The Unhappy History of Federal Question Removal

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I. INTRODUCTION

No one would characterize the rules governing the removal of federal question suits from state to federal courts as obvious. Under current practice, a defendant’s ability to remove such a case depends upon whether the plaintiff, who chose not to, could have initially invoked the federal forum. Under the well-pleaded complaint rule, however, a plaintiff can invoke federal question jurisdiction only by establishing a right to do so on the face of the complaint. A case that presents federal questions only by way of defense cannot be filed initially in federal court. Consequently, the defendant in such a case cannot remove it, even if only federal questions are really involved in the suit.

Because defendants are denied the right to remove to federal court unless the plaintiff has satisfied the well-pleaded complaint requirement, they often will be denied a federal trial forum for defenses arising under federal law. Such suits ordinarily will have to be heard originally in the state courts, with the only chance of federal review in the Supreme Court. Conditioning the defendant’s right to remove on the hypothetical ability of the plaintiff to invoke the federal forum in the first instance has attracted not only a long line of uncharitable commentary, it has prompted even

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1. Original federal question jurisdiction is currently governed by 28 U.S.C. § 1331 (1982), which provides that “the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”

2. The rule is traditionally associated with the Court’s decision in Louisville & N.R.R. v. Motley, 211 U.S. 149, 152 (1908).


the Supreme Court to concede recently that “a rational jurisdictional system” might allow removal to be based not only on the claims raised in the complaint, but also on those raised in subsequent pleadings. Nevertheless, the Court continues to uphold the no-removal rule, observing, almost apologetically, that the choice was Congress’, not its own.

Linking defendant removal to the well-pleaded complaint rule began with an early Supreme Court construction of the 1887 ancestor of the modern removal statute in *Tennessee v. Union & Planters’ Bank.* The origins of the well-pleaded complaint rule and the legislative history of the old removal statute suggest, however, that Congress may not have made the initial choice to restrict federal question removal at all.

Although its origins remain uncertain, the well-pleaded complaint requirement did not necessarily prevent federal trial courts from entertaining cases in which federal issues were raised only in the answer. Under the Judiciary Act of 1875, the Reconstruction predecessor of the 1887 statute, Congress conferred federal jurisdiction over cases arising under federal law, and, in a long line of decisions, the Supreme Court held that a federal defense made a case “arise under” federal law within the meaning of both article III and the 1875 statute. Since a party could base removal on pleadings other than the complaint, and since either party could remove, the well-pleaded complaint rule initially operated only to postpone rather than to preclude federal trial court jurisdiction over cases involving federal defenses. A plaintiff merely anticipating a federal defense could not seek federal jurisdiction as an original matter, but either the plaintiff or defendant could remove from state court after the answer showed that the defense raised some issue of federal law.

In addition, the history of the 1887 amendments to the 1875 statute suggests that the Court’s now-settled construction of the 1887 Act, which tied removal to the well-pleaded complaint rule, was incorrect. The most powerful impetus behind this jurisdiction-restricting statute was not the

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7. 152 U.S. 454 (1894).

8. See Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10-11 n.9 (1983) (noting that “the well-pleaded complaint rule was not applied in full force” to removal jurisdiction under the 1875 Act); see also infra text accompanying notes 61-72.
increase in federal question litigation or federal defense removal, but the burgeoning diversity docket of the lower federal courts. Ironically, the statute's framers tried to protect jurisdiction over federal defenses at every turn. Moreover, Congress rejected the one legislative effort to restrict removal jurisdiction over federal defenses and federally-chartered corporations sued in state courts under circumstances that confirm Congress' intent to retain the 1875 Act's broad jurisdictional scope not only for original federal question jurisdiction, but for removal as well. ⁹

The Court based its decision in *Union & Planters' Bank* on certain changes in the removal language of the 1875 Act made by the 1887 statute. Those changes, however, were at best ambiguous. The Court's opinion is better explained by an examination of a number of unspoken concerns that reflect its jurisdictional agenda in the post-Reconstruction era. ¹⁰ Although the Court in *Union & Planters' Bank* rejected a reading of the statute that would have preserved the principle of federal defense removal and left room for the Court to carve out exceptions on a case-by-case basis, it has nevertheless shaped jurisdictional doctrine in other, sometimes curious, ways to dampen the unwanted effects of the blanket no-removal rule. ¹¹

This Article seeks to demonstrate that, as a historical matter, the Court erred in resolving the important question of federal defense removal, and to show that our current understanding of "arising under" jurisdiction is based on that error. The Article first examines the great expansion of federal jurisdiction resulting from the passage of the Judiciary Act of 1875 and the expansive judicial constructions of that statute's removal provisions. ¹² Against this backdrop, it then examines the origins of the well-pleaded complaint rule ¹³ and the decision in *Union & Planters' Bank*, in which the Court improperly grafted this rule onto the statutory requirements for removal. ¹⁴ An examination of the legislative history of the 1887 Act, which cut back on the scope of the 1875 Act, follows, revealing that diversity jurisdiction, not federal question jurisdiction, was the target of the judicial reform. ¹⁵ Finally, the Article focuses on the pervasive impact of the no-removal rule and attempts to explain what might have led the Court into its error. ¹⁶ Although the Court's turn in *Union & Planters' Bank* seems wrong, this Article does not make any effort to suggest that, because the court misread congressional intent in 1894, it should now, rather melodramatically, reverse course. There are a number of reasons why that course is unrealistic, not the least of which is the Court's recent

