

ANOTHER LOOK AT *SKELLY OIL* AND *FRANCHISE TAX BOARD*

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In recent years, members of the Supreme Court of the United States have twice cited *Skelly Oil Co. v. Phillips Petroleum Co.*¹ for the proposition that the federal Declaratory Judgment Act,² which Congress enacted in 1934, is “procedural only” and does not enlarge the scope of federal jurisdiction.³ By this, they probably mean that *Skelly* allows no case into federal court in the presence of the act that could not find its way there in its absence.⁴ But whether this assertion is accurate today, or was accurate in 1950 when Justice Frankfurter wrote *Skelly*, is not entirely clear. Depending on how one reads *Skelly* and how one defines “enlargement,” the act as currently interpreted may in fact “enlarge” the scope of federal jurisdiction, and it may even have done so under *Skelly*. In particular, *Skelly* may construe the act to allow certain cases to be heard in federal court earlier than they might otherwise have been

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¹ *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

² 28 U.S.C. §§ 2201, 2202 (2012).

³ See *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 848 (2014) (“We agree with *amicus* that the Declaratory Judgment Act does not ‘extend’ the ‘jurisdiction’ of the federal courts.” (quoting *Skelly*, 339 U.S. at 671)); *Vaden v. Discover Bank*, 556 U.S. 49, 77–79 (2009) (Roberts, C.J., concurring in part and dissenting in part) (“To the extent § 4 [of the Arbitration Act] brings some issues into federal court in a particular case that may not be brought in through other procedural mechanisms, it does so by ‘enlarg[ing] the range of remedies available in the federal courts[.] . . . not extend[ing] their jurisdiction.’” (quoting *Skelly*, 339 U.S. at 671)) (comparing the Declaratory Judgment Act to the Arbitration Act); see also Robin E. Dieckmann, Note, *Federal Jurisdiction Over Declaratory Judgment Suits—Federal Preemption of State Law*, 1986 U. ILL. L. REV. ONLINE 127, 128 (“Although the FDJA did create a new federal remedy, it did not enlarge the subject matter jurisdiction of the federal courts.”). *Skelly* actually took its description of the act as “procedural only” from an earlier case. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937) (“The word ‘actual’ is one of emphasis rather than of definition. Thus the operation of the Declaratory Judgment Act is procedural only.”).

⁴ Roughly speaking, that is. If a party could only seek declaratory relief if he or she could also seek coercive (i.e., non-declaratory) relief, then the act would be superfluous. See *infra* note 49 and accompanying text.

heard, and at the instance of the party that may otherwise have been the defendant in a conventional action for coercive (i.e., non-declaratory) relief.⁵ This may constitute a form of jurisdictional “enlargement,” depending on how one defines the term. Given *Skelly*’s status as an icon of federal jurisdiction, issues such as this merit attention. In particular, we should ask ourselves what Justice Frankfurter meant by *Skelly*, if the Court pays homage to *Skelly* in the breach, and what, if anything, is left of the case.⁶

Nor would any discussion of *Skelly* be complete without attention to its adoptive child, *Franchise Tax Board v. Construction Laborers Vacation Trust*. Again, depending on how one reads *Skelly*, *Franchise Tax Board* represents either a vindication or a partial repudiation of the earlier case’s approach. If only because *Franchise Tax Board* has confounded a generation of lawyers,⁷ it too merits attention. More to the point, we should ask ourselves if the case yields a rule that can be applied to other cases. I conclude that it does, although stating

⁵ See generally Daniel Engelstein, Note, *Removal—State Declaratory Actions Based on Federal Question Jurisdiction—La Chemise Lacoste v. Alligator Co.*, 17 B.C. L. REV. 72, 81 (1975) (“Although the *Skelly-Wycoff* rule has been utilized to deny original jurisdiction in those cases where the declaratory complaint raises what would have been a federal defense to a state claim, jurisdiction has been allowed in declaratory actions based on a defense to what would have been a federal coercive action in the conventional procedural posture.”). For further discussion of *Public Service Commission v. Wycoff Co.*, see footnote number fifteen below. Pub. Serv. Comm’n v. Wycoff Co., 344 U.S. 237 (1952); see *infra* note 15. In point of fact, many forms of ostensibly “coercive” relief are virtually identical to declaratory judgments. Consider, for example, an “injunction” that resolves whether a trust has a duty under federal law not to submit to a levy for unpaid taxes from an agency of a state. See, e.g., *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 19–20 (1983). Apart from the threat of contempt for non-compliance, such an injunction would not differ materially from a declaration to the same effect. See, e.g., Josh Blackman, *Declaratory Judgment as a Quasi-Injunction*, LIBR. L. & LIBERTY (Mar. 15, 2014), <http://www.libertylawsite.org/2014/03/25/declaratory-judgment-as-a-quasi-injunction/>. In addition, such a declaration, if unheeded, could often be converted into an injunction. See 28 U.S.C. § 2202 (“[Authorizing f]urther necessary or proper relief . . . against any adverse party whose rights have been determined by . . . [a federal declaratory] judgment.”). See also discussion *infra* Part II (providing a full and detailed treatment of *Franchise Tax Board*).

⁶ *Skelly* has received a fair amount of scholarly attention, much of it critical. See, e.g., Donald L. Doernberg, “*You Can Lead a Horse to Water . . .*”: *The Supreme Court’s Refusal to Allow the Exercise of Original Jurisdiction Conferred by Congress*, 40 CASE W. RES. L. REV. 997, 1009–10, 1012–13 (1990) [hereinafter Doernberg, *You Can Lead a Horse to Water*]; Donald L. Doernberg & Michael B. Mushlin, *History Comes Calling: Dean Griswold Offers New Evidence About the Jurisdictional Debate Surrounding the Enactment of the Declaratory Judgment Act*, 37 UCLA L. REV. 139, 140 (1989) [hereinafter Doernberg & Mushlin, *History Comes Calling*]; Martha A. Field, *Removal Reform: A Solution for Federal Question Jurisdiction, Forum Shopping, and Duplicative State-Federal Litigation*, 88 IND. L.J. 611, 625 (2013); John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What “Arise Under” Federal Law?*, 76 TEX. L. REV. 1829, 1835–36 (1998).

⁷ See, e.g., Eric J. Segall, *Twenty Questions (Or the Hardest Course in Law School)*, 18 GA. ST. U. L. REV. 497, 502–03 (2001) (“[W]hy are there virtually no law review articles on *Franchise Tax Board*?”). Perhaps this article will respond to this question.

the rule is about as awkward as making a three-point turn in a Winnebago. To wit, *Franchise Tax Board* stands for the proposition that, if and only if a state (or one of its instrumentalities) brings an action for declaratory relief under its own laws, in its own courts, and the party against whom it seeks such relief is sitting on (i.e., declining to bring) a coercive action that arises under the laws of the United States, that party may not remove the case to federal court.⁸

In the first part of this article, I will discuss *Skelly* and assess its current vitality,⁹ with particular reference to so-called “mirror-image” cases, a complex category that includes *Franchise Tax Board* as an example.¹⁰ In the second part, I will take up *Franchise Tax Board*.¹¹ In the final part, I will offer a conclusion.

I. SKELLY REDUX

Close analysis reveals that *Skelly* is very much alive, although perhaps not quite as much so as the Justices’ references suggest.¹² In fact, *Skelly* still performs most, if not all, of the work Justice Frankfurter might have expected.¹³ Most significantly, it continues to exclude from federal court so-called “federal-defense” and “federal-reply” cases.¹⁴ In these cases, a party seeking a declaration from a federal court has a distinct action under state law for coercive relief that anticipates a federal response, but the complaint for which, properly pleaded, lacks a federal component.¹⁵ In other words, *Skelly*

⁸ See *Franchise Tax Bd.*, 463 U.S. at 21–22; see also *infra* note 107 and accompanying text (providing an elaboration and example on this point). Presumably few parties would want to initiate such litigation in federal court, although such an action is not unheard of. See, e.g., *Tennessee v. Union & Planters’ Bank*, 152 U.S. 454, 454 (1894) (Harlan, J., dissenting) (demonstrating that a state, anticipating a federal defense, brought a state claim against a bank in federal court).

⁹ See *infra* Part I.

¹⁰ See *infra* note 17 and accompanying text (providing a discussion of *Skelly* in relation to mirror-image cases).

¹¹ See *infra* Part II.

¹² See, e.g., *San Diego Cty. Office of Educ. v. Pollock*, No. 13-CV-1647-BEN (BLM), 2014 U.S. Dist. LEXIS 111113, at *7–9 (S.D. Cal. Aug. 11, 2014) (showing that *Skelly* is still cited as proof that the Declaratory Judgment Act did not in fact increase federal jurisdiction).

¹³ See, e.g., *id.*

¹⁴ See Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn’t Looking*, 36 UCLA L. REV. 529, 532, 548 (1989) [hereinafter Doernberg & Mushlin, *Trojan Horse*].

¹⁵ See *id.* at 548. The category of “federal-defense” cases, as used in this article, should not be confused with the category of cases in which a party, anticipating an adverse action by state officials (and therefore functionally a defendant), asks a federal court for declaratory or injunctive relief on the ground that such an action would violate federal law. In such cases, the plaintiff (i.e., the functional defendant) asserts an anticipatory federal defense to a public cause of action, and arguably has nothing but a derivative cause of action of his or her own. At

continues to exclude from federal court declaratory actions in which the plaintiff has a claim for coercive relief that would fail the well-pleaded complaint rule, even if a federal issue were certain to present itself later in the case.¹⁶

On the other side of the ledger, however, *Skelly* (as currently deployed) does not exclude from federal court the vast majority of mirror-image cases.¹⁷ In these cases, a party seeking declaratory relief from a federal court lacks an action for coercive relief that satisfies the well-pleaded complaint rule, but the party against whom the declaration is sought has an action for coercive relief that does satisfy the rule.¹⁸ Depending on how one reads *Skelly*, this nearly universal access either departs from or is consistent with Justice Frankfurter's vision.¹⁹ But here one finds a wrinkle. Although federal courts now entertain almost all such actions, there are some situations where they will not, as is exemplified by *Franchise Tax Board*.²⁰ Again, depending on how one reads *Skelly*, *Franchise Tax*

least in theory, federal courts have long been willing to hear such cases. See, e.g., *Steffel v. Thompson*, 415 U.S. 452, 475 (1974) (declaratory relief); *Ex parte Young*, 209 U.S. 123, 148–49 (1908) (injunctive relief). To be sure, the Court has been somewhat uneven in allowing declaratory attacks where the ostensible plaintiff (functional defendant) seeks to establish that a particular state law is preempted by federal law. See *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 248 (1952) (citations omitted) (suggesting in dictum that parties with a federal defense of preemption should wait to assert that defense in an adverse proceeding in state court); see generally Dieckmann, *supra* note 3, at 160–61 (criticizing *Wycoff*). Precedent now suggests that federal courts will hear such actions, provided the plaintiff presents a ripe case. See, e.g., *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 n.14 (1983). In any case, “federal-defense” cases, as the term is used in this article, are instances where the would-be federal plaintiff has a distinct cause of action under state law, a federal defense to which it anticipates from the putative defendant. See Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 548. Various commentators have combined the category of cases I am describing as “federal-defense” cases with the category for which *Young* is the exemplar. See, e.g., *id.*, at 571 n.192. For purposes of this article, I am reserving the term for cases in which the party seeking declaratory relief has a distinct (i.e., non-derivative) cause of action of his or her own arising under state law.

