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"FEDERAL QUESTION" JURISDICTION— A SNARE AND A DELUSION

*Ernest J. London**

POORLY defined criteria in the area of jurisdiction are especially wasteful, generating as they often do expensive and protracted litigation over threshold issues, rather than promoting the speedy determination of lawsuits on their merits. One of the most perplexing exercises in American law practice is the effort to define with certainty the original jurisdiction of the lower federal courts¹ in matters where there is no diversity of citizenship.² Although this general head of federal jurisdiction has persistently and pervasively been characterized as "federal question" jurisdiction, it is doubtful whether there is, in fact, original jurisdiction in the lower federal courts over federal questions, as such. This use of an inappropriate and misleading jurisdictional standard has been, and will continue to be, the source of a lack of coherence in the decided cases and uncertainty in the minds of those who must make the choice of a proper forum in which to plead, and it is the purpose of this article both to illustrate the unsuitability of the "federal question" criterion as a test for the original jurisdiction of the lower federal courts in non-diversity matters and to suggest the orientation for a redefinition of this subject matter.

I. The Constitutional and Statutory Provisions

Article III of the Constitution established the national judicial power over all cases arising under the Constitution, laws and treaties of the United States, as well as over controversies between citizens of different states, and it vested that power in the Supreme

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¹ The expression "lower federal courts" is here used to refer to the United States district courts and to the former circuit courts of the United States when those courts had *nisi prius* jurisdiction.

² Cf. Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 (1942); Forrester, "The Nature of a 'Federal Question,'" 16 TULANE L. REV. 362 (1942); Forrester, "Federal Question Jurisdiction and Section 5," 18 TULANE L. REV. 263 (1943); Bergman, "Reappraisal of Federal Question Jurisdiction," 46 MICH. L. REV. 17 (1947); Fraser, "Some Problems in Federal Question Jurisdiction," 49 MICH. L. REV. 73 (1950); Mishkin, "The Federal 'Question' in the District Courts," 53 COL. L. REV. 157 (1953).

Court and in such inferior courts as Congress might from time to time create. Except, however, for the jurisdiction of the Supreme Court as enumerated in Article III, the extent to which this constitutional grant of judicial power would be exercised, particularly with respect to the type and number of inferior courts and the scope of their jurisdiction, was left to the discretion of Congress.³ That discretion was first exercised by Congress in 1789 to establish a system of national *nisi prius* courts,⁴ but only part of the available constitutional jurisdiction was conferred on those courts at that time. Although the first Judiciary Act extended to the lower federal courts original jurisdiction over controversies between citizens of different states, no provision was made therein for original jurisdiction over cases arising under the laws of the national government. This was not an oversight but reflected a compromise made necessary by the determined opposition of the antifederalists to a national judiciary,⁵ and it was not until the Judiciary Act of 1875 that Congress provided generally for the original jurisdiction of the lower federal courts in cases arising under national law.⁶ In thus providing for this head of federal jurisdiction in the Act of 1875, Congress borrowed substantially the same phrasing which had been used in Article III of the Constitution to describe the national judicial power, extending the jurisdiction of the lower federal courts to cases arising under the Constitution or laws of the United States.⁷

³ See *Carey v. Curtis*, 3 How. (44 U.S.) 236 at 245 (1845); *Sheldon v. Sill*, 8 How. (49 U.S.) 441 at 448-449 (1850); *Kline v. Burke Construction Co.*, 260 U.S. 226 at 233-234 (1922).

⁴ Judiciary Act of 1789, 1 Stat. 73.

⁵ See Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 HARV. L. REV. 49 at 53, 65 et seq., 125 et seq. (1923); Friendly, "The Historic Basis of Diversity Jurisdiction," 41 HARV. L. REV. 483 (1928); FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* 11 (1928). The willingness to accept federal jurisdiction with respect to diversity matters, on the other hand, has been explained by the desire of the powerful commercial interests to provide impartial tribunals for the protection of litigants from other states and foreign countries against parochial prejudice. FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* 8-9 (1928).

⁶ 18 Stat. 470 (1875). For a discussion of and reference to the largely unsatisfactory legislative history and contemporary comment on the passage of this act, see Chadbourne and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 642-645 (1942); FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65, note 34 (1928).

⁷ 18 Stat. 470 (1875): "[T]he circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority. . . ."

The present statutory language is substantially the same [28 U.S.C. (1952) §1331]:

In two historic decisions, antedating the Act of 1875, Chief Justice Marshall had already broadly construed the constitutional language. In *Cohens v. Virginia*⁸ he had declared that a case arose under the Constitution and laws of the United States, within the sense of Article III of the Constitution, whenever its correct decision depended upon the construction of either.⁹ In *Osborn v. Bank of United States*¹⁰ he declared that whenever a question of the construction of the Constitution or laws of the United States formed an "ingredient" of a case, Congress had the power to give to the lower federal courts jurisdiction over such a case, although the decision of the case might not actually depend upon such a question.¹¹ In these two pioneer cases Chief Justice Marshall was confronted with the task of outlining a legal framework for the young republic and providing sufficient flexibility and latitude within that framework for the growth and development which he wisely anticipated.¹² The "federal question" con-

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws or treaties of the United States."

In the subsequent discussion, when the context permits, reference to "the statutory provision" or to "the jurisdictional statute" shall include each of the congressional reenactments of the Act of 1875, throughout which the phrasing of the Act of 1875 has been substantially preserved.

⁸ 6 Wheat. (19 U.S.) 264 (1821).

⁹ In *Cohens v. Virginia* the appellants had been convicted in a lower court of the State of Virginia of selling lottery tickets in violation of Virginia law. The appellants contended that the sale of the lottery tickets had been authorized by an Act of Congress, which was a bar to prosecution by the state authorities. The Supreme Court of Virginia upheld the conviction, and the appellants sought to remove the case to the Supreme Court for review. Holding that the Supreme Court of the United States had the power to review the decision of the Supreme Court of Virginia, Chief Justice Marshall stated that it was a case which arose under the Constitution and laws of the United States because its correct decision depended upon a determination of whether, under the Constitution, national law superseded conflicting state law.

¹⁰ 9 Wheat. (22 U.S.) 738 (1824).

¹¹ In *Osborn v. Bank of United States* Congress had incorporated the Bank of the United States and given to it the power to sue and be sued in the state and federal courts. Reading this as an express congressional grant of jurisdiction to the lower federal courts over all cases in which the Bank was a party (see note 38 infra), Chief Justice Marshall then decided that Congress had the power under Article III of the Constitution to confer such jurisdiction. The Bank, he pointed out, was a creature of federal law, and each of its actions potentially involved questions of federal law, such as the power to sue, to contract, etc. This was a sufficient "ingredient" of federal law to justify a congressional grant of federal jurisdiction over all cases in which the Bank was a party.

¹² The successful functioning of the federal system required that the Supreme Court have the constitutional power to act as the ultimate arbiter on all federal questions to resolve the sovereignty conflicts which must inevitably arise among the various state and lower federal courts, as well as the separate and independent branches of government. Cf. HAND, *THE BILL OF RIGHTS* 29 (1958). *Cohens v. Virginia* served that need. Moreover,

cept was admirably adapted to these organic law needs,¹³ whereas such a broad construction of the jurisdictional statute was not similarly required. Jurisdictional legislation can easily be accommodated to changing needs, as contrasted with the difficulty of amending the Constitution, and as long as the state courts were at all times available as forums to try matters which had been excluded from the cognizance of the federal courts—and had been largely relied upon for that purpose, apparently satisfactorily, up until the Act of 1875¹⁴—the jurisdiction of the lower federal courts could always be expanded on an ad hoc basis if, in any particular instance, national interests were discovered to be prejudiced by a restrictive construction of the jurisdictional statute.¹⁵ Notwithstanding the foregoing differences in context and function between the constitutional and the statutory provisions, Chief Justice Marshall's exposition of the constitutional phrasing in *Cohens v. Virginia* and *Osborn v. Bank of United States* was at first thought to control the meaning of the similar phrasing in the Act of 1875, and the pervasive use of the "federal question" rubric to describe the jurisdiction created by the Act of 1875 has its origins in the early uncritical transfer to the jurisdictional statute of Chief Justice Marshall's pronouncements in the cases construing Article III of the Constitution.¹⁶

There were at the same time, however, formidable practical and political considerations militating against the actual imple-

the vindication of national policies in those instances where state courts might be either antagonistic or not properly equipped to cope with the special nature of the problems involved required that Congress have the constitutional power to confer jurisdiction on the lower federal courts in selected matters. Cf. Mishkin, "The Federal 'Question' in the District Courts," 53 COL. L. REV. 157 at 157-160 (1953). *Osborn v. Bank of United States* served that need.

¹³ It was a sufficiently plastic concept to fit almost any future contingency. See note 17 infra, and discussion in text at notes 87-92.

¹⁴ See *M'Intire v. Wood*, 7 Cranch (11 U.S.) 504 (1813).

¹⁵ See Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 642, 649 (1942); Bergman, "Federal Question Jurisdiction," 46 MICH. L. REV. 17 at 18-19 (1947).