⁹. See infra text accompanying notes 144-77.
¹⁰. See infra text accompanying notes 178-202.
¹¹. See infra text accompanying notes 203-27.
¹². See infra text accompanying notes 19-69.
¹³. See infra text accompanying notes 70-82.
¹⁴. See infra text accompanying notes 83-105.
¹⁵. See infra text accompanying notes 106-87.
¹⁶. See infra text accompanying notes 188-239.
an announcement that it will not pursue a different course without further word from Congress.\textsuperscript{17} On the other hand, an awareness of the Court’s rejection of the expansive jurisdictional vision held by the framers of the earliest federal question provisions can help rekindle the debate over the current removal scheme in light of their original but forgotten understanding.\textsuperscript{18}

II. \textsc{The Historical Record and the Original Misunderstanding}

A. \textit{The Judiciary Act of 1875 and the Explosion of Federal Jurisdiction}

Except for the short-lived Judiciary Act of 1801,\textsuperscript{19} Congress did not vest general federal question jurisdiction in the lower federal courts until 1875. The conferral of this power was part of a larger substantive law and jurisdictional revolution that was an outgrowth of the Civil War and Reconstruction.\textsuperscript{20} Beginning in 1863, Congress greatly expanded the availability of the writ of habeas corpus by permitting defendants before or after trial to remove any state court civil or criminal action arising out of acts committed during the Civil War “by virtue or under color of”

\textsuperscript{17} See Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10-11 & n. 9 (1983). A formidable barrier to such a reconsideration is, of course, the current wording of section 1441, which, as discussed more fully below, is more difficult to read consistent with a federal defense removal option than is the 1887 Act. See 28 U.S.C. § 1441 (1982). Until 1948, the removal statute remained substantially as drafted in 1887. See infra note 93. Removal was expressly allowed (as under the 1875 Act) for civil suits “arising under the Constitution or laws of the United States,” a phrase that, it will be shown, the courts had read consistently, before the Supreme Court’s \textit{Union & Planters’ Bank} decision, to permit removal of suits based simply on the presence of a federal defense. The 1887 Act limited removal of cases “arising under” by the pivotal language, “of which the [federal courts] are given original jurisdiction by the preceding section.” Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, 553, amended by Act of Aug. 13, 1888, ch. 366, § 2, 25 Stat. 433, 433-36. Why these two provisions, when taken together and read in the context of the legislative events surrounding the passage of the 1887 Act, did not in fact alter the federal defence removal scheme of 1875, is the primary focus of this Article. However, in the 1948 revision of the Judicial Code, Congress eliminated the express statutory reference permitting removal of cases “arising under [federal law]” without comment. Substituted in place of the older, more ambiguous language was the current version that permits removal of civil suit “of which the district courts of the United States have original jurisdiction,” see 28 U.S.C. § 1441(a) (1982), and precludes consideration of the parties’ citizenship in “[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under [federal law],” see id. § 1441(b). See also infra note 183.

\textsuperscript{18} See infra text accompanying notes 219-39.


any federal executive or legislative authority. 21 Four years later, Congress permitted persons held under state authority "in violation of the Constitution" or federal law to use the writ to challenge the constitutionality of their detention. 22 The national legislature opened the doors of the federal courts at about the same time to state law actions in which litigants were denied or could not enforce statutorily guaranteed civil rights in state courts. 23 During the further course of Reconstruction, Congress also created

21. See Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756. The Act of May 11, 1866, ch. 80, § 3, 14 Stat. 46, 46, amended the 1863 Act to void further state court proceedings held after removal of the action. See Wiecek, supra note 20, at 342-48. The 1866 Act also gave revenue and certain other federal officers the right to remove suits arising out of the performance of their duties. See Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171. The Court upheld the constitutionality of such removal early on in Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 250, 254 (1867). In Justices v. Murray, 76 U.S. (9 Wall.) 274 (1869), however, the Court held unconstitutional that part of the 1863 Act that permitted removal after trial. See id. at 282; cf. Tennessee v. Davis, 100 U.S. 257, 262-71 (1879) (upholding constitutionality of successor provision to 1863 Act). Frankfurter and Landis have provided a listing of the various Reconstruction removal statutes. See F. Franklin & J. Landis, supra note 19, at 61-63 n.22.

