Federal Jurisdiction--Protective Jurisdiction and Adoption as Alternative Techniques for Conferring Jurisdiction on Federal Courts in Consumer Class Actions

Michigan Law Review
NOTES

FEDERAL JURISDICTION—Protective Jurisdiction and Adoption as Alternative Techniques for Conferring Jurisdiction on Federal Courts in Consumer Class Actions

“Consumer protection” has come of age. The heightened appreciation of the consumer's plight has not been matched, however, by an equal commitment to providing effective programs for vindicating his cause. As a practical matter the consumer may be unable to assert his rights. Suits to enforce consumer rights are costly and are not likely to be brought when each individual claim is counted only in the tens of dollars.

It was in response to this obstacle to effective enforcement of consumer rights that Senator Joseph Tydings introduced the Class Action Jurisdiction Act (S. 1980) in the Senate on April 25, 1969. The aim of this legislation was to make a class action available to consumer-plaintiffs so that they might share the costs of litigation. Significantly, the bill provided that the forum for this class action was to be the federal court system, where the liberal requirements of rule 23 of the Federal Rules of Civil Procedure would apply.


4. As used in this Note, the term “federal courts” will refer only to those courts established pursuant to and under U.S. CONST. art. III. “Legislative” courts established under U.S. CONST. art. I powers present special problems that will not be considered in this Note.

5. FED. R. CIV. P. 23 provides in part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintenable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

1. the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

2. adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

3. the party opposing the class has acted or refused to act on grounds gen-
Indeed, it would seem that the grant of federal jurisdiction was solely intended as a means to the real end of the bill—to provide access to the federal class-action rule. More important, under the proposed legislation federal jurisdiction could be invoked even though the action itself arose under state substantive law and there was no diversity of citizenship between the litigants. The pertinent section of the bill read:

(b) The district court shall have original jurisdiction, regardless of the amount in controversy or the citizenship of the parties, of civil class actions brought by one or more consumers or potential consumers of goods, services, realty, or intangibles on behalf of themselves and all other consumers similarly situated, where—

(1) the action involves the violation of consumers' rights under State or Federal statutory or decisional law for the benefit of consumers . . . .

Thus, federal jurisdiction would result whenever a state—or federal—consumer claim was asserted.

To justify this apparent expansion of the jurisdiction of article III courts beyond diversity and federal-question cases, Senator Tydings maintained that Congress might give federal courts jurisdiction to adjudicate state law claims "which arise in areas subject to congressional regulation." Presumably the Senator was referring to the theory of "protective jurisdiction," although his rationale was never clearly articulated as such.

6. Senator Tydings himself admitted that the bill was "designed to counterbalance restrictive State attitudes toward consumer class actions . . . ." 115 Cong. Rec. 10,460 (1969). He continued: "Federal court jurisdiction makes available the refinements of contemporary Federal court practice, including Federal Rule of Civil Procedure 23, the most modern class action procedure in the United States." Id.


10. For an explanation of protective jurisdiction, see notes 26-28 infra and accompanying text.

This lack of clarity regarding the theoretical basis of S. 1980 has in part been obviated by the introduction of a new bill by Senator Tydings on October 29, 1969—the Consumer Class Action Act (S. 3092).\(^\text{12}\) The approach for conferring federal jurisdiction in the new bill differs markedly from that of the original bill. The protective-jurisdiction rationale has been replaced by a forthright adoption of state consumer laws as federal law.\(^\text{13}\) But to all appearances the ultimate goal of S. 3092 remains the same as that of S. 1980: to provide consumer-plaintiffs access to the federal class-action rule.\(^\text{14}\) The language of the new bill can be explained as an attempt to avoid any constitutional problems that protective jurisdiction might present by shrouding the entire exercise in the cloak of adoption.\(^\text{15}\) If, as has been suggested, the adoption technique is being employed to achieve the same end that the protective-jurisdiction theory was intended to accomplish in the earlier bill, at least two questions are suggested. Would the earlier bill itself have been constitutionally valid? If not, can adoption be used to reach an end that could not constitution-

---

\(^{12}\) 91st Cong., 1st Sess. (1969), reprinted in 115 Cong. Rec. 32,141-42 (1969). This new bill was prompted by the suggestion of Virginia Knauer, Special Assistant to the President for Consumer Affairs, that a class action be made available to consumers to seek damages for unfair or deceptive practices as defined under § 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1964). 115 Cong. Rec. 32,142 (1969), (remarks of Senator Tydings). As a result, the first section of the bill addresses itself to providing this class action under the Federal Trade Commission Act. The second part of the proposed Act, however, is concerned exclusively with federal class-action jurisdiction for suits arising under state consumer law; in this regard it parallels the earlier Tydings bill.

\(^{13}\) The relevant sections of the new bill provide:

SEC. 4. (a)(1) An act in defraud of consumers which affects commerce is unlawful and the district courts of the United States shall have original jurisdiction without regard to the amount in controversy to entertain civil class actions for redress of such unlawful acts.

(2) For the purposes of this section an “act in defraud of consumers” is—

\(...\)

(b) an act that gives rise to a civil action by a consumer or consumers under State statutory or decisional law for the benefit of consumers.

\(...\)

(c) In the case of any class action brought upon the basis of a violation of consumers' rights under any State law the court shall, in deciding such action, apply the following criteria:

(1) State law relating to the consumers’ rights under State statutory or decisional law is adopted as Federal law.

(2) Federal law applicable to each case shall be fashioned upon the law of the State and the State statutory and decisional construction shall be applied as if jurisdiction of the Federal court were based on diversity of citizenship.

