculiar to the United States government).

90 *Id.* at 292 (majority opinion).

91 93 U.S. 130 (1876).

92 *Id.* at 142. *But see* Bankers Mut. Cas. Co. v. Minneapolis, St. Paul, & Sault Ste. Marie Ry. Co., 192 U.S. 371, 383 (1904) (stating, in a case where an insurance company sought reimbursement from a railroad for having to pay for a lost bag of money and cited certain postal regulations violated by the railroad, that the claim was merely for negligence, and characterizing *Teal* as a case where an act of Congress was raised in defense, and reviewable under section 25).

1875 cases would allow nonstatutory review actions to be brought in the federal courts as arising under the postal laws.[93]

Overall, "arising under" jurisdiction seems to have found a use in bringing common law actions against government officials. Revenue cases seem to have been the most common examples. Officers such as marshals, whose jobs brought them into unfriendly contact with the citizenry but for whom there were no "arising under" and officer removal provisions, found themselves more frequently stuck in state courts.[94]

B. Diversity Actions with Federal Ingredients

While suits under specific "arising under" provisions often provided avenues to challenge the legality of actions of some federal officials, diversity cases raising federal questions provided a way to challenge the actions of state officials.[95] Modern lawyers and scholars are inclined to think of diversity as quite distinct from federal question jurisdiction, and (as noted above) to see the 1789 Judiciary Act as leaving federal question cases largely to state courts in the first instance.[96] These suppositions, however, tend to understate the extent to which diversity jurisdiction may have been intended as, and was in fact, a vehicle for federal question cases. Both before and after 1875, the Court saw diversity as appropriately employed to raise federal questions, and often gave an expansive interpretation of the diversity jurisdiction to accommodate federal questions.[97]

---

93 *See infra* note 139 and accompanying text.

94 *See, e.g.*, McKee v. Rains, 77 U.S. (10 Wall.) 22, 25 (1869) (holding that a marshal could not remove a trespass suit for levy on property that did not belong to the defendant; the actions did not fall under removal provisions for trespass during the rebellion, nor other removal provisions). Congress authorized federal court actions on the marshal's bond. *See, e.g.*, Gwin v. Breedlove, 43 U.S. (2 How.) 29, 41 (1844) (referring to the right of action conferred by the 1806 statute on the bond as being "without restriction as to citizenship"). The Court, however, refused to hold the federal actions exclusive. *Id.* at 35. In addition, complainants could bring such suits in federal courts as ancillary to the case that led to the marshal's levy. *See* Buck v. Colbath, 70 U.S. (3 Wall.) 334, 338–39 (1865).

95 Diversity actions could also be used to bring actions against federal officers. *See, e.g.*, Williams v. Reynolds, 131 U.S. cxi, cxiii (1873) (Appendix) (noting that federal revenue statutes would not allow an original federal court action against a federal revenue officer "unless the plaintiff and defendant in such suit are citizens of different states").

96 *See supra* note 38.

97 *See* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 85–88 (1997) (elaborating on this point).

Diversity was well suited to enforcing some of the constraints on the states in the original Constitution. For example, state court resistance—in defiance of treaty obligations—to British creditors' efforts to collect debts was an impetus to Article VI's making treaties supreme federal law, and Article III's providing for jurisdiction over cases arising under treaties as well as over controversies between citizens and aliens. British creditors with a sufficient amount in controversy early availed themselves of diversity jurisdiction.[98] Related concerns about state debtor protection were a spur to the Contracts Clause, and for Article III's provision for diversity jurisdiction.[99] Out-of-state creditors accordingly sued their debtors in federal courts in diversity, defendants raised defenses based on state debtor protective legislation, and the creditor-plaintiffs relied on the Contracts Clause to invalidate such state statutory defenses.[100]

The Court's embrace of federal diversity courts as appropriate forums for litigating federal constitutional violations was manifest in its leniency in allowing domestic corporations to challenge state laws by more or less manufacturing diversity. This was evident in a number of cases in which corporations alleged violations of the Contracts Clause in state legislatures' abrogations of promises in corporate charters to limit taxation. Diversity should have been difficult to obtain, because the corporations, by virtue of their state-law incorporation, were citizens of the very states whose tax officials they would need to sue to challenge the taxes. In *Deshler v. Dodge*,[101] however, an Ohio banking corporation successfully invoked diversity jurisdiction by assigning to an out-of-stater its rights to recover bank notes seized for

98 *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

99 *See* Woolhandler, *supra* note 97, at 86. The 1789 Act's requirement that the amount in controversy exceed $500 would relegate some such actions to state court, with section 25 review of right potentially an option. *See* Holt, *supra* note 38, at 1487–88 & n.234 (indicating that the amount in controversy would exclude many British debt claims). Challenges to bills of attainder and ex post facto laws would more likely arise by way of defense to state court enforcement actions.

100 *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 215–27 (1827) (considering a Contracts Clause issue in the course of a suit on a bill of exchange); *see also* Bronson v. Kinzie, 42 U.S. (1 How.) 311, 320–22 (1843) (disallowing under the Contracts Clause a defense under a state law limiting foreclosures in a suit to foreclose a mortgage apparently brought in diversity); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 25–26 (1825) (avoiding a Contracts Clause issue in a diversity suit by holding a Kentucky two-year delay in execution of judgments inapplicable in federal court due to the Court's interpretation of the Process Act as only adopting by reference state procedures at the time of enactment).

101 57 U.S. (16 How.) 622 (1854).

state taxes.[102] While the "assignee clause" of the 1789 Judiciary Act normally would have kept the assignment from creating diversity, the Court held the clause inapplicable to an action for wrongful detention of property—that is, the bank notes.[103] Similarly in *Dodge v. Woolsey*,[104] the Court allowed an out-of-state shareholder to bring a diversity action against a corporation and tax collection officials to enjoin collection of the same bank tax.[105] The Court looked to the shareholder's actual citizenship to find diversity, even though, in most contexts, the Court adhered to a conclusive presumption that all shareholders resided in the state of incorporation.[106]

Similar to the assumpsit actions that arose under the revenue laws against federal collectors, the derivative action against the bank's officers and the state tax collectors enforced a combination of state (or general) and federal primary rights—for example, common law fiduciary duties of corporate officers to shareholders to resist the illegal diminution of corporate assets, and federal primary duties of state officers not to tax in violation of the Contracts Clause. The action did not derive directly from the Constitution or any state or federal statute.[107]

---

102 *Id.* at 622–23 (statement of the case). The Court also allowed the assignment to circumvent state limitations on replevin. *See id.* at 633–34 (Catron, J., dissenting) (protesting that the majority had allowed the assignment to a third party to evade the Ohio prohibition on replevin for goods taken "for the payment of any tax . . . assessed against the plaintiff"). For a discussion of *Deshler*, see Woolhandler, *supra* note 99, at 91–92, 108–09.