¹⁶ See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673–74 (1950). A classic example of such a case would be one in which a plaintiff sued a defendant for breach of contract, knowing that the defendant intended to assert an affirmative defense on the basis of federal law, and knowing as well that the result in the case would depend entirely on the validity of that federal defense. See, e.g., *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 151–53 (1908). The well-pleaded complaint rule would exclude the action for breach from federal court, at least where the plaintiff sought damages, and *Skelly* would exclude from federal court a case arising from the same set of operative facts if the plaintiff stated a claim for declaratory relief. See, e.g., *id.* at 152; see also Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 531 n.9. One wrinkle, of course, is that the Mottleys may actually have sought equitable relief, the proper pleading for which might well have required a description of the railroad company's federal defenses. See Michael G. Collins, “*Economic Rights, Implied Constitutional Actions, and the Scope of Section 1983*,” 77 GEO. L.J. 1493, 1517 (1989); *infra* note 41 and accompanying text.

¹⁷ See Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 532, 548.

¹⁸ See *id.* at 532, 548.

¹⁹ See *id.* at 571 n.190.

²⁰ See discussion *infra* Part II. Exactly what general principle one might derive from

Board either reflects or defies the earlier case.

In its essence, *Skelly* was about a commodities future. Phillips Petroleum Co. (“Phillips”), acting as a broker, wanted to compel the Skelly Oil Company (“Skelly”) to adhere to a contract for the sale of natural gas.²¹ Skelly, meanwhile, thought it had validly terminated the agreement.²² Phillips sued Skelly in federal court for a declaration that the contract remained enforceable.²³ Because they were not diverse, jurisdiction required a federal question.²⁴ Phillips thought it could satisfy this requirement by explaining in its complaint for declaratory relief that the only real issue in the case was the validity of Skelly’s purported termination,²⁵ which in turn depended on whether the Federal Power Commission (“Commission”) had granted a third party—the Michigan-Wisconsin Pipe Line Company (“Michigan-Wisconsin”)—a certificate of public convenience and necessity on or before December 1, 1946,²⁶ (the idea being that Skelly and others would sell natural gas to Phillips, which would then sell the gas to Michigan-Wisconsin).²⁷

Under the contract, Skelly could terminate if Michigan-Wisconsin did not obtain its certificate by the specified date.²⁸ Skelly maintained this had happened; Phillips said it had not.²⁹ (In fact, the Commission had granted a certificate, but subject to conditions.)³⁰ Describing this dispute in its request for declaratory relief, and classifying the completeness and timeliness of the certificate as federal issues, Phillips argued that it satisfied the requirement that a federal issue appear on the face of its well-pleaded complaint.³¹

Writing for the Court, Justice Frankfurter refused to allow Phillips to proceed on this basis.³² By his lights, federal courts could not hear a case simply because a federal issue appeared on the face of a well-pleaded complaint for declaratory relief.³³ Presumably, this was because any competent request for a declaration must anticipate the

Franchise Tax Board is itself a perplexing question. See *infra* note 165 and accompanying text.

²¹ See *Skelly*, 339 U.S. at 669.

²² See *id.* at 670.

²³ See *id.* at 670–71.

²⁴ See *id.* at 671.

²⁵ See *id.* at 670–71.

²⁶ See *id.* at 669. The Federal Power Commission is the predecessor of today’s Federal Energy Regulatory Commission. See 42 U.S.C. § 7171(a) (2012).

²⁷ See *Skelly*, 339 U.S. at 669.

²⁸ See *id.*

²⁹ See *id.* at 670–71.

³⁰ See *id.* at 669–70.

³¹ See *id.* at 670–71.

³² See *id.* at 669, 672 (citation omitted).

³³ See *id.* at 671–72.

other side's arguments, such that the existence of a live dispute is clear.³⁴ If this were permitted, the well-pleaded complaint rule would become a nullity, because any party whose complaint for coercive relief would lack a federal issue could simply ask for declaratory relief as well, thus circumventing the rule.³⁵

Unwilling to tolerate such a development, Justice Frankfurter concluded that, when federal judges receive requests for declaratory relief, they should ignore the words of the actual request and instead hypothesize an action for coercive relief that underlies, or comes close to underlying, the ostensible action.³⁶ If this hypothesized claim would satisfy the well-pleaded complaint rule, a federal court may hear the case.³⁷ If not, the federal court must dismiss the action and the plaintiff must go to state court.³⁸ Applying this approach to the case at hand, Justice Frankfurter concluded that Phillips' action could not proceed in federal court.³⁹ The hypothetical coercive action that most nearly underlay Phillips' action for declaratory relief was an action for anticipatory repudiation of contract, the complaint for which, he concluded, would not have included a federal issue.⁴⁰ Such an issue, he wrote, would have appeared only in Skelly's answer, where it would assert valid termination as an affirmative defense, on

³⁴ See, e.g., *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–40 (1937) (“The Declaratory Judgment Act of 1934, in its limitation to ‘cases of actual controversy,’ manifestly has regard to the [Constitution] . . . and is operative only in respect to controversies which are such in the constitutional sense.” (citation omitted)). So much is required both by the text of the statute as well as by the Constitution. See 28 U.S.C. § 2201(a) (2012) (“In a case of *actual controversy* within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” (emphasis added)).

³⁵ See generally Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1121 (2014) [hereinafter Bray, *Myth*] (“[O]ne could see every decision by a court, including every decision paired with an injunction, as containing something like an implicit declaratory judgment about how the law applies to specific facts.”). Thus, a party with an action for coercive relief that does *not* satisfy the well-pleaded complaint rule, but that *does* anticipate a federal defense or reply, could simply ask for a federal declaration and *append* a claim for coercive relief as a matter of supplemental jurisdiction under 28 U.S.C. § 1367(a). See 28 U.S.C. § 1367(a).

³⁶ See Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 544.

³⁷ See *id.* Under current doctrine, the presence of a federal issue on the face of the plaintiff's well-pleaded complaint for coercive relief is necessary for a federal court to hear the case under 28 U.S.C. § 1331 and related statutes, but it is not sufficient. See, e.g., *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313–14 (2005). The issue must also be substantial enough (from a federal perspective) to merit the attention of a federal court, and allocating it to such a tribunal must not overly disrupt the federalist scheme. See, e.g., *id.*; *infra* notes 100–03 and accompanying text (providing an elaboration on this point). Justice Frankfurter did not address these issues in *Skelly*.

³⁸ See Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 544.

³⁹ See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 674 (1950).

⁴⁰ See *id.* at 672.

the ground that the certificate had been incomplete or untimely.⁴¹ Skelly's possession of a federal defense to Phillips' claim for breach, or Phillips' possession of a federal reply to Skelly's defense, was not sufficient to sustain federal jurisdiction.⁴² Justice Frankfurter thus construed the act to exclude federal-defense and federal-reply cases.⁴³

⁴¹ See *id.* ("Whatever federal claim Phillips may be able to urge would in any event be injected into the case only in anticipation of a defense to be asserted by petitioners."). Justice Frankfurter may have been a bit hasty in reaching this conclusion. An action for anticipatory repudiation can be one for damages, or it can be one for specific relief—an order that the defendant adhere to the terms of the contract, even if performance is not immediately contemplated. Phillips' hypothetical action at law would have lacked a federal issue, just as Justice Frankfurter indicated, but its hypothetical action for specific relief in fact may have satisfied the well-pleaded complaint rule. This is because the invalidity of a federal defense to an action in equity may well have been accepted by the federal courts in 1950 as a valid part of the plaintiff's case-in-chief—perhaps as a function of having to show lack of an adequate remedy at law. See Field, *supra* note 6, at 623; John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 1016 (2008) ("There was no *Skelly Oil* principle for injunctive suits that anticipated actions at law and reversed the parties to them: the pleading to which the well-pleaded complaint rule applied was the bill in equity, not the complaint in the corresponding action at law."); Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1129 (1969) ("To give adequate reasons for the intervention of equity, the petitioner had to tell the entire story."); but cf. Collins, *supra* note 16, at 1517 ("Some of the best examples of the well-pleaded complaint rule, including *Mottley* itself, were equity cases in which the plaintiff unsuccessfully tried to jump the gun and raise a constitutional challenge to an anticipated statutory defense."). If Justice Frankfurter entertained the possibility that Phillips' ostensible action in equity might have satisfied the well-pleaded complaint rule, he must have dismissed it *sub silentio*. If so, the approach he ordained in *Skelly* toward actions for declaratory relief would have applied as well to actions in equity—a decision that would have had nothing to do with Congress' intent in enacting the Declaratory Judgment Act of 1934.

⁴² See *Skelly*, 339 U.S. at 672, 674.

⁴³ See Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 548. Ironically, in his effort to limit the jurisdictional impact of the Declaratory Judgment Act, Justice Frankfurter may have overlooked the possibility—even the likelihood—that there was no federal issue at all in *Skelly*, either in the pleadings or in potential pleadings. See *Skelly*, 339 U.S. at 679–80 (Vinson, C.J., dissenting in part). This is because Phillips and Skelly—not the United States—had decided to make absence of a timely, complete certificate grounds for termination of the contract, and what the parties meant by these concepts was not itself a federal issue. See *id.* at 669 (majority opinion). For a rough equivalent, imagine a bet between two parties about whether a particular federal regulation, when issued, would be "vague" or "opaque." Such a dispute would not present a federal issue, even though the regulation would be the focus of the bet. In a manner of speaking, the regulation would merely provide a "fact." The Commission had granted Michigan-Wisconsin a certificate subject to several conditions (conditions which, by the way, strike the bystander as fairly predictable, and therefore unlikely to have blind-sided anyone). See *id.* at 669–70, 679 n.3. Michigan-Wisconsin had to obtain regulatory approval from the various jurisdictions in which it would operate, it had to obtain approval from the Securities and Exchange Commission for its financing, and finally, its certificate was subject to a carve-out for an incumbent utility in Greater Detroit, the scope of which the Commission would set forth in a subsequent order. See *id.* at 669–70. Whether imposition of these conditions justified Skelly's termination was entirely a matter of interpreting the contract between the parties and had little if anything to do with federal law itself. Thus, the Court could fairly easily have dismissed the case for presenting no federal question, either latent or patent. See *id.* at 679–80 (Vinson, C.J., dissenting in part). Chief Justice Vinson, joined by Justice Burton, seem to have agreed, as did Professors Cohen and Mishkin. See *id.*; William Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV.