S. 3092, 91st Cong., 1st Sess. § 4 (1969), reprinted in 115 Cong. Rec. 32,142 (1969). Section 4(a) incorporates state consumer laws in the definition of “an act in defraud of consumers” and thus in the definition of the federal cause of action. Section 4(c)(1) provides that in such causes of action the state law is adopted as federal law.


ally be reached by use of a theory of protective jurisdiction? The constitutionality of S. 3092 depends upon answers to these questions. 16

The traditional view of federal-court jurisdiction maintains that inferior federal courts can exercise jurisdiction only when it is conferred by Congress and that congressional power to confer jurisdiction is, in turn, limited by the restrictions of article III of the Constitution. 17 Thus, article III has been viewed as the exclusive source of judicial power and hence the power of the federal courts. 18

This traditional view, however, has been questioned on occasion. Perhaps the most notable discussion of article III limitations on federal-court jurisdiction came in National Mutual Insurance Company v. Tidewater Transfer Company. 19 In that case, Justice Jackson, joined by Justices Black and Burton, argued that Congress might expand the jurisdiction of the federal courts when it thought that such an expansion was necessary and proper in order to implement Congress' article I power over the District of Columbia. 20 However,
six members of the Court expressly rejected Justice Jackson's argument and reaffirmed the traditional view that article III expresses the full measure of federal judicial power.  

While re-emphasizing the role of article III as a limitation on federal judicial power, the *Tidewater* decision, because of the wide divergence among the Justices on the theories of federal-court jurisdiction, did little to resolve the difficulties implicit in an attempt to define the scope of article III itself. Indeed, the effect of the decision may have been to compound the difficulties, for now it is necessary to subsume the apparent aberration of the bankruptcy cases under article III alone. In those cases, the Court upheld section 23 of the Bankruptcy Act, which permits trustees in bankruptcy to bring certain state-created causes of action in federal courts irrespective of diversity of citizenship. Justice Jackson read the bankruptcy cases as authority for his article I proposition in *Tidewater*, while two of the Justices who disagreed with that proposition attempted to justify the bankruptcy jurisdiction in terms of article III considerations.

Perhaps to explain the aberrational nature of the bankruptcy cases or perhaps simply to lend some flexibility to the otherwise rigid confines of article III, several writers have developed the thesis of protective jurisdiction. Characterized by one commentator as "a more subtle theory" to reach the same result that Justice Jackson argued for in *Tidewater*, protective jurisdiction would permit the expansion of federal-court jurisdiction while still purporting to observe the dictates of article III. More precisely, under the theory Congress could grant jurisdiction to the federal courts over matters in which there is a federal interest to be protected.

The several variants of the protective-jurisdiction theory, although differing slightly, all attempt to justify protective jurisdiction


22. Williams v. Austrian, 331 U.S. 642 (1947); Schumacher v. Beeler, 293 U.S. 367 (1934). For a discussion of these cases, see notes 42-47 infra and accompanying text.


24. 337 U.S. at 611-15 (Justice Rutledge, concurring), 652 (Justice Frankfurter, dissenting).


27. Thus, for example, in the *Tidewater* case protective jurisdiction would function to legitimize the federal-court jurisdiction because there is a federal interest in the affairs of the citizens of the District of Columbia, as evidenced by the article I power to legislate for the District. The proponents of the several variants of the protective-jurisdiction theory differ in their determinations of what the federal interests are that can be protected by federal jurisdiction. See text accompanying notes 55-68 infra.
in terms of federal-question jurisdiction. One variant suggests that the statute granting the protective jurisdiction is itself the law of the United States under which the case arises. Another variant maintains that the power to make the jurisdictional grant derives from and arises under the federal laws previously enacted in the same general area. Both variants of the theory involve a considerable expansion of the traditional meaning of the article III words, "arising under . . . the Laws of the United States." Most frequently, when courts have addressed themselves to the meaning of these words, they have in fact been interpreting the nearly identical statutory language that confers original jurisdiction upon the federal district courts. It has been recognized that the statutory meaning of the words "arising under" is perhaps not as broad as the constitutional meaning of these same words. Therefore, the fact that the protective-jurisdiction theories would expand the traditional meaning of "arising under" does not necessarily militate against the constitutionality of the theories. But it must still be demonstrated that the definition of "arising under" proposed in the protective-jurisdiction theories falls within the constitutional—as opposed to the stricter statutory—meaning of that phrase.

Proponents of protective jurisdiction argue that the power of Congress to protect federal interests justifies an expanded definition of the term "arising under." There is in fact some case authority,

29. Wechsler, supra note 26, at 225.
30. Mishkin, supra note 11, at 192-96.
33. The statutory language has not usually been given as liberal a construction by the courts and commentators as the constitutional grant. See Shoshone Mining Co. v. Rutter, 177 U.S. 505, 506 (1900); Mishkin, supra note 11, at 160-63. Cf. Forrester, The Nature of a "Federal Question", 16 Tul. L. Rev. 362 (1942).
34. As an analogue to this congressional power to protect federal interests, one commentator has pointed to the diversity jurisdiction provided in article III itself and to other classes of litigants that have been given access to federal jurisdiction by article III. See U.S. Const. art. III, § 2; Mishkin, supra note 11, at 185. These clauses of article III appear to legitimate the use of federal-court jurisdiction for protective purposes. See Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 82-83 (1923), which maintained that the "chief and only real reason" for diversity jurisdiction was to protect litigants from state court prejudices. Compare that view with Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483, 495-97 (1928), which suggested that a more important reason for establishing diversity jurisdiction was to protect creditors from state legislatures that favored debtors. Under either view, the framers intended federal jurisdiction to protect classes of litigants from state prejudices.

In Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 475 (1957), Justice Frankfurter, dissenting, questioned whether these clauses exhausted the framers' intent on the protective use of the federal courts. If they did, application of the protective principle to the federal-question clause of article III would be precluded. There is no logical reason why this should be so, however. It could be persuasively argued that
equivocal though it may be, for the proposition that the Constitution recognizes the exercise of federal-court jurisdiction to protect federal interests. The proponents of this proposition rely heavily on the early case of Osborn v. Bank of the United States, the only case in which the Supreme Court has explicitly construed the scope of the constitutional phrase "arising under." The Osborn decision cut a wide swath for that provision. The case arose in the context of a suit by the Bank of the United States to enjoin the collection of a state tax levied upon it. At issue, at least as Chief Justice Marshall viewed the case, was the constitutionality of the act that incorporated the Bank and gave it the right to sue or be sued in every circuit court of the United States. As the companion case to Osborn indicated, this right to sue in the federal courts would obtain even though the particular cause of action was created by state law and only state law would govern the outcome. Nonetheless, Chief Justice Marshall upheld federal jurisdiction as falling within the federal-question clause of article III since questions concerning the validity of the incorporation, the ability of the Bank to sue in contract, and the like, would necessarily arise in any state law cause of action. The Chief Justice thus deemed the federal incorporation act an "original ingredient" of any case to which the Bank was a party, and he concluded that any such case would therefore arise under that act.

Although Chief Justice Marshall explained the result in Osborn solely in terms of constitutional exegesis, the concern of the Court went beyond mere fidelity to the text of the Constitution. Justice Johnson, in his dissenting opinion in Osborn, made explicit the concern that may have compelled the Court to its decision: state animosity toward the Bank rendered "all the protection necessary, that the general government can give to this Bank." In light of this situation, the Osborn decision might be interpreted as an attempt to protect the form of protection codified in the diversity clause, i.e., protection of a class of litigants from foreign and presumably unfriendly forums, represents but one branch of a genus—protective jurisdiction—the other branch being protection of federal interests to be implied under the federal-question clause. Under this analysis, the codification of one branch in explicit clauses of article III would only preclude the expansion of that same branch; it need not prevent the recognition of the other branch that is not explicitly codified. Logically, then, the recognition of protective jurisdiction under the diversity clause of article III would not seem to militate either for or against the application of protective jurisdiction under the federal-question clause.

35. 22 U.S. (9 Wheat.) 738 (1824).
37. In Bank of the United States v. Planter's Bank, 22 U.S. (9 Wheat.) 904 (1824), the Bank of the United States sued in federal court under state law to recover on negotiable notes made by a state bank.
40. 22 U.S. (9 Wheat.) at 871-72.
the Bank in all its legal relations—particularly those governed by state law in which federal appellate review could not redress subtle discriminations. Thus construed, the Osborn decision would be an endorsement of the concept of protective jurisdiction.

The proponents of protective jurisdiction also cite the Bankruptcy Act and, more specifically, its provisions for trustee suits (section 23) as further authority for the proposition that the federal courts may exercise jurisdiction in order to protect federal interests. The Supreme Court has upheld the constitutionality of section 23, which sets forth instances when a trustee may invoke federal jurisdiction to adjudicate a private cause of action based on state law. Although there is some language in these cases stating that Congress could confer such jurisdiction by virtue of its article I power over bankruptcy, these decisions might better be explained in terms of the explicit Osborn rationale: the federal bankruptcy laws are original ingredients that would exist and could be questioned in any trustee suit. Nevertheless, it can be extrapolated from these bankruptcy cases that one function of the federal courts is to protect at least one type of federal interest even in state law cases.

At least one court, in Teamsters Local 25 v. Mead, has found sufficient authority in this meager precedent to sustain protective jurisdiction. Yet even if one assumes that the Osborn decision and the bankruptcy cases provide some constitutional basis for the exercise of protective jurisdiction, the scope of this jurisdiction remains unclear. Failure to delineate the interests susceptible of pro-

41. Mishkin, supra note 11 at 187.
42. 11 U.S.C. § 46 (1964), provides:
   (a) The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this title, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.
   (b) Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this title had not been instituted, unless by consent of the defendant, except as provided in sections 96, 107 and 110 of this title.
44. See note 42 supra.
45. See Schumacher v. Beeler, 293 U.S. 367, 374 (1934), in which the Court stated that "[t]he Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and prescribe the conditions upon which the federal courts should have jurisdiction."
46. For an analysis of the bankruptcy cases in terms of federal-question jurisdiction, see Justice Rutledge's concurring opinion in the Tidewater case, 337 U.S. at 611-15.
47. Mishkin, supra note 11, at 195.
tection renders the bounds of protective jurisdiction vague. As discussed below, it may well be that the validity of the exercise of such jurisdiction will depend upon its breadth. The several proponents of protective jurisdiction have defined the scope of the jurisdiction differently. Not all of the proposals are equally persuasive in constitutional terms. In the one decision that has upheld the concept of protective jurisdiction, the court itself noted the ambiguities that exist concerning the parameters of protective jurisdiction, but did not feel compelled to define these limits since, in its judgment, section 301 of the Taft-Hartley Act—the statute under consideration—clearly fell within the constitutional bounds of protective jurisdiction. Accordingly, the court failed to articulate a test for the constitutional bounds of protective jurisdiction. The applicability of an argument based on protective jurisdiction to the Taft-Hartley Act has, of course, been subsequently rendered moot, since the Act has been construed by the Supreme Court as a mandate to the federal courts to develop a corpus of federal common law to govern section 301 actions. Thus, there appears to be no authoritative judicial guidance with respect to the precise constitutional limits of protective jurisdiction. Therefore, an essentially independent determination of the constitutionality of protective jurisdiction must be made. In order to accomplish this, the bounds of each of the proposals will be scrutinized to determine whether any or all fall within the constitutional limits of article III.