103 *Deshler*, 57 U.S. (16 How.) at 631 (majority opinion).

104 59 U.S. (18 How.) 331 (1856). For a discussion of the *Woolsey*, see Woolhandler, *supra* note 97, at 91.

105 *Woolsey*, 59 U.S. (18 How.) at 346–58; *see also* Tomlinson v. Branch, 82 U.S. (15 Wall.) 460, 470 (1872) (upholding an injunction, in a shareholder suit, as to parts of the railroad that had been property of a company whose charter gave a tax exemption).

106 *See Woolsey*, 59 U.S. (18 How.) at 364–65 (Campbell, J., dissenting).

107 *See id.* at 341–43 (majority opinion). As Justice Wayne stated in *Dodge v. Woolsey*:

> It must often happen, under such a government as that of the United States, that constitutional questions will be brought to this court for decision, demanding extended investigation and its most careful judgment.
>
> This is one of that kind; but fortunately it involves no new principles, nor any assertion of judicial action which has not been repeatedly declared to be within the constitutional and legislative jurisdiction of the courts of the United States, and by way of appeal or by writ of error, as the case may be, within that of the supreme court.
>
> It is a suit in chancery, which was brought by John M. Woolsey, in the circuit court of the United States for the district of Ohio, seeking to enjoin

III. THE 1875 GENERAL FEDERAL QUESTION STATUTE

A. The 1875 Act in Context

From a modern perspective, § 1331's main application is to provide jurisdiction for federal remedial rights vindicating federal primary rights. From an historical perspective, however, the 1875 Act may have been more squarely directed to actions that Congress had not explicitly provided.[108]

First, the general federal question provision was not needed for claims under federal statutes to the extent such claims already enjoyed specific jurisdictional provisions of their own. Second, the background of nonstatutory "arising under" suits against federal officers, together with diversity common law actions against state officers for violations of federal law, suggest that Congress may have anticipated that the 1875 Act would be used for hybrid actions against governmental officers—for example, actions against state officers without diversity and actions against federal officers not encompassed within specific "arising under" or other jurisdictional provisions.[109] Third, the scant legislative history on the 1875 Act indicated the framers thought they were extending jurisdiction to the full extent allowed by Article III.[110] Indeed, the Act was perceived and initially interpreted as authorizing lower federal court jurisdiction based on federal defenses, at least by removal.[111] The 1875 Act was commonly known

---

> the collection of a tax assessed by the State of Ohio on the Commercial Branch Bank of Cleveland . . . .

Id. at 336.

108 *Cf.* Alleva, *supra* note 3, at 1498–99 (stating that "[t]he existence of the general grant . . . meant that Congress's failure to provide expressly for federal jurisdiction over particular cases did not necessarily end the federal jurisdictional inquiry if congressional permission to hear the case could be found by virtue of section 1331" and gave courts "front-line prerogative" to draw jurisdictional lines).

109 *See* Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1528 & n.190 (1989).

110 *See* Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 723 & nn.32–35 (1986) (citing authority).

111 Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 470 (providing for removal by either party of "any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States"). The Court required the federal issue to arise on the face of the complaint for actions originally filed in federal court in *Metcalf v. Watertown*, 128 U.S. 586, 588–89 (1888). For a discussion of *Metcalf*, see Collins, *supra* note 110, at 731.

as the Removal Act,[112] and federal defense removal continued until the Court's 1894 decision in *Tennessee v. Union & Planters' Bank*.[113] There the Court (possibly incorrectly) interpreted changes in the wording in an 1887 revision of the Act as engrafting the well-pleaded complaint rule onto removal.[114]

If one assumes Congress had no trouble with cases where the federal issue arose by way of defense, it would follow that Congress would be unconcerned with whether the plaintiff's remedial rights derived from state, general, or federal law.[115] Nor did the Court's implementing the well-pleaded complaint rule, first for original filings, and later for removal, suggest any exclusion of state or general law actions, so long as the federal ingredient was part of the plaintiff's claim.[116]

One might argue that the 1871 Civil Rights Act,[117] with its accompanying jurisdictional provisions, provided an explicit cause of action for state and local constitutional violations (including between co-citizens), such that the 1875 Act would not have been necessary for such purposes. But contemporaries did not see the 1871 Civil Rights Act as an all-purpose statutory vehicle for constitutional claims that it has become in modern times. Rather, many saw the Act as addressing a limited set of "civil" (as opposed to "political" and "social") rights—that is, rights such as racial equality in the ability to make contracts, to

---

112 *See, e.g.*, Carson v. Dunham, 121 U.S. 421, 429 (1887) (referring to the "Removal Act of 1875"); Phelps v. Oaks, 117 U.S. 236, 237 (1886) (same); Bowman v. Chi. & Nw. Ry. Co., 115 U.S. 611, 614 (1885) (same).

113 152 U.S. 454, 464 (1894). The *Union & Planters' Bank* Court was interpreting the 1887 revision of the 1875 Act. *See* Act of Mar. 3, 1887, ch. 373, § 6, 24 Stat. 552, 555, *amended by* Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433, 433. For a discussion of *Union & Planters' Bank*, see Collins, *supra* note 110, at 734–56.

114 The 1887 Act provided only for defendant removal of suits "arising under" federal law "of which the circuit courts of the United States are given original jurisdiction by the preceding section." § 2, 24 Stat. at 553.

115 This suggestion is reinforced by John Harrison's observations that federal equity actions with constitutional elements in the plaintiff's pleading might be seen as serving a traditional role for equity as a vehicle for raising what would otherwise be a defense to an action at law when remedies at law were inadequate. *See* Harrison, *supra* note 37, at 998–1000 (discussing how equity cases were often used as a means to enforce defenses, including defenses that could be raised at law, but where the assertion would not afford full protection to the equity plaintiff); *id.* at 1016 ("There was no *Skelly Oil* [*v. Phillips Petroleum*, 339 U.S. 667 (1950)] principle for injunctive suits that anticipated actions at law and reversed the parties to them . . . .").

116 *See Metcalf*, 128 U.S. at 589 (indicating that for original federal jurisdiction the plaintiff's complaint must show "that the determination of the suit depends upon some question of a Federal nature").