22. See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385 (current version at 28 U.S.C. §§ 2241(c)(3), 2254(a) (1982)). Prior to the 1867 Act, the writ was not available for state prisoners detained in violation of the Constitution, nor was it generally available for review of final judgments of state courts. See Wiecek, supra note 20, at 342-44. See generally Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. Pa. L. Rev. 793, 882-908 (1965); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 474-77 (1963). See also Fay v. Noia, 372 U.S. 391, 417 (1963) (observing that 1867 Act's framers had extended federal habeas jurisdiction "evidently to what was conceived to be its constitutional limit").

23. See Act of Apr. 9, 1866, ch. 31, §§ 1-3, 14 Stat. 27, 27. Section 3 of the 1866 Act provided for removal of civil and criminal actions based on state law "affecting persons who are denied, or cannot enforce in the [state] courts . . . any of the rights secured to them by [section 1 of the Act]." See id. § 3, 14 Stat. at 27. It therefore allowed removal of actions brought against these persons, and it also appeared to provide a federal forum for state civil and criminal actions brought by or on behalf of these persons. See generally Eisenberg, State Law in Federal Civil Rights Cases: The Proper Scope of § 1988, 128 U. Pa. L. Rev. 499, 527-32 (1980) (discussing operation of section 3). For a discussion of the rights given in section 1 of the Act, see infra note 25. Removal was also allowed in section 3 for suits "against any officer, civil or military, or other person" for actions arising out of harms committed "under color of authority" that had been granted, inter alia, by the 1866 Act. See Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27, 27. In City of Greenwood v. Peacock, 384 U.S. 808 (1966), the Court concluded that this provision enabled "federal officers and those acting under them" to remove actions filed against them in state court that arose out of the officers' enforcement efforts. See id. at 821-22. Civil rights removal currently is governed by 28 U.S.C. § 1443 (1982).

A subsequent act of the same year also allowed removal for certain separable controversies against out-of-state defendants sued along with nondiverse defendants in the plaintiff's home state when the federal court would have had jurisdiction over those controversies if sued upon separately. See Act of July 27, 1866, ch. 288, 14 Stat. 306-07. This 1866 Act was later amended to allow state court actions exceeding $500 in controversy between a citizen of the state in which the suit was brought and a citizen of another state to be removed by the nonresident party upon a showing of local influence or prejudice. See Act of Mar. 2, 1867, ch. 196, 14 Stat. 558, 558-59.
federal criminal sanctions and a variety of civil actions directly to vindicate newly created federal civil rights. Congress expanded removal on the basis of diversity of citizenship, and it enlarged the appellate jurisdiction of the Supreme Court and jurisdiction over other specialized areas of federal law outside the field of civil rights.

Lower federal court jurisdiction probably reached its high-water mark when Congress passed the 1875 Judiciary Act, which gave those courts original jurisdiction over "all suits . . . arising under the Constitution or laws of the United States." The same also permitted removal of


26. See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 386-87. The Act conferred additional power on the Supreme Court in regard to writs of habeas corpus, the subject of section 1 of that Act. See supra note 22 and accompanying text. It also regulated appeals of cases coming from the state courts that raised federal questions by reenacting section 25 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, 85-87, which had long permitted such review. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 350-52 (1816). This reenactment dropped old section 25's proviso that had limited Supreme Court review to errors respecting only the federal questions in the case. The Act thus arguably meant to expand the Court’s power of review of state court cases over which it had jurisdiction so as to include examination of not just federal questions but all questions raised by the record on appeal. However, the Court quickly rejected such a construction. See Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 632-33 (1875).


28. See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470. The legislation, passed just after Congress had approved the ill-starred 1875 Civil Rights Act, Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (held unconstitutional in The Civil Rights Cases, 109 U.S. 3 (1883)), provided in relevant part:

That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs,
any suit [brought in state court] arising under the Constitution or laws." With the 1875 Act Congress gave the federal courts "the vast range of power which had lain dormant in the Constitution since 1789 . . . and [they] became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." Although the statutory grant of federal question jurisdiction is currently understood to lack the same scope as the similarly worded grant of federal judicial power in article III, the framers of the 1875 statute seemed to think of the constitutional and statutory provisions as coextensive. The tracking of the constitutional language and the few existing bits of legislative history suggest, as Judiciary Committee member and bill sponsor Senator Matthew Carpenter then observed, that Congress had "giv[en] precisely the power which the Constitution confers—nothing more, nothing less." Contemporary perception of the scope of the 1875 Act generally confirmed this unremarkable, but since rejected, view.

The 1875 Act altered jurisdiction in other ways that are not the subject of current dispute. It allowed removal of diversity as well as federal

the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority . . .

29. For the 1875 Act's removal provisions, see infra note 36.
30. F. Frankfurter & J. Landis, supra note 19, at 65.
34. See Forrester, supra note 32, at 375-77 (collecting contemporary reaction); see also F. Frankfurter & J. Landis, supra note 19, at 65-66 n.34 (noting relative dearth of commentary on Act near time of its passage). In describing the operation of the 1875 Act during the first session of Congress in which the prototype of the 1887 Act was debated, members seemed to hold an equally broad view of the statute. See 10 Cong. Rec. 813 (1880) (statement of Rep. New) ("[B]y the act of 1875 this original civil jurisdiction of the circuit court has been enlarged to the very limit of the power vested in Congress in that regard by the Constitution."); see also J. Dillon, Removal of Causes From State Courts to Federal Courts 2 (3d ed. 1881) (The 1875 Act "has amplified the Federal judicial power almost to the full limits of the Constitution.").
35. See generally P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and The Federal System 871 (2d ed. 1973) [hereinafter cited as Hart & Wechsler] (rejecting suggestion that 1875 Act either was meant or ought to be read as conferring arising under jurisdiction to limits of article III); Mishkin, supra note 32, at 160-63.
question cases by either the plaintiff or the defendant.\textsuperscript{35} The Act also worked a significant change in the now obscure assignee clause. Under the Judiciary Act of 1789, an assignee of a promissory note or bill of exchange could not sue the maker of the instrument in diversity unless the assignor could have invoked the diversity forum. The 1875 Act required diverse citizenship of only the assignee.\textsuperscript{37} In recognition of and as a check on the more expansive grant of lower federal court jurisdiction,\textsuperscript{38} the 1875 statute also provided that if "at any time" after a suit had been brought in federal court, either originally or by removal, "it shall appear . . . that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction" of the court, it should remand the case to the state court or dismiss "as justice may require."\textsuperscript{39} The statute also provided for an immediate appeal to the Supreme Court of any order remanding or dismissing such cases from federal court.\textsuperscript{40}

On the issue of removal, the Supreme Court broadly construed the 1875 Act's "arising under" language, recognizing in its first treatment of the issue that Congress had made "some radical changes" in the law.\textsuperscript{41} Although the 1875 Act did not, in so many words, allow removal of cases raising federal defenses or federal questions in the answer, it expressly allowed removal of cases that arose under federal law. Between 1875 and 1887, the Court frequently drew on the sweeping constitutional definition of "arising under" established in \textit{Osborn v. Bank of United States}\textsuperscript{42} to flesh out the meaning of the same language in the new statute.\textsuperscript{43} For

\textsuperscript{35} See Chadbourn & Levin, \textit{ supra} note 32, at 647-49.
\textsuperscript{36} See Chadbourn & Levin, \textit{ supra} note 32, at 647-49.
\textsuperscript{38} See Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 470.
\textsuperscript{39} See Act of Sept. 24, 1789, § 11, 1 Stat. 73, 78-79, and only "foreign bills of exchange" were excepted. See \textit{id}. at 79. The 1875 Act held the jurisdictional amount for diversity and federal question cases at $500, the amount at which it had been set for diversity suits in 1789.
\textsuperscript{40} See \textit{id}.
\textsuperscript{41} See \textit{Gold-Washing & Water Co. v. Keyes}, 96 U.S. 199, 204 (1878).
\textsuperscript{42} See 22 U.S. (9 Wheat.) 737, 818 (1824).
\textsuperscript{43} Although the Court consistently read section 2 of the 1875 Act to provide for removal of cases in which the defendant first raised the requisite federal matter in the answer and
example, in Railroad Co. v. Mississippi, another of the Court's early interpretations of the scope of removal, the "only inquiry" was whether the suit was "in the sense of the Constitution or within the meaning of the Act of 1875, one "arising under the Constitution or laws of the United States." The Court answered the inquiry affirmatively, not only because the plaintiff's own contentions rested on federal law, but also because the

in holding that such cases arose under federal law within the meaning of both the statute and the Constitution, it still was not always clear what allegations were needed in the plaintiff's complaint (or a defendant's answer) to make the case arise under federal law even under this expansive jurisdictional regime. Professors Chadbourn and Levin have recounted the doctrinal disarray of this aspect of the Court's opinions construing the meaning of the words "arising under" in the 1875 Act and have concluded that although Congress intended the language to be construed to reach any case presenting a potential federal question, the Court failed to give effect to that intent. See Chadbourn & Levin, supra note 32, at 650-65 (in series of cases Court refused to so construe statute without evidence of such intent by Congress).

A case was often said to arise under federal law only when it "really and substantially involved a dispute or controversy" as to a right that "depended upon the construction or effect" of federal law. Id. at 650-59. This reading, they concluded, resulted from the Court's transposition of the statutory limitation in section 5 of the Act, which allowed the lower court to remand a case in which it did not involve such a "real" or "substantial" dispute, to what they believed was the analytically distinct and prior question of whether the case arose under federal law. Cf. Cohen, supra note 4, at 892-93 n.18 (pinning blame for use of such restrictive terminology on "uncritical adoption" of test for Supreme Court appellate jurisdiction in determining original federal question jurisdiction).