The proposal that sets the broadest bounds suggests that protective jurisdiction extends to any case that involves facts about which the Congress might legislate under the Constitution. Under this thesis, Congress could provide for federal jurisdiction over the state law claims of a trustee in bankruptcy simply because Congress has a general legislative power over bankruptcy. Professor Mishkin, in describing this theory, has stated, "[S]o long as the interest is of the

49. See notes 67-75 infra and accompanying text.
50. See text accompanying notes 67-70 infra.
52. Teamsters Local 25 v. Mead, 230 F.2d 576, 581 (1st Cir. 1956).
53. The court in Teamsters Local 25 v. Mead did note that the subject matter of § 301 was one over which Congress had undisputed power and, moreover, that Congress had actually exercised its regulatory power in the form of legislative enactments that prescribed certain rules to be applied in § 301 cases. 230 F.2d at 581. Presumably the latter fact was more persuasive to the court since the opinion in Mead placed particular emphasis on the possibility that a federal court would be called upon to apply federal substantive rules in deciding a § 301 case. 230 F.2d at 581-82. The potential involvement of federal law appears to be the touchstone of the court's judgment that the protective jurisdiction of § 301 was a constitutional exercise of jurisdiction.
kind described, it is of no concern whether the particular case be one as to which Congress might have enacted the substantive rule." Congress has a general interest in the field of bankruptcy; a provision for federal jurisdiction in bankruptcy cases is one way of protecting this interest.

The approach to protective jurisdiction outlined above should be distinguished from the approach that suggests that congressional power to confer jurisdiction extends only to the particular cases over which Congress has legislative power to make dispositive rules. Professor Herbert Wechsler formulated the classic statement of this position. While his analysis does not speak explicitly in terms of a "federal interest" to be protected, his theory would, in effect, operate to protect the federal interest in overseeing these types of cases. Endorsing Chief Justice Marshall's position in Osborn v. Bank of the United States that the federal judicial power must extend to every case that might involve an issue under federal law or the Constitution, Wechsler's analysis goes further:

It [judicial power] should extend, I think, beyond this to all cases in which Congress has authority to make the rule to govern disposition of the controversy but is content instead to let the states provide the rule so long as jurisdiction to enforce it has been vested in a federal court.

In cases in which Congress could prescribe the substantive law for the case, Congress should, according to the Wechsler thesis, have the option of a lower-level involvement, i.e., retaining jurisdiction over the case while permitting the states to frame the applicable law. Other commentators have supported this underlying policy of avoiding full displacement of state law.

The Wechsler thesis is not without its problems, however. It has been pointed out that the Osborn decision and the bankruptcy cases,

55. Mishkin, supra note 11, at 188. Professor Mishkin describes this as one possible approach, but does not cite any authorities who have forwarded such a proposition. C. Wright, supra note 27, § 20, at 66 n.2, suggests that Professor Wechsler's theory allows protective jurisdiction "wherever Congress has substantive legislative power." The subsequent development of Wechsler's thesis appears to justify this characterization. See text accompanying note 63 infra.

56. J. Moore, Commentary on the U.S. Judicial Code 188 (1949) appears to support this position, stating that "if Congress can validly legislate concerning a matter it may constitutionally confer jurisdiction upon the federal courts of any claim arising within the ambit of that legislative power."

57. Wechsler, supra note 26, at 224-25.

58. See text accompanying notes 35-39 supra.

59. Wechsler, supra note 26, at 224.

60. See Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1, 19-21 (1957). These authors state that "[i]t would be regrettable for Congress to be forced instead to exert its authority to the full in order to be able to employ it at all." Id. at 20-21.
if they do indeed lend support to the idea of protective jurisdiction, would presumably extend federal-court jurisdiction to cases beyond the actual legislative competence of Congress. For example, it is doubtful that Congress could have prescribed rules for every case in which suit was brought by or against the Bank of the United States. These cases, therefore, suggest a wider scope for protective jurisdiction than originally envisaged by Professor Wechsler.

Perhaps to answer this criticism, Professor Wechsler broadened his original thesis of protective jurisdiction. In discussing the Tidewater case, Professor Wechsler and Hart appear to maintain that even if it is assumed that Congress has no power to enact substantive law governing the relations between residents of the District of Columbia and residents of the other states, Congress still might confer jurisdiction on the federal courts to protect the District's citizens from the possibility of discrimination in state forums. The Wechsler thesis in this expanded form approaches more nearly the strain of protective jurisdiction that is the basis of the diversity clauses—namely, the protection of a class of litigants from discrimination in foreign state courts. The thesis might be distinguished from Justice Jackson's opinion in Tidewater only in the sense that the protection of the class of litigants there—District residents—comes in the context of an explicit article I power to legislate for the District. Yet, this distinction is of no consequence because Tidewater itself indicates that article I cannot be used to expand article III jurisdiction.

The difficulty with assuming that it is simply such a class of litigants that the grant of protective jurisdiction is to shelter is that this branch of protective jurisdiction may well have been exhausted in the diversity clauses of article III. Although the Hart and Wechsler thesis explains the assertion of protective jurisdiction in the Tidewater case on the basis of a class of litigants to be protected, that thesis probably should not be read so narrowly. It is the existence of a federal interest that gives Congress a special expertise in the area, and not simply the presence of a class of litigants, that provides the basis for the Hart and Wechsler approach to protective jurisdiction. Since protection of a class of litigants is not the touchstone on which Hart and Wechsler base their theory of protective jurisdiction, an objection to the use of the Tidewater case as an example of such

61. Mishkin, supra note 11, at 189.
62. See notes 19-25 supra and accompanying text.
64. See note 21 supra and accompanying text.
65. See note 34 supra.
66. See H. Hart & H. Wechsler, supra note 63, at 745.
jurisdiction is an objection only to one application of the thesis and not to its basic rationale.