The application of *Skelly* to mirror-image cases is more complex, however, because Justice Frankfurter never addressed the possibility that *Skelly*—the party against whom Phillips sought declaratory relief—might have had an action for coercive relief under federal law, or that the existence of such an action might have allowed Phillips to proceed.⁴⁴ There are two possible explanations for this. First, Justice Frankfurter might have assumed that *Skelly* did not have a coercive action against Phillips under federal law, thus eliminating the need to reach the issue. If *Skelly* had a cause of action against Phillips, it would have been one for a judgment of non-liability on a contract.⁴⁵ Although such an action is plausible and in fact well-known in the area of insurance, it bears all the characteristics of an action for declaratory, not coercive, relief.⁴⁶ Second, Justice Frankfurter might have considered *Skelly*'s putative action for coercive relief beside the point. In other words, he might have squarely rejected the idea that the Declaratory Judgment Act would allow a mirror-image case into federal court.⁴⁷

Given Justice Frankfurter's general distrust of courts, particularly federal courts,⁴⁸ it would not be unreasonable to assume that he

890, 911 (1967); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 183–84 (1953). In fact, Justice Frankfurter himself may have recognized this in his handling of the accompanying action in diversity between Phillips and Magnolia Petroleum Company, with respect to which there was no jurisdictional problem. See *Skelly*, 339 U.S. at 678 ("Parties do not necessarily endow statutory language in a contract with the scope of the statute, particularly when the same term may have variant meanings for different applications of the statute." (citation omitted)). Justice Frankfurter even wrote a private "caveat" on *Skelly* in which he acknowledged (at least to himself) that the proper construction of the ostensibly "statutory" terms in the contract were really facts. See Memorandum by Felix Frankfurter on Diversity and the Merits of *Skelly Oil Co. v. Phillips Petroleum Co.*, Caveat to No. 221, at 106 (on file with author) [hereinafter Frankfurter, Diversity and the Merits] ("By suggesting to the lower courts that these questions should be treated as questions of fact apart from statutory meaning, some of the ill effects of rejection of Holmes' views in *Kansas City Title* can be minimized."). Two scholars do seem to have concluded, however, that construction of the contract presented a federal issue. See Dieckmann, *supra* note 3, at 145; Jeffery L. Norton, Note, *Removal Doctrine Reaffirmed: Franchise Tax Board v. Construction Laborers Vacation Trust*, 70 CORNELL L. REV. 557, 564 (1985).

⁴⁴ See *Skelly*, 339 U.S. at 672–74 (discussing only Phillips' claim for coercive relief).

⁴⁵ See *id.* at 672.

⁴⁶ See Bray, *Myth*, *supra* note 35, at 1106 n.81 ("Scholars have long recognized that intellectual property and insurance are areas particularly amenable to declaratory judgments."); see also Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 552 n.100 (giving the example of an action for a judgment of non-liability on a debt as a salutary use of the declaratory option).

⁴⁷ See Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 544 (noting the method of jurisdictional analysis taken by the Court in *Skelly*).

⁴⁸ See, e.g., *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 469–70 (1957) (Frankfurter, J., dissenting) (arguing that federal courts should not hear cases where parties lack diversity and where the likelihood of a federal issue arising in the case is remote at best); *Int'l Longshoremen's & Warehousemen's Union v. Boyd*, 347 U.S. 222, 224 (1954) (dismissing an action in equity in federal court for lack of ripeness); cf. *Toucey v. N.Y. Life Ins.*

intended *Skelly* to mean what exactly it has often been taken to mean—that a federal court may hear a request for declaratory relief if and only if the party seeking such relief also has a valid claim for coercive relief that would satisfy the well-pleaded complaint rule, or at least would come close to having such a claim.⁴⁹ In fact, he wrote an article while still a professor in which he took aim at the very idea of anticipatory litigation, at least in the constitutional context, arguing that, “[e]very tendency to deal with . . . [constitutional issues] abstractedly, to formulate them in terms of sterile legal questions, is bound to result in sterile conclusions unrelated to actualities.”⁵⁰ As Professor Purcell observes, although this article was “[o]stensibly” a criticism of advisory opinions, in function it was a criticism of declaratory judgments, arising from a fear that conservatives would use this option to defeat progressive legislation.⁵¹ In making this

Co., 314 U.S. 118, 139–40 (1941) (refusing to construe the Anti-Injunction Act to allow a federal court to enjoin re-litigation of an action previously tried in federal court); R.R. Comm’n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941) (requiring a stay of an action in equity in order to allow state courts to resolve a disputed issue of state law); see generally MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 33 (1991) (describing Justice Frankfurter’s belief that, at least with respect to state experimentation, federal judges should exercise judicial restraint and allow states to figure out new social and economic policies for themselves).

⁴⁹ See Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 544. A literal application of this principle would render the Declaratory Judgment Act a nullity, because anyone who possessed a claim for coercive relief that satisfied the well-pleaded complaint rule would have access to federal court by virtue of that claim, and therefore would not need the act. See, e.g., Illinois *ex rel.* Barra v. Archer Daniels Midland Co., 704 F.2d 935, 939 (7th Cir. 1983) (citations omitted); Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 543 n.63. Such an interpretation would also repudiate *Aetna*, in which the Court upheld the statute against constitutional attack. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). Justice Frankfurter was not a member of the Court at the time of *Haworth*, and perhaps he sought to overrule that decision *sub silentio*. On the other hand, one could reasonably interpret *Skelly* to say that a party seeking federal declaratory relief may only have access to federal court if that party could also seek coercive relief, but for failing to satisfy some prerequisite unique to that form of relief, such as not being able to demonstrate irreparable harm in support of a request for an injunction. See, e.g., Field, *supra* note 6, at 624 (“*Skelly Oil* does not reveal whether the ‘coercive action that would have been brought’ can include actions that could not yet be brought.”); cf. Bray, *Myth*, *supra* note 35, at 1135–36 (“[I]t is hard to define the stage in the lifecycle of a dispute when only the declaratory judgment is available. . . . The beginning of this stage is marked out by the strictures of Article III, . . . [i]ts end is marked by the availability of the injunction . . .”).

⁵⁰ Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1003 (1924). Justice Frankfurter went on to write: “The reports are strewn with wrecks of legislation considered *in vacuo* and torn out of the context of life which evoked the legislation and alone made it intelligible.” *Id.*; see also Samuel Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275, 1299 (2010) [hereinafter Bray, *Preventative Adjudication*] (“[T]here would be enormous administrative costs and error costs from a system that generated legally binding answers to any question a person might ask . . .”). Professors Doernberg and Mushlin also discuss this article by Justice Frankfurter in their piece on *Skelly* and *Franchise Tax Board*. See Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 571 n.190.

⁵¹ See EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*,

argument, of course, Justice Frankfurter might have overlooked a possible distinction between two different kinds of mirror-image cases: those in which the party seeking declaratory relief has a distinct underlying claim for coercive relief, such as an action for breach of contract, and those in which the party seeking declaratory relief seeks only to prevent someone else from bringing an adverse claim.⁵² In the latter context, as Professor Harrison has argued, the plaintiff's cause of action can be seen as entirely derivative of the defendant's, in the sense that the one would not exist without the other.⁵³ But this distinction may have been too gossamer to affect Justice Frankfurter's position. With a little imagination, after all, a suit to restrain another suit can be analogized to an action in equity to restrain a trespass or an action for malicious prosecution.⁵⁴

THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 127 (2000) ("Frankfurter argued that all procedural devices that accelerated judgment served primarily to strengthen the power of the judiciary over the legislature and to restrict the possibilities of intelligent social legislation."); *see also* Frankfurter, *supra* note 50, at 1005 ("[C]oncrete cases under the Due Process Clause are decided not by taking anything out of the Constitution but by putting Adam Smith into it."). Justice Frankfurter was not alone in seeing a threat to progressive legislation in declaratory opinions. *See* PURCELL, JR., *supra*, at 128–29 ("Brandeis's opinion [in *Willing v. Chicago Auditorium Association*] . . . was directed not to courts or lawyers or constitutional theorists but to the Senate, where the declaratory judgment bill was literally on the verge of passage." *Willing v. Chicago Auditorium Association*, 277 U.S. 274 (1928)).

⁵² *See* 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 103.44 (3d ed. 2016) (discussing the unique facets of the *Skelly* case).

⁵³ *See* Harrison, *supra* note 41, at 1001 ("[T]he nominal plaintiffs [in *Ex parte Young*] wanted nothing more from the State than to be let alone; in more formal legal terms, they sought to assert a defense, not a claim for affirmative relief."); *see also* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 122 (1999) ("[C]onstitutional liability in excess of common law liability coexists with the justification-stripping model . . . of *Ex parte Young*"); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 524 n.124 (1954) ("[T]he personal wrong complained of [in *Ex parte Young*] consisted of threats of a multiplicity of prosecutions, a very dubious tort under state law."); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1479 n.218 (1987) ("*Young* itself, for example, involved no individual private law tort by the defendant . . .").

⁵⁴ *See Ex parte Young*, 209 U.S. 123, 153 (1908) (raising this issue); Collins, *supra* note 16, at 1514 ("[A]lthough a common law cause of action in *Young* was not immediately apparent, the Court considered the enforcement of confiscatory rate schedules in state court to be akin to trespass."); David L. Shapiro, *Ex Parte Young and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69, 86 (2011) ("The Court's language [in *Young*] speaks not in terms of the prospective defendant bringing suit to assert an anticipated defense to an enforcement action but rather of the plaintiff's objective of preventing a constitutional wrong analogous to a traditional trespass or, or seizure of, the plaintiff's property."); Sina Kian, Note, *Pleading Sovereign Immunity: The Doctrinal Underpinnings of Hans v. Louisiana and Ex Parte Young*, 61 STAN. L. REV. 1233, 1275 (2009) ("[The] rate structure [in *Young*] was arguably unconstitutional—and if it was, then the rates enforced by officers were trespassory and, thus, created a cause of action against those officers."); *but cf.* Shapiro, *supra*, at 77 (suggesting that tangible property was not at stake in *Young* and that courts had yet to recognize the tort of malicious prosecution fully by 1908). Even today, the exact nature of the cause of action in a case like *Young* is not entirely clear.