Other limitations on federal question jurisdiction arose from common-law pleading requirements. In Gold-Washing & Water Co. v. Keyes, 96 U.S. 199 (1878), for example, the Court denied removal because of the failure of the defendant to plead properly that his defense necessarily rested on federal law. See id. at 201-02. Instead of pleading "facts" to show that his defense turned on federal law, the defendant had committed the error of simple notice pleading by stating that his defense was premised on a construction of federal law and then stating what that law was. See id. at 204 (Bradley, J., dissenting). Invoking the spirit of Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), and Osborn, the Gold-Washing Court seemed prepared to uphold removal under the 1875 Act based on a federal defense, and it saw such cases as arising under federal law. The problem was that the federal defense had not been sufficiently well pleaded. See id. at 203; see also infra note 79. This early decision foreshadowed the Court's well-pleaded complaint rule for plaintiffs in Metcalf's v. Watertown, 128 U.S. 586 (1888). See infra text accompanying notes 70-82.

In another decision, the Court denied removal in a suit for royalties arising from an assignment contract involving letters-patent. See Albright v. Teas, 106 U.S. 613, 616-17 (1883). The defendants argued that the case arose under federal law because the plaintiff had sought discovery in the course of litigation that implicated the scope of the federal patent and the question of infringement. See id. at 616. Although the Court recognized that a defense arising out of federal legislation or an answer raising a federal question would make a case arise under federal law within the meaning of the 1875 Act and would therefore be subject to removal, see id. at 618, it found that none of the parties to the contract had raised such questions. The "incidental and collateral" inquiry into the question of whether the products that the defendants had actually manufactured were covered by the patent and did not "change the nature of the litigation," which was a suit based in contract. Id.

44. 102 U.S. 135 (1880).
45. See id. at 136.
defendant sought the protection of federal law. In upholding removal, the Court invoked the constitutional formula of *Cohens v. Virginia*, a decision that had construed the scope of the Supreme Court's appellate jurisdiction over state courts: "[a] case . . . consists of the right of one party, as well as of the other" and arises under within the meaning of the statute and the Constitution whenever federal law "constitute[s] the right or privilege or claim or protection, or defence of the party, in whole or in part by whom they are asserted."

Only Justice Miller, whose removal views would eventually enjoy a revival on the Court, dissented. He agreed with the majority on the scope of article III, but denied that Congress had intended the 1875 Act's removal provisions to confer jurisdiction up to article III's limit. He criticized the Court for failing to draw what he perceived to be a clear distinction between the wording and purpose of the statutory and constitutional provisions and for adopting a rule that would open the federal courts to state law suits in which the federal question might form only an "incidental" part of the defense.

Whoever may have won the policy argument, the majority's treatment of the removal issue was probably more faithful to the intent of the 1875 Congress. The Court's reading of the removal provisions to extend the lower federal courts' trial jurisdiction over the entire class of federal question cases that previously only could have been heard by the Supreme Court on direct review from the states was consistent with Carpenter's belief that the 1875 legislation had exhausted Congress' article III power.

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46. See id. at 140.
47. Justice Field did not participate, id. at 142, and Justice Miller was the sole dissenter, see id. (Miller, J., dissenting).
49. See id. at 379.
50. See id. at 142-44 (Miller, J., dissenting).
51. See 102 U.S. at 142-44 (Miller, J., dissenting).
52. See id. at 143-44 (Miller, J., dissenting).
53. See id. at 142-44 (Miller, J., dissenting). Justice Miller wanted to draw a distinction between the language of article III and the 1875 federal question statute by focusing on the substitution of the word "suit" in the statute for the word "cases" in the Constitution. See id. at 143 (Miller, J., dissenting). Whereas article III was "broad enough to sustain a statute which authorizes removal of a cause at any stage when a case is made, which . . . requires a judgment based upon the Constitution, a law, or a treaty . . . .", the statutory limitation to "suits" arising under federal law "does not give the right of removal where the defence arises under such a law, unless, 'suit' necessarily includes the defence which may be made thereto. The lexicons do not so define it." *Id.* at 143 (Miller, J., dissenting) (emphasis in original). After examining the various lexicons, Justice Miller
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to vest jurisdiction in the federal courts.54 Furthermore, many commentators now believe that the federal question provisions were added to removal legislation, not only to provide a congenial forum to enforce and give meaning to newly enacted federal legislation and the Civil War Amendments, but also to insure a federal haven at the trial level for burgeoning industrial, financial, and other "entrepreneurial" interests.55 These interests were then contending with unfriendly state regulation and local decisionmakers, not just in the South, but increasingly in the Midwest.56 In the early 1870's, the powerful Granger movement, with its legendary animosity toward "the

concluded that a suit could not arise under federal law where the federal matter arose by defense only. See id. at 144 (Miller, J., dissenting). He thus foreshadowed the result in Tennessee v. Union & Planters' Bank, 152 U.S. 454, 464 (1894), that removal based on federal defenses was impossible. See infra text accompanying notes 85-97; see also HART & WECHSLER, supra note 55, at 870 n.1. Miller's views on federal jurisdiction are discussed in C. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890, at 401-24 (1939). His Railroad Co. dissent also foreshadowed Justice Holmes' own ideas about original federal question jurisdiction in concluding that a suit arises under a law of Congress only when it is established that

the cause of action is founded on the act of Congress; that the remedy sought is one given by an act of Congress; that the relief which is prayed is a relief dependent on an act of Congress; that the right to be enforced in the suit is a right which rests upon an act of Congress.