The exercise of protective jurisdiction, whether over a general area of congressional competence, over particular cases within the congressional lawmaking ambit, or over classes of litigants, will still require a relation back to the federal-question clause of article III. That is to say, the case over which protective jurisdiction is to be exercised must in some sense "arise under" the Constitution or the laws of the United States. It can be argued that the statute that grants the protective jurisdiction is itself the law under which the case arises. The circularity of this suggestion is made more palatable by the reminder that the "arising under" clause would not be eliminated as a control upon federal jurisdiction. The jurisdictional statute would satisfy the "arising under" requirement only when it proceeded from one of the enumerated heads of legislative power in article I of the Constitution. However, this argument is similar to that proffered by Justice Jackson in the Tidewater decision. It is the functional, if not the semantic, equivalent of Justice Jackson's article I rationale—a rationale that failed to sway a majority of the Court. The above approach to protective jurisdiction must, then, be viewed as constitutionally suspect.

At least one theory of protective jurisdiction has been suggested that would relate the federal interest to be protected more satisfactorily to the federal-question clause. Professor Mishkin has developed a theory that posits congressional legislative programs in a particular area as the interests that may be protected under the rubric of protective jurisdiction. Not every article I area would be appropriate for protective jurisdiction; the only appropriate areas would be those in which Congress already had an "articulated and active federal policy" as evidenced by statutory enactments. Under this theory, it is the federal policy as reflected in the legislative program rather than

67. Wechsler, supra note 26, at 224. See also Teamsters Local 25 v. Mead, 230 F.2d 576, 581 (1st Cir. 1956).
68. Bickel & Wellington, supra note 60, at 21.
69. See notes 19-20 supra and accompanying text.
70. See note 21 supra and accompanying text. Justice Jackson's opinion differs from this analysis only in that he demonstrated less compunction to justify the results in terms of federal-question jurisdiction. He went directly to article I for his justification. See National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 596-99 (1949).
71. Mishkin, supra note 11, at 192-96. While the Mishkin article is the best known exposition of this approach, Professor Forrester dealt with a similar suggestion several years earlier. See Forrester, The Jurisdiction of Federal Courts in Labor Disputes, 13 Law & Contemp. Probs. 114, 129-30 (1948), in which Forrester analyzed the Taft-Hartley Act in terms of a federal legislative program as an entity to be protected in much the same way as the Bank of the United States was to be protected in the Osborn case. See text accompanying notes 40-41 supra.
72. Mishkin, supra note 11, at 192.
the immediate litigants that protective jurisdiction is meant to protect. By defining the protectible interests in terms of existing legislative programs, Mishkin’s thesis attempts to justify the protection given as “arising under” the laws of the United States—those laws being the previously enacted legislative programs. This approach to protective jurisdiction has the added advantage of permitting these jurisdictional grants only when there is in fact some concrete interest to be protected. This can be contrasted with the Wechsler theory that would allow Congress to confer jurisdiction over any area or case simply because it falls within an article I power—a less concrete interest unless one assumes that the real object of the protection in such a case is the litigant and not the unexercised legislative power.

Thus, of all the variants of protective jurisdiction, the Mishkin thesis appears to come closest to satisfying the words and the intent of the Constitution. This is not to say that the approach does not have its faults. One major question that remains unresolved within the Mishkin thesis is whether the justification for the exercise of protective jurisdiction is to be found in the fact that aspects of the federal legislative program may become involved in a state law action. If this is the justification, proponents of Mishkin’s theory would argue that the federal courts should have jurisdiction to guarantee that the federal law is faithfully and consistently construed.

This appears to be the argument that Judge Magruder made in the Mead decision, although his emphasis was somewhat differently placed. Judge Magruder viewed actions under section 301 of the Taft-Hartley Act as suits in which “to an important extent” the courts would be obliged to apply federal rules in determining the controversy. He added that Congress might then leave the rules in residual areas to be “ascertained and applied in accordance with state law.” The involvement of federal law need not be as great as it would have been in the Taft-Hartley cases as envisioned by Judge Magruder. Even in a suit governed on the whole by state law, the possible involvement of some federal law might be a sufficient ground on which to exercise federal protective jurisdiction.

73. Id. at 195-96.
74. See text accompanying notes 65-66 supra.
75. See Forrester, supra note 71, at 118-20, 129-30.
76. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908), in which the Supreme Court held that the grounds for federal-question jurisdiction must appear on the face of the plaintiff’s complaint, should not preclude this exercise of jurisdiction since the Mottley requirement is statutory rather than constitutional. See notes 32-33 supra and accompanying text. The Osborn decision defines the parameters of the constitutional words, “arising under . . . the Laws of the United States.” U.S. Const. art. III, § 2. See notes 35-41 and accompanying text.
77. Teamsters Local 25 v. Mead, 230 F.2d 576, 581-83 (1st Cir. 1956).
78. 230 F.2d at 581.
79. 230 F.2d at 581-82.
This regard for the interstitial aspects of federal law in state law cases is not a new one. Indeed, viewed in these terms, protective jurisdiction is simply a restatement of Chief Justice Marshall's interpretation in Osborn of the federal-question clause: a question of the Bank's validity and powers would arise in every case to which the Bank was a party—hence federal jurisdiction should attach. The Mishkin thesis thus construed would differ from Chief Justice Marshall's rationale only in that the former would not require that the possibly interstitial federal law be an original ingredient of the case as well. In the Osborn case, the existence of the Bank depended upon federal law which became, in a sense, the but-for cause of the state cause of action. The exercise of protective jurisdiction, on the other hand, would be based only on the interstitial aspects of federal law in the area.

The Mishkin theory can be interpreted in another way, however. Under this second reading, it is not the interstitial possibilities that prompt federal jurisdiction; rather, the important consideration is simply a desire to utilize the federal courts for the adjudication of cases that fall within areas in which Congress has expressed some legislative policy. The test for protective jurisdiction would still be the existence of a legislative program and policy in the field. Under this second interpretation of the Mishkin thesis, however, it would not be necessary to demonstrate that the federal laws expressing that policy or program would become implicated in the state law case. The purpose of protective jurisdiction under this interpretation is not to protect the federal laws as such, but to guarantee that the case is heard in the forum that is most sympathetic to the general concerns and broad contours behind the federal policy. This approach obviously runs counter to the traditional notion of protective jurisdiction embodied in the diversity clause. That notion is one of protection for litigants from a hostile forum in a foreign state—not one of protection for litigants from their own state courts. This distinction creates no problem, however, if it is assumed, as was suggested.