¹⁶ For a classic example of such a transfer, see quotation from *Starin v. New York*, 115 U.S. 248 at 257 (1885), reproduced in note 64 infra. Cf. discussion in text at notes 30-31; Mishkin, "The Federal 'Question' in the District Courts," 53 COL. L. REV. 157 at 170-171 (1953). For a later recognition that such identity of phrasing does not require identity of interpretation, compare concurring opinion of Justice Rutledge in *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 at 613-614 (1949); Shulman and Jaegerman, "Some Jurisdictional Limitations on Federal Procedure," 45 YALE L. J. 393 at 405, note 47 (1936).

mentation of such a transfer. Because there is a federal question "lurking" in the background of almost every controversy,¹⁷ if the jurisdictional statute were to be given a construction coextensive with the construction which Chief Justice Marshall had already given to the similar phrasing in Article III of the Constitution, access to the lower federal courts would then have been virtually unrestricted.¹⁸ The national system of courts, however, has chronically suffered from the threat of paralysis through glut,¹⁹ and the Supreme Court would understandably be reluctant to give to the Act of 1875 a construction which would have produced an oppressive increase in the case load of the lower federal courts, and, in turn, have fed a correspondingly larger volume of cases into the Supreme Court.²⁰ There were, moreover, com-

¹⁷ See *Gully v. First National Bank*, 299 U.S. 109 at 118 (1936): "If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provision of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power." Cf. *Murdock v. Memphis*, 20 Wall. (87 U.S.) 590 at 629 (1875): "[A]nd it follows that there is no conceivable case so insignificant in amount or unimportant in principle that a perverse and obstinate man may not bring it to this court by the aid of a sagacious lawyer raising a Federal question in the record. . . ." Also see dissenting opinion of Justice Johnson in *Osborn v. Bank of United States*, 9 Wheat. (22 U.S.) 738 at 889 (1824). Although the Act of 1875 seems to have attempted to guard against such a risk by providing in §5 thereof that the circuit court shall dismiss or remand any suit if it shall appear "at any time after such suit has been brought or removed thereto, that such suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of said circuit court," it has been suggested that this section of the act has for the most part been disregarded by the Supreme Court. See Chadbourne and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 652-658 (1942). In any event, §5 has not been included in the present statutory provision. See Reviser's Note, 28 U.S.C. (1952) §1359.

¹⁸ See FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65 (1928). The authors were under the impression that the Act of 1875 gave to the federal courts "the vast range of power which had lain dormant in the Constitution since 1789." However, as will be illustrated in some detail hereinafter, the Supreme Court has given a much narrower construction to that legislation, a result later alluded to by Justice Frankfurter in his opinion in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 at 673 (1950). See note 20 *infra*.

¹⁹ See FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* 22-23, 69-70, 272, 300 (1928); Shafroth, "Report of Administrative Office Shows Federal Court Dockets Still Congested," 44 A.B.A.J. 551 (1958) (summary of Report of Administrative Office of United States Courts for fiscal year 1957).

²⁰ See Frankfurter, "Distribution of Judicial Power Between United States and State Courts," 13 CORN. L. Q. 499 at 503-506 (1928). The extent to which the Supreme Court is overworked was commented upon in a recent address delivered on October 9, 1958 before the State Bar of California at Coronada, California by Dean Erwin N. Griswold of Harvard Law School (as reported in the October 16, 1958 issue of the *HARVARD LAW RECORD*, Vol. 27, No. 4, p. 3:4): "The Court, and each of its members, have far too much to do, and have to work far too hard and too fast, especially in view of the great complexity and importance of the issues that come before it. . . . To an extent to which

selling political reasons against such a construction. Reference has already been made to the apprehension felt in certain quarters that a strong national system of courts would weaken the state governments.²¹ The vast expansion of the original jurisdiction of the lower federal courts inherent in a construction of the jurisdictional statute giving to it as broad a scope as had already been given to Article III of the Constitution might well have been fatal to the peer status of the state courts, for it was fairly to be expected that much of their former business would then drift over to the federal courts. The disturbing effect that such a development would have had on federal-state relationships was not to be lightly countenanced,²² and to impute to Congress such a radical change of policy with respect to the distribution of power between the state and national governments ought to require far stronger evidence of congressional intent than was available.²³

The subsequent analysis of the Supreme Court's decisions construing and applying the jurisdictional statute can not be fully meaningful unless the conflicting impulses to which the Court was thus subjected are borne in mind. On the one hand was the natural tendency to give the same meaning in the juris-

I think the bar is largely unaware, the Supreme Court is now oppressed by mere volume and complexity of its business."

An insight into the attitude of the Court itself was given in *Tennessee v. Union & Planter's Bank*, 152 U.S. 454 at 462 (1894), where, in reviewing certain revisions of the jurisdictional acts, the Court stated: "The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this Court, to contract the jurisdiction of the circuit courts of the United States." And in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 at 673 (1950), the Court, through Justice Frankfurter, stated: "With exceptions not now relevant Congress has narrowed the opportunities for entrance into the federal courts, and this Court has been more careful than in earlier days in enforcing these jurisdictional limitations."

Cf. Public Law 85-554, July 25, 1958, amending 28 U.S.C. (1952) §§1331 and 1332 so as to increase the minimum jurisdictional amounts from \$3,000 to \$10,000.

²¹ See note 5 *supra*.

²² See *Healy v. Ratta*, 292 U.S. 263 at 270 (1934): "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."

For an illustration of contemporary concern over this same problem, see Report of Committee on Federal-State Relationships as Affected by Judicial Decisions, approved at Pasadena, California on August 23, 1958, by the Conference of Chief Justices of State Supreme Courts, as published in a special supplement to the October 23, 1958 issue of the *HARVARD LAW RECORD*, Vol. 27, No. 5.

²³ See Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 *UNIV. PA. L. REV.* 639 at 642-645 (1942), where it is suggested that the Act of 1875 may have been "sneak" legislation.

dictional statute to a case arising under the Constitution and laws of the United States as Chief Justice Marshall had already given to those words in Article III of the Constitution, a tendency which was formalized by the assumption in the early opinions that the cases construing the constitutional provision were apposite to the similar statutory language.²⁴ On the other hand were the persuasive policy reasons for restricting access to the lower federal courts. It is not too surprising, therefore, to discover this conflict reflected by an element of ambivalence in many of the Court's opinions, where "meaningless formal tribute" was often paid to Chief Justice Marshall's pronouncements in *Cohens v. Virginia* and *Osborn v. Bank of United States*, while "essentially contradictory doctrines" were used as the actual basis for the decisions.²⁵ The prevalence of paradoxes of this nature in the opinions construing and applying the jurisdictional statute proved to be particularly disastrous on those occasions when the Court itself failed to read the earlier cases in depth and was itself misled into accepting and applying them on the basis of their superficial import.²⁶

II. *The Restrictive Interpretation of the Jurisdictional Statute*

The first occasion for the Supreme Court to construe the Act of 1875 arose in *Gold-Washing and Water Co. v. Keyes*.²⁷ The defendants, who were engaged in hydraulic mining of gold-bearing placer mines, title to which had been derived from the United States, had been depositing the debris from their mining operations in the channel of an adjacent river, and the plaintiff had brought suit in the state court to restrain this phase of their operations. The defendants attempted to remove the case to the United States circuit court,²⁸ alleging in their petition for removal

²⁴ See note 16 *supra*.

²⁵ See Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 652 (1942). See discussion in text at notes 29-32, 43-58 *infra*.

²⁶ See discussion in text at notes 35-42, 49-54, 59-62, 76-94 *infra*.

²⁷ 96 U.S. 199 (1878).

²⁸ Section 2 of the Act of 1875 authorized the removal of suits arising under the Constitution or laws of the United States. Although this article is properly concerned only with the original jurisdiction of the lower federal courts in non-diversity matters, the scope of such original jurisdiction under §1 of the Act of 1875 was identical with the scope of the removal jurisdiction under §2 thereof. It is, accordingly, appropriate to consider, in analyzing the scope of the original jurisdiction under the Act of 1875, the cases construing §2.

that their right to work the mines had been conferred by Act of Congress and they could only exercise said right by using the adjacent river channel for depositing the debris from their operations. If they were prevented from doing so, they said, the mining rights which they had derived under the laws of the United States would then be rendered valueless. The gist of the petition for removal was, accordingly, that construction must be had of the mining laws of the United States under which the defendants claimed in order to determine if they were privileged to continue with their operations. It would seem that there should have been no doubt about the outcome of the case if Chief Justice Marshall's "federal question" criterion, as developed in *Cohens v. Virginia*²⁹ and in *Osborn v. Bank of the United States*,³⁰ was to be equally applied to the jurisdictional statute. However, although the Court made a nominal obeisance to the authority of those cases—thus, at the very first, establishing the precedent of assuming that those cases were apposite to the construction of the jurisdictional statute—it declined to accept the responsibility for actually giving to the jurisdictional statute the broad scope which had been accorded to the constitutional provision, side-stepping that chore by taking refuge, instead, in what it considered to be a pleading defect—the failure of the petition for removal to allege with sufficient particularity the nature of the federal right upon which the defendants relied.³¹

The Court understandably dealt gingerly with its initial exposure to the Pandora's box of problems presented by the Act of 1875, and it was almost apologetic for its decision.³² When, however, it was confronted, some twenty-two years later, with a similar case in which federal jurisdiction was claimed because

²⁹ 6 Wheat. (19 U.S.) 264 at 379 (1821): A case "may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends upon the construction of either."