117 Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871) (current version at 42 U.S.C. §§ 1983, 1985, 1986 (2006)).

own land, and to testify and be a party in state court.[118] In addition, the Court sometimes read the 1871 Act's language of rights "secured by" the Constitution to mean rights uniquely secured by the Constitution; preexisting common law rights that the Constitution recognized but did not create were not necessarily included.[119] Because rights to property and rights under contracts preexisted the Constitution (as distinguished from rights to racial equality in the ability to own property or to make legally enforceable contracts), Due Process and Contracts Clause claims were not necessarily seen as encompassed in the 1871 Act.[120]

B. The 1875 Act in Practice

Whatever its original purposes, the 1875 Act almost seamlessly became a vehicle for nonstatutory equity and damages actions containing constitutional elements. The new statute was used, for example, for nonstatutory actions challenging taxation[121]—a pre-1875 use of both the diversity and the revenue laws' "arising under" provisions. The Court also upheld original federal question jurisdiction for a trespass action against the treasurer of the City of Richmond who seized property after refusing the taxpayer's tender of state bond coupons; the Virginia legislature had abrogated its prior promise to accept the coupons for taxes, in violation of the Contracts Clause.[122] In another such trespass action, the Court noted that if the amount in controversy were met, "It is not questioned but that the declaration discloses

118 Collins, *supra* note 109, at 1501–03. Such civil rights most clearly encompassed those enumerated in the Civil Rights Act of 1866. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981–82 (2006)).

119 Collins, *supra* note 109, at 1503.

120 *Id.* at 1503–06.

121 For example, in an 1883 action, a West Virginia company sought an injunction against the charging of wharfage fees by Parkersburg, West Virginia, that the company alleged were in fact tonnage fees violating the Commerce Clause. The Court considered the fees to be wharfage fees that presented no Commerce Clause issue but only an issue of state law; otherwise, the case would have arisen under federal law. *See* Transp. Co. v. Parkersburg, 107 U.S. 691, 695, 707 (1883); *see also id.* at 708 (Harlan, J., dissenting) (stating his understanding that the Court was saying that if such duties did violate a right secured by the Constitution or federal laws, then the case unquestionably "arose under the Constitution or laws of the United States").

122 White v. Greenhow, 114 U.S. 307, 307–08 (1885). The pleadings alleged that the treasurer refused to receive the coupons under color of an 1882 Virginia statute, that the latter act violated the Contracts Clause, and that the defendant thereafter forcibly seized personal property worth $3000. *Id.* Although jurisdiction was upheld under the general federal question statute, the Court held in a companion case that the 1871 Act could not be used for a Contracts Clause claim. Carter v. Greenhow, 114 U.S. 317, 322–23 (1885).

a cause of action within the jurisdiction of the Circuit Court . . . for it is a suit of a civil nature arising under the Constitution of the United States, and therefore within the words of § 1 of the act of March 3, 1875."[123] Analogously, in a pair of 1896 cases, the Court approved original "arising under" jurisdiction for both a trespass action for damages, and an injunctive action after state constables seized liquor under a state law alleged to violate the Commerce Clause.[124]

The use of derivative actions to contest the legality of governmental actions illustrates the continuity of pre-1875 diversity cases with post-1875 federal question cases. As noted above, the antebellum Court in *Dodge v. Woolsey* had sustained a diversity derivative action to contest Ohio taxes alleged to violate the Contracts Clause.[125] Post-1875 litigants successfully pursued similar actions under diversity, federal question, or both.[126] In *Pollock v. Farmers' Loan & Trust Co.*,[127] for example, the Court allowed a shareholder suit brought under diversity and federal question jurisdiction to contest the constitutionality of the federal income tax.[128] The Court began its opinion by observing that "[t]he jurisdiction of a court of equity to prevent any threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained," citing *Dodge*.[129]

---

123 Barry v. Edmunds, 116 U.S. 550, 558 (1886). The Court reinstated the action upon finding the amount satisfied. *Id.* at 566.

124 Scott v. Donald, 165 U.S. 58, 59 (1897) (allowing damages action for seizing liquor under state law in violation of the Commerce Clause); Scott v. Donald, 165 U.S. 107, 108 (1897) (allowing similar equity action).

125 *See supra* notes 104–07 and accompanying text.

126 *See, e.g.*, Allen v. Balt. & Ohio R.R. Co., 114 U.S. 311, 314, 317 (1885) (allowing a diversity derivative action to contest Virginia's refusal to accept bond coupons (citing Dodge v. Woolsey, 59 U.S. (18 How.) 331, 331 (1856))).

127 157 U.S. 429 (1895).

128 *Id.* at 430, 434 (indicating that the suit had been filed in equity by a Massachusetts shareholder against a New York banking corporation and its directors, and that both diversity and federal question were alleged as bases for jurisdiction); *see also* Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 10 (1916) (holding that suit by shareholders to enjoin the railroad from paying an allegedly unconstitutional federal tax arose under the Constitution, thus giving the Supreme Court appellate jurisdiction). A reason for framing suits to enjoin federal taxes as a shareholder suit was to avoid the effects of a statute that prohibited injunctions against the collection of federal taxes. *See id.* (citing *Pollock*, 157 U.S. 429); *Pollock*, 157 U.S. at 554 (indicating the collector had not been joined to avoid problems with equitable relief); *cf.* State R.R. Tax Cases, 92 U.S. 575, 577 (1876) (entertaining actions by trustees and shareholders to enjoin taxes as violating, inter alia, the Commerce Clause, although also reciting various limitations on equity's enjoining taxes).

129 *Pollock*, 157 U.S. at 553 (citing *Dodge*, 59 U.S. (18 How.) at 331).

Derivative actions under both federal question and diversity also were vehicles for the Court's development of restrictions on confiscatory rates under the Due Process Clause, in cases such as *Smyth v. Ames.*[130] Similarly, the original suits in *Ex parte Young*[131] were derivative actions relying simultaneously on diversity and federal question jurisdiction.[132] It so happened that the trial court entered its contempt order against Attorney General Young in an action that included a Minnesota shareholder and, therefore, lacked diversity.[133] The Court's decision in *Smith v. Kansas City Title & Trust Co.* to entertain a federal question derivative action thus found ample support in prior decisions.

In addition, post-1875 litigants continued to bring general law, nonstatutory cases against federal officials arising under the revenue, as well as other laws. For example, in *The Insular Cases*, importers challenged the constitutionality of charging duties on goods from the Philippines and Puerto Rico, claiming that the commerce was domestic, not foreign.[134] Although, as noted above, statutory review had largely displaced the customs assumpsit, the Court held the statutory actions inapplicable where the plaintiff alleged that the goods had not been "imported."[135] The Court thus entertained an assumpsit action filed originally in federal court, holding there was jurisdiction without regard to the amount in controversy under provisions derived from the 1833 Force Act for "all suits at law or equity arising under any act providing for a revenue from imports or tonnage."[136]

---

130 169 U.S. 466, 493–94 (1898) (holding, in a derivative suit, that railroad rates must provide a fair return on the current value of the road).

131 209 U.S. 123 (1908).

132 *Id.* at 143.

133 *Id.* at 129.

134 *See, e.g.*, De Lima v. Bidwell, 182 U.S. 1 (1901).

135 *Id.* at 1, 176, 179–80; *see also In re* Fassett, 142 U.S. 479, 486–87 (1892) (holding that a decision of whether a yacht was an imported article could be reviewed on a libel for possession).

