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ADJUDICATION OF FEDERAL CAUSES OF ACTION IN STATE COURT

Martin H. Redish* and John E. Muench**

Since shortly after the founding of the Republic, it has been well established that state courts are obliged to enforce applicable principles of federal law when they adjudicate state causes of action.¹ This rule is hardly surprising. If the federal system is to function properly, a state court cannot be permitted to ignore federal constitutional and statutory provisions that conflict with state law. The supremacy clause² does not appear to permit any other practice.

At the same time, the development of principles concerning the power of state courts to hear federal causes of action has been considerably more confused. Although the framers apparently anticipated that state courts would generally be able to adjudicate federal causes of action,³ *Martin v. Hunter's Lessee*, which held that state courts must apply federal law when it conflicts with applicable state law in state cases, also assumed that state courts were powerless to hear federal causes of action.⁴ While the Supreme Court eventually concluded that state courts generally do possess concurrent jurisdiction with federal courts over federal actions,⁵ serious questions have lingered concerning when specific federal causes of action are to be

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1. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

2. U.S. CONST. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. This was apparently the assumption underlying the Madisonian Compromise of article III, which permitted but did not require the congressional creation of lower federal courts. In reaching this result, the framers assumed that if Congress chose not to create lower federal courts, the state courts could serve as trial forums in federal cases. See C. WRIGHT, *LAW OF FEDERAL COURTS* 2 (3d ed. 1976); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52-56 (1975). See also 1 M. FARRAND, *RECORDS OF THE FEDERAL CONVENTION* 124-25 (1911); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

4. 14 U.S. (1 Wheat.) 304, 337 (1816).

5. *Clafin v. Houseman*, 93 U.S. 130, 136 (1876).

exempted from this presumption of concurrent jurisdiction—in other words, which cases are to be heard exclusively in federal court.

Equally as confused as the state court “power” question has been the issue of a state court’s “obligation” to hear federal causes of action when it does not wish to do so. Subsumed under the “obligation” issue are two specific problems. First, there remains some confusion as to whether the Constitution provides the states with a right to protect their courts from being overburdened by congressionally imposed obligations to adjudicate federal cases. Further, it remains unclear precisely how the judiciary is to determine under what circumstances, if any, Congress has authorized state courts to refuse to entertain federal causes of action.

The answers to these questions may have a significant effect on the development of the federal system and the shaping of federal rights. On the one hand, widespread state court adjudication of federal causes of action could do much to alleviate the extremely overworked condition of the federal judiciary.⁶ On the other hand, state adjudication of federal rights cannot help but decrease uniformity—and therefore predictability—in the development of these rights. Additionally, authorization of state court adjudication of certain federal causes of action might threaten the evolution of federal rights because state judges often lack the expertise to deal with problems unique to federal law.

The first section of this article considers the *power* of state courts to hear federal cases. Since it is now well established that state courts have the constitutional power to adjudicate federal causes of action if Congress so desires, the significant questions concern the method by which the judiciary is to decipher congressional intent. Although the courts have no difficulty where Congress has explicitly addressed the issue of state court jurisdiction, problems do arise in situations where Congress has remained silent on the question. The first section critically examines the traditional criteria employed by the courts for determining congressional intent in the face of congressional silence and then suggests a substantial alteration in the judiciary’s approach to the matter.

The second section of the article considers the *obligation* of state courts to hear federal cases. After first evaluating constitutional questions surrounding such an obligation, this section will also examine difficult questions involving congressional intent—specifically,

6. See 1973 DIV. OF ADMIN. OFFICE OF THE U.S. COURTS, ANN. REP. Table 59, at 219.

the circumstances under which Congress' silence is intended to permit state courts to avoid hearing federal cases.

I. THE POWER OF STATE COURTS TO HEAR FEDERAL CAUSES OF ACTION

When Congress establishes a new cause of action, it has the choice of vesting jurisdiction exclusively in the federal courts or conferring jurisdiction concurrently on state and federal courts.⁷ Where Congress has expressly indicated in the statute whether jurisdiction is to be exclusive or concurrent, there is, of course, no difficulty. The issue becomes considerably more complex, however, where—as is all too often the case—Congress is silent on the question of whether state courts have the power to hear cases based on the particular cause of action.

A. *The Claflin Principle Reconsidered*

The traditional test for determining where jurisdiction lies when Congress is silent was first articulated by the Supreme Court in its seminal decision in *Claflin v. Houseman*:⁸ “[T]he state court has jurisdiction where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case.”⁹ Though by name the *Claflin* decision may not be familiar to every first-year law student, the principle derived from it has become an integral element of the jurisprudence of federalism. Thus, the modern-day Supreme Court concluded that “concurrent jurisdiction has been a common phenomenon in our judicial history”¹⁰ and that the approach delineated in *Claflin* “has remained unmodified through the years.”¹¹ This approach dictates that, where Congress

7. See Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509 (1957) [hereinafter cited as *Exclusive Jurisdiction*]. There is no doubt that Congress has the power to limit jurisdiction to federal courts. See, e.g., *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 429 (1866); *Houston v. Moore*, 5 U.S. (1 Wheat.) 1, 25-26 (1820). See also HART & WECHSLER, *supra* note 3, at 418-19; 1 MOORE'S FEDERAL PRACTICE ¶ 0.63, at 230 (2d ed. 1974).

8. 93 U.S. 130 (1876).

9. 93 U.S. at 136. At another point in its opinion, the *Claflin* Court described the test in this manner:

[T]he general principle is that, where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself; but, if exclusive jurisdiction be neither *express nor implied*, the state courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.

93 U.S. at 136 (emphasis added).

10. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962) (footnote omitted).

11. 368 U.S. at 508.

is silent on the question whether state courts have the power to hear claims arising under a federal statute, a state court presumptively has such power unless, for some reason, jurisdiction is found to be impliedly exclusive in the federal courts.¹²

The *Claflin* principle had its origins in the discussions surrounding the framing of the Constitution, where Alexander Hamilton made clear his view that jurisdiction over federal causes of action was generally to be concurrent.¹³ The framers specifically chose to give Congress the option whether to create lower federal courts.¹⁴ Hence it must have been clearly understood at the time that state courts would be competent to hear federal causes of action, since there was a possibility that no extensive federal judiciary would be formed. Because state courts are bound by the terms of the supremacy clause¹⁵ to apply federal law, it seems reasonable to infer that the framers contemplated that concurrent state jurisdiction over federal causes of action would be the rule, rather than the exception.

The mere fact that the framers conceived of a particular situation does not necessarily mean, however, that their assumptions are equally advisable today. Our concepts of federalism have been drastically altered since the time of the constitutional convention.¹⁶ Since the first effective establishment in 1875 of general federal question jurisdiction in the lower federal courts, those courts have developed a broad expertise in dealing with problems and applications of federal law. At the same time, state judges have become less exposed to the intricacies of federal substantive law.¹⁷ Addi-

12. See C. WRIGHT, *supra* note 3, at 26: "[F]ederal jurisdiction is not exclusive unless Congress chooses to make it so, either expressly or by fair implication." (footnote omitted).

13. See THE FEDERALIST No. 82 (A. Hamilton):

I mean not therefore to contend that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation, to the federal courts solely, if such a measure should be deemed expedient; but I hold that the state courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion, that in every case in which they were not expressly excluded by the future acts of the national legislature they will, of course take cognizance of the causes to which those acts may give birth. . . . When . . . we consider the state governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited.

14. See U.S. CONST. art. III, § 1: "The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." See also C. WRIGHT, *supra* note 3, at 2.

15. U.S. CONST. art. VI, cl. 2.

16. See Redish & Woods, *supra* note 3, at 97-100.

17. See, e.g., AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 166-67 (1969) [hereinafter cited as ALI

tionally, through the usually rigorous selection process, we can be generally assured of some level of competence on the federal bench. No such assurance can be given for the state judiciary. When one considers also the general need for some degree of uniformity in the application of federal law, the modern vitality of *Claflin's* general presumption in favor of concurrent jurisdiction may be subject to considerable question.

In light of the needs of the federal system, therefore, it might be argued that the traditional presumption should be reversed. In other words, unless Congress has explicitly concluded that jurisdiction over a new federal cause of action is to be concurrent, we would generally not presume that Congress meant to entrust to state courts the responsibility for fashioning federal law. Though such an argument might have force with regard to certain "uniquely" federal causes of action, many of the statutes Congress enacts cannot be categorized in this manner. In the words of Felix Frankfurter:

We may take it for granted, however, that our distinctively federal law will in the main be enforced through federal courts. Federal "specialties" are extending their domain and require a common system of federal tribunals. National sentiment also regards federal tribunals as the appropriate guardians of federal rights. But it is a practical sentiment. There are limits to the effective enforcement of national law. Wise distribution of judicial power also depends upon the nature of the issues. Some federal rights are readily adapted to enforcement by state tribunals; others are clearly meant for the federal courts.¹⁸

For example, federal statutes may deal with matters traditionally adjudicated by state courts, such as negligence¹⁹ or contract;²⁰ to force all cases arising under these acts into the federal courts may unnecessarily add to their already heavy burden.²¹

STUDY]; Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 158-60 (1953).

18. Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 515 (1928).

19. See, e.g., Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60 (1970). Even though state courts are familiar with negligence cases, it appears that state courts have had more difficulty than federal courts in the interpretation and application of the FELA standards of liability. See text at note 82 *infra*. However, in order to avoid overburdening the federal courts with such suits, concurrent jurisdiction may be necessary. See note 82 *infra*.

20. See, e.g., Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1970). However, since the law to be applied under section 301(a) has been held to be federal common law rather than state contract law, there is serious question as to whether jurisdiction should have been held concurrent. See notes 93-96 *infra* and accompanying text.

21. See note 6 *supra*.

That the general *Claflin* presumption should not be reversed, however, does not suggest that the *Claflin* rule is free from difficulty. In fact, its seemingly clear directive to the courts provides the judiciary with no guidance in supplementing congressional intent when Congress has failed to state explicitly whether jurisdiction for a particular cause of action is to be concurrent or exclusively federal. One consequence of this shortcoming is that lower courts have, over the years, frequently misunderstood or even disregarded the rule.²²

The *Claflin* standard, it should be recalled, does not simply create from congressional silence a presumption in all cases that jurisdiction is to be concurrent. If this is all the test did, it would at least have the advantage (albeit a questionable one)²³ of predictability. However, the Court's language in *Claflin* was qualified by the limitation that in certain cases federal jurisdiction may be impliedly exclusive. Yet it is not at all clear from the *Claflin* test under what circumstances a court should depart from the normal presumption of concurrent jurisdiction in the event of congressional silence and conclude that jurisdiction for a cause of action is "impliedly exclusive."

The experience with the Sherman and Clayton antitrust acts is illustrative of the *Claflin* rule's lack of guidance. The jurisdictional grants in the two antitrust laws were silent on the question whether state courts would have concurrent jurisdiction over cases arising under these statutes.²⁴ When passed, the Sherman Act provided that certain private civil actions "may" be brought in federal district court.²⁵ The courts have uniformly and summarily concluded that such actions may be brought only in federal court.²⁶ Although these courts have not considered the question at length, their rationale appears to be that the antitrust laws are uniquely federal in that they

22. See text at notes 40-58 *infra*.

23. See text at notes 61-64 *infra*.

24. For the jurisdictional grant with respect to private causes of action under the Sherman Act, see Act of July 2, 1890, ch. 647, § 7, 26 Stat. 209, 210. For the Clayton Act jurisdictional grant, see Act of Oct. 15, 1914, ch. 323, §§ 4, 16, 38 Stat. 730, 731, 737. The present jurisdictional grant covering private actions under both the Sherman and Clayton Acts provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States" 15 U.S.C. § 15 (1970) (emphasis added).

25. See note 24 *supra*.

26. See, e.g., *Klein v. American Luggage Works, Inc.*, 206 F. Supp. 924, *revd. on other ground*, 323 F.2d 787 (D. Del. 1962); *Otis Elevator Co. v. Reynolds*, 81 Misc. 2d 314, 366 N.Y.S.2d 256 (Sup. Ct. 1975); *American Broadcasting-Paramount Theatres, Inc. v. Hazel Bishop, Inc.*, 31 Misc. 2d 1056, 223 N.Y.S.2d 178 (Sup. Ct. 1961); *Ackert v. Ausman*, 29 Misc. 2d 962, 218 N.Y.S.2d 814 (Sup. Ct. 1961).

pertain to issues of national commerce.²⁷ Thus the courts have, in essence, found the jurisdictional grant of the Sherman Act to be impliedly exclusive in the federal courts. However, the legislative history indicates that a judicial finding of implied exclusivity was very possibly contrary to the actual intent of Congress.²⁸ In debating a proposed amendment that would have made jurisdiction expressly concurrent, one senator said:

This section [as it stands without the amendment] provides that any person who shall be injured, etc., by anything declared unlawful in the act may sue therefore in the circuit court of the United States.

. . . .

. . . It leaves everybody, as everybody now has the power under any law of the United States, to sue anybody who wrongs him . . . in a State court if he chooses to do so. So I . . . make the suggestion to him that his amendment [which would provide an express grant of concurrent jurisdiction] is quite useless and unnecessary.²⁹

The concern of many of those opposing the amendment appears not to have been that they desired jurisdiction to be vested exclusively in the federal courts, but rather that the effect of the amendment would be to impose a *duty* on state courts to hear cases arising under the Sherman Act. The amendment's opponents thought that Congress did not have the power to impose a duty on state courts to take cognizance of federal causes of action providing for the award of a penalty.³⁰

This history suggests that Congress may have correctly understood the principal *Clafin* presumption that its silence meant state courts would have the power to hear private causes of action under the Sherman Act. But the courts, in departing from that presumption and finding jurisdiction exclusive, may have displaced actual congressional intent, an error that was at least partially attributable to the failure of the Supreme Court to enunciate standards for the determination of implied exclusivity.

27. See, e.g., *Locker v. American Tobacco Co.*, 121 App. Div. 443, 106 N.Y.S. 115, 119 (1907):

We may eliminate from consideration the statutes of the United States [Sherman Act § 1] . . . because they have no bearing upon the cause of action here presented. They relate only to matters in restraint of trade or commerce between or among the several states of the Union or with foreign nations, and for a violation of their provisions redress *must* be sought in the federal courts, which alone have jurisdiction. (emphasis added).

28. See *Exclusive Jurisdiction*, *supra* note 7, at 509, 510 n.13.

29. See S. Doc. No. 147, 57th Cong., 2d Sess. 316 (1903).

30. *Id.* at 306-21. See *Exclusive Jurisdiction*, *supra* note 7, at 510 n.13. Congress' view with respect to its constitutional power to impose an obligation on state courts to enforce federal causes of action deemed "penal" by the states has been resolved to the contrary by the Supreme Court in *Testa v. Katt*, 330 U.S. 386 (1947).