Professors Doernberg and Mushlin may therefore be correct when they argue that under *Skelly*, “the sole type of declaratory judgment case qualifying for federal question jurisdiction is one in which the plaintiff would have had a coercive claim presenting a federal question.”⁵⁵

To be sure, *Skelly* contains language that supports such a reading. “[A] suggestion of one party,” wrote Justice Frankfurter, “that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws.”⁵⁶ Although “claim” could refer simply to a defense, such use of that word would be unconventional, at least to modern ears.

On the other hand, this language appears toward the end of a long paragraph in which Justice Frankfurter devotes all of his attention to federal defense or federal reply cases, not mirror-image cases.⁵⁷ Moreover, he took these words from *Tennessee v. Union & Planters’ Bank*, which itself was a federal-defense case.⁵⁸ In that case, the state went to federal court to collect a tax from certain banks that objected that the tax impaired an obligation of contract.⁵⁹ The banks thus had a federal defense to the state’s coercive action under state law,⁶⁰ but they themselves had no federal cause of action, as would be required in a mirror-image situation.⁶¹ In fact, even Professors Doernberg and Mushlin acknowledge that Justice Frankfurter may have accepted the mirror-image case as a beneficiary of the act.⁶² As they point out, *Skelly* includes a citation to a note that approved

See Shapiro, supra, at 82 (“I am far from clear that *Young* must be regarded as establishing the existence of a federal cause of action to enjoin wrongful conduct by a government official . . .” (emphasis added)). Only two terms ago, the Court rejected the description of such a case as a direct action on the Supremacy Clause. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383–84 (2015).

⁵⁵ Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 548.

⁵⁶ *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950) (quoting *Tennessee v. Union & Planters’ Bank*, 152 U.S. 454, 464 (1894)).

⁵⁷ *See Skelly*, 339 U.S. at 672.

⁵⁸ *See Union & Planters’ Bank*, 152 U.S. at 464.

⁵⁹ *See id.* at 464–65 (Harlan, J., dissenting).

⁶⁰ *See id.* at 464 (majority opinion).

⁶¹ *See id.* at 464–65 (Harlan, J., dissenting). As noted earlier, however, parties subject to state or local regulations that arguably violate federal law usually may bring an action in equity or for declaratory relief to preclude application of that regulation to their conduct. *See discussion supra* note 15 and accompanying text. In the case of a tax, however, the Tax Injunction Act might preclude access to federal court independent of the well-pleaded complaint rule and its progeny. *See* 28 U.S.C. § 1341 (2012). It should be borne in mind, however, that the bank was actually the defendant in *Union & Planters’ Bank*, and that the state itself had sought a federal forum for the litigation. *See Union & Planters’ Bank*, 152 U.S. at 464–65 (Harlan, J., dissenting).

⁶² *See Doernberg & Mushlin, Trojan Horse, supra* note 14, at 571 n.190.

federal jurisdiction over mirror-image cases.⁶³ “The problem we address[,]” the professors write, “may be the interpretation of *Skelly* by others afterwards, not *Skelly* itself.”⁶⁴

The evidence is therefore inconclusive as to whether Justice Frankfurter himself meant to exclude mirror-image cases from federal court in *Skelly*. In an important sense, however, allowing a mirror-image case into federal court only “expands” federal jurisdiction in a temporal way,⁶⁵ and therefore might not have offended Justice Frankfurter’s jurisdictional sensibilities, at least outside the context of an anticipatory constitutional attack on legislation.⁶⁶ That is, accepting such an action merely allows a federal court to hear a case at the instance of the conventional defendant in a coercive federal action, rather than requiring the court to wait until the conventional plaintiff elects to sue.⁶⁷ Whether the court waits or not, the abstract power of the court to hear the case is the same. To be sure, allowing federal courts to hear mirror-image cases eliminates the conventional plaintiff’s ability to control access to federal courts, which does relax one control on federal jurisdiction.⁶⁸ Thus, whether allowing mirror-image cases into

⁶³ See *id.* at 571 n.190.

⁶⁴ *Id.* Their primary thesis, however, appears to be that Justice Frankfurter intended to exclude mirror-image cases from the federal courts. See *id.* at 548.

⁶⁵ See *id.* at 571–72.

⁶⁶ See *supra* notes 50–51 and accompanying text. Justice Frankfurter also may not have foreseen the federalist reaction to the trajectory of *Ex parte Young* at the close of the 1960s. Under *Younger*, for example, federal courts will not ordinarily enjoin criminal prosecutions pending in state court. See *Younger v. Harris*, 401 U.S. 37, 40–41 (1971). In addition, although such courts are willing to grant declaratory relief to people who have a ripe case but who are not in fact being prosecuted, the Court has emphasized the ultimately *discretionary* nature of such relief, noting the presence of the word “may” in the federal Declaratory Judgment Act. See, e.g., *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136 (2007); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995) (“Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants.”); *Steffel v. Thompson*, 415 U.S. 452, 475 (1974); see also Wm. Grayson Lambert, *Unmixing the Mess: Resolving the Circuit Split Over the Brillhart/Wilton Doctrine and Mixed Complaints*, 64 KAN. L. REV. 793, 808–09 (2016) (discussing this notion of discretion in the context of a particular line of cases).

⁶⁷ See generally Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 564 (offering an example of a mirror-image federal question action).

⁶⁸ See Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 544. The ability of the conventional defendant to bring an anticipatory action for declaratory relief can also affect the location of the litigation. See Chester S. Chuang, *Offensive Venue: The Curious Use of Declaratory Judgment to Forum Shop in Patent Litigation*, 80 GEO. WASH. L. REV. 1065, 1067 (2012) (“[M]any declaratory judgment actions are filed by accused infringers to control the forum and timing of suit because they can secure a significant advantage when the cases go to trial.”); Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365, 368 (2000). Judge Moore has also found that juries are less likely to uphold patents when a putative infringer brings an action for declaratory relief than when a putative patentee brings an action for infringement. See Moore, *supra*, at 368. Of course,

federal court “expands” federal jurisdiction is largely a matter of perception. If one sees accelerated access (at the instance of a conventional defendant) as an “expansion” of jurisdiction, then current members of the United States Supreme Court are incorrect when they describe the effect of the Declaratory Judgment Act as “procedural only.”⁶⁹ If, by contrast, one sees such access as merely a temporal adjustment, then these descriptions are accurate.⁷⁰ As several scholars have observed, anticipatory litigation can yield efficient results.⁷¹

But whether or not mirror-image cases “expand” federal jurisdiction, the fact remains that the Court has refused to allow federal courts to hear a sub-category of such cases exemplified by the oft-maligned *Franchise Tax Board v. Constructive Laborers Vacation Trust*. Analyzing this case will go a long way toward determining the current operative effect of *Skelly*.

II. *FRANCHISE TAX BOARD* REDUX

Franchise Tax Board began as an action in state court by California’s equivalent of the Internal Revenue Service, the Franchise Tax Board (“Board”).⁷² The complaint had two counts. The first count was a coercive action, a claim for current and future money owed.⁷³ According to the Board, the Construction Laborers Vacation Trust (“Trust”) was holding assets on behalf of certain people who were delinquent in their taxes, and the Trust had a duty to render those assets to the Board to satisfy those delinquencies.⁷⁴ The second count was an action under California’s Declaratory Judgment Act for

limiting access to declaratory relief might not materially reduce strategic behavior. For example, someone accused of infringing a patent who seeks to avoid the United States Court of Appeals for the Federal Circuit might choose to sue the putative infringer for antitrust, provoking a *counterclaim* for infringement, appeal for which (from a federal district court) would lie in a regional circuit rather than the Federal Circuit because of *Holmes*. See *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 827–30 (2002); C. Scott Hemphill, *Deciding Who Decides Intellectual Property Appeals*, 19 FED. CIR. B.J. 379, 380 (2009). In *Holmes*, the Court held that the Federal Circuit lacks jurisdiction to hear appeals from cases in which the complaint lacked a claim of patent infringement, even if the *counterclaim* in such cases includes such a claim. See *Holmes Group, Inc.*, 535 U.S. at 830.

⁶⁹ See *supra* note 3 and accompanying text.

⁷⁰ See Bray, *Myth*, *supra* note 35, at 1134.

⁷¹ See, e.g., Bray, *Preventative Adjudication*, *supra* note 50, at 1278 (“[T]here are two categories of cases in which discounting is pervasively inadequate and preventive adjudication is therefore necessary: uncertainty about legal status, and ‘clouded’ ownership of property.”); William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683, 690–92 (1994).

⁷² See *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 5 (1983).

⁷³ See *id.* at 5–7.

⁷⁴ See *id.*

a declaration that the Trust had to submit to similar levies from the Board in the future, notwithstanding the Trust's apparent position that federal law forbade it from doing so.⁷⁵ After the Board brought its action in state court, the Trust removed.⁷⁶

A unanimous Court, per Justice Brennan, held that federal jurisdiction was not proper.⁷⁷ Justice Brennan made short work of the first count.⁷⁸ Its elements were simple and lacked a federal issue, he said.⁷⁹ Simply, the Court found that the Trust owed the Board money under the laws of California, and that the Trust had refused to submit to the Board's levy.⁸⁰ To be sure, the Trust may have had an affirmative defense under federal law, but such a defense was irrelevant under the well-pleaded complaint rule.⁸¹

The second count was a little more complicated. As an initial matter, Justice Brennan had to explain why *Skelly* applied, even though the Board had asked for relief under California's Declaratory Judgment Act, not the federal one.⁸² The Court sensibly concluded that *Skelly's* purposes would be undermined if it were not applied to a state declaratory action removed to federal court.⁸³ In fact, *Skelly* made even more sense here than in its original context, because here the plaintiff had chosen state court and was resisting federal jurisdiction.⁸⁴

Justice Brennan then had to apply *Skelly*.⁸⁵ That is, he had to hypothesize a complaint for coercive relief that underlay the Board's request for a declaration.⁸⁶ But this complaint was only "hypothetical" in a nominal sense, because the Board had pleaded it as its first count—its coercive action for current and future money

⁷⁵ See *id.* Arguably, the Board could have sought *only* coercive relief and relied on *stare decisis* to support similar actions in the future. See Bray, *Myth*, *supra* note 35, at 1121. As noted above, every judicial award of relief relies on some supporting legal principle, which constitutes a "declaration" of the rights and duties of the parties, however denominated. See *supra* note 20.