80. See text accompanying notes 38-39 supra.
81. Mishkin, supra note 11, at 195, states:

Even in cases where no specific statutory provision is itself involved, the overall federal policy thus may nonetheless be better protected if all connected litigation is adjudicated by courts well versed in, and receptive to, the national policies established by the legislation.

Justice Frankfurter in his dissenting opinion in Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 476 (1956), construed the Mishkin thesis as not based upon the interstitial formula. Indeed, Justice Frankfurter commented:

Professor Mishkin's theory of "protective jurisdiction" may find more constitutional justification if there is not merely an "articulated and active" congressional policy regulating the labor field, but also federal rights existing in the interstices of actions under § 301 [of the Taft-Hartley Act].

353 U.S. at 476-77.

82. See note 34 supra.
earlier, that there are two forms of protective jurisdiction: protection for certain classes of litigants, as is the case in diversity jurisdiction; and protection for the federal interest in legislative programs, as may be implied in the federal-question clause. While the applicability of the first form might be limited to cases in which litigants appear before foreign forums, the protection of a federal policy would seem necessary even when a litigant is before his own forum.

The most important question about the Mishkin theory that remains unresolved is whether the theory will prove persuasive enough to convince the Supreme Court of its constitutionality. As indicated above, when construed as an interstitial theory, the Mishkin thesis comes very close to the theory on which the Osborn case was based. The theoretical difference of "original ingredient" exists, but in terms of the significance and number of federal questions that might be raised, this difference may well be of no practical importance. This may be slightly less true under the second interpretation of the Mishkin theory, but even under that interpretation it seems probable that a substantial number of federal questions will arise. Thus, the expansion of "arising under" to at least the interstitial interpretation of Mishkin's theory would seem to be justified as a practical matter. And the Court may be more willing to permit this expansion if significant federal interests are in strong need of protection. On the other hand, considerations such as the traditional judicial reluctance to expand federal jurisdiction and notions of federalism and comity might well lead the Court to reject the Mishkin theory entirely. At the very least, these are some of the more crucial factors that must be resolved in deciding the constitutionality of protective jurisdiction, and in view of the scarcity of authoritative judicial guidance, further speculation concerning what decision the Court might make on this issue does not seem valuable.

The first consumer class-action act proposed by Senator Tydings, S. 1980, would fall within the bounds of protective jurisdiction

83. Id.
84. Mishkin, supra note 11, at 184, envisions that this protection could be attained by exploiting the institutional differences between the federal and state courts. As an example, he cites the possibility that federal judges might view the facts of a case more sympathetically than might state judges. Since the outcome of a particular case might well be different according to the forum in which it is heard, the purpose of protective jurisdiction in Mishkin's scheme is at odds with the policy expressed by the Supreme Court in Guaranty Trust Co. v. York, 326 U.S. 99 (1945), of eliminating differences in the application of the governing state substantive law. Mishkin notes the existence of this policy (Mishkin, supra note 11, at 185), but fails to address himself to the inconsistency of his thesis with it.
85. See text accompanying note 80 supra.
86. See notes 81-84 supra and accompanying text.
87. See notes 3-7 supra and accompanying text.
as defined by several of the above theories. Under the broadest approach, it could be maintained that Congress, by virtue of its commerce powers, could enact substantive laws dealing with the rights of consumers in or affecting interstate commerce. Having concluded that consumer protection laws are within a potential area of legislative regulation, it could then be argued that this is a sufficient interest to be protected by the assertion of federal-court jurisdiction. However, as previously suggested, the constitutionality of this approach to protective jurisdiction is suspect.

The language of S. 1980 seems to obviate the need for an analysis of whether there might be cases involving consumer protection that would not be amenable to the exercise of congressional lawmaking powers. If there are specific cases and issues in an area over which Congress does not have legislative sway, one could retreat to Professor Wechsler's latest thesis that protective jurisdiction should obtain despite the absence of congressional power to enact substantive law for those cases and issues. However, this rationale, already subject to some question, loses much of its force when applied to S. 1980. Professor Wechsler was able to rely on the specter of discrimination against the residents of the District of Columbia in other state courts as the prime example to sustain his position. The Tydings bill, in contrast, can be intended only to protect consumers from their own state judicial systems.

Surely the most obvious theory on which to frame a protective-
jurisdiction argument in favor of S. 1980 is that of Professor Mishkin. Senator Tydings took pains to emphasize that consumer protection is an area of congressional regulation that is based on a "well established Federal policy." There have been numerous federal legislative enactments in the field of consumer protection, thus satisfying the prerequisites for protective jurisdiction under the Mishkin thesis.

The more telling question then arises concerning the role of the legislative program in the protective-jurisdiction scheme. If one assumes that protective jurisdiction over legislative programs is valid only because of the possible interstices of the federal programs in the state law suit, the Tydings bill is a less likely candidate for protective jurisdiction than the Taft-Hartley Act; but it is a candidate nonetheless. Prior to *Lincoln Mills* many issues of federal labor law could have arisen in a state law suit brought for violation of a contract between an employer and a labor organization. There would seem to be fewer issues of federal consumer law that might arise in a suit brought under state consumer laws. One such issue is that of the pre-emptive effect of federal consumer legislation upon state consumer laws. Similarly, the circumstances in which a particular suit arises may require a court to resolve a question concerning the consistency of state law with federal law. Section 111(a) of the Truth in Lending Act expressly leaves in force state laws relating to the disclosure of information in connection with credit transactions except to the extent that those state laws are inconsistent with the federal regulations. A court might well be obliged to construe the Truth in Lending Act and decide whether the applicable state law is consistent with the Act as so construed.