An examination of the *Claflin* standard in light of the legislative history of the Clayton Act raises different questions concerning the standard's capacity for rationally allocating jurisdiction between federal and state courts. As with the Sherman Act, the jurisdictional provision covering private civil actions under the Clayton Act was silent in regard to state court jurisdiction,³¹ and the courts found it to be impliedly exclusive.³² Prior to the act's passage, Congress had rejected an amendment that would have vested concurrent jurisdiction in the state courts.³³ However, unlike the debate over the Sherman Act, the legislative history here reveals that the amendment was apparently rejected because Congress intended that jurisdiction be exclusive in the federal courts.³⁴ Thus, the result reached in the Clayton Act context, that the federal courts have exclusive jurisdiction, seems to have coincided with actual congressional intent. Yet this fact, rather than providing support for the *Claflin* approach, also casts doubt on the wisdom of its continued use, for it indicates that in enacting the Clayton Act Congress was laboring under the misapprehension that its failure to make jurisdiction explicitly concurrent rendered jurisdiction exclusively federal. Such a misunderstanding between Congress and the judiciary is, to say the least, troubling.³⁵ In any event, the formulation of a rule providing for a presumption of concurrent jurisdiction, with an implied exclusivity exception, has meaning only if the courts give a reasoned justification for invoking or failing to invoke the exception; such justifications were totally absent from the antitrust decisions, as well as from *Claflin* itself.³⁶

31. See note 24 *supra*.

32. See, e.g., *Freeman v. Bee Mach. Co.*, 319 U.S. 448 (1948); *General Inv. Co. v. Lake Shore & Michigan S. Ry.*, 260 U.S. 245 (1922); *Leonia Amusement Corp. v. Loew's Inc.*, 117 F. Supp. 747 (S.D.N.Y. 1953).

33. 51 Cong. Rec. 9664 (1914).

34. See *id.* at 9662-64. Thus, it appears that the debate over, and defeat of, the proposed grant of concurrent jurisdiction to the states focused not on the power of Congress to impose a duty on state courts to hear claims arising under the Act but rather on whether state courts would have the power to hear federal claims. Defeat of the amendment, therefore, seems to have reflected the actual intent of Congress to vest exclusive jurisdiction in the federal courts.

35. See text following note 58 *infra*.

36. See also *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936). This case involved what is now 28 U.S.C. § 1345 (1970), which provides that the federal district courts have jurisdiction where the United States is a plaintiff, but which is silent as to state court jurisdiction. In finding that jurisdiction was concurrent, the Supreme Court made no mention of the implied exclusivity branch of the *Claflin* rule. In other words, the Court made no attempt to discover whether jurisdiction should be found impliedly exclusive but simply concluded that jurisdiction was concurrent.

Some additional illustrations will underscore the judicial confusion surrounding the interpretation to be given congressional silence. The first example involves cases arising under the Outer Continental Shelf Lands Act.³⁷ The grant of jurisdiction in the Act provides that the "United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf."³⁸ Under the traditional *Claflin* rule, the primary presumption would be that Congress intended state courts to have concurrent jurisdiction over such causes of action. The judiciary, however, has indicated that jurisdiction lies exclusively in the federal courts.³⁹ In *Gravois v. Travelers Indemnity Co.*,⁴⁰ the court held: "Had Congress intended to grant concurrent jurisdiction to the State Courts it would have so specified in this Act as they did in the Jones Act. The failure to do so shows their intention to retain jurisdiction in the United States Courts."⁴¹ This language suggests that the court did not merely find this act to be an appropriate instance of implied exclusivity but actually reversed the principal *Claflin* presumption, so that congressional silence would be taken to represent an intent to make jurisdiction exclusive.⁴² The courts can hardly expect Congress to understand the implications of the judge-made *Claflin* rule if they themselves are unaware of its meaning.⁴³

37. 43 U.S.C. §§ 1331-1343 (1970).

38. 43 U.S.C. § 1333(b) (1970).

39. See, e.g., *Gravois v. Travelers Indem. Co.*, 173 So. 2d 550 (La. Ct. App. 1965). Cf. *Huson v. Otis Engr. Corp.*, 430 F.2d 27, 30 (5th Cir. 1970).

40. 173 So. 2d 550 (La. Ct. App. 1965).

41. 173 So. 2d at 556.

42. As noted earlier, a complete reversal of the *Claflin* presumption is probably not advisable. See text at notes 18-21 *supra*.

43. Though the *Gravois* opinion at the outset does evince an apparent disregard for the *Claflin* presumption, that decision, as well as others, also appears to apply more pragmatic criteria in concluding that jurisdiction under the statute in question is impliedly exclusive. Thus, the courts have emphasized the pervasive federal regulation reflected in the substantive provisions of the Outer Continental Shelf Lands Act. See *Fluor Ocean Servs., Inc. v. Rucker Co.*, 341 F. Supp. 757, 759-60 (E.D. La. 1972); *Gravois v. Travelers Indem. Co.*, 173 So. 2d 550, 556 (La. Ct. App. 1965). As the *Fluor Ocean* court noted: "In an area where the federal government has exerted exclusive sovereignty, such as the outer Continental Shelf, a single federal forum would be more appropriate than multiple state forums to decide disputes that arise there." 341 F. Supp. at 760. Moreover, it appears that the legislative history of the Act would support a finding of exclusivity. See *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 365 (1969). As will be suggested below, see text at notes 72-118 *infra*, a movement toward such a pragmatic approach is likely to result in an allocation of jurisdiction over federal cases that is more rational than that generated by the traditionally articulated rule.

The problems surrounding use of the traditional rule are also reflected in the Ninth Circuit's decision in *Tsang v. Kan*.⁴⁴ The issue in *Tsang* was whether a prior state court adjudication of a veteran's claim under a federal statute⁴⁵ relating to employment and wages should be given *res judicata* effect; to decide this issue, the court had to determine first whether the state court had jurisdiction to entertain the case. The federal statute conferred jurisdiction on the federal courts to hear these veterans' claims but was silent as to state court jurisdiction. The court noted that the *Claflin* rule was the governing principle. Acknowledging that the normal presumption was that state courts had jurisdiction, the court asked whether jurisdiction was impliedly exclusive, and answered in the negative. But in doing so, the court appeared to misunderstand certain aspects of the traditional *Claflin* presumption. Instead of considering possible factors that might lead to the conclusion that concurrent jurisdiction would somehow be incompatible with accomplishment of the statute's purposes, the court deemed it necessary to find additional factors that called for concurrent jurisdiction. It pointed out, for example, that it would be inconvenient for veterans to be forced to bring their claims in federal court, while access to state courts might be easier.⁴⁶ But under the traditional rule derived from *Claflin*, so long as Congress has been silent on the question of concurrent jurisdiction, the burden is on those arguing exclusive jurisdiction to establish that concurrent jurisdiction would be inappropriate. Unless such factors are present (and the court in *Tsang* found none), there is no need for the court to seek additional policy reasons calling for concurrent jurisdiction.

The confusion in this area can also be discerned in the judicial treatment of the jurisdictional provision in the Interstate Commerce Act relating to enjoining orders of the Interstate Commerce Commission. The jurisdictional grant provides: "Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in any part, any order of the Interstate Commerce Commission."⁴⁷ The courts have simply concluded that this is a

44. 173 F.2d 204 (9th Cir.), *cert. denied*, 337 U.S. 939 (1949).

45. Selective Service and Training Act of 1940, 50 U.S.C. § 308(b)(B) (1970).

46. 173 F.2d at 205. The court may simply have been adding "icing to the cake," rather than feeling the need for affirmative reasons for concurrent jurisdiction. The court's decision is ambiguous on the point, however, and it is therefore important to emphasize that, under the traditional approach, in the face of congressional silence there is no need for the finding of such additional factors.

47. 28 U.S.C. § 1336(a) (1970).

grant of exclusive jurisdiction to the federal courts.⁴⁸ While this may seem correct as a policy matter, it should be recalled that the normal presumption under the *Claflin* rule is that the state courts would have concurrent jurisdiction. In order for the two-part test to make any sense, the courts must give adequate reasons for invoking the part of the *Claflin* rule providing for exceptions. Yet it appears that the only reason proffered by the courts for a finding of exclusivity in this area rests on the fact that the United States is an indispensable party to a suit to enjoin an ICC order; because it has not consented to suit in the state courts, the latter have no jurisdiction to entertain such an action.⁴⁹ But Congress should be presumed to have consented to suit in a state court, for, if it had understood the *Claflin* presumption, it would have understood the consequences of its failure to make jurisdiction exclusive.⁵⁰

A final example of the judicial confusion surrounding the *Claflin* rule is presented by the references to the jurisdictional grant in the National Bank Act⁵¹ in two Supreme Court cases, *First National Bank v. Union Trust Company*⁵² and *Mercantile National Bank v. Langdeau*.⁵³ In *Union Trust*, the Court was faced with the issue of jurisdiction over cases arising under the Federal Reserve Bank Act, but it discussed the National Bank Act in passing. The Court concluded that "without the grant of the act of Congress [of explicit concurrent jurisdiction] such controversies would have been federal in character."⁵⁴ Nearly half a century later, the *Langdeau* Court repeated this conclusion:

48. See, e.g., *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118 (1948) (dictum); *Davidson Transfer & Storage Co. v. United States*, 164 F. Supp. 571 (D. Md. 1958).

49. See *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118, 122 (1948); *Lambert Run Coal Co. v. Baltimore & O.R.R.*, 258 U.S. 377, 382 (1922).

50. A similar situation can be found in 26 U.S.C. § 7426 (1970), which confers jurisdiction on the federal courts to entertain claims against the United States for a wrongful levy on property but fails to mention state courts. The courts have said that jurisdiction under this section is exclusive. See *Stapleton v. \$2,438,110*, 454 F.2d 1210 (3d Cir.), cert. denied, 409 U.S. 894 (1972); *Crow v. Wyoming Timber Prods.*, 424 F.2d 93 (10th Cir. 1970). Apparently, jurisdiction is deemed exclusive for the same reason as it is in the case of actions to enjoin ICC orders and therefore is subject to the same objection, if one assumes the *Claflin* rule is the governing principle. "Because the waiver of sovereign immunity contained in § 7426 is limited to suits brought in federal court, a state court would not have jurisdiction over an action seeking relief under that section." *Crow v. Wyoming Timber Prods.*, 424 F.2d 93, 96 (10th Cir. 1970). However, as is also true in the ICC context, if the *Claflin* rule is rejected and a case-by-case approach followed, a finding of exclusivity is probably the correct result.

51. 12 U.S.C. § 94 (1970).

52. 244 U.S. 416 (1917).

53. 371 U.S. 555 (1963).

54. 244 U.S. at 428.

Section 59 of the 1863 Act provided that suits by and against any association under the Act could be had in any federal court held within the district in which the association was established. No mention was made of suits in state courts. If the law had remained in this form, there might well have been grave doubt about the suability of national banks in the state courts, as this court noted in *First National Bank v. Union Trust Co.* . . .⁵⁵

One might ask what happened to the *Claflin* rule. In *Union Trust*, it was simply not mentioned. In *Langdeau*, the Court, after citing *Union Trust*, indicated in a footnote “[b]ut cf. *Claflin v. Houseman*.”⁵⁶ It is difficult to see how a court cognizant of *Claflin* could have believed that there was “grave doubt” as to concurrent jurisdiction, at least without a fair analysis under the second branch of the *Claflin* rule.⁵⁷ Even the Supreme Court, it would seem, has been unable to implement the *Claflin* rule in a rational fashion.⁵⁸

Such confusion may represent more than a failure of the judiciary to develop enduring generalizable principles for finding instances of implied exclusivity. Beyond the judicial failure to apply consistently

55. 371 U.S. at 559 (footnote omitted).

56. 371 U.S. at 559 n.7.

57. It should be noted that under an “implied exclusivity” analysis, the conclusion of both Courts might have been correct. However, neither seemed aware that such an analysis was necessary.

58. A few other examples of the judicial uncertainty as to the effect of congressional silence are worth noting, for they also cast doubt on the wisdom of retaining the *Claflin* rule as an allocator of jurisdiction between the federal and state systems.

Section 302(e) of the Labor Management Relations Act, 29 U.S.C. § 186(e) (1970), confers jurisdiction on the federal courts to hear claims, *inter alia*, that a union pension fund has violated federal statutory requirements. The jurisdictional grant does not mention state courts. With neither side adequately explaining its conclusion, the courts are split as to whether jurisdiction is exclusive. For cases suggesting jurisdiction is exclusive, see *Insley v. Joyce*, 330 F. Supp. 1228, 1234 (N.D. Ill. 1971); *Davenport v. Terry*, 134 N.J. Super. 88, 338 A.2d 815 (Super. Ct. App. Div. 1975). For cases concluding jurisdiction is concurrent, see *Nixon v. O’Callaghan*, 392 F. Supp. 1081 (S.D.N.Y. 1975); *Cox v. Superior Ct.*, 52 Cal. 2d 855, 346 P.2d 15 (1959).

Section 4(a) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5(f) (Supp. V 1975), also gives the federal courts jurisdiction over suits for unlawful employment practices but fails to mention state courts. In *Hutchings v. United States Indus., Inc.*, 428 F.2d 303, 310 (5th Cir. 1970), the court suggested only federal courts could hear such claims. *But see Anderson v. Tennessee Office of Economic Opportunity*, 384 F. Supp. 788, 792 (M.D. Tenn. 1974) (suggesting that such suits can be brought in state courts).

Finally, the jurisdictional grant in section 3(c) of the Uniform Time Act of 1966, 15 U.S.C. § 260a(c) (1970), confers jurisdiction on the federal courts to entertain actions for violations of the section and makes no mention of state courts. The court in *Whitmer v. House*, 198 Kan. 629, 634, 426 P.2d 100, 106 (1967) said: “In view of the specific designation of Federal District Courts, as the proper forum for the enforcement of the Act and the express declaration of the governing procedure in such proceedings, it appears that the state courts are excluded from any jurisdiction” The court’s statement constitutes, in effect, a reversal of the traditional *Claflin* presumption.

the rule derived from *Claflin* lies a more fundamental problem. The effectiveness of the first portion of the *Claflin* approach depends on total comprehension by Congress of its meaning: Congress must be aware that its silence as to state court jurisdiction over a federal cause of action will generally be taken by the courts to mean that jurisdiction is concurrent, lest state courts be given jurisdiction over the development of federal rights that Congress did not deem appropriate for state adjudication.

The second portion of the *Claflin* rule, on the other hand, assumes there exist federal causes of action which, although not expressly made exclusive by Congress, are so "federal" in nature that exclusive federal jurisdiction can be inferred. But if Congress genuinely understood the effects of the first portion of the *Claflin* rule, is it conceivable that Congress would have considered a statutory cause of action so uniquely federal that jurisdiction should lie exclusively in the federal courts, yet not explicitly so provide in the statute? By leaving the statute silent on the question of concurrent jurisdiction, Congress would be relying on the courts to overcome the first portion of *Claflin* and to hold jurisdiction exclusive—an uncertain outcome at best. It would certainly seem illogical for Congress to leave to the vagaries of judicial decision the fate of a cause of action that Congress believed to demand exclusive federal jurisdiction. Yet that is exactly the result postulated by the second portion of *Claflin*—the doctrine of implied exclusivity—for by its terms that doctrine will not apply unless the cause of action appears to be uniquely federal in nature. What the existence of the second portion of the *Claflin* rule seems implicitly to recognize, then, is that in circumstances where Congress has remained silent on the question of exclusive jurisdiction, but the courts have nevertheless found jurisdiction to be impliedly exclusive, Congress either (a) is unaware that its silence will be taken to mean that jurisdiction is to be concurrent or (b) has simply not given the matter any consideration. For, as just noted, if neither of these facts were true, the doctrine of implied exclusivity would impute to Congress motives of extremely questionable rationality. Accordingly, if the two segments of the *Claflin* rule are to be retained, we are left with an impossible situation: The fact that we retain a doctrine of implied exclusivity effectively concedes that on occasion (as, indeed, the Clayton Act's history demonstrates)⁵⁹ Congress may not comprehend the implications of the first portion of the rule. Yet such a concession indicates that retention

59. See notes 31-35 *supra* and accompanying text.

of the first portion of the *Claflin* rule—presumption of concurrent jurisdiction from congressional silence—may often be unwise.