136 Downes v. Bidwell, 182 U.S. 244, 248 (1901) (quoting Act of Mar. 2, 1833, ch. 57, 4 Stat. 632); *see also id.* ("While, as we have held in *De Lima v. Bidwell*, actions against the collector to recover back duties assessed upon non-importable property are not 'customs cases' in the sense of the Administrative Act, they are, nevertheless, actions arising under an act to provide for a revenue from imports, in the sense of section 629, since they are for acts done by a collector under color of his office."). The Court also reasoned that the original jurisdiction provisions should be read similarly to the removal provisions. Those provisions allowed officers to remove when sued for actions "'on account of any act done under color of his office, or of any such [revenue] law,'" and was the basis for removal of an assumpsit action in *De Lima. Downes*, 182 U.S. at 248 (quoting Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632, 633). *See also* Dooley v. United States, 182 U.S. 222, 223, 225 (1901) (holding that a suit to

The courts also allowed nonstatutory review actions against federal postal officials as arising under federal law generally or the postal laws—a possibility suggested in the antebellum decision in *Teal v. Felton* discussed above.[137] For example, in *American School of Magnetic Healing v. McAnnulty*,[138] the Court entertained a federal equity action between nondiverse parties to contest the postmaster's refusal to deliver mail based on grounds that the Court held unauthorized by the statute.[139] And although previously the Court had largely limited actions arising under the patent laws to statutory actions, it allowed nonstatutory actions by the United States to revoke patents for fraud. In *United States v. American Bell Telephone Co.*,[140] the Court held that such an action came not only under jurisdiction for the United States as a party, but also under general federal question jurisdiction.[141] Actions against other officers, such as marshals, could arise under federal law, although the well-pleaded complaint rule unevenly foreclosed jurisdiction.[142]

---

recover customs duties could also be brought in the Court of Claims against the United States, which was authorized to hear claims against the United States "founded upon the Constitution . . . or any law of Congress" and that "[s]uch cases, although arising under the revenue laws, are not within the purview of the Customs Administrative act; as for such cases there is still a common-law right of action against the collector, and we think also by application to the Court of Claims").

137 *See supra* notes 84–93 and accompanying text.

138 187 U.S. 94 (1902).

139 *Id.* at 94 (likely alleged under general federal question jurisdiction, given that the plaintiff also raised constitutional issues); *see also* Griffith v. W.S. Vick Grocery Co., 272 F. 246, 249 (6th Cir. 1921) (holding that an equity suit against the postmaster and a company seeking that certain mail be delivered to the plaintiff could be brought under the laws of the United States); Lewis Pub. Co. v. Wyman, 152 F. 200, 201 (E.D. Mo. 1907) (involving equity action that alleged that the postmaster—without notice and hearing, and contrary to statute—revoked second class mail privileges); *id.* at 205 (noting that there was no postal officer removal); *cf.* United States v. Shaw, 39 F. 433, 435 (C.C.S.D. Ga. 1889) (indicating that a suit on postmasters' bond arose under the postal laws); New Orleans Nat'l Bank v. Merchant, 18 F. 841, 845–46 (C.C.E.D. La. 1884) (allowing removal of action for denial of certain postal privileges as arising under the postal laws).

140 128 U.S. 315 (1888).

141 *Id.* at 359; *see also* United States v. Am. Bell Tel. Co., 159 U.S. 548, 552 (1895) (reiterating this holding, and also holding that the Supreme Court had review of the action even though actions arising under the patent laws were normally final in the Circuit Courts under the jurisdictional statute, because the statute did not mean to forbid Supreme Court review of cases in which jurisdiction was premised on the United States as a party).

142 *Compare* Walker v. Collins, 167 U.S. 57, 58–59 (1897) (holding state court suit for damages for alleged wrongful seizure by marshal was not removable, even though the defense was that the seizure was under a writ of attachment from the federal

* * * *

The continuity of post-1875 federal question cases with the pre-1875 practice of raising federal questions within state and general law remedial rights in diversity suggests that Proposition B cases were not merely fringe cases for "arising under" jurisdiction. Under the 1875 Act, litigants alleging violations of federal primary rights—litigants who previously might have invoked diversity—now could rely on federal question, diversity, or both. The continuation of common law cases arising under the customs laws, as well as postal and other laws, reinforces this conclusion.

One may object that general law actions with federal ingredients should be seen as cases in which federal law itself in fact supplied the remedial rights. It is true that many of these actions would eventually morph into actions that the Court would see as more thoroughly federal. At the time, however, the Court and litigants seemed to view the remedial rights as hailing from general law or state law,[143] and they distinguished more purely federal statutory actions. The Court, moreover, was not overly concerned with designating the sources of the remedial rights as between state law or general law. Rather, it seemed

---

court), *with* Sonnentheil v. Christian Moerlein Brewing Co., 172 U.S. 401, 405 (1899) (noting that even if the action were not on the bond, the right of action "is given by the laws of the United States" and that if suits against federally chartered corporations arose under federal law, "with even greater reason must it be considered that a suit against a marshal of the United States for acts done in his official capacity falls within the same category"). Although *Sonnentheil* addressed whether the Supreme Court had appellate jurisdiction, this jurisdiction depended on whether the case was originally properly alleged as a federal question case. *See also* Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. PA. L. REV. 1, 48–49 n.264 (1968) (discussing the disparity of results in federal marshal cases); *cf.* Eighmy v. Poucher, 83 F. 855, 856 (C.C.N.D.N.Y. 1898) (allowing removal but not directly addressing whether federal law was part of the well-pleaded complaint, and stating that "all the proceedings against the plaintiff were by United States officials in a United States court for violation of United States laws"); Rury v. Gandy, 12 F.2d 620, 620 (E.D. Wash. 1926) (allowing removal of suit for malicious prosecution against bankruptcy trustee, the trustee's attorney, and attorney for a creditor, and not addressing the well-pleaded complaint rule). *But cf.* Chappell v. Waterworth, 155 U.S. 102, 108 (1894) (holding unremovable an action for ejectment against the keeper of a lighthouse, whose defense was that the United States owned the property); Thompson v. Standard Oil Co., 67 F.2d 644, 646 (4th Cir. 1933) (disallowing federal question removal for an alleged libel in the private defendant's answer to plaintiff's federal complaint).

143 *See, e.g.*, Harrison, *supra* note 37, at 1014 (stating that the cause of action in *Ex parte Young* did not derive from the Constitution and would likely not have been considered to be federal). General law issues did not present federal issues for direct review. *Id.* at 1014 n.103.

to see the various forms for raising federal primary rights as somewhat interchangeable ways of raising federal issues; an assumpsit action, filed in state court (presumably using state law elements) and reaching federal court by removal, was similar to the assumpsit action filed originally in federal court (presumably using general law or state law elements).[144] Cases where federal law ingredients were incorporated into remedial rights that were viewed as nonfederal were, therefore, a significant and likely anticipated use of the 1875 "arising under" provisions.