³⁰ 9 Wheat. (22 U.S.) 738 at 822 (1824): A case arises under the Constitution and laws of the United States when "the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction. . . ."

³¹ See Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 652 (1942).

³² At 96 U.S. 204 (1878), the Court stated: "The act of 1875 has made some radical changes in the law regulating removals. Important questions of practice are likely to arise under it, which, until the statute has been longer in operation, it will not be easy to decide in advance. . . . Under these circumstances, the present case is not to be considered as conclusive upon any question except the one directly involved and decided."

mining rights derived from the United States were in issue, it dealt more confidently with the task of construing the scope of the Act of 1875. In *Shoshone Mining Co. v. Rutter*³³ it was flatly held that there was no federal jurisdiction over an action to determine the right to a patent to mining lands derived under federal law. The Court explained that Congress had provided that adverse claims with respect to such mining rights should be determined by local laws and customs, when not in conflict with the federal law, and because the actual decision of the case might well turn on a question of local law or on an issue of fact, it was not a case which "necessarily" arose under the laws of the United States.

Inasmuch as litigation involving United States placer mining rights and United States mining patents are just as pregnant with a potential federal question as would be the run-of-the-mill litigation in which the Bank of the United States might be involved, it is clear that in *Gold-Washing and Water Co. v. Keyes* and *Shoshone Mining Co. v. Rutter* the Court had already made a significant exception to Chief Justice Marshall's declaration in *Osborn v. Bank of United States* that a case arose under the Constitution and laws of the United States whenever a federal question formed an "ingredient" of the original cause.³⁴ And, indeed, for the first time, the Court in *Shoshone Mining Co. v. Rutter* openly acknowledged that the scope of the constitutional and statutory provisions was not necessarily the same.³⁵ Between the times of the decisions in *Gold-Washing and Water Co. v. Keyes* and *Shoshone Mining Co. v. Rutter*, however, the Court decided the *Pacific Railroad Removal Cases*,³⁶ where, in construing the meaning of a case arising under the Constitution and laws of the United States as used in the Act of 1875, the Court reverted to the literal construction which Chief Justice Marshall had given to the constitutional phrasing in *Osborn v. Bank of*

³³ 177 U.S. 505 (1900).

³⁴ See Mishkin, "The Federal 'Question' in the District Courts," 53 COL. L. REV. 157 at 161-163 (1953).

³⁵ 177 U.S. 505 at 506 (1900): "Under these clauses Congress might doubtless provide that any controversy of a judicial nature arising in or growing out of the disposal of the public lands should be litigated only in the courts of the United States. The question, therefore, is not one of the power of Congress, but of its intent. It has so construed the judicial system of the United States that the great bulk of litigation respecting rights of property, although those rights may in their inception go back to some law of the United States, is in fact carried on in the courts of the several States."

³⁶ 115 U.S. 1 (1885).

United States. The defendant railroads in the *Pacific Railroad Removal Cases*, upon being sued in various state courts on a land condemnation suit and assorted personal injury claims, sought to have their cases removed to the appropriate United States circuit courts on the ground that, since they were all corporations deriving their charters from Acts of Congress, the suits against them were suits arising under the laws of the United States under the authority of *Osborn v. Bank of United States*. Considering itself to be bound by the latter decision, the Court sustained the contention of the railroads that all cases in which corporations chartered by the United States were parties were automatically cases arising under the laws of the United States within the meaning of the Act of 1875. Chief Justice Marshall, however, had not been concerned with the Act of 1875 in *Osborn v. Bank of United States*,³⁷ and the portion of his opinion upon which the Court relied in the *Pacific Railroad Removal Cases* was applicable only to whether Congress had power under Article III of the Constitution to confer jurisdiction upon the federal courts over all cases in which the Bank of the United States was a party.³⁸ The Court failed to note this difference between the two cases and the possibility of a variance in the scope of the con-

³⁷ See note 11 supra.

³⁸ In *Osborn v. Bank of United States* the Court was actually confronted with two questions. (1) Did Congress intend, in the act chartering the Bank of the United States and authorizing it to sue and be sued in the state and federal courts, to confer original jurisdiction on the United States circuit courts over all cases in which the Bank was a party? (2) If Congress so intended, did it have the power to confer such jurisdiction under the constitutional language extending the national judicial power to all cases arising under the Constitution or laws of the United States? Chief Justice Marshall answered both the statutory and the constitutional questions in the affirmative, but his "federal question" doctrine was not pertinent to his construction of the statutory predicate for federal jurisdiction and was developed only in connection with the constitutional provision. Inasmuch as the Court in the *Pacific Railroad Removal Cases* did not rely upon the language of the acts chartering the railroads as the statutory predicate for federal jurisdiction, but purported, instead, to construe the new legislation of 1875 and to base its finding of federal jurisdiction upon that legislation only, it was construing a statutory provision which Chief Justice Marshall had not ruled upon. It was not, therefore, technically bound by the decision in *Osborn v. Bank of United States*, as it mistakenly thought that it was, and it could properly have held that Chief Justice Marshall's constitutional exposition was not transferable to the jurisdictional statute.

Chief Justice Marshall's position with respect to the statutory question was later abandoned by the Supreme Court in *Bankers Trust Co. v. Texas & Pacific Ry. Co.*, 241 U.S. 295 (1916), where the Court held that the language in the charter of a United States corporation authorizing such corporation to sue and be sued in the federal courts merely defined the power of the corporation to bring suits in courts of competent jurisdiction but did not in itself create such jurisdiction.

stitutional and the statutory provisions,³⁹ a possibility which it was careful to point out only five years later in *Shoshone Mining Co. v. Rutter*. This has led to the conclusion that the decision in the *Pacific Railroad Removal Cases* was a "sport,"⁴⁰ in which the Court was bemused by the identical language in the two provisions. In any event, the decision was later expressly nullified by Congress,⁴¹ with the apparent concurrence and satisfaction of the Supreme Court.⁴²

The tendency implicit in *Gold-Washing and Water Co. v. Keyes* and *Shoshone Mining Co. v. Rutter* to narrow the scope of the "federal question" concept when applying it to the jurisdiction of the lower federal courts was developed further by the Court in three subsequent decisions, wherein federal jurisdiction was denied although there was a substantial and clearly defined federal question involved in each case.⁴³ In *Metcalf v. Watertown*⁴⁴ the plaintiff, as assignee of a federal court judgment, had sued on that judgment in the United States Circuit Court for the Western District of Wisconsin. The defendant answered that the action was barred by a Wisconsin 10-year statute of limitation applicable to actions on federal court judgments and judgments of states other than Wisconsin, in rebuttal of which the plaintiff argued that because Wisconsin law provided a 20-year limitation for actions on Wisconsin judgments, the selective application of the shorter period of limitation to an action on a federal court judgment would be contrary to the Constitution of the United States. The circuit court had disposed of the case on its merits, but on appeal the Supreme Court held that the case had to be dismissed for lack of federal jurisdiction, declaring that in order to predicate jurisdiction on the Act of 1875, it should appear at the outset, from the declaration or bill of the parties suing, that a question of a federal nature was involved, whereas whatever federal ques-

³⁹ Only Chief Justice Waite, joined by Justice Miller, dissented, pointing out that the identical phrasing did not have the same broad meaning when used in the statute as it did when used in the Constitution.

⁴⁰ Mishkin, "The Federal 'Question' in the District Courts," 53 COL. L. REV. 157 at 160, n. 24 (1953).

⁴¹ 28 U.S.C. (1952) §1349. See Mishkin, "The Federal 'Question' in the District Courts," 53 COL. L. REV. 157 at 160, n. 24 (1953).

⁴² FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* 272-273 (1928).

⁴³ *Metcalf v. Watertown*, 128 U.S. 586 (1888); *Tennessee v. Union & Planter's Bank*, 152 U.S. 454 (1894); and *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908).

⁴⁴ 128 U.S. 586 (1888).

tion was present in the record was there only because of the nature of the defense and the plaintiff's rebuttal thereto. The plaintiff's claim, the Court pointed out, was based on nothing more than an ordinary right of property, and if the defendant had failed to answer, the record would then have been barren of any suggestion of a federal question. In *Tennessee v. Union Planter's Bank*⁴⁵ and *Louisville & Nashville Railroad Co. v. Mottley*⁴⁶ the holding in *Metcalfe v. Watertown* was extended to cases where the federal question was present only because of the plaintiff's anticipation of a defense or the defendant's petition for removal to a federal court.⁴⁷

The qualifications with which the Court had by this time surrounded the "federal question" concept,⁴⁸ apparently in an effort to close the floodgate of litigation which the literal application of that doctrine would otherwise have opened wide, had

⁴⁵ 152 U.S. 454 (1894). In this case the State of Tennessee had, in one instance, filed a bill in equity in the circuit court of the United States to recover taxes allegedly due to the state from the defendant bank. The complaint expressly alleged that the case arose under the Constitution of the United States because the defendant contended that the tax was unconstitutional, thus raising the federal question in the complaint by anticipation of a defense. The plaintiff had also simultaneously filed another bill in the state court seeking the same relief, which the defendant had attempted to remove to the United States circuit court. In this instance the defense of unconstitutionality had not been anticipated in the complaint but had been raised by the defendant in its petition for removal.