Recognition of the inadequacy of the dual-segment *Claflin* rule leaves open several options. As noted above, we might reverse the presumption. In other words, congressional silence could be taken to mean that jurisdiction was to lie exclusively in the federal courts, and an explicit statutory statement would generally be required to render jurisdiction concurrent. But, as previously noted, many federal causes of action deal with legal questions similar to those already heard in state court; for these questions, presumably, the state courts possess adequate expertise. To require the federal courts to hear all such cases unless Congress explicitly says otherwise would unduly add to their already heavy burden. A second option would be to reject only the portion of the *Claflin* rule dealing with implied exclusivity. Adoption of this alternative would give rise to the predictable—and mechanical—rule that congressional silence in *all* cases will be taken to mean concurrent jurisdiction. It is unlikely the judiciary would accept such a result, however, and with good reason. As Professors Bickel and Wellington have commented, “there are solutions the legislature may adopt for problems properly in its sphere which on analysis turn out to be enmeshed in other issues and to be fraught with consequences above and beyond those that Congress had in view.”⁶⁰ As the courts have apparently concluded in the antitrust area,⁶¹ there may be federal causes of action, wholly inappropriate for state adjudication and development, for which Congress has, somehow, failed to make federal jurisdiction explicitly exclusive. The *Claflin* Court itself recognized that *some* safety valve must be available to the courts in deciding the question of exclusive jurisdiction. When one also considers that at times⁶² Congress has appar-

60. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 27 (1957).

61. See notes 26, 32 *supra*.

62. It should be noted that Congress has sometimes evidenced a conscious understanding of the first branch of the *Claflin* presumption. When the Federal Employers Liability Act was passed in 1908, Act of April 22, 1908, ch. 149, 35 Stat. 65 (current version at 45 U.S.C. §§ 51-60 (1970)), there was no mention of state court jurisdiction. Subsequently, in *Hoxie v. New York, N.H. & H.R.R.*, 82 Conn. 352, 73 A. 754 (1909), a Connecticut court declined to hear a case arising under the Act because it concluded jurisdiction was intended to be exclusive. In 1910, Congress amended section 6 of the Act to provide expressly for concurrent state court jurisdiction. See Act of April 5, 1910, ch. 143, 36 Stat. 291. The legislative history accompanying this amendment suggests that Congress understood when it originally passed the Act that its silence meant jurisdiction would be concurrent. See S. REP. NO. 467, 61st Cong., 2d Sess. 411 (1910). However, all this establishes is that Congress' understanding of the *Claflin* rule is as unpredictable and haphazard as its misunderstanding of it.

ently misunderstood the effect of its silence, adoption of this second alternative becomes highly questionable.

The third option is a rejection of the first portion of the *Claflin* test. This *rejection* of the *Claflin* presumption must be distinguished from the first alternative considered, namely its *reversal*. Under this "rejection" approach, no presumption whatsoever would be inferred from congressional failure to deal with the issue of concurrent jurisdiction for a particular cause of action. The courts would read nothing into congressional silence; instead, they would examine each case to determine whether the needs of the federal system or the legislative history indicate a need for exclusivity. In this way, a claim of implied exclusive jurisdiction would not be faced with the significant hurdle currently presented by the first branch of the *Claflin* rule.⁶³

The third alternative appears to be the most reasonable, if only by default. However, one must still develop rational criteria upon which a determination of exclusivity can be made. The next section explores the various factors that might suitably constitute those criteria.

B. *Alternatives to the Claflin Approach: A Search for Rational Criteria*

1. *The Modified Dowd Approach: A Look to Legislative History*

A possible modification of the traditional *Claflin* approach—one superior to the rationale used in the development of implied exclusivity in the antitrust area—is the method employed by the Supreme Court in *Charles Dowd Box Co. v. Courtney*.⁶⁴ There the Court considered whether state courts have concurrent jurisdiction under

63. It might be contended that, as a practical matter, rejection of the *Claflin* rule would have little effect on the judicial approach to exclusive jurisdiction, since under both *Claflin* and the case-by-case approach suggested here, see text at notes 72-100 *infra*, the courts will be looking to many of the same factors in making a finding of exclusivity. Even if this were true, rejection of the *Claflin* rule seems warranted, if only because of its inherent logical difficulties. But even from a purely practical standpoint, it is likely that replacement of the *Claflin* presumption with a case-by-case, nonpresumptive analysis would lead to a rejection of what the Supreme Court has called our nation's "consistent history of hospitable acceptance of concurrent jurisdiction." *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 508 (1962). Under *Claflin*, the presumption is that jurisdiction is concurrent, and some strong showing of need for exclusive jurisdiction is required to overcome that presumption. Under the revised analysis suggested here, in each case the court would fully consider the justifications claimed to warrant concurrent, as well as exclusive, jurisdiction. See text at note 97 *infra*. It is therefore likely that the analysis suggested here would give rise to a more balanced appraisal of the advisability of exclusive federal jurisdiction.

64. 368 U.S. 502 (1962).

section 301(a) of the Labor Management Relations Act,⁶⁵ which was silent on the question. In holding that jurisdiction was concurrent, the Court placed some reliance on the fact that the language of the jurisdictional grant did not expressly vest exclusive jurisdiction in the federal courts: "It provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be."⁶⁶ The Court then invoked the *Claflin* rule for determining where jurisdiction lies when Congress is silent. After noting that in such cases jurisdiction is generally concurrent, the Court proceeded with a particularized examination of the legislative history of section 301(a), in order to determine whether this was an appropriate case for a finding of implied exclusivity. From this examination, the Court concluded:

The legislative history makes clear that the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations. Moreover, there is explicit evidence that Congress expressly intended not to encroach upon the existing jurisdiction of the state courts.⁶⁷

The *Dowd* Court eliminates some of the conceptual difficulties of the *Claflin* rule by providing specific guidelines for applying the implied exclusivity exception. Under *Dowd*, a court would presume that state courts generally have jurisdiction when Congress is silent on the question, but it would inquire into the legislative history of a particular act to determine whether Congress actually intended jurisdiction to be exclusive.

The *Dowd* approach can be modified to fit into our third option—rejection of the primary *Claflin* presumption. Under this

65. 29 U.S.C. § 185(a) (1970). Section 301(a) provides:

Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

66. 368 U.S. at 506. However, the permissive language in the jurisdictional grant, if it has any significance, only speaks to the question of whether there was an express grant of exclusive jurisdiction to the federal courts. Once this question is answered in the negative, the problem is one of ascertaining the meaning of congressional silence. On this question, the use of the word "may" in the jurisdictional grant appears irrelevant. For, although jurisdiction was found concurrent under section 301(a) of the Labor Management Relations Act, jurisdiction was found impliedly exclusive in the antitrust laws, which contain the same permissive language. See notes 26, 32 *supra*.

67. 368 U.S. at 508-09. For example, one senator said:

Mr. President, there is nothing whatever in the now-being-considered amendment which takes away from the State courts all the present rights of the State courts to adjudicate the rights between parties in relation to labor agreements. The amendment merely says that the Federal courts shall have jurisdiction. It does not attempt to take away the jurisdiction of the State courts.

368 U.S. at 512.

modification, a court would simply examine the legislative history to determine congressional intent on the issue of concurrent jurisdiction. Such a standard would eliminate the possibility, inherent in the periodic, unsupported invocation of the second branch of the *Claflin* standard, that jurisdiction would be held exclusive when Congress in fact intended that state courts have the power to hear claims arising under a federal statute.⁶⁸ Thus, if strictly adhered to, *Dowd* at least provides a systematic approach to the judicial distribution of jurisdiction between the state and federal systems where Congress has remained silent in the jurisdictional grant. The modified *Dowd* approach would retain these benefits, while at the same time avoiding the logical and practical difficulties presented by a two-pronged *Claflin* test.

The viability of the modified *Dowd* approach is questionable, however. If the desired goal is a reasoned and deliberate allocation of jurisdiction over federal statutory claims between federal and state courts, exclusive reliance on legislative history seems inadequate. The legislative history, like the statute itself, may simply be silent on the question of state court jurisdiction. To allocate jurisdiction on the basis of such an inquiry may often relegate an important question⁶⁹ to sheer speculation.

68. This appears to have occurred with jurisdiction over private civil actions under the Sherman Act. See text at note 28 *supra*.

69. One possibly significant result of a finding of concurrent or exclusive jurisdiction would be the potential collateral estoppel effect of issues litigated in state court on a subsequent federal court proceeding. In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), the Supreme Court held that an alleged infringer in a patent infringement suit in federal court could use a prior federal court determination of a patent's invalidity in an earlier infringement suit as collateral estoppel against the purported patent holder who was a party to the preceding suit. Earlier, in *Lear v. Adkins*, 395 U.S. 653 (1960), the Court held that a state court could determine the validity of a patent when its invalidity was raised as a defense to a breach of contract suit. One commentator has assumed that, after *Lear* and *Blonder-Tongue*, state court findings as to the validity of a patent may be used as collateral estoppel against the purported patent holder in a subsequent patent infringement suit in federal court. See Chisum, *The Allocation of Jurisdiction Between State and Federal Courts in Patent Litigation*, 46 WASH. L. REV. 633, 662-64 (1971).

However, it is not clear that the holding in *Blonder* would extend to the situation where the previous finding of patent invalidity was made by a state court. See HART & WECHSLER, *supra* note 3, at 878 n.1. A substantial argument can be made that to give collateral estoppel effect to such state court findings would bring about too extensive an infringement on the federal court's exclusive jurisdiction. See *Exclusive Jurisdiction*, *supra* note 7, at 514-15. Cf. *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 189 (2d Cir. 1955). If, in fact, the collateral estoppel effect of state court findings on subsequent federal proceedings will turn upon whether the matter is within the exclusive jurisdiction of the federal courts, then any rule adopted by the courts to allocate jurisdiction between federal and state courts when Congress is silent takes on increasing significance.

However, even where an examination of the legislative history reveals some discussion of the jurisdictional issue, total reliance by the courts on their discernment of the actual intent of Congress will not produce a sensible allocation of jurisdiction for federal causes of action. First of all, if the legislative history is extensive, the goal of ascertaining the actual intent of a majority of Congress may be unattainable. In the words of one commentator,

[t]he various documented steps in the progress of a statute [should] be realistically seen, not as so many conscious group decisions in which a majority of legislators have participated, but rather as forms of "public notice" of their progressing activities by those who do participate.⁷⁰

Moreover, even if purported expressions of majority opinion could be identified, their reliability would be questionable, for "[m]aterials in hearings and floor debates" are extremely "heterogeneous and fragmentary" and are heavily "influenced by the tactics of promoting enactment."⁷¹ This is not to suggest, of course, that legislative history can never be of assistance in deciphering congressional intent. Rather, the point is that, because of its inherent limitations, *exclusive* reliance on legislative history is inadvisable. Since both the attainability and reliability of expressions of congressional intent are subject to serious question, both the *Dowd* approach and the modified *Dowd* approach are inadequate in view of the consequences of these determinations of concurrent and exclusive jurisdiction.

70. Linde, Book Review, 66 YALE L.J. 973, 975 (1957), quoted in Wasby, *Legislative Materials as an Aid to Statutory Interpretation: A Caveat*, 12 J. PUB. LAW 262, 270 (1963).

71. R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 155 (1975). Dickerson, in fact, goes so far as to state that these materials "have almost no credibility for the purposes of later interpretation." *Id.* See also Justice Jackson's concurrence in *Schwegmann Bros. v. Calvert Distillers Co.*, 341 U.S. 384, 395-96 (1951):

Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. I cannot deny that I have sometimes offended against that rule. But to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions.

Even the reliability of "presumably . . . well considered and carefully prepared" Committee Reports is subject to serious question:

[C]ommittees are not always representative of the general membership; they are not each a random sample of the larger body, nor are they fractional committees of the whole

The less representative the committee, the greater the possibility that the ideas of the committee will vary from those of the other members of the legislature in a given issue.

Wasby, *supra* note 70, at 271.

2. *An Exercise in Creative Judicial Lawmaking: A Look to the Needs of the Federal System.*

An alternative means of replacing the traditional *Claflin* two-pronged analysis would be for a court to proceed on a case-by-case basis (as in the modified *Dowd* approach), looking not to legislative history but to the practical needs of the federal system as perceived by the court. In other words, a court faced with congressional silence in a statute as to state court jurisdiction would engage in creative judicial lawmaking.⁷² In so doing, the judiciary would not be unduly invading the legislative province. In the words of Learned Hand:

When we ask what Congress "intended", usually there can be no answer, if what we mean is what any person or group of persons actually had in mind. Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion.⁷³

Indeed, the *Claflin* rule itself attempts to supplement expressly stated congressional intent, albeit in a generalized and unsatisfactory fashion.

In exercising its creative judicial lawmaking function when Congress is silent on the question of concurrent jurisdiction, a court should examine the potential impingement on important federal interests and programs that might result from their consideration by state judges who lack sufficient background, expertise or—on occasion—competence to deal with these uniquely federal concerns.

Considerations of expertise may well serve as a modern justification for the generally accepted principle that a state court may not directly control the actions of a federal officer. In *Tarble's Case*,⁷⁴ for example, where the Supreme Court indicated that state courts lacked power to issue writs of habeas corpus to federal officials, it

72. The creative judicial lawmaking *terminology* was derived from Professor Dickerson's work on statutory interpretation. See R. DICKERSON, *supra* note 71, at 169. However, it should be noted that the authors do not purport to employ the terminology in the technical sense in which it is used in Professor Dickerson's conceptual framework. Instead, the authors are using the creative lawmaking term in a looser sense: "It has been said that the problem of statutory interpretation is to give meaning to that which is meaningless, and that, to do this, the court must give expression not to what the legislature thought but to what it would have thought had it thought." Foster, *Public Law and Social Change in SOCIETY AND THE LAW: NEW MEANING FOR AN OLD PROFESSION* 162 (1962), *quoted in* Wasby, *supra* note 70, at 262.

73. *United States v. Klinger*, 199 F.2d 645, 648 (2d Cir. 1952), *affd. per curiam*, 345 U.S. 979 (1953).