102 U.S. at 144 (Miller, J., dissenting) (emphasis in original). For the views of Justice Holmes, see Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 214-15 (1921) (Holmes, J., dissenting); American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 259-60 (1916); see also 1 HOLMES-LASKI LETTERS 312 & n.2 (M. Howe ed. 1953), where Holmes mentions his "categorical" views on this question of jurisdiction shortly before going to the dentist.

54. See supra text accompanying notes 33-34. Indeed, Senator Carpenter, relying on dicta in Justice Story's opinion for the Court in Martin v. Hunter's Lessee, thought that it had been "substantially in contravention of the Constitution" for Congress in 1789 not to have vested the whole of federal judicial power in the federal courts. See 2 Cong. Rec. 4986 (1874) (citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328 (1816)); see also F. FRANKFURTER & J. LANDIS, supra note 19, at 68 n.43.

55. See, e.g., F. FRANKFURTER & J. LANDIS, supra note 19, at 64-65 & n. 31; id. at 91-93; H. HYMAN, A MORE PERFECT UNION 536-40 (1973); S. KUTLER, supra note 20, at 157-58; Wiecek, supra note 20, at 341 (footnote omitted):

The flourishing economic development of the postwar years led most Republicans to substitute sympathies for entrepreneurial interests in place of their earlier care for the freedman. It was no accident that the most important later use of removal jurisdiction redounded to the benefit of businessmen and corporations rather than Negroes. Congress abandoned its suspicions of southern courts and concentrated its attention on the middlewestern courts and legislatures infected with Granger resentment toward eastern capitalists.

While it may be overstating the case somewhat to accuse the 1875 Congress, which had just passed the far-reaching public accommodations provisions of the 1875 Civil Rights Act, see supra note 28, of having already abandoned its Reconstruction civil rights goals, it is nevertheless true that the civil rights acts of this period already carried their own jurisdictional provisions providing a federal forum for much of the litigation of rights and issues arising under them, see supra notes 23-28.

56. See, e.g., Wiecek, supra note 20, at 341.
Farmer’s symbiotic enemies—railroads, warehouses, and grain elevators,” had reached its peak of influence in state and local governments.\(^{57}\) Not long before, investors had faced a rash of defaults by municipalities on bonds issued to secure the railroads’ presence in the first place.\(^{58}\) The upswing in rate regulation, taxation, and other local controls on commerce in the early 1870’s paralleled the rapid expansion of the nation’s economy, eventually producing an enormous flood of constitutional litigation.\(^{59}\) Although parties could raise federal claims and defenses in the lower federal courts when there was diversity of citizenship, diversity jurisdiction obviously could not help everyone adversely affected by state action.\(^{60}\) Congress, therefore, is thought to have appreciated the business community’s


\(^{58}\) See 6 C. Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88, at 918-1116 (1971).

\(^{59}\) A host of traditional constitutional challenges and defenses were already in place for parties adversely affected by state action, and the recent passage of the Civil War Amendments made new ones available. Up to this period the contract clause, U.S. Const. art. I, § 10, cl. 1, was the clause of choice in challenging state or local action arguably destructive of vested rights, but it soon received competition from the commerce clause, U.S. Const. art. I, § 8, cl. 3, and, to a lesser extent, article IV’s privileges and immunities clause, U.S. Const. art. IV, § 2, cl. 1. See generally Currie, The Constitution in the Supreme Court: Limitations on State Power, 1865-1873, 51 U. Chi. L. Rev. 329 (1984). In addition, although the due process clause of the fourteenth amendment had only recently been given short shrift by a five-four Court in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80-81 (1873), lawyers were apparently undeterred from pressing their due process arguments against state regulatory action. See F. Frankfurter & J. Landis, supra note 19, at 64 & n.30 (noting “steady torrent of cases” being litigated under due process clause, Slaughter-House notwithstanding). See generally B. Twiss, Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court (1942). By the early twentieth century, the due process clause had largely overtaken the contract clause as the preferred vehicle for challenging state action unconstitutionally interfering with liberty and property. See E. Wright, The Growth of American Constitutional Law 96, 113 (1942).