IV. HOLMES AND FEDERAL QUESTION JURISDICTION

A. *Holmes' Collapse of Primary and Remedial Rights*

Given this background, one might conclude that it was Justice Holmes who was out of step when he claimed, in his *Smith v. Kansas City Title & Trust Co.* dissent, that the derivative action raising the issue of the legality of federal bonds arose only under state law for purposes of original federal court jurisdiction.[145] In *Smith*, Missouri bank shareholders sued a Missouri bank and its officers, to enjoin the defendants from making illegal investments.[146] The investments were in federal land bank bonds whose authorization, the plaintiffs claimed, exceeded Congress' enumerated powers.[147]

The majority had no trouble finding that the action arose under federal law, reciting the well-pleaded complaint rule, and also relying on prior derivative actions raising federal constitutional issues such as *Pollock*.[148] The Court did not attribute the derivative action to any particular source of law. But for Holmes, it was "evident that the cause of action arises not under any law of the United States but wholly under Missouri law."[149]

Holmes would famously state that the law "does not exist without some definite authority behind it," and rejected the notion of general common law.[150] But neither an embrace of positivism nor the rejec-

144 *See supra* notes 134–36 (discussing *The Insular Cases*).

145 255 U.S. 180, 214 (1921) (Holmes, J., dissenting).

146 *Id.* at 189, 195 (majority opinion).

147 *Id.* at 195. The federal act, inter alia, made the bonds lawful investments for all fiduciaries and trust funds and provided that they could be accepted as security for public deposits. *Id.* at 198. The illegality of the bonds, alleged the shareholders, would have made the income from the bonds ineligible for state tax exemptions provided in the congressional statute. *Id.*; *see also id.* at 190 (argument of counsel).

148 *Id.* at 200–01.

149 *Id.* at 214 (Holmes, J., dissenting).

150 Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

tion of general common law necessarily explains Holmes' rejection of federal jurisdiction for Proposition B cases.[151] A positivist might still see the remedial right of the derivative action as primarily sourced in Missouri law (as opposed to general law), while also seeing the primary rights at stake in the lawsuit as at least partly federal (i.e., constitutional limitations allegedly making the bonds illegal).

Holmes' attitude may be more explicable, however, when one considers that Holmes eschewed the concept of primary rights as distinct from remedial rights. As G. Edward White has explained, Holmes' early legal writings attempted to systematize law through the concept of legal duty,[152] taking an analytical approach that scholars characterize as similar to John Austin's.[153] For Holmes, legal duty was prior to right, and a duty was only "created by commands which may be broken at the expense of incurring a penalty."[154] While Austin had previously defined law as command, Holmes saw himself as placing greater emphasis than did Austin on consequences and enforcement as the core of the duty.[155] Given Holmes' paramount role for enforcement predictions—an emphasis that would only increase with time—

151 Chisum, *supra* note 40, at 642 (attributing Holmes' position to his treating law as the command of the sovereign); Cohen, *supra* note 3, at 898–99 (arguing that while Holmes reasoned that there would be no cause of action but for state law, one could also say the same for federal law).

152 G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES 113 (1993).

153 *See* Mathias W. Reimann, *Holmes's* Common Law *and German Legal Science, in* THE LEGACY OF OLIVER WENDELL HOLMES, JR. 72, 78–79, 111 (Robert W. Gordon ed., 1992) (citing 2 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES 66–83 (1963)) (characterizing Holmes' early attempts to systematize law as Austinian, and indicating that Holmes did not wholly abandon his attempt to seek and arrange the underlying principles of the common law).

154 Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 12 (1870).

155 For example, Holmes faulted Austin for attributing law to "a definite political superior," and argued that "by whom a duty is imposed must be of less importance than the definiteness of its expression and the certainty of its being enforced." *Id.* at 4. He gave an example of wearing dinner dress in London, on pain of not being invited again, as more a law than was a legal rule against usury that juries routinely refused to enforce. *Id.* at 4–5. In discussing the custom of merchants, he stated, "Why should not a rule, which is more compulsory than many statutes in practice, be recognized as binding in law?" Oliver Wendell Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 657 (1873) [hereinafter Holmes, *Torts*]; *see also* Oliver Wendell Holmes, Jr., *Book Notices*, 6 AM. L. REV. 723, 724 (1871) ("But it is clear that in many cases custom and mercantile usage have had as much compulsory power as law could have . . . ."); *id.* ("The only question for the lawyer is, how will the judges act?").

the duty by which Holmes proposed to organize law corresponded to Austin's category of sanctioning duties, not primary duties.[156]

Eventually Holmes moved away from treating "duty" as the central concept of law,[157] substituting the notion of "the prediction of the incidence of the public force through the instrumentality of the courts."[158] He stated that one should see "legal duty" from the view-

---

156 In *Codes, and the Arrangement of the Law*, Holmes observed that current organizations of law lumped together

> on account of the practical cohesion of the conception [of] property . . . not only the true duty to respect possession which is enforced by the action of trover, but likewise the *quasi* duty, the performance of which is compelled by the officers of the law when they give possession to the successful plaintiff in a real action.

Holmes, *supra* note 154, at 12. But "[t]hat which the law directly compels, although it may onerously affect an individual, cannot be said to impose a duty upon him." If one used "what Austin calls sanctioning rights," one would treat as distinct the duty that the court compelled the defendant to perform himself from the duty that an officer of the state performed. *Id.* at 12–13. The passage just summarized might be interpreted in another fashion. *See, e.g.*, HOWE, *supra* note 153, at 68 (interpreting the passage as meaning that Holmes' scheme would exclude "the subject matter of 'sanctioning rights' which had played such an important part in Austin's classification of law"). *But cf. id.* at 77–80 (suggesting that, although criticizing Austin's concept of duty, Holmes continued to use the concept). In *The Theory of Torts*, Holmes responded to an objection against using the title "Torts" in his arrangement of law "that it puts the cart before the horse, that legal liabilities are arranged with reference to the forms of action allowed by the common-law for infringing them,—the substantive under the adjective law. But an enumeration of the actions which have been successful, and those which have failed, defines the extent of the primary duties imposed by the law . . . ." Holmes, *Torts*, *supra* note 155, at 659–60.