74. 80 U.S. (13 Wall.) 397 (1871).

noted that if state courts possessed such power, "[i]n many exigencies the measures of the National government might . . . be entirely bereft of their efficiency and value."⁷⁵ By having power to control directly the actions of federal officials, state courts that may be unfamiliar with or antagonistic to federal programs⁷⁶ can interfere with the execution of those programs. Considerations such as these have caused the judiciary generally to infer exclusive federal jurisdiction to issue writs of habeas corpus, mandamus,⁷⁷ or injunction⁷⁸ to federal officials, despite the absence of an explicit statement by Congress on this issue.

Admittedly, such a form of potential state court interference with federal programs constitutes an unusually direct and immediate threat to federal governmental interests; arguably, then, the rationale for exclusive federal jurisdiction may be limited to situations where the danger of interference is this acute. However, even in a case where there exists no danger of direct state control of the actions of federal officials, there is, in the words of one commentator, a "probability that the federal bench [is] better equipped to cope with the technical problems inherent in actions under a particular statute."⁷⁹ The federal judiciary has, indeed, developed a substantial expertise in those areas where the federal courts have been given exclusive jurisdiction.⁸⁰

Federal judges are appointed under uniform selection procedures, and have developed "an expertness in dealing with questions of federal law that comes from more extended contact with such questions than state court judges have."⁸¹ The experience under

75. 80 U.S. (13 Wall.) at 409. See also *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858).

76. See, e.g., *Alabama ex rel. Gallion v. Rogers*, 187 F. Supp. 848 (M.D. Ala. 1960), *affd. per curiam*, 285 F.2d 430 (5th Cir.), *cert. denied*, 366 U.S. 913 (1961) (involving Title III of the Civil Rights Act of 1960). Cf. ALI STUDY, *supra* note 17, at 167:

Where the difficulty is not misunderstanding of federal law, but lack of sympathy—or even hostility—toward it, there is a marked advantage in providing an initial federal forum. Such attitudes are perhaps less common among federal judges, chosen and paid by the national government, and enjoying the protection of life tenure, than they are in the state judiciary.

77. See, e.g., *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821). See also *Armand Schmoll, Inc. v. Federal Reserve Bank*, 286 N.Y. 503, 37 N.E.2d 225 (1941), *cert. denied*, 315 U.S. 818 (1942).

78. See, e.g., *Pennsylvania Turnpike Commn. v. McGinnes*, 179 F. Supp. 578 (E.D. Pa. 1959), *affd. per curiam*, 278 F.2d 330 (3d Cir.), *cert. denied*, 364 U.S. 820 (1960); *Ex parte Schockley*, 17 F.2d 133 (N.D. Ohio 1926).

79. *Exclusive Jurisdiction*, *supra* note 7, at 516.

80. For example, in the fields of patent, bankruptcy, and antitrust law. See ALI STUDY, *supra* note 17, at 164-65.

81. *Id.* at 166-67.

the Federal Employers Liability Act seems to bear out this conclusion. The fact that the Supreme Court has granted certiorari in many more cases adjudicated in state courts than federal courts tends "to indicate that the lower federal courts adapted more readily to the Supreme Court's decisions as to the meaning of negligence under the act, and the sufficiency of the evidence to create a jury issue, than did state courts."⁸²

Another factor to be considered by the courts is whether the need for uniformity in application of the statute in question requires that jurisdiction be vested exclusively in federal courts.⁸³ The most significant factor in this inquiry is the nature of the federal statute creating the particular cause of action. In other words, a court should determine whether the federal statute is likely to provide the judiciary wide latitude in developing federal rights, or whether the cause of action is sufficiently detailed in its scope and clear as to its purpose that the likelihood of future judicial gloss is comparatively limited. A clear illustration of the former is section 1 of the Sher-

82. *Id.* at 166. This is not to suggest that in the case of the FELA, where Congress made an express determination that jurisdiction over claims arising under the Act should be concurrent, Congress made an unwise policy decision. For, "[w]hen a large number of cases are expected to arise under a particular statute—for example, the FELA—efficient distribution of the case burden suggests that exclusive jurisdiction is inappropriate." *Exclusive Jurisdiction*, *supra* note 7, at 516. The FELA situation merely exemplifies the fact that, as a general proposition, greater uniformity is likely to result when federal claims are adjudicated in federal courts. This is not to say that the need for uniformity should be the controlling consideration in every context.

83. See ALI STUDY, *supra* note 17, at 166: "It would seem a priori that lack of uniformity in the application of federal law stemming from misunderstandings as to that law, and the body of decisions construing it, would be less in the federal courts than in the state courts." See also Cullisen, *State Courts, State Law, and Concurrent Jurisdiction of Federal Questions*, 48 IOWA L. REV. 230 (1963). It should be noted that the ALI Study's comments are directed to the question of whether federal courts should have original, not exclusive, jurisdiction in certain areas. Nevertheless, the distinction is one of degree, and the Study's discussion is equally relevant to the question whether federal courts should have exclusive jurisdiction in a particular area. When Congress is silent on the question of state court jurisdiction, the courts, under the approach suggested here, should engage in creative lawmaking. When Congress has properly exercised its lawmaking powers in this area and proclaimed jurisdiction to be exclusive in certain classes of cases, it "has seemingly made a judgment that there is a national interest in uniform construction of the applicable law, and is [therefore] unwilling to permit the litigants to choose a state forum." ALI STUDY, *supra* note 17, at 478.

The courts in exercising their lawmaking functions when Congress is silent may make the same determination—namely, that the need for uniformity in a particular context is so great that jurisdiction should be found exclusive.

[E]ven if both parties had an opportunity to choose the federal system in every case [even if there was an initial federal forum available], the need for exclusiveness would still not be wholly eliminated. At least in the fields of patent and antitrust law, the interests to be protected go beyond those of the parties to the suit.

Exclusive Jurisdiction, *supra* note 7, at 513.

man Act,⁸⁴ which by its own terms and subsequent judicial interpretation⁸⁵ has provided the courts with considerable authority to fashion the law of restraint of trade as they see fit. An example of the latter might be the Truth in Lending Act,⁸⁶ which is quite explicit, in many of its provisions, as to the scope of the federal right provided.

The relevance of this criterion in determining the need for uniformity is quite apparent, for to the extent that a statutory right depends upon judicial development for its content, the danger of legal chaos will vary directly with the number of courts independently interpreting the right. In light of the fact that an overworked Supreme Court⁸⁷ is capable of providing a uniform practice for only a fraction of the numerous issues of federal law that arise each year, the danger of divergent judicial interpretations must be taken seriously.⁸⁸

Such divergence is likely to be harmful for several reasons. First, to the extent that varying or contrary interpretations are given in different areas of the nation, the nationally unifying force of federal law is undermined, and the post-Civil War development of federal supremacy over local interests is weakened. Second, the arbitrariness of the enjoyment of federal rights that this divergence

84. 15 U.S.C. § 1 (1970): "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

85. See *Standard Oil Co. v. United States*, 221 U.S. 1, 69-70 (1911).

86. 15 U.S.C. §§ 1601-1681 (1970 & Supp. V 1975). The provisions of the Act are clearly more specific than the "restraint of trade" language in the Sherman Act. See note 84 *supra*. However, it should be kept in mind that what is involved here is a question of degree. Statutes like the Truth in Lending Act, though more elaborate than the Sherman Act, will still require extensive judicial interpretation. It can nevertheless safely be said that judicial lawmaking will be restricted in direct proportion to the specifics of the statutory scheme.

Another relevant consideration may well be whether the statutory scheme provides for administrative regulations to implement the statute. To the extent that such regulations do accompany the particular statute, the amount of discretion left to the court will decrease accordingly. See, e.g., Regulation Z, 12 C.F.R. § 226 (1975), which implements the Truth in Lending Act.

87. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 619-23 (1974). See also STUDY GROUP ON CASE LOAD OF THE SUPREME COURT, FEDERAL JUDICIAL CENTER, REPORT 9 (1972).

88. It is true, of course, that even a finding of exclusive federal jurisdiction will not insure uniformity of interpretation. Nevertheless, the likelihood of varying interpretations of federal law, both in terms of degree and occurrence, is substantially reduced when only federal courts are making the interpretations. Since there are only eleven courts of appeals which, though not bound by decisions of other circuits, generally give them significant weight, and since a common basis for the Supreme Court's decision to grant certiorari is the existence of a conflict among the circuits, the danger of proliferation is considerably reduced. See ALI STUDY, *supra* note 17, at 166-67; *Exclusive Jurisdiction*, *supra* note 7, at 512.

would produce presents a significant moral problem. Would it be fair, for example, for a Colorado resident to receive a favorable interpretation of federal law from his state court, while a Michigan resident receives a contrary analysis of the same federal right from the Michigan courts? Such a distinction would be dependent upon the totally fortuitous circumstance of the individual's residence, a factor that presumably was in no way intended to influence the enjoyment of the federal right in question.⁸⁹ Finally, in many cases the proliferation of judicial interpretations of a federal right will unduly undermine the predictability in enforcement of that right, thereby interfering with the often significant planning of primary commercial, social, or personal conduct and decision-making.⁹⁰

Where, on the other hand, a federal statute is comparatively clear in its directives, the danger of varying or contrary judicial interpretations is presumably reduced, even if the number of courts interpreting the right is substantial. Barring complications due to a lack of sufficient expertise (already considered as a relevant factor in determining implied exclusivity),⁹¹ it is less likely that judicial interpretations of a tightly drawn statute will vary to any great extent.⁹²

The relevance of the need for uniformity in deciding whether a particular cause of action is to be deemed exclusively federal casts doubt upon the soundness of the Court's conclusion in *Dowd* that section 301(a) of the Labor Management Relations Act was intended to establish concurrent, rather than exclusive, jurisdiction. On its face, section 301(a) is unclear as to whether it was intended merely to provide a forum in federal court for the adjudication of state-created causes of action for breach of labor agreements, or, instead, to establish a new substantive federal common law in the area, to be fashioned by the courts. In *Textile Workers Union v. Lincoln*

89. It might be argued that a similar danger of arbitrariness exists when different suits on the same issue are brought in different federal district courts. However, for the reasons mentioned in note 88 *supra*, the dangers are considerably reduced when suit is brought in federal, rather than state, court.

90. The importance of these interests has been recognized in other contexts. Cf. *Hanna v. Plumer*, 380 U.S. 460, 475-77 (1965) (Harlan, J., concurring).

91. See text at notes 74-82 *supra*.

92. It should be emphasized that the considerations urged here to influence a judicial finding of implied exclusivity are by no means intended to undermine the well established rule that, in adjudicating state causes of action, state courts are bound to interpret and apply relevant principles of federal law. See note 1 *supra*. It is true that the need for expertise and the danger of proliferation are affected as much when a state court interprets federal law in the course of a state adjudication as when a state court hears a federal cause of action. Cf. *Lear v. Adkins*, 395 U.S. 653 (1960). In the former situation, however, having the state court interpret federal law is a necessary evil since the only alternative would be the potential demise of federal supremacy.

Mills,⁹³ however, a majority of the Supreme Court had held that section 301(a) was, as petitioner in *Dowd* argued, "more than jurisdictional—that it authorizes federal courts to fashion, from the policy of our national labor laws, a body of federal law for the enforcement of agreements within its ambit."⁹⁴ Petitioner in *Dowd* reasoned—quite logically, it would seem—that if chaos were to be averted in the evolution of the federal common law of labor agreements, jurisdiction under section 301(a) must necessarily be exclusively federal. Despite this seemingly persuasive argument for uniformity, the *Dowd* Court responded that "whatever the merits of this argument as a matter of policy, we find nothing to indicate that Congress adopted such a policy in enacting section 301."⁹⁵ *Dowd* may thus present an instance where use of an approach tied more to general pragmatic factors than to the specific intent found in legislative history would have produced a different result.⁹⁶

As a counterweight to factors calling for exclusive federal jurisdiction, courts should consider factors that militate in favor of concurrent jurisdiction over a federal statutory claim. For example, if the number of claims under the statute is likely to be burdensome, a court might properly find jurisdiction to be concurrent, in order to distribute the projected case load among the federal and state judicial systems.⁹⁷ Also, situations might arise where it is advisable, for the convenience of the parties, to increase the number of available forums. In addition, there may be situations where state courts have gained considerable experience by enforcing similar state laws and are thus likely to be familiar with and less antagonistic to a comparable federal

93. 353 U.S. 448 (1957).

94. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 506 (1962).

95. 368 U.S. at 507.

96. A possible explanation for the apparent discrepancy in *Dowd* between logic and pragmatism on the one hand and legislative history on the other is the questionable basis of the *Lincoln Mills* decision itself. The language of section 301(a) certainly suggests that Congress intended only the provision of a federal forum for the adjudication of state-created rights. The legislative history relied upon by Justice Douglas, speaking for the Court, to support the conclusion that section 301(a) was designed to establish a new federal law of labor agreements was speculative, to say the least. See Bickel & Wellington, *supra* note 60, at 35-37; Note, *Federal Common Law*, 82 HARV. L. REV. 1512, 1531-35 (1969). In dissent, Justice Frankfurter listed in an appendix persuasive evidence that Congress intended nothing more than the provision of a forum. 353 U.S. 448, 485-546.

The legislative history relied on by Justice Stewart in *Dowd* not only supports his conclusion that jurisdiction under section 301(a) was intended to be concurrent but also indicates that section 301(a) was not intended to establish a federal common law of labor agreements. See 368 U.S. at 507.

97. See *Exclusive Jurisdiction*, *supra* note 7, at 516.

statute.⁹⁸ The presence of these or similar factors is hardly conclusive, however, for the mere fact that concurrent jurisdiction leaves a federal forum open may not be sufficient to protect the important federal interests embodied in a particular federal statute. For, in the words of one commentator, "even if both parties had an opportunity to choose the federal system in every case, the need for exclusiveness would still not be wholly eliminated. At least in the fields of patent and antitrust law the interests to be protected go beyond those of the parties to the suit."⁹⁹ In the last analysis, "when the interests involved are broader than those of the parties to the suit and the need for experienced determination is great . . . the legislative purpose may be most effectively accomplished by a grant of exclusive jurisdiction."¹⁰⁰

Although the foregoing discussion of the types of factors a court should consider is not intended to be exhaustive, it does suggest that a case-by-case approach along these lines is more likely to produce a rational and efficient allocation of jurisdiction over federal statutory claims than is the traditional practice under the amorphous *Claflin* approach.

3. *A Combination Approach*

It is possible that the optimum approach could be achieved by conducting, on a case-by-case basis, both an examination of the legislative history¹⁰¹ and an inquiry into the needs of the federal system that are relevant to the determination of impliedly exclusive federal jurisdiction.

Exactly how these two factors are to be combined will depend on their relative weight in each instance. If, for example, the legis-

98. It has been suggested, for example, that under section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1970), jurisdiction should be made concurrent rather than exclusive. See *Exclusive Jurisdiction*, *supra* note 7, at 515. See also ALI STUDY, *supra* note 17, at 183-84. Similarly, it has been suggested that the antitrust laws, because of the fact that the state courts frequently enforce similar state laws, may fall within that class of cases where jurisdiction might appropriately be made concurrent. *Exclusive Jurisdiction*, *supra* note 7, at 515. However, the ALI Study, though conceding that the need for exclusivity may be less in the antitrust area than in the area of patents and copyrights, nevertheless concludes that jurisdiction should be exclusive since the federal interest embodied in the antitrust laws is "more important than the wishes of the parties." ALI STUDY, *supra* note 17, at 183, 478.