\(^{60}\) In-state enterprises and residents would clearly be out of luck. Diverse citizenship might also be lacking in a given case because of the stringent requirement of complete diversity between all plaintiffs and all defendants set up in Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806). The 1866 Congress had, however, partially amended the Strawbridge rule when it allowed for the removal of separable controversies, see supra note 23, and in 1875 it enlarged upon its earlier enactment when it allowed diverse litigants having controversies wholly between themselves to remove the entire suit, despite the presence of nondiverse parties. See Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 470-71. Although the 1867 Congress had arguably liberalized the Strawbridge requirements in other ways by allowing for the removal of certain cases when there was less than complete diversity if there was an allegation of local prejudice, see supra note 23, the Court rejected that interpretation of the statute. See Case of the Sewing Machine Companies, 85 U.S. (18 Wall.) 553, 585-86 (1873). Given the case with which a local defendant might be found in any litigation to keep a case in state court, a diverse defendant might have little prospect of removing the case to federal court. The Sewing Machine Case, appropriately enough, was the initial impetus for the 1875 Act. See F. Frankfurter & J. Landis, supra note 19, at 66-69; H. Hyman, supra note 55, at 540-41.
unwillingness . . . to rely upon state courts for the vindication of [their] constitutional rights" and to have intended them as one of the beneficiaries of the federal question removal provisions. Of course, these entrepreneurial interests eventually made heavy use of those provisions.

Justice Miller's *Railroad Co.* protest notwithstanding, the Court showed few signs of departing from its expansive interpretation of the 1875 Act's removal language, capping off its consistent line of decisions with the


62. There also is every reason to believe that Congress thought that the federal trial forum could make a difference. The removal of cases in which federal issues arose only by defense is certainly consistent with the unabashed skepticism of state courts that is evident in the enactment of other Reconstruction jurisdiction-enlarging statutes, of which the 1875 Act was in many ways the culmination. In addition, with respect to the trial of factual matters, Congress must have been aware of the decided lack of parity between state and federal jury pools, inasmuch as it had legislated that anyone who had given aid to the Confederacy would be kept off federal juries. See Schmidt, *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 Tex. L. Rev. 1401, 1450-51 (1983) (discussing Civil War loyalty oath requirements and their elimination in 1879). Nor, when it came to legal and a host of other nonjury issues (including habeas corpus and equity proceedings), could it have passed unobserved that the now predominantly elective state judiciaries were arguably even less insulated from popular pressure than they had been in 1789 when their primary mode of selection was appointive. See L. Friedman, *supra* note 57, at 323 (noting, however, that some southern states had returned to an appointive system during Reconstruction). These differences could only magnify the problems of a jurisdictional scheme limited to direct Supreme Court review of cases from the state courts in which litigants with factually-oriented federal defenses might arrive at their federal forum with the facts already found against them, and unable to secure effective review.

63. See *Wiecek*, *supra* note 20, at 342.

64. See, e.g., *Southern Pac. R.R.* v. California, 118 U.S. 109, 110, 112-13 (1886) (removal upheld when state-created corporation raised defense under equal protection clause, U.S. Const. amend. XIV, § 1); Ames v. Kansas *ex rel.* Johnston, 111 U.S. 449, 462 (1884) (defense set up under federal law held to confer jurisdiction on removal on basis of *Osborn and Cohens*); Feibelman v. Packard, 109 U.S. 421, 422-23, 425-26 (1883) (removal upheld in suit on federal marshal's bond; although Court focused on fact that federal law created cause of action, it looked both "at the nature of the plaintiff's cause of action and the grounds of the defence" to see if suit arose under federal law). For a discussion of *Gold-Washing & Water Co. v. Keyes*, 96 U.S. U.S. 199 (1878), and *Albright v. Teas*, 106 U.S. 613 (1883), two cases in which removal was denied, see *supra* note 43 and accompanying text.

In *Starin v. New York*, 115 U.S. 248 (1885), the Court concluded that federal law would in no way affect the outcome of the plaintiff's claim and accordingly denied removal grounded on a federal defense. See id. at 258-59. The Court made clear, however, that dispositive federal questions raised by the defendant would normally be sufficient to confer jurisdiction. See id. at 257-58. On the same day that the Court decided the Pacific R.R. Removal Cases, 115 U.S. 1 (1885), it held in *Provident Sav. Life Assur. Soc'y v. Ford*, 114 U.S. 635 (1885), that a suit on a prior federal court judgment was not one arising under federal law and hence not removable in the absence of some actual question of federal law raised by the parties. See id. at 641-42. Although the federal judgment in *Provident Savings* arguably constituted an ingredient of the plaintiff's case in a suit on such a judgment, these suits were described as actions to enforce an ordinary property right or a debt. See id. at 642. The Court distinguished a suit "by or against" a federal corpora-
celebrated *Pacific Railroad Removal Cases*. In that decision the Court held that any suit against a federally-chartered corporation, even if it implicated only ordinary state law claims and defenses, came within both the language of article III and the removal provisions of the 1875 Act. The Court declared that its earlier decision in *Osborn*, in which it had found the presence of a federal charter of incorporation sufficient to permit a congressional conferral of original jurisdiction to the lower federal courts over a suit brought by the Bank of the United States, compelled this result. Lower federal courts were no less enthusiastic than the Supreme Court in broadly construing the 1875 Act in the context of removal. The Act not only extended federal judicial power "to all cases arising under the Constitution and laws," but also to cases in which the defense alone provided the federal matter, and the courts freely allowed removal of these cases.