⁴⁶ 211 U.S. 149 (1908). The plaintiffs had here sued the defendant railroad for specific performance of an agreement under which the plaintiffs were entitled to free passes on the railroad. The complaint raised the federal question by anticipation of a defense, stating that the railroad was attempting to excuse its refusal to live up to its agreement on the ground that a subsequent Act of Congress had outlawed such passes. The plaintiffs argued that the act relied upon by the railroad did not have the effect claimed for it, but even if it did, the act unconstitutionally deprived the plaintiffs of their contract rights.

⁴⁷ See, also, *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 367 (1950). Upon the dismissal of *Louisville & Nashville R. Co. v. Mottley*, the plaintiffs filed suit again, this time in the state court. In their second case the plaintiffs prevailed in both the state trial court and the state supreme court, and the railroad then appealed to the Supreme Court of the United States, where the Court assumed jurisdiction of the appeal. *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467 (1911). Thus, in this pair of cases was neatly illustrated the difference in scope between the constitutional and statutory provisions, for what was not a case arising under the Constitution or laws of the United States for purposes of the original jurisdiction of the lower federal courts was such a case for purposes of the appellate jurisdiction of the Supreme Court.

⁴⁸ The various qualifications, including those already discussed, are summarized in *Gully v. First National Bank*, 299 U.S. 109 (1936). But see note 64 *infra*. They represent a substantial gloss on Chief Justice Marshall's uncomplicated approach in *Osborn v. Bank of United States*, where it was said to be immaterial how the federal question was raised, or whether it was ever raised at all, providing that there was a federal question potentially present in the case. See Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 662 (1942).

the anomalous effect of making it virtually impossible to justify federal jurisdiction on the basis of a federal question. Not only was it necessary that the federal question be raised in the plaintiff's statement of his own case, without reference to the answer and unaided by anticipation of a defense, but there had to be a genuine and present controversy with respect thereto, upon which the outcome of the case depended.⁴⁹ It is difficult to conceive of a case in which it would be possible to determine, upon the basis of the plaintiff's statement of his cause of action alone, before the issues had been framed by the answer, precisely which questions would be in controversy and determinative of the outcome of the litigation.⁵⁰ *Hopkins v. Walker*,⁵¹ a suit to remove a cloud on title to a placer mining claim which the plaintiff held under a United States patent, was thought by the Supreme Court to be one of those exceptional cases where the issue in controversy upon which the outcome depended could be determined by reference to the well-pleaded portions of the complaint alone. The plaintiff had alleged in her complaint that the defendant's certifications of location, which were a cloud on the plaintiff's title, had been acquired under a mistaken theory of the mining laws of the United States. In the conventional law suit, such an issue would be deemed to have been raised by anticipation of a defense, but because the plaintiff was required under good pleading practice to allege the invalidity of the defendant's title as part of her cause of action,⁵² she had, it was said, avoided the objection that the federal question was raised in this fashion.⁵³ Until the case was actually at issue, however, it would be impossible to know for certain whether its outcome would "necessarily" turn on the alleged mistaken theory as to the construction of the mining

⁴⁹ See *Starin v. New York*, 115 U.S. 248 at 257 (1885); *Defiance Water Co. v. Defiance*, 191 U.S. 184 at 190-191 (1903).

⁵⁰ See Mishkin, "The Federal 'Question' in the District Court," 153 Col. L. Rev. 157 at 170 (1953); *McGoon v. Northern Pacific Ry. Co.*, (D.C. N.D. 1913) 204 F. 998 at 1001. ⁵¹ 244 U.S. 486 (1917).

⁵² In a suit to remove a cloud on title, the plaintiff must allege, in addition to facts showing his title, facts showing the existence and invalidity of the instrument sought to be eliminated as a cloud upon his title.

⁵³ The special nature of *Hopkins v. Walker* is illustrated by *Marshall v. Desert Properties Co.*, (9th Cir. 1939) 103 F. (2d) 551, cert. den. 308 U.S. 563 (1939), where in a suit to quiet title to mining rights derived under federal law, it was held that the lower federal court was without jurisdiction. The case was distinguished from *Hopkins v. Walker* on the technical ground that the latter case had been a case to remove a cloud on title, not a suit to quiet title.

laws of the United States. If the defendant were to base his defense upon a defect in the plaintiff's title not involving those laws or upon an issue of fact, rather than upon the ground anticipated in the complaint, there would then have been no genuine controversy in the case with respect to the construction of federal law.⁵⁴ Even *Hopkins v. Walker*, therefore, did not possess the qualifications for federal jurisdiction which the Court had outlined in its previous decisions.

III. *The Difference, for Purposes of the Jurisdictional Statute, Between a "Question" and a "Case" Arising Under the Constitution or Laws of the United States*

*Metcalf v. Watertown, Tennessee v. Union & Planter's Bank and Louisville & Nashville Railroad Co. v. Mottley*⁵⁵ are primarily significant, not because they illustrate a difference only in degree in the scope which the Court had accorded to the constitutional and the statutory provisions but, because they suggest that the Court, although still paying lip-service to the "federal question" criterion, was really in the process of abandoning that doctrine and evolving an entirely different approach to the jurisdictional statute. In those cases the Court placed meaningful emphasis on the source of the plaintiff's cause of action, that is, whether the right relied upon by the plaintiff was one created by state law or by federal law and, because in each instance it was a right created by state law, the Court seems to conclude that the lower federal courts could not have original jurisdiction, although the outcome in each case might turn on the determination of one or more federal questions.⁵⁶

⁵⁴ See discussion in text at notes 32-34 supra. Moreover, although the complaint in *Hopkins v. Walker* contained the allegation that the defendant's certifications of location had been acquired under a mistaken theory as to the mining laws of the United States, the plaintiff's cause of action did not stem from those laws but from the law of property providing for the vindication of clouded titles, which was a local cause of action, created by state law. The decision appears to disregard the long line of cases holding that although mining rights may have originally been obtained by grant from the United States, suits to vindicate those rights arise under state law. See quotation from *Shoshone v. Rutter* in note 35 supra. In each of the four cases cited by the Court in support of federal jurisdiction in *Hopkins v. Walker*, the actual holding was against such jurisdiction: *Boston & Montana Consolidated Copper v. Montana Ore Purchase Co.*, 188 U.S. 632 (1903); *Shulthis v. McDougal*, 225 U.S. 561 (1912); *Denver v. New York Trust Co.*, 229 U.S. 123 (1913); *Taylor v. Anderson*, 234 U.S. 74 (1914).

⁵⁵ See note 43 supra.

⁵⁶ In *Tennessee v. Union & Planter's Bank*, 152 U.S. 454 at 464 (1894), the Court said: "[T]he only right claimed by the plaintiff is under the law of Tennessee, and they assert

If the Court really meant what it appears to be saying in those cases—that, for purposes of the jurisdictional statute, a case arising under the Constitution or laws of the United States is a case stating a cause of action created by federal law—then the inquiry into whether there was federal jurisdiction could always be answered by whether the plaintiff had pleaded a cause of action under federal law. Only by giving those cases such a reading can one ascribe any plausibility to the requirement that the element upon which federal jurisdiction depends must appear in the well-pleaded portions of the complaint and must be determinative of the outcome of the case. If the Court was still thinking in terms of Chief Justice Marshall's "federal question" criterion—will the correct decision of the case depend upon the construction of some provision of the Constitution or laws of the United States—the determination of whether there was federal jurisdiction could never be made by reference to the well-pleaded allegations of the complaint alone.⁵⁷ If, on the other hand, the Court was now thinking in terms of a federal cause of action as the necessary predicate for federal jurisdiction under the Act of 1875, then routine, good-pleading practice would always demand that the complaint contain within its four corners, without reference to or reliance upon a responsive pleading, the allegations essential to establish that predicate. If the plaintiff had properly pleaded a federal cause of action, the outcome of the case would then naturally depend upon whether the plaintiff had or had not sustained his right to relief under federal law. The element necessary to federal jurisdiction would, therefore, always appear in the well-pleaded portions of the complaint and would always be determinative of the outcome of the litigation.

This implied equating, for purposes of the jurisdictional statute, of a case arising under the Constitution or laws of the

no right whatever under the Constitution and laws of the United States." And in *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 at 152 (1908): "[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is the plaintiff's original cause of action, arises under the Constitution."

⁵⁷ See discussion in text at notes 47-54 *supra*.