99. *Exclusive Jurisdiction*, *supra* note 7, at 513. Another "factor . . . frequently relied upon in support of concurrent jurisdiction—that a choice of courts will give the plaintiff a greater opportunity to procure inexpensive, speedy resolution of his claim—does not appear to be of major importance at the present time." *Id.* at 517.

100. *Id.* at 517.

101. Cf. R. DICKERSON, *supra* note 71, at 169: "Most if not all appropriate uses of legislative history may be justified . . . as part of the act of judicial creation"

lative history is reasonably clear that Congress intended jurisdiction to be concurrent, a court would have to discover exceptional circumstances of a pragmatic character to justify rejection of the apparent inference to be drawn from the legislative history. If, as is more likely,¹⁰² the legislative history is either silent or internally contradictory, the court would be permitted considerably greater freedom to make its own inquiry into the needs of federalism.

It would be incorrect to suggest that such a procedure provides the judiciary such latitude that it will act as a "super-legislature." The courts would be engaging only in a well-accepted form of statutory construction in determining "how the legislature would have handled the matter had it been brought to its attention and had the legislature acted rationally and consistently."¹⁰³ The likelihood that such a practice would stray substantially from congressional will is minimal, for "a rational court and a rational legislature would presumably apply the same basic standard: What fits best with the rest of the statutory and legal system?"¹⁰⁴

It may be useful at this stage to examine cases where courts have attempted to provide a reasoned justification for their conclusions as to whether congressional silence in a particular jurisdictional grant should be read to make jurisdiction exclusive or concurrent, and to contrast the approaches taken in those cases with the one suggested here. In *Alabama ex rel. Gallion v. Rogers*,¹⁰⁵ the issue was whether state courts had jurisdiction to enjoin the Attorney General of the United States from inspecting and copying voting records. Title III of the Civil Rights Act of 1960¹⁰⁶ permits the Attorney General to compel production of such voting records; the Act expressly vests jurisdiction in the federal courts but is silent on the question of state court jurisdiction.¹⁰⁷ The district court, resting on two grounds, concluded that the state court was without jurisdiction. First, to allow the state court to issue such an injunction would be

102. However, it should be noted that commentators have even questioned the reliability of such acts as the rejection of an amendment to proposed legislation. *Id.* at 160. Cf. *Copra v. Suro*, 236 F.2d 107, 115 (1st Cir. 1956) ("There was extensive discussion on the floor, particularly in the Senate, but this history is subject to the usual infirmities, by way of ambiguity, of legislative debates.").

103. R. DICKERSON, *supra* note 71, at 244.

104. *Id.*

105. 187 F. Supp. 848 (M.D. Ala. 1960), *affd. per curiam*, 285 F.2d 430 (5th Cir.), *cert. denied*, 366 U.S. 913 (1961).

106. 42 U.S.C. § 1974 (1970).

107. 42 U.S.C. § 1974d (1970): "The United States district court for the district in which a demand is made pursuant to section 1974b of this title, or in which a record or paper so demanded is located, shall have jurisdiction by appropriate process to compel the production of such record or paper."

"in violation of the basic legal principle that state courts are without jurisdiction to review the discretion or enjoin the acts of federal officers."¹⁰⁸ Moreover, the court reasoned, the grant of jurisdiction to the federal courts was intended to be exclusive:

Section 305 of Title III of the Civil Rights Act of 1960 vests jurisdiction for the settlement of disputes under that Title in the federal district courts. There is nothing in the language or legislative history that permits the conclusion that the jurisdiction of the federal district courts is to be shared with the courts of the various states. Rather the entire history of the Act reflects that it was and is designed to provide a means of enforcing the basic federally guaranteed rights of citizenship (to vote) against state action. It is apparent to this Court that Congress did not intend this jurisdiction to be concurrent with state courts, since such would be incompatible from the "particular nature of the case."¹⁰⁹

Though the *Rogers* court followed an approach closer to the combination approach advanced here than that adopted by most courts, its analysis does not contain detailed consideration of the factors that we have suggested are important. This omission precludes the case from serving as an adequate guide for future decisions. Ultimately, all the *Rogers* court did was to find shelter under the enigmatic language of the second branch of the *Claflin* test—that "such would be incompatible with the 'particular nature of the case.'" The court never explains what gives rise to the incompatibility. The mere fact that "federally guaranteed rights of citizenship" are involved is, of course, of little help, because *all* these cases involve *some* federally guaranteed right. Nor is the fact that the purpose of the federal right is to protect against state action sufficient in itself to remove state court jurisdiction, because state courts are, at least theoretically, as much obligated under the supremacy clause to prohibit illegal or unconstitutional conduct of state officials as are federal courts. It is likely that the court was concerned principally with possible state court hostility toward federal rights and the possible lack of state court expertise in enforcing and evolving federal rights of this nature. Perhaps interests of comity deterred the *Rogers* court from explicitly relying on these factors. But if the fed-

108. 187 F. Supp. at 852. See also *Alabama ex rel. Patterson v. Jones*, 189 F. Supp. 61 (M.D. Ala. 1960). But cf. *Perez v. Riddlehoover*, 247 F. Supp. 65 (E.D. La. 1965).

109. 187 F. Supp. at 852 (footnote omitted). Cf. *United States v. Louisiana*, 265 F. Supp. 703, 708 (E.D. La. 1966), *affd. per curiam*, 386 U.S. 270 (1967); *Huson v. Otis Engr. Corp.*, 430 F.2d 27, 30 (5th Cir. 1970), *affd. sub. nom. Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (suggesting that the federal courts are the proper forum for the adjudication of Outer Continental Shelf cases since the federal government has "exerted exclusive sovereignty" in that area).

eral interest analysis advocated here is to be successful, the judiciary must be candid in explaining conclusions of exclusivity.

A decision somewhat more explicit in its use of pragmatic factors is *Safe Workers' Organization v. Ballinger*,¹¹⁰ where the court considered whether jurisdiction over a civil action for violation of section 101 of the Labor-Management Reporting and Disclosure Act of 1959¹¹¹ (the "Bill of Rights of Members of Labor Organizations") was exclusive. Section 102¹¹² of the Act conferred jurisdiction on the federal courts but made no mention of state courts. The court relied on various factors, both practical and historical, in concluding that jurisdiction was exclusive. It first noted that another section of the Act was expressly concurrent, and from this inferred that section 102 was intended to be exclusive.¹¹³ The court then stated that section 102, unlike other provisions in the Act involving "obligations already widely recognized and enforced by state courts,"¹¹⁴ "created new law and new rights" that should be developed by the federal courts.¹¹⁵ Additionally, section 102 was said to be analogous to the "economic bill of rights" in the Sherman Act, where jurisdiction has

110. 389 F. Supp. 903 (S.D. Ohio 1974).

111. 29 U.S.C. § 411 (1970).

112. 29 U.S.C. § 412 (1970).

113. 389 F. Supp. at 910. It should be noted that the court purported to apply the *Clafin* rule in this case. 389 F. Supp. at 910. However, its drawing of an inference of exclusivity from silence is inconsistent with the traditional rule that the primary presumption from silence is one of concurrent jurisdiction. The presence of an express grant of concurrent jurisdiction in one section and Congress' silence on the point in another seem to illustrate congressional inability to comprehend the implications of *Clafin*. The first test of *Clafin* postulates that congressional silence is generally to be taken to intend concurrent jurisdiction. Thus, if Congress had truly understood *Clafin*, it would not have felt it necessary to insert an express grant of concurrent jurisdiction in either section.

114. 389 F. Supp. at 911.

115. 389 F. Supp. at 910. Such a conclusion might be contrasted with the judicial treatment of section 301(a) of the Labor Management Relations Act, where the Supreme Court found jurisdiction to be concurrent even though it had also held that federal common law was to govern. See notes 64-67 *supra* and accompanying text. However, if the Court had not held in *Lincoln Mills* that federal common law was to govern, the decision in *Dowd* that jurisdiction was concurrent would be more easily justified. Nevertheless, the Court in *Dowd* should have looked to factors in addition to legislative history in order to reach its result. Justice Traynor, in *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 315 P.2d 322 (1957), reached the same conclusion as the Court in *Dowd* but relied on more criteria. He concluded that state court enforcement of section 301(a) was not likely to frustrate any federal policy embodied in the Act. Moreover, he found no expertise justification for exclusivity in this context since state courts have traditionally engaged in the interpretation and enforcement of contracts. Finally, Justice Traynor found no particular uniformity need for exclusive jurisdiction. While one might disagree with the analysis and conclusions of a court using the pragmatic approach, a more reasoned allocation of jurisdiction over federal causes of action is likely to result when a court is required to justify its jurisdictional conclusions.

been held exclusive.¹¹⁶ Finally, the court said that the history of the enactment of section 102 supported the conclusion that jurisdiction was intended to be exclusive.¹¹⁷ The *Ballinger* court's approach¹¹⁸ represents an improvement over an approach that, without adequate explanation, simply invokes one segment or the other of the traditional *Claflin* rule.

4. Possible Objections to the Alternative Criteria

There exist two possible objections to adoption of the alternative criteria (in particular, the combination approach) suggested here. Both stem from the vagueness inherent in a case-by-case analysis. On the one hand, it might be argued that such unpredictability undermines the goal of introducing certainty into the planning of commercial and social conduct. On the other hand, adoption of the approach suggested here might unduly burden the federal judiciary by requiring the courts to engage in a thorough examination of all the relatively ambiguous factors suggested here every time Congress fails to address the question of concurrent jurisdiction.

Neither of these arguments merits the rejection of the suggested approach. Certainly, the current chaotic situation provides no more predictability than does the revised approach. The only alternative that might substantially increase predictability is the second option previously considered,¹¹⁹ rejection of the implied exclusivity branch of the *Claflin* test in favor of universal application of the presumption of concurrent jurisdiction from congressional silence. Whatever benefit of predictability that might result from this approach is, for reasons already discussed,¹²⁰ outweighed by its potential harmful consequences.

Moreover, the benefits of predictability in terms of planning primary conduct may be questionable. It is unlikely that much primary decision-making would turn on whether a particular statutory right was to be adjudicated exclusively in the federal courts. In any event, whatever unpredictability may exist concerning a particular statute will likely dissipate when a judicial determination of

116. 389 F. Supp. at 911.

117. 389 F. Supp. at 911-12.

118. *Cf. Travel Agents v. Regal Cultural Socy., Inc.*, 118 N.J. Super. 184, 195-99, 287 A.2d 4, 10-13 (Super. Ct. App. Div.), *cert. denied*, 60 N.J. 353, 289 A.2d 798 (1972).

119. *See* text at notes 60-62 *supra*.

120. *See* text at notes 60-62 *supra*.

exclusivity is made at a comparatively early point in a statute's history.

The argument based on judicial burden is equally unconvincing, for the *Claflin* test presently requires an examination of each statute to determine whether the cause of action is impliedly exclusive. The changes proposed here simply remove the presumption of concurrent jurisdiction and provide a set of standards with which to evaluate the statute.

II. THE OBLIGATION OF STATE COURTS TO HEAR FEDERAL CAUSES OF ACTION

To this point, we have examined the power of state courts to hear a federal cause of action when Congress has been silent on the question in the statute creating the cause of action. There can be little doubt, that, at the very least, if Congress explicitly confers jurisdiction on the state courts, those courts have the power to adjudicate that cause of action. The next logical question is whether state courts have an obligation to hear federal causes of action when Congress explicitly grants the power or when the judiciary concludes that concurrent jurisdiction is appropriate.

A. *Compelling State Courts to Hear Federal Causes of Action: Constitutional Questions*

In considering a state's obligation to provide a forum for the adjudication of federal causes of action, the Supreme Court over the years has failed to distinguish between possible constitutional limitations on congressional power, on the one hand, and self-imposed statutory limits intended by Congress to allow state courts to escape the burdens such an obligation would impose, on the other. Before proceeding to an analysis of the problems surrounding the question of congressional intent, then, it seems appropriate to discuss the doubts surrounding Congress' constitutional power to impose on the state judiciaries the obligation to provide a forum for the vindication of federal rights.

Any theory that the Constitution itself limits congressional power in this area necessarily assumes that within the body of the Constitution lies some enclave shielding the states from the imposition of such burdens by the federal government. Some—albeit without specific reference to the language of the Constitution—have reasoned that such an enclave is total in its extent. The leading ex-

position of this view appeared in Justice Frankfurter's concurring opinion in *Brown v. Gerdes*,¹²¹ where he argued:

Neither Congress nor the British Parliament nor the Vermont Legislature has power to confer jurisdiction upon the New York courts. But the jurisdiction conferred upon them by the only authority that has power to create them and to confer jurisdiction upon them—namely the law-making power of the State of New York—enables them to enforce rights no matter what the legislative source of the right may be [assuming, that is, that jurisdiction was not exclusively vested in the federal courts].¹²²

Thus, in Frankfurter's view, Congress lacks the constitutional power to compel state courts to enforce federal causes of action.¹²³

Though the case authority is not of much assistance in answering the question whether there exists a state enclave limiting congressional authority in this area,¹²⁴ what little there is appears to be contrary to Frankfurter's analysis. It has, in fact, long been established that, at least under certain circumstances, Congress may impose on state courts the burdens of adjudicating federal causes of action.¹²⁵ What has not been adequately answered in the case law, however, is whether the Constitution imposes *some* limit on Congress' power to burden state courts in this manner. In *Mondou v. New York*,

121. 321 U.S. 178 (1944).

122. 321 U.S. at 188.

123. For other cases reflecting the early view that Congress has no power to compel the exercise of jurisdiction, see *Huntington v. Attrill*, 146 U.S. 657, 672 (1892) (dictum) ("[T]he courts of a State cannot be compelled to take jurisdiction of a suit to recover a like penalty for a violation of a law of the United States."); *Robinson v. Norato*, 71 R.I. 256, 260, 43 A.2d 467, 474 (1945) ("Instead of it being a question of what the states are *obligated* to do in furnishing a forum for litigating rights under a penal law of the United States, it is more properly a question of what Congress *may* do, under the Constitution, in conferring jurisdiction over such litigation upon the state courts.") (emphasis in original); *Gibson v. Bellingham & N. Ry.*, 213 F. 488, 490 (W.D. Wash. 1914) (dictum) ("Congress cannot enlarge the jurisdiction of a state court, nor has it power to prescribe rules of procedure or methods of trial to be followed in a state tribunal").

The legislative history of the Sherman Act indicates that Congress at one time acted under the assumption that it did not have the constitutional power to confer jurisdiction on the state courts. See S. Doc. No. 147, 57th Cong., 2d Sess. 313 (1903): "It is not competent for Congress to confer a jurisdiction upon a state court any more than it is for a state to confer a jurisdiction upon a United States Court."

124. C. WRIGHT, *supra* note 3, at 173. According to Professor Wright: "The Supreme Court has not yet considered whether Congress can require state courts to entertain federal claims when there is no analogous state-created right enforceable in the state courts." *Id.* See also Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551, 1556 (1960).