In addition to the newer genre of federal consumer protection laws, such as the Truth in Lending Act and the Fair Packaging and

---

95. See text accompanying notes 71-73 *supra*.
98. See note 54 *supra* and accompanying text.
99. See text accompanying notes 77-79 *supra*.
100. See *Atlantic Ocean Prods., Inc. v. Leth*, 292 F. Supp. 615 (D. Ore. 1968). *Atlantic Ocean Products* sought to enjoin the enforcement of an Oregon statute that limited the use of the word "halibut" in the sale of certain fish. The plaintiff argued that the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-61 (Supp. V, 1965-1969), had pre-empted this area of regulation. The court ruled that the Act superseded only state regulations dealing with the net contents of a package, and added that the state statute did not conflict with any decision of the Food and Drug Administration pertaining to the classification of halibut. 292 F. Supp. at 618.
Labeling Act, older federal legislation exists that is also designed to safeguard the interests of consumers. The Food, Drug, and Cosmetic Act and the Federal Trade Commission Act establish federal regulation of significant portions of the consumer market, although neither act expressly provides the consumer with a federal cause of action for violations of the act. Section 303 of the Food, Drug, and Cosmetic Act authorizes criminal sanctions for any person who adulterates or misbrands the specified items in interstate commerce, but the provisions of this Act might become involved in a state cause of action, particularly if the latter proceeds upon a theory of negligence per se. The Federal Trade Commission Act gives the Commission the power to order the cessation of "unfair or deceptive acts or practices in commerce." The breadth of "unfair or deceptive practices" as interpreted by the Commission and the federal courts suggests that the involvement of federal decisional law in a state law cause of action is not unlikely. Indeed, the importance and involvement of federal law in this area can only be enhanced, for the second Tydings bill, S. 3092, also provides consumers with a class action to vindicate violations of the Federal Trade Commission Act. It is thus likely that federal law would become implicated in state consumer actions. The original Tydings bill, therefore, appears to satisfy the interstitial requirements of the Mishkin protective-jurisdiction theory.

If it is concluded that S. 1980 meets the interstitial test, it follows a fortiori that the bill meets the broader test that there be a legislative program to be protected in its broad contours. In this regard, it is difficult to distinguish the field of consumer protection today from that of labor-management relations at the time of the passage of the Taft-Hartley Act. If section 301 of the Taft-Hartley Act can

107. See Orthopedic Equip. Co. v. Eutsler, 276 F.2d 455 (4th Cir. 1960), in which the court allowed a civil remedy on a negligence per se theory for a violation of the Food, Drug, and Cosmetic Act. See also Bolitho v. Safeway Stores, 109 Mont. 213, 95 P.2d 443 (1939), in which compliance with the federal statute was raised as a defense to a damage action.
111. See Forrester, supra note 71.
arguably be subsumed under the Mishkin thesis,\textsuperscript{112} it is difficult to see why S. 1980 should not likewise be regarded as an appropriate grant to the federal courts of the right to exercise protective jurisdiction.

The objection that can be raised to protective jurisdiction under S. 1980, however, is that the ultimate intent of the bill was to bypass, and perhaps indirectly to force the reform of, state procedures for class actions. It may be questioned whether this is an appropriate function for protective jurisdiction. Assuming the constitutional validity of the Mishkin thesis of jurisdiction to protect legislative programs, critics of protective jurisdiction might still maintain that "it is going beyond the fair purport of the Constitution to permit the federal judicial system to be used as a means of indirect reform and modification of the rules of procedure of the states."\textsuperscript{113} As applied to S. 1980, this criticism may in part be unjustified since it is not clear that the purpose of the bill was to force the states to reform their procedures for class actions, although this might well be the denouement. What is clear, however, is that the bill was intended as a means to bypass restrictive state class-action procedures.\textsuperscript{114} Protective jurisdiction would function under S. 1980 not to protect legislative programs from less sympathetic hearings before state courts;\textsuperscript{115} rather, it would serve to protect state consumers from the procedural rules of their own state courts. Such an extension stretches the concept of protective jurisdiction beyond that which Professor Mishkin himself may have envisioned.

Whether Mishkin actually did envision that his theory could validly be put to such a use is not clear. Admittedly, he was concerned more with the sympathetic application of state law than with the failings of state procedure,\textsuperscript{116} but he probably was not unaware of the fact that many of the proponents of the Taft-Hartley Act viewed section 301 as a necessity because restrictive state procedural rules made the state courts inadequate forums for the enforcement of labor contracts.\textsuperscript{117} Thus, it is at least arguable that Mishkin's analysis of the Taft-Hartley Act in terms of his thesis\textsuperscript{118} may in fact have been an implicit endorsement of the use of federal jurisdiction to protect litigants from cumbersome state procedure.

Conceptually, this extension is not wholly unjustified, for state procedural rules could as easily thwart a suit that is supported by a strong federal policy as could an unsympathetic hearing before a

\textsuperscript{112} See Mishkin, \textit{supra} note 11, at 195-96.
\textsuperscript{113} Forrester, \textit{supra} note 71, at 120.
\textsuperscript{115} See text accompanying note 81 \textit{supra}.
\textsuperscript{116} See Mishkin, \textit{supra} note 11, at 184-85, 195-96.
\textsuperscript{117} Forrester, \textit{supra} note 71, at 117-18.
\textsuperscript{118} See Mishkin, \textit{supra} note 11, at 195-96.
state court. If providing the most favorable forum is a legitimate function of protective jurisdiction, providing the most favorable rules of procedure would appear to be an equally legitimate function. Both functions may be necessary to vindicate the federal policy in the case. Moreover, providing favorable rules of procedure does not seem to be a greater impingement on the state in most cases than providing a sympathetic forum. Since the litigation would be shifted to the federal courts, the state interests in cost of judicial administration and in orderly procedure—two of the most common goals of state procedural rules—would not be adversely affected. And if the state rule is merely the product of the state’s failure to revise its procedure adequately, the rule should certainly not be sufficient to stand in the way of federal protective jurisdiction. Moreover, even if the state procedural rule reflects a substantive state policy, the exercise of federal protective jurisdiction should still prevail under the supremacy clause of the Constitution. 119 Thus, if the Mishkin theory of protective jurisdiction is constitutional, its application to S. 1980 would appear to be justified, as would the further conclusion that S. 1980 would have been constitutionally valid.