United States with a case stating a federal cause of action was finally made articulate by Justice Holmes in *American Well Works Co. v. Layne & Bowler Co.*,⁵⁸ which was an action for damages for alleged slander of the plaintiff's rights in a certain pump. The slander was said to have consisted of statements by the defendants that the plaintiff's pump infringed a United States patent held by the defendants, and the Court had to decide whether the case arose under the patent laws of the United States. Justice Holmes, speaking for a unanimous Court, pointed out that the plaintiff's claim was for damages for slander, a right created under state law, and the case, accordingly, had to arise under state law, and not the patent laws of the United States, even though the defendants' justification of the truth of their statements might involve questions of the validity and infringement of a United States patent. "A suit," he said, "arises under the law that creates the cause of action." If the state had seen fit to do away with a cause of action for slander of title, Justice Holmes continued, no one would suppose that the plaintiff could still purport to bring his action under the patent laws of the United States. The patent laws, although particularly providing for an action to test the validity of patents, to recover damages for their infringement and to enjoin their wrongful use, make no provision whatsoever for an action for slander of title.⁵⁹

⁵⁸ 241 U.S. 257 (1916). Although this case technically involved only the question of when a suit arises under the patent laws of the United States, within the scope of 28 U.S.C. (1952) §1338 (conferring exclusive jurisdiction on the lower federal courts over all cases arising under the patent and copyright laws of the United States), the problem was in all respects analogous to when a suit arises under the laws of the United States, generally, within the scope of the jurisdictional statute, and in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), discussed in text at notes 60-62 infra, Justice Holmes recognized the applicability to the jurisdictional statute of the analysis in *American Well Works v. Layne & Bowler Co.*

⁵⁹ In *Pratt v. Paris Gaslight & Coke Co.*, 168 U.S. 255 (1897), a similar analysis had earlier been made for purposes of determining whether a state court could dispose of a case involving a patent question. There, the Court spoke of the difference between a case arising under the patent laws of the United States and between questions arising under those laws. The Court explained that it was only when the claim itself arose under the patent laws of the United States in the sense that it was created by those laws that the federal courts had exclusive jurisdiction; otherwise, the state courts were free to decide patent questions which arose as an incidence of litigation based upon state-created contract and property rights. See note, 31 COL. L. REV. 461 (1931).

Compare *The Fair v. Kohler Dye & Specialty Co.*, 228 U.S. 22 (1913), where the plaintiff asserted the right to recover for an infringement of a patent, as expressly provided for in the patent laws. There, the Court, in a decision also written by Justice Holmes, held that where the cause of action was one for relief from an alleged infringement, such a suit did arise under the patent laws of the United States. Unlike *American*

Notwithstanding that the Court now appeared to have penetrated some of the confusion engendered by the early and long-standing application to the jurisdictional statute of Chief Justice Marshall's broad pronouncements with respect to Article III of the Constitution, the "federal question" approach to the jurisdictional statute had become too deeply rooted in usage not to expect it to cause further difficulty, as it, in fact, did in the very next decision of the Court on this subject. In *Smith v. Kansas City Title & Trust Co.*⁶⁰ the plaintiff had sought to enjoin the defendant corporation, its officers, agents and employees from investing the funds of the corporation in farm loan bonds issued by federal land banks on the ground that the act authorizing the issue of such bonds was unconstitutional and that, accordingly, the imminent investment in such bonds by the corporation would be an investment in an unlawful security. Apparently overlooking the intervening development of the law and reaching, instead, straight back to *Cohens v. Virginia* and *Osborn v. Bank of United States*, the Court held that there was federal jurisdiction because of the necessity to decide the constitutional question. In a somewhat testy dissent, Justice Holmes, relying upon his earlier analysis in *American Well Works Co. v. Layne & Bowler Co.*,⁶¹ pointed out that the plaintiff's cause of action had been created by the corporation law of the State of Missouri, and the case, therefore, had to arise under Missouri law and not under the laws of the United States. It was only because Missouri law made it improper for a corporation to invest in bonds which were issued contrary to the Constitution of the United States, he explained, that it became at all material to decide the constitutional question. As long,

Well Works Co. v. Layne & Bowler Co., where the question of infringement was only incidental to a state-created cause of action for slander of title, the claim in *The Fair v. Kohler Dye & Specialty Co.* was made pursuant to the federally-created remedy for patent infringement, and the Court held that the jurisdiction conferred upon the federal courts by the allegations of patent infringement in the complaint could not be destroyed by any defense or denial interposed by the defendant. As long as the complaint had set forth a substantial (i.e., a non-frivolous) claim under the patent laws, all that such a defense or denial could do was to raise an issue as to whether the plaintiff had made out a good cause of action, an issue which went to the merits of the case and not to the jurisdiction of the Court. Unsuccessful, as well as successful, cases may be brought under the patent laws, Justice Holmes declared, if it is, in fact, the patent laws upon which the plaintiff bases his claim. See further discussion of *The Fair v. Kohler Dye & Specialty Co.* in text at notes 81-86 *infra*.

⁶⁰ 255 U.S. 180 (1921).

⁶¹ See discussion in text at notes 58-59 *supra*.

however, as the cause of action upon which the plaintiff relied was created by state law, federal jurisdiction could not be predicated on the fact that the outcome of the case depended upon the determination of one or more incidental federal questions. It is the "suit," he said, "not a question in the suit, that must arise under the law of the United States."

The rationale of Justice Holmes' dissent in *Smith v. Kansas City Title & Trust Co.* was adopted by a unanimous Court in *Puerto Rico v. Russell & Co.*,⁶² where the plaintiff had based its claim of federal jurisdiction upon an act of Congress authorizing the Treasurer of Puerto Rico to enforce the collection of a territorial tax "by a suit at law instead of by attachment, embargo, distraint or any other form of summary administrative proceeding." The plaintiff argued that since its authority to sue for the tax had been conferred by an act of Congress, the case was one arising under the laws of the United States. The Supreme Court rejected this contention, pointing out that Congress had merely authorized the territorial government to sue, but that the claim itself, based upon the right to collect and the duty to pay the tax in question, had been created by the Puerto Rican legislature. The Court said (at 483):

"Federal jurisdiction may be invoked to vindicate a right or privilege created under a federal statute. It may not be invoked where the right asserted is nonfederal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The federal nature of the right to be established is decisive—not the source of the authority to establish it."

The test announced in *Puerto Rico v. Russell & Co.* was shortly thereafter followed in *Gully v. First National Bank*,⁶³ where the

⁶² 288 U.S. 476 (1933). Although no express reference was made to *Smith v. Kansas City Title & Trust Co.*, the Court did refer (at 483-484) with approval to *McGoon v. Northern Pacific Ry. Co.*, (D.C. N.D. 1913) 204 F. 998 at 1001, 1005, where the district judge had anticipated the view expressed by Justice Holmes in *Smith v. Kansas City Title & Trust Co.*

⁶³ 299 U.S. 109 (1936). The tax collector for the State of Mississippi was suing a national bank to recover a money judgment on the latter's undertaking to assume the debts of another national bank. The plaintiff alleged that among the debts and liabilities so assumed were the monies owing by the other national bank for state taxes. The case had been commenced in the state court, and the defendant had sought to remove it to the United States district court on the ground that the plaintiff's claim—involving the right to tax a national bank—had its origin in a federal statute permitting such taxation, for in the absence of such a statute, the state would have been prohibited under the Constitution from taxing a national bank. The Court pointed out that not-

Court reiterated: "The federal nature of the right to be established is decisive."⁶⁴

The foregoing test for the original jurisdiction of the lower federal courts in non-diversity matters, as announced in *Puerto Rico v. Russell & Co.* and *Gully v. First National Bank*, cannot be reconciled with *Smith v. Kansas City Title & Trust Co.*⁶⁵ Although the latter case involved a constitutional question, the cause of action asserted by the plaintiff was one created by state law—the right of a stockholder of a corporation to enjoin the corporation and its officers from doing an act unlawful under the law of the domiciliary state. The dominant trend of the cases through *Gully v. First National Bank*, however, makes clear that it is never enough, for purposes of the jurisdictional statute (as contrasted with Article III of the Constitution), that a case involves one or more incidental questions arising under the Constitution or laws of the United States, if the plaintiff's cause of action itself was not created by federal law.⁶⁶

withstanding this origin in federal law, the cause of action upon which the plaintiff was actually suing was one sounding in contract, the right to recover upon the promise of one bank to assume the obligations of another, a right which was created by and arose under state law. "Not every question of federal law emerging in a suit," the Court explained, "is proof that a federal law is the basis of the suit."

⁶⁴ With his characteristic scholarliness, Justice Cardozo, in *Gully v. First National Bank*, canvassed the earlier cases, with their disparate results, in a futile attempt to distill some coherence out of them. Unfortunately, he seems to have misread the first two cases with which he began his review. He cited *Starin v. New York*, 115 U.S. 248 at 257 (1885), and *First National Bank v. Williams*, 252 U.S. 504 at 512 (1920), for the proposition that in order to bring a case within the jurisdictional statute, the plaintiff had to claim a right created by federal law. Although that proposition was developed in the later Supreme Court cases, the thinking in *Starin v. New York* and *First National Bank v. Williams* came undiluted out of *Cohens v. Virginia* and *Osborn v. Bank of United States*. In *Starin v. New York*, for example, the Court declared: "The character of a case is determined by the questions involved [citing *Osborn v. Bank of United States*]. If from the questions it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875 . . . [citing *Cohens v. Virginia*]."

And the language in *First National Bank v. Williams* is almost identical. Thus, although Justice Cardozo was swimming with the contemporary current in stressing that federal jurisdiction depended upon the federal nature of the right to be established, his choice of authorities was unfortunate, and this may explain the puzzling fact that his decision was later incorrectly cited by the Supreme Court in *Bell v. Hood*, 327 U.S. 678 at 685 (1946), as authority for the most dubious kind of "federal question" jurisdiction. See note 88 *infra* and discussion in text at notes 87-94.