125. See *Testa v. Katt*, 330 U.S. 386 (1947); *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1 (1912). Cf. *Palmore v. United States*, 411 U.S. 389, 402 (1973): "[T]his Court unanimously held [in *Testa*] that Congress could constitutionally require state courts to hear and decide Emergency Price Control Act cases involving the enforcement of federal penal laws."

N.H. & H.R.R.,¹²⁶ the Supreme Court specifically held that Congress, in the Federal Employers Liability Act, did not purport to impose an absolute obligation on the state courts to enforce claims arising under the Act. Thus, the Court did not reach the question whether there were any constitutional limits on Congress' power to impose such an obligation. In *Testa v. Katt*,¹²⁷ however, the Court never expressly stated that Congress, in enacting the Emergency Price Control Act, did *not* intend to impose an absolute duty on state courts to hear such claims; accordingly, the *Testa* Court's recognition of a "valid excuse" doctrine (that under certain circumstances a state court may decline to hear a federal cause of action)¹²⁸ has given rise to speculation that there may be a constitutionally based state right to refuse to adjudicate certain federal causes of action.¹²⁹

Absent controlling case law, one must determine whether the Constitution can reasonably be read as creating an enclave for the states that the federal government may not invade. The language of the supremacy clause itself¹³⁰ provides no limit of any kind on Congress' power to burden the state judiciaries. Any search for a constitutional state enclave, then, logically begins with the tenth amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the State respectively, or to the people." For a time, the Supreme Court read into the terms of this amendment what Professor Ely has called "a second line of constitutional defense [in addition to the limits of article I] against federal overreaching."¹³¹

Until quite recently, modern theory had rejected this view of the tenth amendment¹³² because, as Professor Ely had asserted, the lan-

126. 223 U.S. 1, 56-57 (1912).

127. 330 U.S. 386 (1947).

128. See text at notes 162-71 *infra*.

129. See Note, *supra* note 124, at 1554, where the author interprets the opinion in *Mondou* to suggest that, if Congress had purported in the FELA to impose an absolute obligation on state courts, there would be constitutional problems.

130. See note 2 *supra*.

131. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 701 (1974). To exemplify this view, Professor Ely cites *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918), where the Court said: "Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter [manufacture] to which the federal authority does not extend." For examples of cases similar to *Hammer v. Dagenhart*, see *United States v. Butler*, 297 U.S. 1 (1936); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Hill v. Wallace*, 259 U.S. 44 (1922).

132. See Ely, *supra* note 131, at 701-02:

[T]he enclave theory does not accurately reflect the Constitution's plan for allocating power between the federal and state governments. The Constitution in no way defines the content of any enclave of exclusive state authority—except,

guage of the amendment seemed to permit no other logical result.¹³³ By its terms, the tenth amendment specifically reserves to the states only those rights not extended to the federal government. If, in imposing an obligation on state courts to hear a federal cause of action, Congress has exceeded its powers as enumerated in article I and the necessary and proper clause, a state would presumably be able to shield itself from the imposition of such an obligation by use of the tenth amendment. Yet if Congress has exceeded its article I power, the statute is unconstitutional regardless of the tenth amendment's existence. In the words of Professor Ely: "[I]t could hardly be clearer that the question of what matters are to be left exclusively to the states is to be answered not by reference to some state enclave construct but rather by looking to see what is not on the federal checklist."¹³⁴ Hence the tenth amendment is seemingly of use when, and only when, it is not necessary. The inescapable conclusion under this analysis is that the Constitution provides no special state enclave; the only constitutional protections open to the states are the limits imposed by the enumeration of Congress' power in article I, a safeguard of diminishing importance.

The current validity of this analysis was brought into serious question by the Supreme Court last term in its decision in *National League of Cities v. Usery*.¹³⁵ The case involved a challenge by cities, states and intergovernmental organizations to the constitu-

of course, by a process of inference from what is not on the checklist of federal power.

See also E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 238-39 (1963), quoting *United States v. Darby*, 312 U.S. 100, 114, 123, 124 (1941) (citations omitted):

The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." . . . That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. . . . It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the state. . . . Our conclusion is unaffected by the Tenth Amendment which . . . states but a truism that all is retained which has not been surrendered.

See also Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 207 n.84:

Although congressional power to impose jurisdiction on state courts was denied as recently as 1944, see *Brown v. Gerdes* . . . , *Testa v. Katt* would seem to suggest the contrary. In the absence of any express limitation upon Congress' power, its authority "to make all laws which shall be necessary and proper for carrying into execution" its enumerated powers would appear to provide adequate authority. The existence of such authority might be implied also from the fact that Article III permits, but does not require, establishment of federal courts inferior to the Supreme Court, suggesting that Congress was to be free to make use of state judicial systems in the exercise of its powers under Article I.

133. Ely, *supra* note 131, at 702.

134. *Id.*

135. 96 S. Ct. 2465 (1976).

tionality of the 1974 amendments¹³⁶ to the Fair Labor Standards Act,¹³⁷ which extended the Act's minimum wage and maximum hour provisions to most state and local employees. In an opinion by Justice Rehnquist, a sharply divided Court¹³⁸ invalidated the amendments in a decision apparently based on the proposition that Congress' power under the commerce clause does not extend to actions that unduly interfere with state sovereignty.¹³⁹

Exactly how substantial the invasion of state sovereignty must be before congressional action will be invalidated under *Usery* is not at all clear.¹⁴⁰ In invalidating the 1974 amendments, the Court noted that "solely in terms of increased costs in dollars" the amendments have caused "a significant impact on the functioning of the governmental bodies involved."¹⁴¹ The Court also noted that "the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require,"¹⁴² and that "[t]his congressionally imposed displacement of state decisions may substantially restructure traditional ways in which the local governments have arranged their affairs."¹⁴³ To the extent that *Usery* applies to congressional attempts to burden state courts, then, it appears that some ill-defined constitutional enclave might now be found to exist. It is likely that these limits would correspond closely to the content of the "valid excuse" doctrine described in the following section,¹⁴⁴ because these excuses are ac-

136. 29 U.S.C. § 203(d) (Supp. V 1975).

137. 29 U.S.C. §§ 201-219 (1970 & Supp. V 1975).

138. Justice Blackmun filed a separate concurring opinion. 96 S. Ct. at 2476. Justice Brennan dissented in a highly caustic opinion in which Justices White and Marshall concurred. 96 S. Ct. at 2476. Justice Stevens dissented separately. 96 S. Ct. at 2488.

139. It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed not to private citizens, but to the State as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

96 S. Ct. at 2471.

140. It is sufficient to refer to the words of Justice Brennan in dissent, who expressed alarm at "the startling restructuring of our federal system, and the role [the Court] create[s] therein for the federal judiciary," 96 S. Ct. at 2485, and who noted that "there is an ominous portent of disruption of our constitutional structure implicit in today's mischievous decision." 96 S. Ct. at 2487-88.

141. 96 S. Ct. at 2471.

142. 96 S. Ct. at 2472.

143. 96 S. Ct. at 2473.

144. See text at notes 162-71 *infra*.

cepted by the courts in circumstances where requiring the state courts to hear a federal case would unduly burden state resources without serving an overriding federal interest.¹⁴⁵

It is by no means certain, however, that *Usery* will apply to all attempts by Congress to burden state judiciaries with the obligation to adjudicate federal cases. In a footnote, the Court stated:

We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the Spending Power, Art I, § 8, Cl. 1, or § 5 of the Fourteenth Amendment.¹⁴⁶

Indeed, in a separate decision last term, *Fitzpatrick v. Bitzer*,¹⁴⁷ the Court upheld the amendments to Title VII of the 1964 Civil Rights Act¹⁴⁸ that prohibit state and local governments from discriminating in hiring against an attack under the eleventh amendment.¹⁴⁹ No mention of the tenth amendment was made.¹⁵⁰

Though attempts by Congress to require state courts to hear federal cases will be based, in most instances, on the commerce power,¹⁵¹ this need not always be the case. Congress might, for example, have utilized its power under section five of the fourteenth amendment to require, explicitly or implicitly, that state courts hear certain kinds of civil rights cases. Thus, the precise reach of *Usery* remains unclear.¹⁵²

Regardless of the constitutional constraints that may exist, there may well be limits on the obligation of state courts to hear federal

145. Basically, the "valid excuse" doctrine includes situations where a state court rejects a federal case on valid grounds of *forum non conveniens*, see *Southern R.R. v. Mayfield*, 340 U.S. 1 (1950), or because the state court in which the case was brought is a court whose jurisdiction does not include the type of case in question. See *Herb v. Pitcairn*, 324 U.S. 117 (1945); text at notes 166-67 *infra*.

146. 96 S. Ct. at 2474 n.17.

147. 44 U.S.L.W. 5120 (U.S. June 28, 1976).

148. 42 U.S.C. § 2000e-2 (Supp. V 1975).

149. U.S. CONST., amend. XI. The eleventh amendment has been interpreted to prohibit suits in Federal court by private citizens directly against a state. See *Hans v. Louisiana*, 134 U.S. 1 (1890). See generally HART & WECHSLER, *supra* note 3, at 926-47.

150. It appears difficult to distinguish logically among the exercise of different article I congressional powers for purposes of determining the scope of tenth amendment protection, as the Court intimated it might do in *Usery*. See text at note 146 *supra*. Exercise of congressional power under section 5 of the fourteenth amendment, however, is arguably distinguishable, since the fourteenth amendment was, of course, adopted after the tenth, and to the extent the two are inconsistent, it can be said to have superseded the tenth.

151. The Federal Employers' Liability Act and the Emergency Price Control Act are good examples. See text at notes 160-85 *infra*.

152. See 96 S. Ct. at 2476-83 (Brennan, J., dissenting).

causes of action, for Congress need not exercise its powers to the fullest extent possible. In other words, Congress may desire to provide the state courts an opportunity to decline to hear federal cases that is broader than that required by the Constitution. Indeed, the courts have often strained to infer from total congressional silence an intent to permit the states some opportunity for escape from a burdensome obligation to adjudicate a particular federal cause of action.¹⁵³

B. *Compelling State Courts to Hear Federal Causes of Action:
Deciphering Congressional Intent*

While Congress often indicates explicitly whether state courts have the *power* to hear federal causes of action, the question of a state's *obligation* to hear these cases is rarely, if ever, answered with a clear expression of congressional intent, either in the statute itself or in the legislative history. In most respects, then, courts considering the question will generally have to fend for themselves in deciphering whether there is a particular congressional intent.

One logical option is for the courts to assume, unless Congress specifies otherwise, that state courts are to have the power, but not the duty, to hear federal causes of action. While Congress can, despite *Usery*, clearly impose *some* burden on the states, it may not intend to exercise its full power in all instances. It should be recalled that the Court in *Clafin v. Houseman*¹⁵⁴ framed the issue to be whether, in the face of congressional silence, a state court *could* (not must) entertain claims under a federal statute. The Court then concluded that a state court *could* enforce federal claims unless jurisdiction was found to be impliedly exclusive.¹⁵⁵

In support of this position, one might argue that if Congress intends to exercise its supremacy powers by obligating state courts to hear federal cases, it should be required to say so explicitly. Professor Terrance Sandalow has adopted such a position.¹⁵⁶ While he concedes that "if the states are free to decline jurisdiction over federal claims and if they exercise that option, the resulting burden on

153. Ely, *supra* note 131, at 706: "The fact that the state enclave model is not that of the Constitution need not, of course, imply that it is not a model Congress might by legislation impose on federal courts." This appears to be what the Court presumed Congress did in the Federal Employers Liability and Price Control Acts. See notes 160-61 *infra* and accompanying text.

154. 93 U.S. 130 (1876).

155. See HART & WECHSLER, *supra* note 3, at 436; Note, *supra* note 124, at 1553.

156. See Sandalow, *supra* note 132, at 207.

the federal courts may be extremely heavy,"¹⁵⁷ Professor Sandalow nevertheless concludes that, "[i]n the absence of a declaration by Congress that state courts must enforce rights that Congress has created, there appears to be no substantial reason why the Supreme Court should impose such an obligation."¹⁵⁸ Thus, under Professor Sandalow's view, even where a state court has the power to adjudicate federal causes of action, it may refuse to provide a forum for the enforcement of these rights, absent an express declaration by Congress that it has an obligation to do so.

In our judgment, the view that state courts should have the power to enforce federal claims without some accompanying obligation is inconsistent with the concept of federal supremacy that has evolved over the years. In giving state courts the power to adjudicate federal causes of action, presumably Congress (or, where Congress is silent, the court, necessarily exercising a lawmaking function) has decided that the substantive policies embodied in the federal statute creating the cause of action and the federal policies concerning the administration of the federal court system are best advanced by distributing the case burden between the state and federal courts. If the state courts could frustrate these federal policies by simply declining to adjudicate the federal claims, then the concept of federal supremacy would be considerably undercut. A second consideration is that, under such a system, each state judiciary would decide for itself whether to accept federal cases; thus there would be no way to regulate the allocation of burdens between state and federal courts. The resulting unpredictability in the federal judiciary's caseload could conceivably hinder congressional decision-making concerning the structure and jurisdiction of the federal courts. It therefore seems unwise to presume that Congress intended such a result unless, of course, it explicitly provides in the terms of a new statute that state courts are to be given the power but not the duty to hear federal cases.¹⁵⁹

157. *Id.*

158. *Id.* (footnote omitted). Professor Sandalow is of the opinion that "[r]ecognition of congressional power to require the exercise of jurisdiction by state courts would permit ample protection of any federal interests." *Id.*

159. In *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1 (1912), and *Testa v. Katt*, 330 U.S. 386 (1947), the Supreme Court dealt with the issue of a state court's obligation to hear federal causes of action. In both cases, the Court held that the state courts could not decline to adjudicate the federal claims before them. The federal statutes involved in *Mondou* and *Testa* (the Federal Employers Liability Act and the Emergency Price Control Act, respectively) expressly vested concurrent jurisdiction in the state courts, while *Claflin* was an instance of congressional silence on the question of state court jurisdiction. Thus, on their facts, *Mondou* and *Testa* are not

Thus, congressional silence should not be construed to authorize state courts to reject federal cases at will. However, Congress' silence should be understood to permit state judiciaries at least some discretion to decline to hear federal causes of action. A series of decisions construing the Federal Employer's Liability Act (FELA)¹⁶⁰ and the Emergency Price Control Act¹⁶¹ recognized such a power in the state courts under the heading of "valid excuse."¹⁶² Although the Court had not been entirely clear on the matter, it was reasonable to assume that these decisions had construed only congressional intent, not the Constitution, in developing the valid excuse doctrine. In light of *Usery*, it is likely that much, if not all, of this doctrine will henceforth acquire a constitutional dimension. As a practical matter, however, the shift in thinking will probably make little difference, for neither the statutory language nor the legislative history have ever been of much assistance in construing congressional intent on this question. Hence, if it believes it must interpret congressional intent, the judiciary will be forced to employ what we have previously termed "creative judicial lawmak-

inconsistent with a view that where Congress is silent a state court could have the power to hear federal claims but no duty to do so.