⁷⁶ See *Franchise Tax Bd.*, 463 U.S. at 7.

⁷⁷ See *id.* at 7.

⁷⁸ See *id.* at 13–14.

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See *id.* at 18.

⁸³ See *id.* at 18–19. To complete the analytical loop for Justice Brennan, if the Court did not apply *Skelly* to an action under state law for declaratory relief, a future Phillips could simply include a count along those lines in its complaint against a future *Skelly* and bring the action in federal court.

⁸⁴ See *id.* at 7.

⁸⁵ See *id.* at 19–21.

⁸⁶ See *supra* note 36 and accompanying text.

owed.⁸⁷ Because this coercive action failed the well-pleaded complaint rule, *Skelly* appeared to preclude federal jurisdiction.⁸⁸

But this preliminary conclusion was complicated by the presence of an apparently coercive action in the Trust.⁸⁹ Section 502(a)(3) of the Employment Retirement Income Security Act of 1974 (“ERISA”) appears to authorize parties like the trustees to bring an action in equity in federal court to clarify their rights and duties under the statute.⁹⁰ *Franchise Tax Board* thus appeared to present an issue that Justice Frankfurter had left unresolved in *Skelly*—whether a federal court may hear a case where the party seeking declaratory relief lacks an underlying action for coercive relief that satisfies the well-pleaded complaint rule, but the party against whom the declaration is sought possesses such an action.⁹¹ Thus, if Justice Frankfurter meant to construe the federal Declaratory Judgment Act to preclude mirror-image cases in *Skelly*, the effect of his work would not be felt until a case like *Franchise Tax Board*.

Further complicating this analysis was the fact that, by the time of *Franchise Tax Board*, lower federal courts were routinely entertaining mirror-image cases under the act, even though the Court itself had never addressed such a case.⁹² To his credit, Justice

⁸⁷ See *Franchise Tax Bd.*, 463 U.S. at 5–7.

⁸⁸ See *id.* at 13–14.

⁸⁹ I say “apparently” because the Trust’s action bore many of the characteristics of an action for declaratory relief. This may have been, but probably was not, a factor in the Court’s analysis. See discussion *infra* notes 174–80.

⁹⁰ See 29 U.S.C. § 1132(a)(3) (2012) (“A civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan[.]”); *Franchise Tax Bd.*, 463 U.S. at 5 (noting that the trustees would have qualified as “fiduciari[ies]” under this language). Whether ERISA section 502(a)(3) in fact would have authorized the trustees to bring an action in equity to clarify their duties vis-à-vis the Board is not entirely clear, even though Justice Brennan seemed to assume as much in *Franchise Tax Board*. See *Franchise Tax Bd.*, 463 U.S. at 20 n.21. Although section 502(a)(3) authorizes parties like the trustees to seek equitable relief, it does not refer specifically to “clarification” or “rights,” whereas a nearby paragraph in the same sub-section, section 502(a)(1), actually does use such words, or at least their cognates. See 29 U.S.C. § 1132(a)(1)(B) (“A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]”). A conventional application of the maxim *expressio unius est exclusio alterius* might therefore suggest that parties like the Trust could *not* use section 502(a)(3) to seek clarification of their rights and duties under ERISA. The Court has struggled somewhat with the proper scope of relief under section 502(a)(3). See *infra* notes 178–80 and accompanying text. Apart from the foregoing complications, there is also the wrinkle that the Tax Injunction Act might have prevented the trustees from attacking the Board’s levy in federal court under section 502(a)(3) of ERISA. See 28 U.S.C. § 1341; *Franchise Tax Bd.*, 463 U.S. at 20 n.21.

⁹¹ See *Franchise Tax Bd.*, 463 U.S. at 19.

⁹² See, e.g., *infra* note 93.

Brennan acknowledged this trend, noting in the text of the opinion that federal courts “regularly” heard such cases,⁹³ and noting in a footnote that such “courts ha[d] consistently adjudicated suits by alleged patent infringers to declare a patent invalid, on the theory that an infringement suit by the declaratory judgment defendant would raise a federal question over which the federal courts have exclusive jurisdiction.”⁹⁴

What was the Court to do? On the one hand, *Skelly* stood for the proposition that the federal Declaratory Judgment Act is “procedural only” and does not enlarge the scope of federal jurisdiction.⁹⁵ Moreover, in *Franchise Tax Board*, a state was seeking to enforce its own rights in its own courts as a plaintiff, implicating strong federalist concerns.⁹⁶ On the other hand, letting federal courts entertain requests for declaratory relief in the mirror-image situation arguably does not “enlarge” federal jurisdiction—it merely accelerates it—and lower federal courts were routinely allowing such actions to proceed.⁹⁷ In addition, Congress had a strong reason to want federal courts to establish a uniform set of rules governing the rights and duties of such entities as the Trust.⁹⁸

The doctrinally uncomplicated answer would have been to allow the federal courts to entertain the dispute. This would have been consistent with the trajectory of cases in the lower courts that Justice Brennan had acknowledged, and it would have eliminated any lingering uncertainty about whether the Declaratory Judgment Act authorizes federal courts to hear cases in the mirror-image context.⁹⁹

But here yet another complicating factor must be introduced into the analysis. Even where the well-pleaded complaint rule is satisfied, as it arguably is (in an oblique sense) in the mirror-image context, federal courts will still ask if the federal issue is “substantial” enough to merit federal judicial attention.¹⁰⁰ If not,

⁹³ See *Franchise Tax Bd.*, 463 U.S. at 19 (“Federal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.”).

⁹⁴ *Id.* at 19 n.19 (citing *E. Edlmann & Co. v. Triple-A Specialty Co.*, 88 F.2d 852 (7th Cir. 1937)).

⁹⁵ See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)).

⁹⁶ See generally *Franchise Tax Bd.*, 463 U.S. at 5 (“Appellant Franchise Tax Board is a California agency charged with enforcement of that [s]tate’s personal income tax law . . . [and it] filed a complaint in state court . . .”).

⁹⁷ See *id.* at 19.

⁹⁸ See *id.* at 19–21.

⁹⁹ See *id.* at 19–20.

¹⁰⁰ See *id.* at 13.

they will reject the case, even though it literally satisfies the rule.¹⁰¹ The word “substantial” here is something of a term of art, however. The true—but not particularly useful—test is whether, all things considered, federal jurisdiction is appropriate.¹⁰² As Justice Brennan explained in *Franchise Tax Board*, the statutory concept of “[arising under]” has resisted all attempts to frame a single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district courts.”¹⁰³

An early example of this principle in action is *Moore v. Chesapeake & Ohio Railway Co.*¹⁰⁴ In this case, Moore brought two counts invoking three statutory actions against the Chesapeake & Ohio Railway Co. (“C&O”) in federal court, alleging that he had sustained injuries because of a “defective uncoupling lever” in the C&O’s yards in Russell, Kentucky.¹⁰⁵ The first count was for violation of the Federal Employers’ Liability Act and the federal Safety Appliance Acts, which combined governed injuries in interstate commerce, and the second was for violation of the Employers’ Liability Act of Kentucky, which governed injuries in intrastate commerce.¹⁰⁶ Although the second count arose under the law of Kentucky, the state had by legislation provided that violation of a federal standard relating to equipment—here, arising from the federal Safety Appliance Acts—constituted negligence *per se* for purposes of liability.¹⁰⁷ Thus, an allegation that the defective lever violated

¹⁰¹ See, e.g., *Gully v. First Nat’l Bank*, 299 U.S. 109, 117–18 (1936).

¹⁰² See *id.* Use of the word “substantial” in this context appears to have originated with Justice Cardozo’s opinion for the Court in *Gully*. See *id.* (“To define broadly and in the abstract ‘a case arising under the Constitution or laws of the United States’ . . . there has been a selective process which picks the substantial causes out of the web and lays the other ones aside.”).

¹⁰³ *Franchise Tax Bd.*, 463 U.S. at 8. Justice Brennan may have come to regret the breadth of this observation. Three years after *Franchise Tax Board*, in the case of *Merrell Dow Pharmaceuticals, Inc.*, the Court addressed a situation in which a complaint literally satisfied the well-pleaded complaint rule, but the majority deemed the federal issue embedded therein too insubstantial to justify federal jurisdiction—a conclusion perfectly consistent with Justice Brennan’s description of this area of the law as cryptic in *Franchise Tax Board*. See *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 816–17 (1986). Justice Brennan himself dissented in *Merrell Dow*, however, arguing that satisfying the well-pleaded complaint rule should be both necessary and sufficient to sustain federal jurisdiction. See *id.* at 821 n.1 (Brennan, J., dissenting) (“[I]f one makes the test sufficiently vague and general, virtually any set of results can be ‘reconciled.’” (citation omitted)).

¹⁰⁴ *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205 (1934).

¹⁰⁵ See *id.* at 207–08.

¹⁰⁶ See *id.* at 208.

¹⁰⁷ See *id.* at 213 (“As in the analogous case under the Federal Employers’ Liability Act, a violation of [e.g., the federal Safety Appliance Acts] . . . was to constitute negligence *per se* in applying the state statute and was to furnish the ground for precluding the defense of contributory negligence as well as that of assumption of risk.”). This observation by the Court suggests—but does not conclusively establish—that Moore’s case might not have satisfied the well-pleaded complaint rule. See *Merrell Dow*, 478 U.S. at 821 n.1 (Brennan, J., dissenting).

federal law was arguably a formal part of his case-in-chief.¹⁰⁸ Nevertheless, the Court, per Chief Justice Hughes, held that federal jurisdiction was not available on this second count.¹⁰⁹ Although the Court provided relatively little analysis in support of this conclusion, subsequent treatment of the case has settled on the explanation that the mere embedding of a federal standard in an ordinary action for negligence under the law of a state does not suffice to make a case “arise under” the laws of the United States, even it literally satisfies the well-pleaded complaint rule.¹¹⁰

Another decision in this vein—although it post-dates *Franchise Tax Board* by three years—is *Merrell Dow Pharmaceuticals, Inc. v. Thompson*. In this case, Thompson sued Merrell Dow Pharmaceuticals (“Merrell Dow”) in Ohio state court on a variety of state theories, including negligence and product liability.¹¹¹ One of Thompson’s theories was that Merrell Dow had breached a duty by failing to disclose certain side-effects of one of its medications as required by a federal statute, the Food, Drug and Cosmetic Act (“FDCA”).¹¹² Thus, much like Moore, Thompson embedded a federal issue—whether Merrell Dow had violated a federal standard of disclosure—in an otherwise ordinary complaint under the laws of Ohio.¹¹³ On this ground, Merrell Dow attempted to remove the case to federal court.¹¹⁴ And, just as in *Moore*, the Court rejected federal jurisdiction.¹¹⁵ Although Thompson’s action literally satisfied the well-pleaded complaint rule, the Court, per Justice Stevens, deemed the embedded federal issue “insufficiently ‘substantial’” to merit the federal judiciary’s attention.¹¹⁶

Unlike in *Moore*, however, the Court in *Merrell Dow* provided a fairly fulsome explanation of why the federal courts could not hear

That is, if the C&O’s failure to provide a proper decoupling lever as per the federal Safety Appliance Acts simply precluded a *defense* of contributory negligence or assumption of the risk, a federal issue would not have presented itself in the case until the third round of pleading. Justice Brennan emphasized this point in his dissent in the *Merrell Dow* case. See generally *id.* (explaining federal jurisdiction).