157 *See* WHITE, *supra* note 152, at 121 (seeing Holmes' statement that the term duty is "open to objection," as signaling Holmes' abandonment of using duty as his central principle (internal quotation marks omitted)), *referring to* Oliver Wendell Holmes, Jr., *Possession*, 12 AM. L. REV. 688, 702 (1878) ("[L]egal duties are logically antecedent to legal rights. We may leave on one side the question of their relation to moral rights . . . . To put it more broadly and avoid the word duty, which is open to objection, the direct operation of the law is to limit freedom of action or choice on the part of a greater or less[er] number of persons in certain specified ways; while the fact that the power of removing or enforcing this limitation is generally confided to certain other private persons is not a necessary or universal correlative."); *see also* Letter from Oliver W. Holmes to Frederick Pollock (Apr. 21, 1932), *in* 2 HOLMES-POLLOCK LETTERS 307, 307 (Mark DeWolfe Howe ed., 1941) ("I can imagine a book on the law, getting rid of all talk of duties and rights—beginning with the definition of law in the lawyer's sense as a statement of the circumstances in which the public force will be brought to bear upon a man through the Courts, and expounding rights as the hypostasis of a prophecy—in short, systematizing some of my old chestnuts.").

158 *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897); *cf.* RUDOLPH VON JHERING, LAW AS A MEANS TO AN END 241 (Isaac Husik trans., 4th ed. 1914) ("Coercion put in execution by the State forms the absolute criterion of

point of the bad man for whom it is "a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money."[159] One could characterize these prophecies as predictions about the incidence of remedial rights; Holmes' principal bugbear was not so much remedial rights as the concept of primary rights separate from remedies and enforcement. He accordingly wrote in a letter to Sir Frederick Pollock in 1883:

> But in my old age I become less and less inclined to make much use of the distinction between primary rights duties [*sic*] and consequences or sanctioning rights or whatever you may call them. The primary duty is little more than a convenient index to, or mode of predicting the point of incidence of the public force.[160]

And in *The Path of the Law* in 1897, Holmes again manifested his disdain for the notion of primary rights:

> Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else. If

---

law; a legal rule without legal coercion is a contradiction in terms . . . ."); Reimann, *supra* note 153, at 102–03 (discussing the relationship of Holmes' ideas to Jhering's). Among others, H.L.A. Hart criticized the predictive view of law, and scholars widely view Hart as having refuted the notion of a purely predictive view of the law. *See* H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994). Hart discusses an external point of view by which actors would only look to sanctions as opposed to an internal point of view by which people use rules as guides of conduct: "For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility." *Id.* at 84; *see also id.* at 90. In addition, he states,

> If it were true that the statement that a person had an obligation meant that *he* was likely to suffer in the event of disobedience, it would be a contradiction to say that he had an obligation, e.g., to report for military service but that, owing to the fact that he had escaped from the jurisdiction, or had successfully bribed the police or the court, there was not the slightest chance of his being cause caught and made to suffer. In fact, there is no contradiction in saying this, and such statements are often made and understood.

Id. at 24.

159 Holmes, *supra* note 158, at 461.

160 Letter from Oliver W. Holmes to Frederick Pollock (Mar. 25, 1883), *in* 1 HOLMES-POLLOCK LETTERS, *supra* note 157, at 20–21; *see also* Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918) ("But for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things to contravene it . . . .").

> you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.[161]

Holmes' apparent rejection of the primary/sanctioning distinction and the cognate common law right/remedy distinction surfaced in his opinion for the Massachusetts Supreme Judicial Court in *Heard v. Sturgis*.[162] Prior to the state court litigation in *Heard*, an 1875 federal judgment assigned all assets of two bankrupt former partners to an assignee in bankruptcy.[163] The United States government later received an arbitration award from Great Britain for shipping losses inflicted by the Confederate ship *Alabama* and other specified vessels, which had operated out of British ports.[164] Congress set up a procedure for shippers to make claims upon the fund.[165] When the "Alabama claims" of those with direct shipping losses did not exhaust the fund, Congress in 1882 passed an act allowing those who had paid war risk insurance premiums to make claims.[166] The trustee in bankruptcy for the former partners received such an award for the partners' insurance payments.[167] At issue in *Heard* was whether the proceeds should go to the bankruptcy trustee or to the former partners.[168]

Holmes opined that the war risk premium claims against the fund had no existence prior to the 1882 statute, and thus no existence at the time of the 1875 assignment of the estates of the bankrupts to the trustee: "[I]t must be remembered, whenever a new statute comes up for consideration, that although it may be found by construction to give what it gives as if in pursuance of a legal duty, there is no such legal duty in fact, and no antecedent right on the part of the persons who receive its benefits."[169] The claims, Holmes concluded, were therefore in the nature of a gift from the United States government, which had no obligation to pay the funds to those with the insurance

---

161 Holmes, *supra* note 158, at 461.

162 16 N.E. 437, 440 (Mass. 1888). For a discussion of Holmes' opinion in *Heard*, see MICHAEL H. HOFFHEIMER, JUSTICE HOLMES AND THE NATURAL LAW 19–23 (1992).

163 These assets had been insufficient to cover the debts. *See* Williams v. Heard, 140 U.S. 529, 530 (1891).

164 *See id.* at 530, 538.

165 *Id.* at 538.

166 *Id.*

167 *Id.* at 539.

168 Heard v. Sturgis, 16 N.E. 437, 440 (Mass. 1888).

169 *Id.* at 441.

premium claims. The partners, and not the bankruptcy trustee, should therefore get the payment for the war risk insurance premiums.[170]

The United States Supreme Court's unanimous reversal of Holmes' state court decision in *Heard* manifests the view opposed by Holmes—the common law view that rights, particularly those backed by moral obligations, could preexist remedies.[171] While agreeing that Congress might have declined to distribute the funds as it did, the Court said that even if there were no means to compel Congress to distribute the award to those who suffered losses:

> [N]evertheless there was at all times a moral obligation on the part of the government to do justice to those who had suffered in property. . . . They were rights growing out of property, rights, it is true, that were not enforceable until after the passage of the act of Congress for the distribution of the fund. But the act of Congress did not create the rights. They had existed at all times since the losses occurred. They were created by reason of losses having been suffered. All that the act of Congress did was to provide a remedy for the enforcement of the right.[172]

Holmes wrote, "I think it an interesting case and one which I could have written the other way, but I confess I think the ground adopted by the U.S. Court one which is quite irreconcilable with primary juridical notions."[173]

B. Holmes' Supreme Court Opinions

These divergent views may give some insight into Holmes' dissent in *Smith v. Kansas City Title & Trust Co.*, where the issue was the legality of the federal bonds in which the bank's officers proposed to invest. If one accepted a notion of primary rights, one might say that, in the real world, apart from any particular forms that remedies might take, Congress either had power to issue the bonds or it did not,[174] and this issue might be litigated in remedial forms supplied by state or federal law. But for Holmes, primary rights were at best a shadow of

---

170 *Id.* at 442–43.

171 *Williams*, 140 U.S. at 545. Justice Bradley took no part in *Heard*. *Id.*

172 *Id.* at 541.

173 Letter from Oliver W. Holmes to Frederick Pollock (July 8, 1891), *in* 1 HOLMES-POLLOCK LETTERS, *supra* note 157, at 39, 40. *See* HOFFHEIMER, *supra* note 162, at 23–25 (discussing *Heard*).