The problems of interpretation and perhaps of constitutionality presented by S. 1980 have been rendered less obvious by Senator Tydings’ introduction of S. 3092. 120 Although S. 3092 is, on its face, a bill to amend the Federal Trade Commission Act, the bill also contains the provisions of the earlier Tydings bill (S. 1980), although in a slightly varied form. 121 The new bill attempts to confer jurisdiction on the federal courts by treating state law as federal law through the techniques of adoption and incorporation. 122 As already noted, the objective of the new bill is the same as that of S. 1980: to confer federal jurisdiction so that Federal Rule of Civil Procedure 23 will be available to consumer-plaintiffs. It may be questioned why Senator Tydings chose a new approach—incorporation and adoption—in S. 3092 to achieve the same objective he sought to achieve in S. 1980 through protective jurisdiction.

One suspects that the supporters of this legislation changed the theory on which the legislation was based because they feared that the bill as first introduced (S. 1980) would not fall within constitutional bounds. 124 To be sure, the Mishkin thesis, particularly when construed in terms of an interstitial formula, is a constitutionally persuasive one; and the original Tydings bill would apparently fall

119. U.S. Const. art. VI.
120. See notes 12-15 supra and accompanying text.
121. See text accompanying note 7, and note 18 supra.
122. See note 13 supra.
123. See text accompanying note 14 supra.
124. See text accompanying note 15 supra.
within that formula despite the fact that the intent of the bill was to avoid state procedural rules. But it is not certain that the concept of protective jurisdiction itself would be upheld by the Supreme Court, and at least one well-known commentator is of the opinion that the Court would reject the notion as violative of article III limitations. The question that arises, then, is whether the adoption technique can be validly used to accomplish the same end as S. 1980 would have achieved and at the same time avoid the constitutional constraints that would have been imposed on that bill.

Traditionally, adoption and incorporation have not been used to confer federal jurisdiction (and its attendant procedural benefits) as an end in itself. Rather, these techniques have been employed to achieve broader goals. Perhaps the most notable use of adoption can be found in the series of federal assimilative crimes acts. In passing on one of the earlier assimilative acts, the Supreme Court read as congressional intent a “design that the places under the exclusive jurisdiction of the United States shall not be freed from the restraints of the law . . . .” Congress adopted state law so that some law would in fact govern the federal enclave. This goal differs markedly from the adoption of state law in order to vest federal-court jurisdiction in areas in which state law is already being applied.

Adoption and incorporation have also been utilized to supplement state laws with federal law. In Griswold v. President of the United States, the Court of Appeals for the Fifth Circuit upheld the constitutionality of the Connally Hot Oil Act. This Act made it a federal crime to ship oil in interstate commerce in excess of amounts permitted by state law. It can be argued that the adoption technique in S. 3092 is being similarly employed to aid and supplement state consumer laws already in existence. However, the use of adoption in the Connally Hot Oil Act and Griswold is distinguishable from its use in S. 3092 because in the former case adoption was necessary to assist the states in remedying an abuse that they were otherwise at a serious disadvantage in stopping. Federal adoption is peculiarly appropriate in such circumstances. The same is not true, however, in the case in which adoption is used to avoid stringent state procedural rules that the states are capable of amending if they so desire.

Moreover, both the assimilative crimes acts and the Connally Hot

---

125. See text accompanying notes 114-19 supra.
126. C. Wright, supra note 27, § 20, at 67.
129. 82 F.2d 922 (5th Cir. 1936).
131. 82 F.2d at 925.
Oil Act are clearly distinguishable from S. 3092 in one overriding particular. The assimilative crimes acts and the Hot Oil Act were both based on a valid legislative purpose that went beyond merely confining jurisdiction in federal courts. The purpose of the former was to create laws in an area of exclusive federal jurisdiction, and the purpose of the latter was to bring federal law enforcement facilities to bear on the proscribed activity. The sole purpose behind the adoption in S. 3092, however, appears to be the granting of federal jurisdiction. When this is so clearly the case, it would seem that article III limitations should be operative because the granting of federal jurisdiction is expressly limited by that article alone. Although adoption may be justified as an exercise of Congress' article I powers, the Supreme Court has rejected article I as a basis for expanding federal-court jurisdiction. Since the purpose of the adoption in S. 3092 is solely jurisdictional, article III considerations should be determinative. Thus, the same arguments for and against the constitutional validity of S. 1980 should apply to S. 3092.

The use of adoption and incorporation of state law solely as a means of providing federal-court jurisdiction should not be countenanced unless the result is one that can be reached within the bounds of a constitutionally valid theory of protective jurisdiction. As indicated earlier, S. 1980 would probably have fallen within the most persuasive of the protective-jurisdiction theories—the Mishkin theory. Yet even that theory is subject to serious and as yet totally unresolved constitutional questions. And in answering those questions, the Supreme Court would be compelled to undergo an analysis of the appropriate limits on federal jurisdiction under article III of the Constitution. Since the sole purpose of S. 3092 is jurisdictional, that same analysis should be required in determining its constitutionality.

133. Griswold v. President of the United States, 82 F.2d 922, 925 (5th Cir. 1936).
134. See notes 20-21 supra and accompanying text.
135. See notes 95-97 supra and accompanying text.
136. See text accompanying notes 85-86 supra.