¹⁰⁸ See *Moore*, 291 U.S. at 208.

¹⁰⁹ See *id.* at 217.

¹¹⁰ See, e.g., *Merrell Dow*, 478 U.S. at 814 n.12; see generally Cohen, *supra* note 43, at 911 (“[A] case does not arise under federal law if federal law merely provides a standard of conduct which affects a state-law-based negligence action.”).

¹¹¹ See *Merrell Dow*, 478 U.S. at 805.

¹¹² See *id.* at 805–06.

¹¹³ See *id.* at 809–10 (quoting *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting)).

¹¹⁴ See *Merrell Dow*, 478 U.S. at 806.

¹¹⁵ See *id.* at 817.

¹¹⁶ See *id.* at 814. Justice Brennan dissented, describing *Moore* “as having been a ‘sport’” from the moment it was decided. *Id.* at 821 n.1 (Brennan, J., dissenting).

the case. In particular, it put enormous weight on the fact that Congress did not appear to have vested Thompson with a private right of action to sue Merrell Dow under the federal statute.¹¹⁷ Justice Stevens inferred from the absence of such a right of action that Congress would not have wanted Thompson's analogous claim under the law of Ohio to proceed in federal court.¹¹⁸

Although one might disagree with *Moore* and *Merrell Dow*, the two cases are fairly strong evidence that satisfaction of the well-pleaded complaint rule, although necessary to sustain federal jurisdiction under statutes like 28 U.S.C. § 1331, is not sufficient to do so. To be sure, *Merrell Dow* came after *Franchise Tax Board*, and therefore could not have served as precedent to the earlier case.¹¹⁹ But not so for *Moore*.¹²⁰ Thus, there was precedent at the time of *Franchise Tax Board* that would permit Justice Brennan to reject federal jurisdiction in that case, even though the party against whom a declaration had been sought—the Trust—had a coercive action in its back pocket that would satisfy the well-pleaded complaint rule.¹²¹ In other words, there was precedent under which Justice Brennan could conclude that the Trust's action, although literally satisfying the rule, was insufficiently "substantial," with all the word entails, to justify federal jurisdiction.¹²²

The next wrinkle that arises, however, is that the Trust's hypothetical action looked about as "substantial" (from a federal perspective) as an action could possibly look. Far from being a state action with an embedded federal issue, as in *Moore* or *Merrell Dow*, the Trust in *Franchise Tax Board* had a fairly explicit federal action under ERISA.¹²³ Thus, it satisfied the old, strict test for federal jurisdiction of *American Well Works Co. v. Layne & Bowler Co.*¹²⁴ Under this test, a case "arises under" the laws of the United States if and only if the United States supplies the plaintiff's cause of action.¹²⁵ Under modern doctrine, a case need not satisfy *American Well Works*

¹¹⁷ See *id.* at 810–11 (majority opinion). To be precise, the Court simply assumed that the federal statute did not confer a private right of action, and plaintiff and defendant agreed on this point. See *id.* at 810.

¹¹⁸ See *id.* at 812, 817.

¹¹⁹ See *id.* at 804; *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 1 (1983).

¹²⁰ See *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 205 (1934).

¹²¹ See *id.* at 217.

¹²² See *id.*; see generally *Merrell Dow*, 478 U.S. at 814 (using the language "insufficiently substantial" when holding that the presence of a claimed violation of a federal statute in a cause of action may not necessarily confer federal jurisdiction).

¹²³ See *supra* note 90 and accompanying text.

¹²⁴ See *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916).

¹²⁵ See *id.* at 260 ("A suit arises under the law that creates the cause of action.").

to lie in federal court, but satisfaction of this test is considered a virtual guarantee that federal jurisdiction will be available.¹²⁶ In other words, satisfaction of *American Well Works* is almost invariably *sufficient* to sustain federal jurisdiction, even if it is not *necessary*, much as satisfaction of the well-pleaded complaint rule is *necessary* to do so, although not *sufficient*.

In fact, the only case that jurists and scholars can typically identify in which the test eventually established in *American Well Works* was satisfied, but federal jurisdiction was still held not to be available, is *Shoshone Mining Co. v. Rutter*.¹²⁷ This case arose from a dispute over a federal patent to a mining claim.¹²⁸ A federal statute authorized miners to obtain such patents by “staking a claim,” which was then held up to sixty days, during which time rivals could submit adverse claims.¹²⁹ If such a claim was received, a related provision of federal law stayed issuance of the patent “until the controversy shall have been settled or decided by a court of competent jurisdiction”¹³⁰ This same provision also required the rival “to commence proceedings in a court of competent jurisdiction, [and] to determine the question of the right of possession” within thirty days of submitting the adverse claim.¹³¹ The Court held that federal jurisdiction was not available, and many have construed *Shoshone Mining* as a rare—or even solitary—counter-example to *American Well Works*.¹³² Mining

¹²⁶ See *Franchise Tax Board*, 463 U.S. at 9 (“[I]t is well settled that Justice Holmes’ test is more useful for describing the vast majority of cases that come within the district courts’ original jurisdiction than it is for describing which cases are beyond district court jurisdiction.”); see also Carlos M. Vázquez, *Alien Tort Claims and the Status of Customary International Law*, 106 A.J.I.L. 531, 535–36 (2012) (“Since the general federal question statute is narrower in scope than the ‘arising under’ clause of Article III, any suit that satisfies the Holmes test necessarily falls within the scope of Article III.”).

¹²⁷ *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900); see, e.g., Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on “Arising Under” Jurisdiction*, 82 IND. L.J. 309, 343 (2007) (stating that the leading exception to the *American Well Works* test is *Shoshone Mining*).

¹²⁸ See *Shoshone Mining Co.*, 177 U.S. at 506, 511–12; see also Oakley, *supra* note 6, at 1841 n.63 (stating that *Shoshone Mining* was a case dealing with competing claims of title to mineral rights originally conveyed by federal deed or patent).

¹²⁹ See Act of May 10, 1872, ch. 152, § 6, 17 Stat. 91, 92 (codified as amended at 30 U.S.C. § 29 (2012)). I am indebted to Professor Oakley for his diligence in uncovering the statute at issue in *Shoshone Mining*. See Oakley, *supra* note 6, at 1841 n.63.

¹³⁰ Act of May 10, 1872, ch. 152, § 7, 17 Stat. 91, 93 (codified as amended at 30 U.S.C. § 30).

¹³¹ *Id.*

¹³² See, e.g., Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg., 545 U.S. 308, 317 n.5 (2005) (“For an extremely rare exception to the sufficiency of a federal right of action, see [*Shoshone Mining*].” (citation omitted)); see also Cohen, *supra* note 43, at 902 (describing *Shoshone Mining* as an oft-cited case that presents an exception); Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 535 n.29 (“The Court later announced [in *American Well Works*] that the law creating the cause of action was the law under which the action arose, but it did so without disapproving *Shoshone [Mining]*.”).

the statutes quoted above, however, Professor Oakley has persuasively argued that Congress simply provided that applications for federal patents could be held up while rivals pursued adverse claims in a “court of competent jurisdiction.”¹³³ According to this view, the cause of action at issue in *Shoshone Mining* was not federal, and therefore *American Well Works* was not satisfied.¹³⁴ If he is correct, *Shoshone Mining* was excluded from federal court on much the same ground as *Moore* and *Merrell Dow*—for lack of a “substantial” federal issue, even though that issue might have appeared on the face of the well-pleaded complaint.¹³⁵ But history belongs largely to those who write it, and courts and scholars have often described *Shoshone Mining* as a lone or rare counter-example to *American Well Works*.¹³⁶ As Professor Oakley demonstrates, it may not be,¹³⁷ but—oddly enough—*Franchise Tax Board* may take its place.

As may be recalled, the Trust in *Franchise Tax Board* had a cause of action that was itself a creature of federal law.¹³⁸ If the Trust had brought suit against the Board under section 502(a)(3) of ERISA, its action would have satisfied *American Well Works* and federal jurisdiction would have been clear, provided of course that the Trust had a ripe case.¹³⁹ As may also be recalled, however, the Trust did not bring this action, but instead waited for the Board to commence suit.¹⁴⁰ Thus, the Trust was the defendant in the Board’s request for declaratory relief.¹⁴¹

¹³³ Oakley, *supra* note 6, at 1841 n.63.

¹³⁴ *See id.*

¹³⁵ *See id.* at 1839.

¹³⁶ *See, e.g.,* Freer, *supra* note 127, at 343 (stating that the leading exception to the *American Well Works* test is *Shoshone Mining*); Patti Alleva, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After Merrell Dow*, 52 OHIO ST. L.J. 1477, 1527 n.185 (1991) (noting that the Court has recognized *Shoshone Mining* as an exception to the *American Well Works* test).

¹³⁷ *See* Oakley, *supra* note 6, at 1841 n.63.

¹³⁸ *See* *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 19–20 (1983).

¹³⁹ As noted earlier, this action would have resembled a request for declaratory relief in the sense that the Trust would have sought nothing more than a determination that it had no duty to submit to the Board’s levy. *See supra* note 89 and accompanying text. Ordinarily, one must establish some acute need for such a determination before one may obtain the attention of a court. In *Franchise Tax Board*, the Trust arguably could have shown this by pointing to an extensive correspondence between itself and the Board over the Trust’s duties to submit to the Board’s levies. *See Franchise Tax Bd.*, 463 U.S. at 5 n.4 (describing the back and forth correspondence between the Board and the Trust). A judge might reasonably have inferred from the Board’s posture during this correspondence that the Board was on the verge of bringing a coercive action against the Trust, which suit under section 502(a)(3) would have forestalled. *See* 29 U.S.C. § 1132(a)(3) (2012); *supra* note 90 and accompanying text.