However, the Court's opinion in *Testa* seems inconsistent with any attempt to distinguish the meaning of congressional silence in the two contexts. The Court in *Testa* apparently considered *Clafflin* to have answered the question of the meaning of congressional silence in both the power and duty situation. See 330 U.S. at 391. See also *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1, 58 (1912) ("The existence of the jurisdiction creates an implication of the duty to exercise it . . ."). Although *Testa* and *Mondou* apparently extended the reach of *Clafflin* beyond its original confines, see HART & WECHSLER, *supra* note 3, at 436; Sandalow, *supra* note 132, at 204-05, their holdings seem to apply whether or not there is an express grant of jurisdiction to the state courts. Thus, *Testa* appears to dictate the conclusion that congressional silence would be interpreted in the same manner, regardless of whether the question presented is a state court's power or obligation to hear federal claims. This outcome necessarily leads to the further conclusion that where a state court has the power to adjudicate such claims, Congress has also intended to impose a corresponding duty to do so.

For cases accepting the power-therefore-duty rationale, even when there is no express grant of concurrent jurisdiction, see *Egner v. Texas City Indp. School Dist.*, 338 F. Supp. 931 (S.D. Texas 1972); *Calpo v. Highway Truck Drivers*, 201 F. Supp. 307 (D. Del. 1961); *Williams v. Horvath*, 45 Cal. App. 3d 422, 119 Cal. Rptr. 413 (1975); *Maryland Comm. for Fair Representation v. Tawes*, 228 Md. 412, 180 A.2d 656 (Ct. App. 1962); *Lewis v. Delta Loans, Inc.*, 300 S.2d 142 (Miss. 1974); *Vogt v. Nelson*, 69 Wis. 2d 125, 230 N.W.2d 123 (1975).

160. See *Missouri ex rel. So. Ry. v. Mayfield*, 340 U.S. 1 (1950); *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934); *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929) *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1 (1912).

161. See *Testa v. Katt*, 330 U.S. 386 (1947).

162. See *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377, 388 (1929) ("there is nothing in the Act of Congress that purports to force a duty upon such courts as against an otherwise valid excuse").

ing.”¹⁶³ The courts will be required, in other words, to determine what Congress would have dictated had it considered the matter. In so doing, the courts can properly assume that Congress would have acted reasonably and would thus have generally accepted a legitimate state excuse that neither discriminates against nor unduly interferes with the enforcement of federal law. Though the newly discovered constitutional state enclave has yet to be defined, it will likely be quite similar to the principle just described. Consequently, unless Congress were to attempt an explicit abrogation of part or all of the valid excuse doctrine, the source of that doctrine will probably matter little.

Given our assumption that *Usery* will not alter most analyses in this area, what light have the cases shed on the question of exactly when a state court may properly decline to provide a forum for the adjudication of federal claims? First, the courts have not presumed that Congress, when it confers jurisdiction on state courts to entertain federal claims, intended either to enlarge the jurisdiction of a state court which, under state law, has limited jurisdiction,¹⁶⁴ or to compel the states to create courts competent to hear federal causes of action.¹⁶⁵ Consistent with this position is the holding that it is a valid excuse to decline to hear a federal cause of action on the ground that the suit concerned a matter beyond the limited jurisdiction of the state court in which the case was brought. For example, in *Herb v. Pitcairn*¹⁶⁶ the plaintiff brought an FELA action in a city court of Illinois. Under the Illinois constitution, as interpreted by that state's highest court, a city court did not have jurisdiction to hear cases based upon a cause of action (whether state or federal) that arose outside the city. The plaintiff then moved for a change of venue to a court of general jurisdiction. In the interim, however, the two-year FELA statute of limitations had run. The Supreme Court upheld the state court's decision that, because the action had not been commenced in a court of competent jurisdiction as defined by state law, there was no cause to transfer under Illinois venue law; therefore, the case was properly dismissed because the federal statute of limitations had run.¹⁶⁷

163. See text at note 72 *supra*.

164. See, e.g., *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1, 56-57 (1912).

165. See Note, *supra* note 124, at 1554 n.28.

166. 324 U.S. 117 (1945).

167. However, the Court issued a caveat: "The freedom of the state court so to decide is, of course, subject to the qualification that the cause of action must not be discriminated against because it is a federal one." 324 U.S. at 123. See *Stein v. Aintablian*, 100 N.Y.S.2d 90 (Sup. Ct. 1950), where the plaintiff brought suit in a

Permitting a state court of limited jurisdiction to decline to entertain a federal cause of action beyond its scope would seem to accord with the apparent rationale of the valid excuse doctrine.¹⁶⁸ In the first place, requiring such courts to hear federal claims would involve a serious infringement on the state's policies of judicial administration. Secondly, the "court-of-limited-jurisdiction" valid excuse appears to involve little or no conflict with federal policy. It would be extremely difficult for a state court to manipulate this excuse to avoid its obligation to hear a federal claim, since simple reference to state law will reveal whether a particular court is, in fact, a court of limited jurisdiction. Also important is the fact that this use of the valid excuse doctrine will generally not interfere with the federal government's allocation of the burdens of adjudication between state and federal courts, because the state courts of general jurisdiction will remain open to federal claims. Moreover, it is unlikely Congress would want to entrust the development of federal law to courts that are by state law incompetent to hear the kind of cases that will arise under the statute in question. Hence, had it considered the question, Congress would likely have required that only state courts of general or compatible jurisdiction enforce particular federal claims.

In addition to authorizing state courts to decline federal cases when their jurisdiction is "limited" by state law, some commentators have read the Supreme Court's valid excuse cases to authorize a state court of general jurisdiction to refuse to adjudicate a federal cause of action when it does not enforce "analogous" forum or foreign state created rights.¹⁶⁹ It should be noted at the outset that none of the Supreme Court's state obligation cases¹⁷⁰ explicitly employ the "anal-

county court under section 205 of the Housing and Rent Act of 1947, 50 U.S.C.A. app. § 1895(c) (1951), which provided for recovery of rent overcharges in a state court of competent jurisdiction. Although the county court was a state court, state law prohibited it from hearing cases involving claims for more than three thousand dollars. Since the plaintiff was seeking more than that amount, it was held that the county court could properly decline to hear the federal claim. *See also* *Miller v. Municipal Court*, 22 Cal. 2d 818, 142 P.2d 297 (1943).

168. *See* text following note 161 *supra*.

169. *See, e.g.,* Note, *supra* note 124, at 1554-55. *See also* Sandalow, *supra* note 132, at 205. However, it should be noted that Professor Sandalow, while acknowledging that the analogous right theory is predominantly accepted, does not himself specifically endorse this interpretation, and believes that the Court's decisions support a "broader doctrine." *See* note 195 *infra*. Professor Wright and Professor Hart describe as open the question whether Congress can constitutionally compel the states to enforce nonanalogous federally created rights. *See* C. WRIGHT, *supra* note 3, at 173; Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 507-08 (1954); Note, *supra* note 124, at 1554.

170. *See* cases cited notes 160, 161 *supra*.

ogous state-created" terminology when addressing the valid excuse issue. In fact, there is serious question whether the doctrine is anything more than a product of commentators' unfounded speculation. The case support for the doctrine's existence is at best tenuous and at worst nonexistent.¹⁷¹

The "analogous right" concept is apparently derived from language used in the Court's opinion in *Mondou v. New York, N.H. & H.R.R.*,¹⁷² a case involving a state court's refusal to adjudicate an FELA claim. In *Mondou*, the Court said:

We say [a state court is obligated to hear a federal case] "when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion," because we are advised by the decisions of the Supreme Court . . . that the Superior Courts of the State are courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction . . .¹⁷³

This would appear to be a rather weak foundation upon which to build another block of the valid excuse doctrine. The language may reasonably be read to say no more than that state courts of general jurisdiction are required to hear federal claims; the language concerning a state court's customary enforcement of personal injury claims may be no more than surplusage.

Similar ambiguity appears in the later decision of *Testa v. Katt*,¹⁷⁴ a case involving a state court refusal to hear a Price Control Act claim. There the Court said:

It is conceded that this same type of claim arising under Rhode Island law would be enforced by that State's courts. . . . Thus the Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action. Under these circumstances the State courts are not free to refuse enforcement of petitioners' claim.¹⁷⁵

The Court's language is sufficiently unclear, on its face, that it may be subject to the interpretation that the Court contemplated two distinct justifications for a state court refusal to entertain a federal cause of action (neither justification was actually present in *Testa*):

171. In his dissenting opinion in *Dice v. Akron C. & Y. R.R.*, 342 U.S. 359, 364-67 (1952), Justice Frankfurter stated in dictum that a state court need hear negligence cases under the Federal Employers' Liability Act only if that state enforced its own cause of action for negligence. This appears to be the only explicit support in a Supreme Court opinion for the analogous right theory. The opinion of the majority did not deal with the question.

172. 223 U.S. 1 (1912).

173. 223 U.S. at 57.

174. 330 U.S. at 386 (1947).

175. 330 U.S. at 394.

(1) that the declining court is one of limited jurisdiction under state law or (2) that the state courts of general jurisdiction do not customarily enforce state-created rights which are similar to those created by the federal statute. If by its language the Court meant to accept the second alternative, this would be tantamount to judicial acceptance of the "analogous right" theory. However, that the *Testa* Court intended only the former interpretation is evidenced by its direction¹⁷⁶ to compare the *Testa* situation to that found in *Herb v. Pitcairn*.¹⁷⁷ In *Pitcairn*, it will be recalled,¹⁷⁸ the Court concluded that if a court is not a court of general jurisdiction, it has a valid excuse for refusing to adjudicate, so long as it does not discriminate against the federal claim. Hence, despite the ambiguity in its language, the *Testa* Court probably intended nothing more than an affirmation of the "limited jurisdiction" exception.

Further support of the analogous right doctrine's existence has been discerned¹⁷⁹ in the Supreme Court's decisions in *McKnett v. St. Louis & S.F. Ry.*¹⁸⁰ and *Douglas v. New York, N.H. & H.R.R.*¹⁸¹ Though the manner in which these decisions support the doctrine is not made wholly clear, the argument would likely proceed as follows: In *McKnett*, the state court had dismissed an FELA claim on the ground that a state statute permitted the state courts to entertain suits against foreign corporations based on causes of action under state law, but not under federal law. The *McKnett* Court held that

the Federal Constitution prohibits state courts of general jurisdiction from refusing to [provide a forum] solely because the suit is brought under a federal law. The denial of jurisdiction by the Alabama court is based solely upon the source of law sought to be enforced A state may not discriminate against rights arising under federal law.¹⁸²

Since the opinion rejects a state court's power to decline to adjudicate federal cases on the mere ground that they are federal cases, the argument presumably runs, *McKnett* implicitly approves a state refusal to hear a federal case if the rejection is based on something other than naked discrimination. The rejection of a federal case by a state court because it does not customarily enforce analogous state-created rights is obviously based on a ground other than mere dis-

176. 330 U.S. at 394.

177. 324 U.S. 117 (1945).

178. See text at notes 166-68 *supra*.

179. See, e.g., Sandalow, *supra* note 132, at 205.

180. 292 U.S. 230 (1934).

181. 279 U.S. 377 (1929).

182. 292 U.S. at 233-34.

crimination against federal law; thus, the argument would apparently conclude, *McKnett* indirectly authorizes such rejection.

The decision in *McKnett*, however, provides rather weak support for the existence of the analogous right concept. It is difficult to understand how *McKnett*'s rejection of a state court's power to discriminate against federal law can be taken to constitute *approval* of a state court's power to decline to hear federal cases on another basis. The issue simply did not present itself, and the Court did not address it, even in dictum.

Nor does *Douglas* in any way support the analogous right concept. It is true that, unlike *McKnett*, *Douglas* "sustain[ed] the refusal of a state court to exercise jurisdiction over a federal statutory claim under circumstances in which it would also have declined to adjudicate a state-created claim."¹⁸³ But an examination of the *Douglas* holding, as well as later decisions recognizing similar types of valid excuses, underscores the significant differences between the theory upon which these cases were decided and the analogous right theory.

In *Douglas*, the Supreme Court upheld a state court refusal to entertain an FELA claim on the ground that a state statute permitted discretionary dismissal of both federal and state claims where neither the plaintiff nor the defendant were residents of the forum state. Similarly, in *Missouri ex rel. Southern Ry. v. Mayfield*,¹⁸⁴ the Court upheld a state court refusal to adjudicate an FELA claim on the ground of *forum non conveniens*. Finally, in *Barnett v. Baltimore & Ohio Ry.*,¹⁸⁵ a state court held that it could properly decline to adjudicate a federal claim on the ground that a suit between the parties was pending in a federal district court.

The theory that traditional considerations of *forum non conveniens* justify the state courts' refusal to adjudicate federal causes of action appears to be sound. Admittedly, permitting state courts to decline jurisdiction for this reason produces a greater risk of abuse than the "court-of-limited-jurisdiction" excuse, because it is by nature a discretionary doctrine. However, this excuse, unlike the analogous right excuse, is not established by reference to the nature of the substantive cause of action upon which a suit is based. Rather the considerations normally involved in a *forum non conveniens* determination—"the ease of access of proof, the availability and cost of obtaining witnesses, the possibility of harassment of the defend-

183. Sandalow, *supra* note 132, at 205.

184. 340 U.S. 1 (1950).

185. 119 Ohio App. 2d 329, 200 N.E.2d 473 (1963).

ant in litigating in an inconvenient forum"¹⁸⁶—remain the same whether the source of law to be applied is state or federal. Thus, the potential for state obstruction of federal interests is quite restricted. Moreover, the necessary implication of a *forum non conveniens* decision is that the courts of another state would be more appropriate to adjudicate the case; accordingly, the federal interest in having a state forum open would not be frustrated, as it might be under the analogous right theory. Finally, as discussed more fully below, the legitimate state interest in avoiding undue burdens by means of *forum non conveniens* is considerably more substantial than the comparable interest in avoiding federal cases in which state courts are called upon to adjudicate nonanalogous rights.

Case support for the analogous right theory has already been shown to be quite weak. Indeed, simply as a matter of policy, the application of such a theory is in no way warranted. As noted earlier,¹⁸⁷ the apparent purpose of the valid excuse doctrine is to avoid imposing extraordinary burdens on the state judiciaries without undermining the federal policy of having federal cases heard in state courts. Thus, in determining whether the analogous state-created right concept is an appropriate application of the doctrine, two questions must be answered. First, does the requirement that state courts enforce federal rights not analogous to rights presently enforced in those courts unduly burden the administration of the state judicial system? Second, is acceptance of the analogous state-created right excuse consistent with the limits that the Supreme Court has placed on the valid excuse doctrine—limits apparently designed to prevent state courts from interfering with federal substantive policy and frustrating the federal policies of allocating jurisdiction over certain causes of action among both state and federal courts?

In answer to the first question, it is difficult to see how the obligation to enforce nonanalogous rights unduly burdens the admin-

186. *Goodwine v. Superior Ct.*, 63 Cal. 2d 481, 485, 407 P.2d 1, 4, 47 Cal. Rptr. 201, 204 (1965). It has also been suggested that the courts place heavy reliance on whether the plaintiff is a resident of the forum in making the *forum non conveniens* determination:

The plaintiff's residence is given great weight in most cases. If "the plaintiff is a bona fide resident of the forum state," the California court has stated, "forum non conveniens has only an extremely limited application." . . . In New York a virtually iron-clad rule that forum non conveniens would not be invoked if one of the parties to the action was a New York resident was only recently relaxed.