⁶⁵ See discussion in text at notes 59-61 *supra*.

⁶⁶ Cf. Mishkin, "The Federal 'Question' in the District Courts," 53 COL. L. REV. 157 at 170-171 (1953).

IV. *Erie Railroad Co. v. Tompkins* and the
Conceptual Coup de Grace

Although the Supreme Court now appeared to have discarded the "federal question" criterion in favor of a "federal cause of action" criterion, it was not until *Erie Railroad Co. v. Tompkins*⁶⁷ that the Court delivered what should have been the conceptual *coup de grace* to the notion that the presence of a federal question alone was sufficient to support the jurisdiction of the lower federal courts in non-diversity cases. In the course of clarifying the manner in which the federal courts find and apply the pertinent law in diversity cases, the Court declared that the rights sought to be enforced in any lawsuit must have been created by some governmental authority, either state or federal, for there was no transcendental body of law existing independently of such governmental authority.⁶⁸ From this proposition, it should follow that in each case one ought to be able to trace the plaintiff's cause of action back to the particular governmental authority creating it, and a case ought to arise, for purposes of the jurisdictional statute, only under the law of the government by whose authority the cause of action was created. This is precisely the result which the Court had already reached,⁶⁹ without benefit of the conceptual reinforcement provided in *Erie Railroad Co. v. Tompkins*.

Moreover, because the Court in *Erie Railroad Co. v. Tompkins* also declared that there was no federal general common law,⁷⁰ it would seem to follow that a plaintiff's cause of action can never be said to have been created by federal law (and, thereby,

⁶⁷ 304 U.S. 64 at 78-80 (1938).

⁶⁸ The Court here quoted with approval from Justice Holmes' earlier dissenting opinions in *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 at 370-372 (1910), and *Black and White Taxi Co. v. Brown and Yellow Taxi Co.*, 276 U.S. 518 at 532-533 (1928), and it was more than mere coincidence that the Court finally came to follow Justice Holmes in the latter two dissenting opinions, as well as in his dissenting opinion in *Smith v. Kansas City Title & Trust Co.* (see discussion in text at notes 60-62 *supra*), for these three dissenting opinions reflect a consistent conceptual orientation (see discussion in text immediately following this note).

⁶⁹ See discussion in text at notes 58-59, 62-66 *supra*.

⁷⁰ See, also, *Wheaton v. Peters*, 8 Pet. (38 U.S.) 591 at 658 (1834): "It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the Union and has the authority of law, that is not embodied in the constitution or laws of the Union."

In a note in 59 HARV. L. REV. 966 (1946), cases apparently contradicting the declarations in *Erie R. Co. v. Tompkins* that there is no federal general common law are discussed. However, federal common law is applied in those cases to facilitate the enforcement of rights which have been created by and to effectuate the policies of express

to arise under federal law within the sense of the jurisdictional statute) unless it has been sanctioned by some express federal statutory or constitutional⁷¹ provision. Read by itself, therefore, the jurisdictional statute would seem to be an empty shell, for it is only when there is another federal statute creating the particular right⁷² sought to be enforced that the plaintiff's case does, in fact, arise under federal law. In order to determine, therefore, whether a case arises under federal law, in the sense that the plaintiff's cause of action has been created by federal law, the jurisdictional statute must be read in conjunction with the express federal right under which the plaintiff is claiming, and the two statutory provisions together then constitute the statutory predicate upon which federal jurisdiction must rest.⁷³ This dependence of the jurisdictional statute upon an express federal cause of action is a reciprocal one, of course, in the sense that federal jurisdiction could not be predicated on such a right alone. The jurisdiction

federal statutory or constitutional provisions. In other words, whatever federal common law does exist is incidental to and implicit in a federal right which has been expressly created by the Constitution or laws of the United States, but there is no federal common law which can itself be the source of such a right, as it can in those states which have adopted common law causes of action.

⁷¹ Although the federal courts have traditionally granted equity relief against threatened violations of the Constitution and laws of the United States by state and federal officers and agencies, the authority for such jurisdiction is derived from a tradition antedating the Act of 1875 [Davis v. Gray, 16 Wall. (83 U.S.) 203 (1873); cf. Board of Liquidation v. McComb, 92 U.S. 531 at 534 (1875)] and independent thereof [American School v. McAnnulty, 187 U.S. 94 (1902); Miller v. Standard Nut Margarine Co. of Florida, 284 U.S. 498 (1932); cf. Maule Industries v. Tomlinson, (5th Cir. 1957) 244 F. (2d) 897 at 899; Bell v. Hood, (S.D. Cal. 1947) 71 F. Supp. 813 at 818-819]. It is doubtful, however, whether the Constitution itself creates any private rights against individuals which can be enforced in an action at law in the federal courts, without some additional statutory implementation. See discussion in text at notes 76-94 *infra*.

⁷² The following private causes of action, among others, have been expressly sanctioned by federal law: 15 U.S.C. (1952) §15 (for violations of antitrust laws); 15 U.S.C. (1952) §§781(c), 78p(b), 78r(a) and 78aa (for violations of Securities Exchange Act); 15 U.S.C. (1952) §1114 et seq. (for infringement and other trademark violations); 17 U.S.C. (1952) §101 et seq. (for infringement and other copyright violations); 26 U.S.C. (Supp. V, 1958) §§6532(a)(1) and 7422(a) and (b) (for recovery from collectors of internal revenue, individually, of taxes illegally assessed or collected) [See Plumb, "Tax Refund Suits Against Collectors of Internal Revenue," 60 HARV. L. REV. 685 at 690-691 (1947).]; 28 U.S.C. (1952) §§2674 and 1346(b) (for torts of United States); 29 U.S.C. (1952) §§185 and 187 (for violations of labor laws); 35 U.S.C. (1952) §281 et seq. (for infringement and other patent violations); 38 U.S.C. (1952) §445 (for recovery of insurance benefits by veterans); 40 U.S.C. (1952) §270b (for recovery on bonds of public works contractors); 42 U.S.C. (1952) §§1983 and 1985 (for deprivations of civil rights under color of state law); 45 U.S.C. (1952) §§51 and 56 (for injuries suffered by employees of interstate railroads); and 49 U.S.C. (1952) §20(11) (for items lost or damaged by common carriers in interstate shipments).

⁷³ See notes 83-84 *infra*.

of the lower federal courts is purely statutory and, unless Congress had provided a federal forum for the enforcement of federally created rights, the plaintiff would have to rely upon the state courts to enforce them.⁷⁴ Such a possibility, however, is now obviated by the jurisdictional statute, since it serves as a catch-all jurisdictional provision, automatically assuring a federal forum for every case in which Congress has created a cause of action but has not otherwise provided for a remedy in the federal courts.⁷⁵

⁷⁴ See authorities cited in note 3 *supra* and discussion in text at note 14 *supra*.

⁷⁵ For most of the federal statutory causes of action listed in note 72 *supra*, Congress made specific provision for a remedy in the federal courts, aside and apart from the jurisdictional statute. However, in the case of private claims against common carriers for items lost or damaged in interstate shipments [49 U.S.C. (1952) §20(11)], for example, no such specific provision for remedy in the federal courts was made, and the Supreme Court was, accordingly, obliged in *Peyton v. Railway Express Agency*, 316 U.S. 350 (1942), to read 49 U.S.C. §20(11) in conjunction with 28 U.S.C. §1337 [formerly 28 U.S.C. §41(8)], providing generally for federal jurisdiction over suits arising under acts of Congress regulating commerce. Similarly, no specific provision for a remedy in the federal courts is made for the federal statutory causes of action for infringement and other violations of the patent [35 U.S.C. (1952) §281 *et seq.*] and copyright [17 U.S.C. (1952) §101 *et seq.*] laws, for recovery from collectors of internal revenue, individually, of taxes illegally assessed or collected [26 U.S.C. (Supp. V, 1958) §§6532(a)(1) and 7422(a)] or for deprivations of civil rights under color of state law [42 U.S.C. (1952) §§1983 and 1985]. Accordingly, in order to afford a remedy in the federal courts for persons asserting claims under the latter statutes, the respective statutory causes of action must be read in conjunction with 28 U.S.C. §1338 (providing generally for federal jurisdiction over cases arising under the patent, copyright and trademark laws of the United States), 28 U.S.C. §1340 (providing generally for federal jurisdiction over cases arising under the internal revenue laws of the United States) or 28 U.S.C. (Supp. V, 1958) §1343 (providing generally for federal jurisdiction over cases arising under the civil rights laws of the United States). It would, to be sure, be just as appropriate to read each of the federal statutory causes of action for which no specific provision for a remedy in the federal courts has been made in conjunction with the jurisdictional statute (providing for federal jurisdiction over cases arising under the laws of the United States, generally), as it is to read it in conjunction with the corresponding special provision for federal jurisdiction over cases arising under a certain class of laws, except that the special jurisdictional provisions have been construed as not requiring the minimum amount in controversy which is necessary when federal jurisdiction is predicated on the jurisdictional statute. *Peyton v. Railway Express Agency*, 316 U.S. 350 (1942).