¹⁴⁰ *See Franchise Tax Bd.*, 463 U.S. at 5.

¹⁴¹ *See id.*

If the mirror-image rule applied, however, the Trust's status as the "declaratory judgment defendant" should have made no difference. As Justice Brennan himself noted in *Franchise Tax Board*, alleged infringers of patents routinely obtain federal declaratory relief against putative infringers, thus predicating federal jurisdiction on a reversal of roles—precisely what the mirror-image rule contemplates.¹⁴² As noted earlier, straight-forward adherence to this trajectory would have yielded a decision sustaining federal jurisdiction.¹⁴³ But a unanimous Court went the other way.¹⁴⁴ "There are good reasons," wrote Justice Brennan, "why the federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law."¹⁴⁵ According to him, the Board's request for declaratory relief was "sufficiently removed from the spirit of necessity and careful limitation" that underlay such decisions as *Skelly Oil* to preclude federal jurisdiction, absent some congressional indication to the contrary.¹⁴⁶

This conclusion could easily be seen as bizarre by those who expect universal adherence to the mirror-image rule, which incorporates *American Well Works*. Professors Doernberg and Mushlin, for example, describe this aspect of *Franchise Tax Board* as "intellectually unsupportable."¹⁴⁷ Similarly, Professor Segall asks: "What federal values could th[e] 'race to the courthouse' rule [ordained by *Franchise Tax Board*] possibly serve?"¹⁴⁸

These are fair objections. In fact, *Franchise Tax Board* is a worthy target for scholars who decry *Skelly* in the first place, or who could do without the well-pleaded complaint rule itself. Most famously, this includes Professor Doernberg, who has written that *Skelly*, "though requiring . . . a bit of mental gymnastics," was "workable" until *Franchise Tax Board*.¹⁴⁹ With *Franchise Tax Board*, however, *Skelly's* "true problems and another absurdity resulting from adherence to the *Mottley* rule became manifest."¹⁵⁰ The American

¹⁴² See *id.* at 19 n.19.

¹⁴³ See *supra* note 99 and accompanying text.

¹⁴⁴ See *Franchise Tax Bd.*, 463 U.S. at 28.

¹⁴⁵ *Id.* at 21.

¹⁴⁶ *Id.* at 21–22.

¹⁴⁷ Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 545.

¹⁴⁸ Segall, *supra* note 7, at 502–03. In saying this, Professor Segall is emphasizing the fact that federal jurisdiction would have been proper if the Trust had brought an action against the Board under section 502(a)(3) of ERISA, instead of waiting for the Board to initiate suit.

¹⁴⁹ Donald L. Doernberg, *There's No Reason For It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes Federal Questions Jurisdiction*, 38 HASTINGS L.J. 597, 642 (1987) [hereinafter Doernberg, *There's No Reason for It*].

¹⁵⁰ *Id.* In a series of articles, some of which he has co-written with his colleague Professor Mushlin, Professor Doernberg has argued that the well-pleaded complaint rule defies

Law Institute has also recommended that Congress amend the federal judicial code to permit removal on the basis of a federal defense.¹⁵¹

But if one accepts the possibility that even cases that satisfy *American Well Works* might—on rare occasions—fail to present a “substantial” federal question, then *Franchise Tax Board* can be reconciled with other cases, much like *Shoshone Mining* has been. As Professor Cohen famously argued, the “practical reasons” for denying federal jurisdiction in *Shoshone Mining* were “overwhelming.”¹⁵² Many of the cases, he wrote, would turn on idiosyncratic local

congressional intent, not only by misconstruing various statutes of the late nineteenth century, but also by misconstruing the Declaratory Judgment Act of 1934. *See id.* at 601–07 (late nineteenth-century statutes); Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 547–49 (Declaratory Judgment Act). As a consequence, he would allow federal courts to hear cases in all three of the categories we have been discussing—federal-defense cases, federal-reply cases, and mirror-image cases. *See* Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 531–33, 548–49. And he would do so in the presence of, or in the absence of, the act. *See* Doernberg, *There’s No Reason for It*, *supra* note 149, at 662. As a matter of legislative history, Professor Doernberg makes a fairly strong case that Congress did not intend what is now 28 U.S.C. § 1331 to include the well-pleaded complaint rule. *See id.* at 601–07. In fact, between 1875, when Congress first enacted what is now § 1331, and 1887, when it amended that statute, the Court would often consult a defendant’s answer to determine if federal jurisdiction was proper on removal. *See Franchise Tax Bd.*, 463 U.S. at 10 n.9. On the other hand, as Justice Brennan himself observed in *Franchise Tax Board*, the well-pleaded complaint rule—as adapted by *Skelly* to actions for declaratory relief—has now become so entrenched in federal law that only Congress could displace it. *See id.* at 18 n.17 (“At this point, any adjustment in the system that has evolved under the *Skelly Oil* rule must come from Congress.”). Moreover, it is now a fairly well-established canon of statutory jurisdiction that the Court requires clear statements from Congress before it will apply general statutes in ways that significantly alter the federalist balance. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (requiring a clear statement by Congress to overcome a presumption against preemption of state law); *see also* Ernest A. Young, *Federal Courts: Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1607–08 (2000) (“[P]rocess federalism has significant potential as a viable means of enforcing significant constraints on federal power.”); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 126 (2004) (discussing situations in which the Court can draw the line between valid and invalid federal actions). Although the well-pleaded complaint rule is not an explicit part of § 1331 or any similar statute, it prevents federal courts from hearing a significant number of cases that arise under state law. *See* Doernberg, *There’s No Reason for It*, *supra* note 149, at 662. Construing § 1331 not to include the rule would therefore dramatically affect the allocation of cases between state and federal court. *See generally id.* at 663 (describing this shift as potentially salutary for “overburdened state systems”). Most particularly, it would allow federal jurisdiction over many actions in tort where the defendant has a federal defense of preemption. Given the scope of the federal regulatory state, there are many contexts in which such a defense will be available. This is not to say that Congress should not allow federal jurisdiction in such situations, but only that the legislature should decide.

¹⁵¹ *See* STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1311 (AM. LAW INST. 1969); *see also* Field, *supra* note 6, at 616–17 (noting that, prior to *Mottley*, courts would consider all pleadings to be relevant in terms of invoking federal question jurisdiction, not just the complaint).

¹⁵² Cohen, *supra* note 43, at 906.

customs, resolution of which would not require a federal judge's expertise, and allowing such cases into federal courts in the Old West might have overwhelmed such tribunals.¹⁵³ The question thus presents itself—can similar logic explain *Franchise Tax Board*?

Perhaps, but the case is hard to make. We can begin by remembering that the Trust's coercive action—the action that the Board sought to anticipate—satisfied *American Well Works*, which is generally recognized as a virtual guarantee that a case “arises under” the laws of the United States for purposes of 28 U.S.C. § 1331 and analogous statutes.¹⁵⁴ As noted above, conventional wisdom teaches that only one case, *Shoshone Mining*, satisfied *American Well Works* yet failed to qualify for federal jurisdiction,¹⁵⁵ and even that characterization is subject to valid criticism.¹⁵⁶ This alone suggests that the Court reached a conclusion in error in *Franchise Tax Board*.

Other considerations point in the same direction. Consider, for example, the federal interest in proper resolution of the case. At stake in *Franchise Tax Board* was the duty under federal law of the trustees of a plan governed by ERISA to submit to a levy upon beneficiaries of the plan by a state.¹⁵⁷ Although the constitutionality of a federal statute was not in play,¹⁵⁸ one could easily suppose that Congress would want a federal forum for an issue of the sort presented in *Franchise Tax Board*.¹⁵⁹ Witness Congress' creation of an express cause of action in the trustees under the statute. Witness as well that suits by fiduciaries under section 502(a) of ERISA lay exclusively in federal court and would be governed by a body of federal common law.¹⁶⁰ The aggregate of the foregoing considerations leads many—if not all—scholars in the area of federal jurisdiction to find *Franchise Tax Board* mystifying.¹⁶¹

So what rationale can possibly account for *Franchise Tax Board*? We can begin by remembering that the opinion was unanimous,¹⁶² which means not a single member of the Court argued for federal

¹⁵³ See *id.* at 906–07.

¹⁵⁴ See *supra* note 126 and accompanying text.

¹⁵⁵ See *supra* notes 127–32 and accompanying text.

¹⁵⁶ See *supra* note 133 and accompanying text.

¹⁵⁷ See *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 26–27 (1983).

¹⁵⁸ *Cf., e.g., Smith v. Kan. City Title & Tr. Co.*, 255 U.S. 180, 195, 199, 200 (1921) (allowing federal jurisdiction over an action under the law of Missouri where the crux of the case was the constitutionality of a federal statute authorizing the sale of certain bonds).

¹⁵⁹ See Dieckmann, *supra* note 3, at 131.

¹⁶⁰ See *Franchise Tax Bd.*, 463 U.S. at 24 n.26.

¹⁶¹ See, e.g., PETER W. LOW ET AL., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 608 (8th ed. 2014) (“Say again?”) (responding to the holding in *Franchise Tax Board*).

¹⁶² See *Franchise Tax Bd.*, 463 U.S. at 3.

jurisdiction.¹⁶³ Although judges do on occasion misapprehend the law, they tend not to do so en masse.¹⁶⁴ At the very least, therefore, there must be a prudential explanation for the case.

Such an explanation is arguably hidden in plain sight. An instrumentality of a state had pled a case under its own laws, in its own courts, after Congress had apparently authorized the object of the state's interest to seek relief in federal court, if and only if it took the initiative. A high regard for federalism, a desire to reward initiative, and even perhaps a desire to punish sloth, all tend to explain the result in *Franchise Tax Board*.¹⁶⁵ Of course, as Robin Dieckmann points out, a state that took the initiative and wanted federal jurisdiction over a case like *Franchise Tax Board* would also be shunted to state court,¹⁶⁶ a result that she plausibly criticizes.¹⁶⁷ A possible response to her argument is that states do not often try this sort of thing, that they have access to their own courts, and that Congress could certainly authorize federal jurisdiction over such actions if it so chose.¹⁶⁸

We should also note here that Justice Frankfurter's private papers¹⁶⁹ indicate that he probably would have supported the result in *Franchise Tax Board*. In more than one early draft of *Skelly*, he decried the possibility that entities like the Board could take advantage of the federal Declaratory Judgment Act to enforce their levies in federal court if they anticipated a federal defense (and if

¹⁶³ See *id.* at 28.