174 *Cf.* HART, *supra* note 158, at 85 ("[I]t is crucial for the understanding of the idea of obligation to see that in individual cases the statement that a person has an obligation under some rule and the prediction that he is likely to suffer for disobedience may diverge.").

predictions of enforcement; one needed federal remedial rights to get into federal court.[175] In his *Smith* dissent, Holmes thus emphasized that federal law did not provide or require any remedies at all for the bank shareholders under the circumstances presented. The state, according to Holmes, could have exempted the fiduciaries from any action based on the investments in the challenged government bonds. Because "the law of the United States has no force *proprio vigore*," federal law did not even create "part of the cause of action."[176]

Holmes had earlier engaged in similar reasoning in his majority opinion in *American Well Works*, where he concluded that there was no original federal question jurisdiction in a case alleging trade libel based on the defendant's statements that the plaintiff violated the defendant's patents.[177] According to Holmes, the state could even have made it actionable for the defendant truthfully to say that the plaintiff infringed his patent.[178] Thus, for Holmes, state law's giving remedies without federal law providing or compelling a remedy under the circumstances, created entirely state remedial duties.[179]

---

175 Our discussion will continue to use the terms remedial rights and duties, even if it is not Holmes' preferred terminology.

176 Smith v. Kan. City Title & Trust Co., 255 U.S. 180, 215 (1921) (Holmes, J., dissenting); *see also id.* ("But the law must create at least a part of the cause of action by its own force, for it is the suit, not a question in the suit, that must arise under the law of the United States.").

177 Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916). In addition, the patent issue did not necessarily arise on the face of the complaint. *Id.* at 259; *cf.* Cohen, *supra* note 3, at 897 (stating that Holmes' opinion did not rest on the patent issue being a matter for the answer).

178 *Am. Well Works*, 241 U.S. at 260 ("If the State adopted for civil proceedings the saying of the old criminal law: the greater the truth the greater the libel, the validity of the patent would not come in question at all.").

179 *See* Cohen, *supra* note 3, at 898–99 (attributing to Holmes an untenable, but-for-state-law test, that could easily have reached the opposite conclusion, and also stating that a position that no hybrid claims arose under federal law would be untenable). Holmes also discussed whether a case was a federal question case or merely diversity in *Louisville & Nashville R.R. Co. v. W. Union Tel. Co.*, 237 U.S. 300, 302 (1915). The action was one in which the telegraph company had condemned, under Louisiana law, part of the railroad's right of way. *Id.* at 301. The Court held that a recitation of a federal statute in the plaintiff's complaint did not make the action a federal question case because the federal act did not require but only permitted eminent domain powers to be exercised by the company. *Id.* at 302–03. Holmes then proceeded with a more convoluted suggestion (which he rejected) to support federal question jurisdiction. Louisiana law, as construed, required that a company, in order to exercise eminent domain powers in the state, be authorized by its state of incorporation (here New York) to operate in Louisiana. *Id.* Supposing New York law did not authorize the company's operating in Louisiana, the federal statute would have

It is possible Holmes meant that remedial rights are either entirely state or federal, and that there is not a category where remedial rights were both state and federal.[180] Or perhaps he thought such an either/or allocation made the most sense as a matter of jurisdictional policy. That would provide the clear rule that modern scholars find and value in the Holmes test: "A suit arises under the law that creates the cause of action."[181] But Holmes emphasized the lack of any federal compulsion to the remedial rights in the few cases in which he addressed the issue directly, and argued in *Smith* that the remedial rights did not even come partly from federal law.[182] Thus, it is possible that Holmes would not have excluded from federal courts

---

authorized its operation and could have filled that authorization gap. Holmes continued:

> But when, as here, the foundation of the right claimed is a state law, the suit to assert it arises under the state law none the less that the state law has attached a condition that only alien legislation can fulfil. The state law is the sole determinant of the conditions supposed, and its reference elsewhere for their fulfilment is like the reference to a document that it adopts and makes part of itself.

Id. at 303.

180 Holmes' opinion for the Court in *Burrill v. Locomobile Co.*, 258 U.S. 34 (1922), is somewhat suggestive of such an either/or stance. A taxpayer brought an assumpsit action claiming that a tax was unconstitutional, alleging both federal question and diversity. *Id.* at 35 (argument of counsel). The state required that a refund remedy be brought against the state and not the collector—a requirement that would prevent the taxpayer from filing the refund action in federal court. *Id.* at 34. In the past, the Court had ignored state laws requiring suits against the state and allowed complainants to sue an appropriate state officer on common law actions in federal court. *See* Woolhandler, *supra* note 97, at 138–39. In *Burrill*, however, Holmes allowed this state requirement of a suit against the state itself to preclude a federal forum, provided the state remedy was adequate. *See* 258 U.S. at 38; *cf.* Miller's Ex'rs v. Swann, 150 U.S. 132 (1893) (cited with approval by Holmes in his dissent in *Smith*, 255 U.S. at 215). In *Miller's Executors*, Congress ceded federal land to the state in aid of certain railroads, with provisions that the state only dispose of land as certain conditions were met. *Id.* at 135. The state set aside the lands to the railroad, but held a mortgage in the land. *Id.* The mortgage subjected the railroad's sales to the limits of the congressional statute. *Id.* at 132–34. The Alabama Supreme Court had voided the railroad's sale of land to a private party as not meeting these limits. *Id.* In an opinion by Justice Brewer, the United States Supreme Court held there was no federal question for direct review, stating, "The fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State, does not make the determination of such rights a Federal question." *Id.* at 136–37. The Court also indicated that the interpretation of state law and the mortgage were adequate state grounds. *Id.* at 137.

181 *Am. Well Works*, 241 U.S. at 260.

182 *Smith*, 255 U.S. at 214–15 (Holmes, J., dissenting).

some state law actions with federal ingredients, provided he saw the remedial rights and duties as deriving at least partly from federal law.

Some support for this suggestion may be found in Holmes' failure to voice any objection to federal jurisdiction in suits typically thought to be Proposition B paradigms: suits to remove a cloud on title where the cloud is the defendant's asserting a federally authorized claim to the land. For example, in *Hopkins v. Walker*,[183] the plaintiff, who had a senior "placer" (nonmineral) claim, brought an action to remove a cloud on title consisting in junior, rival claimants' filing of certificates of location for "lode" (mineral) claims.[184] Under a federal statute, a junior lode claim could trump a prior placer claim, if the lode had been known at the time of the application for the placer patent.[185] The unanimous Court concluded, as a matter of both general law and Montana law, that the cloud was properly pleaded as part of the plaintiff's well-pleaded bill to remove a cloud on title,[186] and therefore presented a valid federal question case.[187]

The case presented, about as squarely as any pre-*Erie*[188] case could, the issue of whether a state law claim with a federal ingredient could state a claim arising under federal law. But Holmes did not dissent in *Hopkins*, nor in another case presenting a similar issue.[189] We do not know why he did not dissent. But perhaps he thought that federal law, to a degree, required remedies by which either of the rival claimants might seek a determination of better title under federal law. This would contrast with the action between the shareholders and the bank in *Smith*, which Holmes treated as in no way required by federal law.[190] It is possible, then—although the matter is not free from doubt—that the "Holmes test" was not Holmes' test.