Peyton v. Railway Express Agency illustrates both sides of the jurisdictional coin, for it is manifest in that case that jurisdiction could not have been predicated on 28 U.S.C. §1337 alone and that without the express rights created under 49 U.S.C. §20(11), the lower court would not have had the power to grant the relief sought. Similarly, although 28 U.S.C. §1338, 28 U.S.C. §1340 and 28 U.S.C. §1343 provide generally for jurisdiction over cases arising under the patent, copyright and trademark laws, the internal revenue laws and the civil rights laws of the United States, respectively, a private remedy in the federal courts cannot be predicated on those special jurisdictional provisions alone (just as it cannot be predicated on the jurisdictional statute alone), but they must always be read in conjunction with the particular federal statutory causes of action, creating private rights under the respective classes of laws. Unless Congress had created such express rights under those laws, the lower federal courts would be without jurisdiction to afford relief to private litigants, notwithstanding that the outcome of the litigation might turn on the determination of one or more questions concerning such

V. *The Inexorlicable Ghost*

In *Bell v. Hood*⁷⁶ the Court was obliged to address itself directly to the question of whether the inference arising out of *Erie Railroad Co. v. Tompkins* was applicable to the jurisdictional statute, namely, whether a cause of action had to be expressly sanctioned by federal law in order to justify the original jurisdiction of the lower federal courts in non-diversity matters.⁷⁷ The plaintiffs in *Bell v. Hood* had brought suit in the United States district court against agents of the Federal Bureau of Investigation for money damages for alleged unlawful arrests and illegal searches and seizures, in violation of the plaintiff's purported rights under the Fourth and Fifth Amendments of the Constitution of the United States.⁷⁸ There was no diversity of citizenship, and the district court judge dismissed the case for want of federal jurisdiction. After the affirmance of the dismissal by the Ninth Circuit, the Supreme Court granted certiorari. The Court characterized the issue as "whether federal courts can grant money recovery for damages said to have been suffered as the result of federal officers violating the Fourth and Fifth Amendments."⁷⁹ That, the Court declared, is not a jurisdictional

laws. Cf. *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916), discussed in text at notes 58-59 *supra*.

⁷⁶ 327 U.S. 678 (1946).

⁷⁷ This question had already been approached on several occasions by the United States courts of appeals in cases involving the right of private persons to recover damages for violations of or to enjoin violations of certain of the federal regulatory acts, such as the Securities Exchange Act and the Public Utility Holding Company Act, where no private remedy had been expressly authorized for the particular violations complained of. In at least two of those cases it was suggested that a private remedy did exist. *Baird v. Franklin*, (2d Cir. 1944) 141 F. (2d) 238, cert. den. 323 U.S. 737 (1944); *Goldstein v. Groesbeck*, (2d Cir. 1944) 142 F. (2d) 422, cert. den. 323 U.S. 737 (1944); but see *Downing v. Howard*, (3d Cir. 1947) 162 F. (2d) 654; cf. note, 56 YALE L.J. 880 (1947). The courts in those cases, however, were not concerned with the particular issue of federal jurisdiction in non-diversity matters but, rather, with the more general problem of whether private relief could be predicated on the violation of regulatory legislation, where no express provision therefor has been made. Those cases, moreover, can be read as holding that the private remedy, although not expressly provided for in the act, was so implicit in the pattern of the legislation as to amount, for all practical purposes, to a statutory remedy. Cf. *Philadelphia v. The Collector*, 5 Wall. (72 U.S.) 720 at 731 (1867); *Plumb*, "Tax Refund Suits Against Collectors of Internal Revenue," 60 HARV. L. REV. 685 at 690-691 (1947).

⁷⁸ The pertinent portion of the Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." And the Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property without due process of law. . . ."

⁷⁹ 327 U.S. 678 at 684. Neither the Constitution nor any federal statute expressly provided such a private remedy against federal officers, although one is expressly provided

question, but goes to the merits of the plaintiffs' case, and it was error for the lower court to have dismissed the case on jurisdictional grounds. Although expressing its belief that the plaintiffs had stated a substantial claim for relief under federal law, the Court refrained from actually deciding whether a federal remedy was available but remanded the case to the district court for further proceedings.⁸⁰

The Court was under the mistaken impression that because the plaintiffs were seeking recovery "squarely on the ground that the respondents violated the Fourth and Fifth Amendments," the lower court was compelled to assume jurisdiction under the

for the deprivation of certain civil rights under color of state law. 42 U.S.C. (1952) §§1983 and 1985, 28 U.S.C. (Supp. V, 1958) §1343.

⁸⁰ Upon remand to the district court, the case was once more dismissed. *Bell v. Hood*, (S.D. Cal. 1947) 71 F. Supp. 813. This time, however, in deference to the Supreme Court's instructions, the dismissal was said to be on the ground that the complaint had failed to state a claim upon which relief could be granted, rather than upon the jurisdictional ground. In an excellently reasoned opinion, the district court judge (Mathes, J.) analyzed the authorities upon which the Supreme Court had relied to support the substantiality of the federal claim asserted by the plaintiffs and concluded that the plaintiffs did not have a remedy against the defendants under the Fourth and Fifth Amendments. He pointed out that the prohibitions of the Fourth and Fifth Amendments apply only to the federal government, not to individuals, and provide no protection against individual misconduct. See *Feldman v. United States*, 322 U.S. 487 at 490 (1944); *Weeks v. United States*, 232 U.S. 383 at 398 (1914). If, in order to assimilate their claim to the rights created by the Fourth and Fifth Amendments, the action had been brought on the theory that the defendants had acted as agents of the federal government, within the scope of their duties, the plaintiffs would then have been barred by the sovereign immunity doctrine. See *Kendall v. Stokes*, 3 How. (44 U.S.) 87 at 96-99 (1845). In any view of the case, therefore, the Fourth and Fifth Amendments could not be the basis of a private action for damages against the defendants. See quotation from *Johnston v. Earle*, (9th Cir. 1957) 245 F. (2d) 793, in note 94 *infra*.

Among the other authorities relied upon by the Supreme Court in *Bell v. Hood* in support of its conclusion that the plaintiffs had stated a substantial claim under the Fourth and Fifth Amendments were the cases where equitable relief had been granted in the federal courts against threatened violations of the Constitution and laws of the United States by officers or agencies of the federal or state governments. The district court judge pointed out, however, the distinction between enjoining a threatened violation of federal law by an officer or agency of the federal or state governments and recognizing a private cause of action for money damages against individuals for injuries resulting from such a violation. See note 71 *supra*.

The Supreme Court had also relied upon two earlier decisions in suits brought to recover damages for deprivation, under color of state law, of the right to vote. *Wiley v. Sinkler*, 179 U.S. 58 (1900); *Swafford v. Templeton*, 185 U.S. 487 (1901). The district court judge explained, however, that the plaintiffs in those cases had the benefit of an act of Congress giving a private remedy for deprivation of voting rights under color of state law. 42 U.S.C. (1952) §1983, 28 U.S.C. (Supp. V, 1958) §1343. If particular statutory authorization was thought by Congress to be necessary to afford private relief in the federal courts against individuals for deprivation of civil rights covered by the Fourteenth and Fifteenth Amendments, it should follow that such statutory authorization is also required to afford such relief for deprivation of the rights covered by the Fourth and Fifth Amendments.

authority of *The Fair v. Kohler Dye & Specialty Co.*⁸¹ In *The Fair v. Kohler Dye & Specialty Co.*, however, the plaintiff was suing for an alleged infringement of its patent, for which a cause of action had been particularly provided under the patent laws of the United States. The Court there carefully pointed out that since the theory of the plaintiff's case was that he was entitled to relief under a particular federal law and since there was no doubt that federal law did provide a private remedy for the type of injury claimed by the plaintiff, the only jurisdictional question which remained was whether the facts alleged in the complaint made out a substantial (i.e., a non-frivolous) claim under that particular law. If they did, the district court had jurisdiction to inquire into the matter on the merits.⁸² In *Bell v. Hood*, on the other hand, the very question to be determined, according to the Court's own analysis, was whether the plaintiffs had a right to relief under federal law for the type of injury claimed by them. This is a question which goes to the power of the federal courts to give the relief sought⁸³ and is the essence of a jurisdictional question.⁸⁴

In concluding that the district court had jurisdiction, the Court appears to have confused the setting forth of a substantial factual claim under an admitted federal remedy (which was the situation in *The Fair v. Kohler Dye & Specialty Co.*) with the making of a substantial legal argument in support of the existence

⁸¹ 288 U.S. 22 (1913), discussed in note 59 supra.

⁸² See *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923), where the plaintiff had sued in the district court for damages for an alleged violation of the federal antitrust laws, a remedy which was expressly authorized in that legislation. The lower court had dismissed the case, and the Supreme Court was required to decide whether it had been a dismissal on the merits or for jurisdictional reasons. The Court declared that where the cause of action is thus expressly authorized by act of Congress and the complaint sets forth a substantial claim under that statute, jurisdiction cannot be made to stand or fall on the way the Court may chance to decide an issue as to the legal sufficiency of the facts alleged to support the claim. In both *Binderup v. Pathe Exchange, Inc.* and *The Fair v. Kohler Dye & Specialty Co.* there was no question as to whether a federal remedy existed for the type of injury claimed by the plaintiff, whereas that was precisely the question to be decided in *Bell v. Hood*.