¹⁶⁴ See generally Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 915–16, 924 (1989) (arguing that judges may lack expertise in particular areas of the law and may make errors, but that those errors do not go unchecked by other judges or the system as a whole).

¹⁶⁵ See *Franchise Tax Bd.*, 463 U.S. at 21 n.22 (“[C]onsiderations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it.”); Dieckmann, *supra* note 3, at 154 n.177 (accounting for *Franchise Tax Board* in this manner); Norton, *supra* note 43, at 569 (“[*Franchise Tax Board* is] an exception to the *Skelly Oil* rule . . . [created out of] deference to state governments . . .”); see generally Field, *supra* note 6, at 630 (“If the rationale [of *Franchise Tax Board*] was limited to cases brought by states, it is too bad that was not well explained and did not even appear in the body of the opinion.”).

¹⁶⁶ See Dieckmann, *supra* note 3, at 168, 171.

¹⁶⁷ See *id.* at 159 (“Contrary to *Franchise Tax Board*, federal question jurisdiction should be broad enough to include suits in which a state seeks a declaratory judgment that federal law does not preempt a state law.”).

¹⁶⁸ The well-pleaded complaint rule and its various permutations are not driven by the Constitution. See, e.g., *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494–95 (1983) (citations omitted).

¹⁶⁹ Frankfurter, *Diversity and the Merits*, *supra* note 43; Memorandum by Felix Frankfurter on Jurisdiction in *Skelly Oil* Case, Other than on Basis of Diversity (on file with author) [hereinafter Frankfurter, Jurisdiction Memorandum]; Memorandum by Felix Frankfurter, Untitled (on file with author) [hereinafter Frankfurter, Untitled Memorandum].

Phillips' construction of the statute were to prevail):

This is not a bit of mere formalism. To sanction a suit for declaration merely because a defense is anticipated or made on the strength of a federal law will turn into the federal courts a vast current of litigation indubitably arising under State law in the sense that the right to be vindicated was State created. Thus the enforcement of State tax laws and of the extensive range of State regulatory measures could be brought in, or removed to, the federal courts in the frequent instances when it may be anticipated or is claimed that the asserted State-created right is invalidated by limitations imposed by the Constitution or the laws of the United States upon the States in creating such rights.¹⁷⁰

The fact that Justice Frankfurter ultimately deleted this language from *Skelly* may suggest that he thought better of it. On the other hand, his general hostility to federal jurisdiction is well known, and this language reflects that hostility.¹⁷¹ Moreover, although he did delete this language, he retained his citation to *Tennessee v. Union & Planters' Bank*, which corresponded precisely to what he had deleted.¹⁷² In *Union & Planters' Bank*, a state brought an action in federal court against a bank to collect a tax, predicting that the bank would raise a federal defense.¹⁷³ Retention of this citation suggests that Justice Frankfurter was not repudiating the language he deleted. But gauging Justice Frankfurter's likely approach to *Franchise Tax Board* is complicated by the existence of the Trust's action under section 502(a)(3) of ERISA.¹⁷⁴ Had he been aware of such an action, he might have approved federal jurisdiction over a mirror-image case. In short, there is no clean resolution of these issues.

This brings us to the question of whether there is a universal principle that one can derive from the case. One can begin by supposing that mirror-image cases are cognizable in federal court under the federal Declaratory Judgment Act if and only if the party

¹⁷⁰ Frankfurter, Jurisdiction Memorandum, *supra* note 169, at 104–05; *see also* Frankfurter, Untitled Memorandum, *supra* note 169, at 112 (“[O]n the theory of the present suit against Skelly and Stanolind, litigation of State tax laws . . . could be had in the federal courts in the frequent instances when it may be anticipated or explained that the asserted State-created right is invalidated by [some federal limitation] . . .”).

¹⁷¹ *See supra* note 48 and accompanying text.

¹⁷² *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672–73 (1950) (quoting *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 462, 464 (1894)).

¹⁷³ *See Union & Planters' Bank*, 152 U.S. at 464.

¹⁷⁴ *See Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 19–20 (1983).

seeking declaratory relief is not a state or an instrumentality thereof. As noted above, a high regard for federalism, a desire to reward initiative, and a desire to punish sloth all support allowing a case to remain in state court if a state chooses a state forum for declaratory relief and Congress has authorized the counter-party to avail itself of a federal forum.¹⁷⁵ Similar considerations would cut sharply in the opposition direction in the common situation where a putative infringer of a patent brings an action for declaratory relief in federal court against a putative infringer. In that situation, although the putative infringer is neither a state nor an instrumentality thereof, and although Congress has given the putative infringer an express right of action against the putative infringer, at least the putative infringer has taken the initiative to sue in federal court.¹⁷⁶ This combination of factors would explain the disparate results in *Franchise Tax Board* and cases like *E. Edlmann & Co. v. Triple-A Specialty Co.*¹⁷⁷

Another possible explanation for *Franchise Tax Board* lies in the oddly declaratory nature of section 502(a) of ERISA. Although this provision uses the language of injunctive relief, authorizing a “fiduciary” (such as the trustees) to sue “to enjoin any act or practice” that violates ERISA, or “to obtain other appropriate equitable relief . . . to redress such violations . . . [.]”¹⁷⁸ an “injunction” forbidding the Board from imposing a levy on the Trust would not have been dramatically different from a declaration to the same effect. To be sure, the threat of contempt would lie behind it, but such an injunction—if granted—would presumably have the same immediate effect as a declaration.¹⁷⁹ Perhaps the *Franchise Tax Board* Court was afraid of walking into a hall of mirrors, where an ostensibly coercive, but functionally declaratory, federal cause of action sustained federal jurisdiction to grant declaratory relief in the mirror-image context.¹⁸⁰

¹⁷⁵ See *supra* note 165 and accompanying text.

¹⁷⁶ See, e.g., *CAE Screenplates, Inc. v. Beloit Corp.*, 957 F. Supp. 784, 785 (E.D. Va. 1997).

¹⁷⁷ See *Franchise Tax Bd.*, 463 U.S. at 27–28; *E. Edlmann & Co. v. Triple-A Specialty Co.*, 88 F.2d 852, 853–54 (7th Cir. 1937). In fact, Justice Brennan cited *E. Edlmann & Co.* with approval in *Franchise Tax Board*. See *Franchise Tax Bd.*, 463 U.S. at 19 n.19.

¹⁷⁸ 29 U.S.C. § 1132(a)(3) (2012).

¹⁷⁹ See, e.g., *Bray, Myth*, *supra* note 35, at 1123 (“[I]n many cases in which a plaintiff seeks prospective relief, a declaratory judgment and an injunction are interchangeable.”).

¹⁸⁰ The speculation here is that the Court might have seen the Board’s second count and the Trust’s action under section 502(a)(3) as opposing requests for declaratory relief, with nary a request for coercive relief in sight (other than the Board’s first count, which would fail the well-pleaded complaint rule). In their article on declaratory judgments, Professors Doernberg and Mushlin take the opposite tack, suggesting not only that the Trust’s action can be seen as coercive, but also that it can be seen as a distinct original action, such that the Board’s action

This may be. But ultimately I am disinclined to draw this inference from *Franchise Tax Board*, for two reasons. First, the statute literally uses the language of equity.¹⁸¹ Second, the Board and the Trust had had an exchange of papers, and the Board was presumably asserting its position with increasing vigor.¹⁸² At some point, “saber-rattling,” so to speak, can satisfy the criteria for equitable relief.¹⁸³ In the context of intellectual property, for example, a sufficiently clear threat to seek immediate relief for alleged infringement can justify injunctive relief.¹⁸⁴ The facts of *Franchise Tax Board* would appear to satisfy a comparable test under section 502(a)(3).¹⁸⁵

CONCLUSION

Like the Infield Fly Rule,¹⁸⁶ the well-pleaded complaint rule can be an object of scholarly and juristic fascination. But it also has practical implications for a vast array of actual or potential federal litigants. Although *Skelly* and *Franchise Tax Board* may be lovely chestnuts for scholars in the area of federal jurisdiction, evaluating their scope and their merits can serve useful purposes. As I hope I

could be seen as *defensive* in nature. See Doernberg & Mushlin, *Trojan Horse*, *supra* note 14, at 545 n.71. This is plausible, but it would require some imagination to visualize. If the money to which the Board laid claim were seen as being already in its constructive possession, and the Board were trying to prevent the Trust from “seizing” that money under section 502(a)(3), the Board’s action could in turn be seen as defensive in nature. In other words, with some imagination, the Board’s action could be analogized to an action in equity to restrain a trespass. See *id.* The arguably simpler way to visualize the matter is that the Trust’s action under section 502(a)(3) was not distinct, but instead derivative of the Board’s action, such that the latter would not exist without the former.

¹⁸¹ See 29 U.S.C. § 1132(a)(3).

¹⁸² See *Franchise Tax Bd.*, 463 U.S. at 5 n.4.

¹⁸³ See, e.g., Bray, *Myth*, *supra* note 35, at 1135–36.

¹⁸⁴ See, e.g., *id.* at 1135–36. A similar practice is in place for actions to quiet title. See, e.g., *Wehrman v. Conklin*, 155 U.S. 314, 322 (1894) (“At common law a party might by successive fictitious demises bring as many actions of ejectment as he chose, and a bill to quiet title was only permitted for the purpose of preventing the party in possession being annoyed by repeated and vexatious actions. The jurisdiction was in fact only another exercise of the familiar power of a court of equity to prevent a multiplicity of suits by bills of peace.”).

¹⁸⁵ To be sure, the Court itself has not settled on a liquidated determination of the scope of available relief under section 502(a)(3). In *Mertens*, it held that relief under this provision was limited “to those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution . . .).” *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993). Presumably an order forbidding the Board from imposing a levy on the Trust would qualify under this test, but the validity of this conclusion might depend upon how the Court conducted its historical analysis. See, e.g., Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1016 (2015) (“Equity has a long history, and in that history many conflicting things have been said about it. It was once said, for example, that equity would never enjoin a trespass.”).

¹⁸⁶ Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474, 1474–75 (1975).

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have demonstrated, *Skelly* retains an enormous influence on our jurisprudence, often as a precedent that can be worked around, but often as well as a precedent that can bar access to federal court.