R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* 600 (2d ed. 1975). Such emphasis on the plaintiff's residence provides a strong safeguard against abuse of the *forum non conveniens* excuse to frustrate the federal policy of having a state court open to the plaintiff for his federal claims.

187. See text at notes 168-69 *supra*.

istration of the state judicial system. It would appear to be no more burdensome to impose upon a state court of general jurisdiction a duty to hear a newly created federal cause of action than a duty to hear a new cause of action created by the state legislature. In this context, it is significant that the Court in *Mondou*, the case usually relied on to support this branch of the valid excuse doctrine,¹⁸⁸ rejected as an excuse the argument that it would be "inconvenient and confusing" to apply the federal standards of liability in FELA cases involving personal injuries and different state standards in others.¹⁸⁹ In the Court's words:

[I]t is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects. . . . But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases.¹⁹⁰

Since we can see no purpose even arguably served by the analogous right excuse other than to protect the state judiciaries from the burden of having to apply unfamiliar federal standards of liability and since the Supreme Court appears to have rejected this burden as a valid excuse, the analogous right concept would appear to bear no relation to the presumed protective purpose of the valid excuse doctrine. Hence, on this basis alone, the analogous right excuse should be rejected.¹⁹¹

Even if one considers the protective purpose of the valid excuse doctrine to be furthered by the analogous right theory, it is still necessary to determine whether allowing state courts to dismiss federal claims on this basis is consistent with the limits that the Supreme Court has placed on the valid excuse doctrine. The Court has long demonstrated that it will not allow a state court to decline to hear a case arising under a federal law because the state rejects the substantive policy embodied in that federal law. In *Mondou*, for ex-

188. See Sandalow, *supra* note 132, at 205; Note, *supra* note 124, at 1553-54.

189. 223 U.S. at 58.

190. 223 U.S. at 58-59.

191. It is true, of course, that on occasion, due to the number or complexity of the nonanalogous federal cases that the state courts will be called upon to adjudicate, the burden imposed will be substantial. But the point to be emphasized is that the very same burdens—due to either number or complexity—may result from the requirement that state courts adjudicate analogous federal rights. In other words, the degree of burden will be unrelated to whether the federal cause of action in question is analogous or nonanalogous. The only inherent additional burden presented by the adjudication of nonanalogous rights is the state courts' presumed unfamiliarity with the law in question, long rejected by the Supreme Court as a basis for establishing a valid excuse. See *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1 (1912).

ample, where a state court had declined to hear an FELA claim because of disagreement with the policy embodied in the federal statute, the Court stated:

When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.¹⁹²

Similarly, in *Testa v. Katt*,¹⁹³ where the state court had refused to hear a Price Control Act claim on the ground that it was against the forum's policy to enforce nonforum created "penal" claims, the Court concluded that "the fact that [the forum state] has an established policy against enforcement by its courts of statutes of other states and the United States which it deems penal, cannot be accepted as a 'valid excuse.'"¹⁹⁴ Judged by this standard, there is serious doubt whether the analogous right concept can be allowed.¹⁹⁵ For the fact that the state does not recognize a right analogous to the federal right in question may mean, in effect, that the state legislature has, by its inaction, made a substantive policy decision that it does not wish to establish that kind of right. In other words, in many (though probably not all) instances, the state's failure to provide an analogous right represents the legislature's decision that such a right is not worthy of protection. This conclusion, in turn, will invariably represent the legislature's disagreement with the *substantive* policy contained in the federal statute. Yet the Supreme Court has already held that such disagreement is not a viable basis for a state court's refusal to hear federal cases. Moreover, if state courts of general jurisdiction can refuse to adjudicate all federal causes of action that are not analogous to those presently enforced in those courts, there will be a total frustration of the federal jurisdictional

192. 223 U.S. at 57.

193. 330 U.S. 386 (1947).

194. 330 U.S. at 392. The forum state in *Testa* did enforce forum-created "penal" statutes. 330 U.S. at 388. Hence, the *holding* in *Testa* is not factually inconsistent with the analogous right theory. See Sandalow, *supra* note 132, at 206. However, the Court's real concern in *Testa* was that a state court's refusal to enforce a federal claim because of its disagreement with federal policy would violate federal supremacy. As the *Testa* Court stated, "a state court cannot 'refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.'" 330 U.S. at 393.

195. Professor Sandalow, while acknowledging the conventional wisdom that the Supreme Court's valid excuse cases have established "that a state must enforce a federally created right if it enforces analogous forum-created rights," Sandalow, *supra* note 132, at 205, has also noted the importance of the Court's federal supremacy

policy that the caseload created by a particular federal cause of action should be shared by the two judicial systems.¹⁹⁶

Thus, it would seem that a state court should not escape its supremacy clause obligation to enforce a federally created right by simply refusing to enforce analogous state-created rights. First of all, the case authority relied on to support such an excuse is tenuous at best. Indeed, the case most frequently cited for the existence of this excuse, *Mondou*, appears to have expressly rejected it.¹⁹⁷ Because the requirement that state courts enforce nonanalogous federally created rights would not impose a very severe burden on the state judicial system, the analogous right excuse would not serve the protective purpose of the valid excuse doctrine. Moreover, even if this obligation were deemed unusually burdensome, the analogous right excuse should be rejected for two other reasons. First, in at least some cases, it permits the states to do precisely, though indirectly, what *Mondou* and *Testa* have declared to be forbidden by the principle of federal supremacy—to refuse to enforce federal rights because of disagreement with federal substantive policy. Second, acceptance of the analogous right excuse may result in a substantial frustration of the federal jurisdictional policy of having federal cases allocated between state and federal courts.

reasoning in *Mondou* and *Testa*. However, he has taken a more expansive view of the potential reach of those decisions than that advanced here. In Professor Sandalow's words:

Federal policy is the same whatever lines the state has drawn in defining the jurisdiction of its courts over local claims. If the state may not assert a policy at variance with that expressed by the federal law . . . insofar as the local jurisdictional rule prevents adjudication, it is to that extent under the reasoning of *Mondou* [and *Testa*] inconsistent with the policy underlying the federal claim. *Id.* at 205-06. Thus, apparently, in Professor Sandalow's view the logical extension of the Court's reasoning in *Mondou* and *Testa* would be that a state could have no valid excuse for declining to adjudicate a federal claim.

However, the Court has permitted the state courts to refuse to adjudicate federal claims under certain circumstances. See *Missouri ex rel. So. Ry. v. Mayfield*, 340 U.S. 1 (1950); *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929). Hence the federal supremacy limits that the Court in *Mondou* and *Testa* has placed on state court refusals to adjudicate federal causes of action do not preclude all such refusals but only those that are based on reasons inimical to the federal substantive policy expressed by the federal cause of action or those that unduly impinge on the federal jurisdictional policy of having a state forum available to hear the federal cause of action.

196. In contrast, the court of "limited jurisdiction" excuse and the excuse based upon the considerations of *forum non conveniens* have no such drastic impact on Congress' allocation of jurisdiction between state and federal courts. In the former case, the state courts of general jurisdiction are presumably still open to hear the federal claim. The *forum non conveniens* excuse will only be available where the state court is clearly not the appropriate forum; in that limited class of cases, presumably, some other convenient forum is available to hear the federal claim.

197. See text at notes 188-91 *supra*.

When, then, may a state court properly decline to provide a forum for the adjudication of federal claims? The above discussion indicates that there is a valid excuse for refusing to entertain federal causes of action only where there exists "an express and articulated¹⁹⁸ bona fide state policy relating to judicial administration,"¹⁹⁹ which does not discriminate against rights created by federal law and which will not likely be used to frustrate the congressional policy of having federal claims heard in state court.²⁰⁰ In those cases where a valid excuse was found—*Pitcairn*, *Douglas*, *Mayfield* and *Barnett*—the state courts justified their dismissals on grounds relating to the administration of their state judicial system, and those grounds were equally applicable to claims based on federal and state rights. On the other hand, where no valid excuse for the refusal to adjudicate was found—*Mondou*, *Testa* and *McKnett*—the state courts dismissed either for reasons based on disagreement with the policies expressed by the federal act²⁰¹ or on grounds that reflected patent

198. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 358 n.293 (1963): The Court has held that the time within which an action may be brought to enforce a federal right may not be shortened by state statutes of limitation and nonclaim, e.g. *Cox v. Roth*, 348 U.S. 207, 210 (1955), but in such cases the policy of the statute as one related to the administration of the courts (as opposed to one concerned with protection of the defendant) was not clearly asserted.

If the policy underlying the statute was one of defendant protection, then it conflicts with the federal policy of defendant nonprotection. In such a situation, *Testa* teaches us that the state policy must be subordinated under the supremacy clause.

199. *Id.* at 358. See Cullisen, *supra* note 83, at 239.

200. It is conceivable that cases will arise where there would exist a "bona fide state policy relating to judicial administration" for refusing to adjudicate federal cases, yet such a refusal might well seriously frustrate the policy of distributing the caseload between state and federal courts under a particular statute. For example, a federal law might require adjudication of extremely complex issues or call for intricate judicial supervision of relief. It is not entirely clear, especially in light of the constitutional dimension added by *Usery*, how such a case would be decided. It is likely that in each case a careful balance would have to be struck. Such an approach suffers from the drawbacks of unpredictability and lack of guiding principles, but in striking this balance a court should keep in mind the obligations imposed on the state courts by the supremacy clause to enforce federal law, so that in close cases the presumption should be in favor of binding the state courts. In any event, cases that do not fit within the traditional categories of the valid excuse doctrine are likely to be rare.

201. *Testa v. Katt*, 330 U.S. 386 (1947); *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1, 57 (1912) ("The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible."). See also B. CURRIE, *supra* note 198, at 358-59:

When Rhode Island refused to entertain a consumer's action for damages under the Emergency Price Control Act . . . there was no declaration of a Rhode Island policy relating to the administration of courts that was inconsistent with providing a forum. Indeed, if any policy basis for the refusal is discernible, it is one of hostility to the national price-control policy and a desire to protect local enterprise against sanctions that were deemed unduly severe. . . . The Supremacy Clause in such a case forecloses state social and economic policies. . . . The Supreme Court, in reversing, justly treated Rhode Island's refusal to

discrimination against the federal claim.²⁰² Moreover, although the Supreme Court does not seem to have decided the question, it should not recognize as a valid excuse a state court refusal to adjudicate a federal claim on the ground that it does not enforce analogous state-created rights. Even though there may be no discrimination, the very availability of this excuse will in many cases turn on the state's unwillingness to adopt and enforce state rights analogous to the federal right sued upon; thus the excuse, albeit indirectly, may permit the state to reject federal law because of disagreement with the substantive policies involved.

CONCLUSION

Though the two issues examined in this article may appear to involve very different case precedents and immediate questions of interpretation, they are significantly linked on a broader level. Both the "power" and the "obligation" questions ultimately turn on the same considerations of political philosophy and legal process. Underlying both issues is the exercise of Congress' wide-ranging discretion in allocating the adjudication of federal causes of action between state and federal courts. This congressional power is premised on the concept of ultimate federal supremacy, legally established in the supremacy clause and politically reaffirmed by the Civil War.

Despite the importance of preserving Congress' control in these matters, the evidence is all too clear that in enacting substantive legislation Congress has, with comparatively few exceptions, given precious little consideration to questions of jurisdictional allocation. Though Congress has given somewhat more attention to the issue of exclusive federal jurisdiction (the "power" issue), its efforts in that area have not clarified matters sufficiently. Despite its longevity, the current judicial approach to congressional silence in a particular enactment is ill-advised. The *Clafflin* doctrine—that congressional silence will be understood to establish concurrent jurisdiction unless some special basis justifies a finding of federal exclusivity—is inadequate for several reasons. First, the absence of any standard for determining implied exclusive jurisdiction prevents the test from providing a rational ordering of jurisdictional distribution.

entertain the action as an attempt to interpose the state's own notions of wartime price-control policy. Its decision does not necessarily mean that, in the absence of an express directive from Congress requiring states to provide a forum for federal causes of action, a state policy grounded in good faith upon considerations relating to the efficiency and cost of the local judicial system would be overridden.

202. See *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934).

More importantly, the effectiveness of the *Claflin* test depends upon Congress' awareness that its silence will, in most cases, be taken to authorize concurrent state court jurisdiction for the federal cause of action in question. History has demonstrated, however, that Congress' understanding of this point is erratic. Indeed, the second portion of the *Claflin* test—the doctrine of implied exclusive federal jurisdiction—acknowledges that there may well be occasions where, despite Congress' silence, a finding of exclusive federal jurisdiction is essential to the development of federal law. Given the inadequacy of the present approach, our suggested alternative is a case-by-case analysis that would look both to legislative history and to pragmatic considerations of federalism.

Neither legislative history nor statutory language generally provides the judiciary with much guidance in determining under what circumstances Congress intended that courts be required to hear federal cases. The courts have generally assumed that the supremacy clause imposes on the state judiciary an obligation to adjudicate federal causes of action. It is not entirely clear under what circumstances Congress will be presumed to have permitted state courts to refuse to hear federal cases.

As with the "power" issue, the judiciary should approach the "obligation" question by assuming that, if Congress had directly considered the matter, it would have attempted to preserve federal supremacy without unduly impinging upon state interests. Such an analytical approach will lead to the conclusion that state courts may validly refuse to hear federal cases only when (1) to do so would further a significant interest in efficient state judicial administration, (2) the refusal is in no way premised on state disagreement with principles of substantive federal law or the mere fact that federal law is involved, and (3) refusal will not significantly undermine the federal policy of alleviating the burdens on the federal courts by distributing the caseload between federal and state courts.²⁰³

To date, the Supreme Court has, for the most part, properly applied these criteria in determining the scope of the state courts' obligation to hear federal cases, though commentators have complicated matters by reading into Supreme Court decisions the "analogous right" theory of valid excuse, a doctrine that finds little support in the cases and even less in policy. What the Court has not clarified is whether the valid excuse doctrine is a constitutionally imposed limit on Congress' power to burden the states or whether it is simply

203. *But cf.* note 200 *supra*.

an inference of congressional will drawn from congressional silence. The Supreme Court's recent decision in *Usery* may be taken to mean that the valid excuse doctrine is constitutionally based. Although such a conclusion seems to misinterpret both the language and the policy of the Constitution, "constitutionalizing" the valid excuse doctrine will probably not have much practical effect, except in the unlikely event that Congress were to attempt to abrogate all or part of it.

The duties of the federal courts, in resolving both "power" and "obligation" questions, are considerably greater than many of those courts have recognized. Both issues present questions of construction of congressional intent on matters about which Congress may never have articulated a specific intent. Under these circumstances, the burden on the federal courts is clear: In each case, they must carefully consider how the interests of federalism will best be served and construe congressional will accordingly. In so doing, the courts will be appropriately performing their creative law-making function, long recognized as a proper—and at times necessary—tool of legislative construction.