⁸³ Because the federal courts are courts of limited jurisdiction, their power to adjudicate and give relief must always be sought in some act of Congress. See authorities cited in note 3 supra. The jurisdictional statute authorizes the exercise of that power, in an abstract sense, over all causes of action created by the federal government, but whether the federal courts actually have that power in any specific instance depends upon whether there is a particular federal cause of action for the type of injury claimed by the plaintiff. See discussion in text at notes 70-75 supra.

⁸⁴ In *Rhode Island v. Massachusetts*, 12 Pet. (37 U.S.) 657 at 718 (1838), it was stated that a court has jurisdiction "if the law confers the power to render a judgment or decree." And in *Cooper v. Reynolds*, 10 Wall. (37 U.S.) 308 at 316 (1870): "By jurisdiction

of such a remedy. Where there is no controversy as to the existence of a particular federal remedy, the rule in *The Fair v. Kohler Dye & Specialty Co.* is that the setting forth of a substantial factual claim under said remedy will confer jurisdiction on a federal court to inquire into the merits.⁸⁵ But any inquiry into the merits presupposes that the court has the power to render the judgment or decree sought. The determination of whether there is such power is a question of law which lies at the threshold of all other controversies in the case and must be resolved by the Court before it can presume to dispose of the matter on its merits. Where the very dispute centers on whether a federal remedy exists, the fact that the plaintiffs may have made a creditable legal argument in favor of such a remedy can not confer jurisdiction if the correct view of the law is that no such remedy has been provided.⁸⁶

The most curious aspect of the case, however, was the resurrection by the Supreme Court of the "federal question" concept, which, like Banquo's ghost, appears to be inexorlicable. With surprising unawareness of or indifference to the dominant trend of the later cases,⁸⁷ the Court reinforced its conclusion that the

over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred."

⁸⁵ Compare *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103 (1933), where federal jurisdiction was denied on the ground that the factual allegations of the complaint did not make out a substantial claim under the express remedy afforded by the federal antitrust laws.

⁸⁶ In his dissenting opinion (327 U.S. 678 at 685-686), Justice Stone succinctly pointed out the error into which the Court had fallen: "The district court is without jurisdiction as a federal court unless the complaint states a cause of action arising under the Constitution or laws of the United States. Whether the complaint states such a cause of action is for the court, not the pleader, to say. When the provision of the Constitution or federal statute affords a remedy which may in some circumstances be availed of by a plaintiff, the fact that his pleading does not bring him within that class as one entitled to the remedy, goes to the sufficiency of the pleading and not the jurisdiction. . . . But where, as here, neither the constitutional provision nor any act of Congress affords a remedy to any person, the mere assertion by a plaintiff that he is entitled to such a remedy cannot be said to satisfy jurisdictional requirements. Hence we think that the courts below rightly decided that the district court was without jurisdiction because no cause of action under the Constitution or laws of the United States was stated."

One of the effects of characterizing the dismissal as on the merits, rather than as jurisdictional, was also commented upon by Justice Stone in his dissenting opinion, where he pointed out that if the dismissal is not jurisdictional, the federal court may, under the doctrine of *Hurn v. Oursler*, 289 U.S. 238 (1933), be required to try a non-federal claim, if the same facts alleged by the plaintiff give rise to a cause of action under state law, such as trespass, for example. For further discussion of this problem, see note, 56 YALE L. J. 880 (1947).

⁸⁷ *Bell v. Hood* was described as a case in which the plaintiffs' legal rights had been

district court had jurisdiction over the matter by the alternative argument that the very inquiry into whether the plaintiffs had a cause of action under federal law in itself raised questions under the Constitution and laws of the United States sufficient to support the jurisdiction of the lower court on a conventional "federal question" basis.⁸⁸ In effect, the Court seems to be saying that whenever a plaintiff claims a federal remedy and a substantial question is raised as to whether he does, in fact, have such a remedy, the mere assertion of such a claim is sufficient to justify federal jurisdiction. Inasmuch as the claim of a right to relief under federal law is synonymous with a claim of federal jurisdiction and the inquiry into whether there is a federal cause of action is the real heart of the jurisdictional matter,⁸⁹ the Court is thus sanctioning a species of "bootstrap" jurisdiction, in which jurisdiction may be predicated merely on the necessity to inquire into whether there is jurisdiction. Every court, of course, must have preliminary and tentative jurisdiction to determine whether it has jurisdiction over the subject matter,⁹⁰ but to say that the presence of a substantial question as to federal jurisdiction is alone sufficient to confer jurisdiction on a federal court is to render the jurisdictional standard illusory, for a standard which will always admit jurisdiction in every earnest test is no standard at all. This is the ultimate application of the "federal question" criterion, far exceeding the limits to which it had ever been extended before,⁹¹ and it graphically illustrates

"ruthlessly violated" (see 327 U.S. 678 at 683) and may be another example of a hard case making bad law.

⁸⁸ The constitutional provisions about which the Court felt substantial questions had been raised were the Fourth and Fifth Amendments, and the statutory provision was 28 U.S.C. (1952) §1331 (formerly 28 U.S.C. §41), which is the statutory successor of the Act of 1875. For authority, the Court relied on *Gully v. First National Bank*, which it erred in assessing (see note 64 *supra* and discussion in text there), and *Smith v. Kansas City Title & Trust Co.*, which, like the *Pacific Railroad Removal Cases* before it (see discussion in text at notes 36-42 *supra*), was a "sport" (see discussion in text at notes 65-67 *supra*).

⁸⁹ See discussion in text at notes 70-86 *supra*.

⁹⁰ See *In re National Labor Relations Board*, 304 U.S. 486 at 494 (1938).

⁹¹ Left unanswered in the opinion is this question, which immediately suggests itself: if the inquiry into federal law occasioned by *Bell v. Hood* was sufficient to support federal jurisdiction, why was not the similar inquiry occasioned by all of the earlier cases in which jurisdiction was denied [to name just two—*Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933), discussed in text at note 62 *supra*, and *Gully v. First National Bank*, 299 U.S. 109 (1936), discussed in text at note 63 *supra*] also sufficient? Certainly the issues in those cases were just as substantial, if the care which the Court took in those opinions to treat of them is any measure.

that plastic quality which has been its strength as a constitutional idea and its fatal weakness as a workable rule.⁹²

Bell v. Hood came at a critical stage in the development of the Supreme Court's thinking on the relationship between a federal question and the original jurisdiction of the lower federal courts in non-diversity matters. The later cases had gradually been abandoning the obscurantism of the "federal question" concept and evolving a more positive approach, in which a case was said to arise under federal law, for purposes of the jurisdictional statute, only when the plaintiff was asserting a cause of action created by that law. *Bell v. Hood* was ideally suited as a vehicle for giving a definitive exposition of that approach, but the Court faltered in its analysis of the issues and refused to come to grips with the central question in the case—did the plaintiffs have a cause of action under federal law? Only Justice Stone in his dissenting opinion (joined by Justice Burton) picked up the thread of the thinking of the later cases and applied it logically to the facts.⁹³ Unfortunately, it is fairly to be expected that until the majority opinion is clarified, this subject will continue to be a trap for the wary and the unwary, indiscriminately.⁹⁴

⁹² See discussion in text at notes 12-13 *supra*.

⁹³ See excerpt from dissenting opinion of Justice Stone, in note 86 *supra*.

⁹⁴ See, for example, *Fielding v. Allen*, (2d Cir. 1950) 181 F. (2d) 163, where *Bell v. Hood* was followed to support federal jurisdiction in a private action for violation of the Interstate Commerce Act, although no such remedy had been expressly provided therein, on the ground that the question of whether or not there had been a violation presented a federal question; *Fratt v. Robinson*, (9th Cir. 1953) 203 F. (2d) 627, where *Bell v. Hood* was followed to support federal jurisdiction in a private action for violation of the Securities Exchange Act, although no such remedy had been expressly provided therein, on the ground that the need to adjudicate whether such a remedy was available presented a federal question; *Lowe v. Manhattan Beach School District*, (9th Cir. 1955) 222 F. (2d) 258, where *Bell v. Hood* was followed to support federal jurisdiction in a private action for damages against a state school board for having taken the plaintiff's property without due process of law, on the ground that the need to adjudicate whether such a remedy was available presented a federal question; but see *Johnston v. Earle*, (9th Cir. 1957) 245 F. (2d) 793, where federal jurisdiction was denied in a private action for damages against the district director of internal revenue for alleged illegal seizure of plaintiff's property, where the Ninth Circuit (referring to *Bell v. Hood*) stated (at 796):

"On its return to the district court, that court, in a very able opinion by Judge Mathes, held that no federal cause of action existed for the acts of federal officials violating the Fourth and Fifth Amendments. His reasoning is that the due process clause of the Fifth Amendment applies only to the federal government, and not to individuals.

"In fine, the federal government has created no cause of action enforceable in its courts for such torts under the state law, and hence the district court here lacked jurisdiction of the subject matter.

"Judgment is reversed, and the district court ordered to enter an order dismissing the action for failure to state a claim arising under the laws of the United States."