In addition, Holmes was familiar with, and not generally averse to, traditions of nonstatutory review of state and federal governmental

183 244 U.S. 486 (1917).

184 *Id.* at 487–88.

185 *Id.* at 489–90.

186 *See id.* at 489 (reversing unanimously a dismissal by a lower federal court, and holding that under both general and Montana law, the federal issue was properly alleged in the complaint).

187 *Id.* at 491.

188 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

189 Wilson Cypress Co. v. Del Pozo y Marcos, 236 U.S. 635, 643–44 (1915) (holding unanimously that the Supreme Court had appellate jurisdiction of an action to quiet title and remove a cloud on title from a lower federal court based on "arising under" jurisdiction).

190 In *American Well Works*, before the advent of federal declaratory judgments, presumably no remedy initiated by the alleged infringer was provided by federal law. Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 257 (1916).

actions. In *Nixon v. Herndon*,[191] for example, he recognized a damages action brought under the general federal question statute for denial of a right to vote, making reference to English common law precedent.[192] Nor did equity actions to enjoin enforcement of unconstitutional laws, such as *Ex parte Young*,[193] seem to pose for Holmes the problems that the derivative action in *Smith* did. Presumably Holmes could attribute the remedial rights in such cases primarily to federal law, including judge-made law; federal remedial law could require that the object of enforcement have a remedy against the enforcement. In the derivative action, by contrast, Holmes saw no federal source for the shareholder remedy.

Over time, the Court as a whole would come to view general or state law actions with federal ingredients as more thoroughly federal actions (as to both primary and remedial rights).[194] In suits against officials, equity and damages actions might be deemed to be created by the federal question jurisdiction provision and the Constitution. Section 1983[195] and the Administrative Procedure Act[196] provided statutory-based remedies against state and federal officers respectively. In short, the Court increasingly perceived many Proposition B actions as Proposition A actions, helping to make Proposition B actions look more exceptional than they had traditionally been.

V. IMPLICATIONS FOR THE CURRENT DEBATE

The above history suggests that Proposition B cases were in no way outliers, but rather central exemplars of federal question jurisdiction. Instead, it was Holmes who was out of step with long tradition when he claimed that state law actions with federal ingredients, including derivative actions, should not find a federal forum. History, then, is more supportive of Proposition B cases than critics have claimed.

In addition, to the extent critics rely on Holmes to support excising Proposition B cases from original federal jurisdiction, their reliance may be misplaced. Holmes' position seems to have derived from his collapsing of the concepts of primary and remedial rights as part of his predictive view of law—a view that many would find overly

191 273 U.S. 536 (1927).

192 *Id.* at 540.

193 209 U.S. 123, 142–69 (1908).

194 *Cf.* Hart, *supra* note 17, at 524 ("By almost imperceptible steps [the Court] appears to have come to treat the remedy of injunction as conferred directly by federal law . . . .").

195 42 U.S.C. § 1983 (2006).

196 Administrative Procedure Act § 1, 5 U.S.C. §§ 702–703 (2006).

reductive, particularly in light of H.L.A. Hart's insights that violations of rules are "not merely grounds for a prediction that a hostile reaction will follow" but also "a reason or justification for such reaction."[197] What is more, Holmes himself may have been willing to accord federal jurisdiction for Proposition B cases backed by some federal remedial compulsion, thus making his test differ from the easily applied rule it is thought to embody.

Still, questioning the historical and Holmesian bases for rejecting Proposition B does not mean Proposition B necessarily should survive. After all, many prefer the (supposed) "Holmes test" because its clarity represents sound jurisdictional policy. What is more, notions of general law that supported Proposition B actions have largely dissipated.

We tentatively suggest, however, that a workable rule might be generated by distinguishing constitutional from statutory actions—as the Court came close to doing in *Merrell Dow*.[198] Actions based on federal statutes, moreover, are the area where the background presumptions that general law supplies remedies have faded the most.

In the past, when Congress enacted federal legislation against a backdrop of general law actions, it arguably comported with legislative intent that the federal norms would be privately enforced through such actions,[199] whether in state or general law form. But Congress, with some help from the Court, no longer regulates with similar background presumptions. Rather, Congress is generally explicit about remedies, and the Court ordinarily will not imply private rights of action under statutes. One might further surmise that Congress, by not providing a private right, was at best indifferent to private enforcement. And if Congress did not preempt state law remedies for violation of the federal law, Congress may have expressed no strong concern that states would overenforce the federal norm through such state law remedies. Arguably then, Proposition B cases enforcing federal statutory norms are good candidates for remaining in state courts.

For constitutional actions, however, the presumptions of general law remedies have not so dissipated. Even if the Court prefers locating constitutional actions in statutory sources such as § 1983, constitutional actions are largely court fashioned and derived from adding constitutional elements to generic common law trespass and equity actions. As compared to their common law ancestors, modern consti-

197 HART, *supra* note 158, at 84.

198 478 U.S. 804 (1986). We do not suggest that this rule fits current cases, such as *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005).

199 *Cf.* Collins, *supra* note 109, at 1525 n.173 (discussing general law cases that incorporated federal statutory standards).

tutional equity actions are in some ways even more generic—requiring merely an injury in fact and a constitutional violation. A state cause of action that raises a federal constitutional question on its face, then, will often not be all that different from a cognate federal action—as was true in the past.[200]

CONCLUSION

Cases such as *Smith v. Kansas City Title & Trust Co.*—ones that fall under federal question jurisdiction's Proposition B—are treated as second class citizens for jurisdictional purposes. This Article has suggested that cases along the model of *Smith* were, historically, quite familiar to the federal courts and may even have been a primary focus of the 1875 federal question statute. In addition, Holmes' dissent in *Smith* was itself something of a novelty—not the majority's opinion. Holmes' view may have been the product of his jurisprudential attempts to dispense with the concept of "primary rights." What is more, Holmes' own test for jurisdiction may not have represented the simple rule it is now thought to embody. The question whether Proposition B cases should continue to survive in either the constitutional or statutory setting is a difficult one on which we have offered only a brief suggestion. But they cannot be dismissed as being historically suspect, much less aberrational.

200 *See* City of Chi. v. Int'l Coll. of Surgeons, 522 U.S. 156, 163 (1997); FALLON ET AL., *supra* note 9, at 883 (suggesting that *Merrell Dow* might indicate that Proposition B cases might only be available when a federal action was also available).