**B. Between the Acts—The Origin of the Well-Pleaded Complaint Rule**

Within the expansive removal framework of the 1875 Act, the Court first articulated its well-pleaded complaint rule in the unheralded and little-
noted opinion of *Metcalf v. Watertown*. Metcalf sued in federal court to recover on a prior federal judgment entered in favor of his predecessor in interest. At the time Metcalf's suit was filed, federal jurisdiction might have been premised on the fact of the federal judgment itself, inasmuch as it was arguably a necessary ingredient in any such suit. By the time of Metcalf's appeal, however, the Supreme Court had decided in *Provident Savings Life Assurance Society v. Ford* that suits to enforce federal judgments, for that reason alone, did not arise under federal law. Neither party appears to have addressed the issue of, or raised any objection to, jurisdiction either in the court below or in the Supreme Court. Both sides were urging the merits of the case—whether, assuming that state law was applicable in the federal proceeding, a state could constitutionally provide a shorter statute of limitations for enforcing a federal, as opposed to state, court judgment.

After noting that *Provident* withdrew the only apparent basis for jurisdiction, the Court went out of its way to hold that original federal question jurisdiction could not attach unless the plaintiff's complaint itself showed that the suit depends upon some "question of a Federal nature." Although Metcalf had alleged that the statute of limitations defense urged by the City of Watertown presented a question of federal law, the Court stated that anticipation of a federal question in the answer would not suffice to invoke the federal court's original jurisdiction. The Court cited no authority for this conclusion. It was forced to distinguish its long line of cases upholding jurisdiction in which federal questions had been raised in the defendant's answer on the ground that those "were removal cases." Unlike original jurisdiction, explained the Court, removal jurisdiction could be decided on the basis of pleadings other than the complaint, such as

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70. 128 U.S. 586 (1888). Similar pleading requirements previously had been applied to the sufficiency of an answer to secure removal under the 1875 Act. See Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 201-02 (1878), which is discussed supra note 43. Although the Metcalf decision was itself relatively obscure, the underlying litigation involving Watertown, Wisconsin, that produced this and a batch of other Supreme Court opinions over a twenty-year period, made up a rather notorious episode in the history of municipal bond defaults. See 6 C. Fairman, supra note 58, at 1040-47.

71. 128 U.S. at 586.

72. 114 U.S. 635 (1885). Metcalf's suit had been filed in 1883. See Metcalf, 128 U.S. at 586.

73. See 114 U.S. at 641-42.

74. 128 U.S. at 588. The City of Watertown had raised the limitations issue in its answer, which urged that Wisconsin law barred Metcalf's action. See Record at 7, Metcalf.

75. See 128 U.S. at 588. The Court resolved the substantive issue in Metcalf's favor after the case was remanded and appealed a second time to the Supreme Court. See Metcalf v. Watertown, 153 U.S. 671, 684 (1894). The Supreme Court concluded as a statutory matter that the Wisconsin law did not provide a shorter limitations period for federal judgments. See id. at 683-84.

76. See 128 U.S. at 588-89.

77. See id. at 589.
the answer, the plaintiff's reply, and the removal petition itself. The Court neglected to indicate whether its newly articulated rule for plaintiffs was based on article III, the terms of the 1875 Act, or general common-law pleading requirements somehow thought to apply in the absence of a more explicit constitutional or statutory command.

78. See id.

79. The well-pleaded complaint requirement appears to have been built on pleading rules "dependent on the long-forgotten lore as to the forms of action." 13B C. WRIGHT, A. MILLER & E. COOPER, supra note 3, § 3566, at 89 (1986). However, the pleading rules did not themselves have any connection with the question of jurisdiction, at least after the demise of the English writ system. According to the "long-forgotten lore" as discussed by the authority to whom the Court once had occasion to refer in this context, pleading was a statement of "facts which constitute[d] the plaintiff's cause of action" made in "logical and legal form." See 1 J. CHITTY, PLEADING *235 (1876), cited in Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203 (1878). A party (whether a plaintiff or a defendant) could make only those factual allegations that were encompassed by his or her own claim or defense. "It is . . . a general rule of pleading, that matter which should come more properly from the other side need not be stated. In other words, it is enough for each party to make out his own case or defence." J. CHITTY, supra, at *245. Extraneous allegations or allegations respecting another's pleading were not properly part of one's own pleading. A party "is not bound to anticipate" exceptions, answers, or other objections to his or her own plea. Id. At common law, extraneous allegations that is, where "no allegation whatever on the subject was necessary," were simply struck by the court and "rejected as surplusage." Id. at *252. They might also be demurrable. Id. at *253-54.

Unlike most common-law courts, the federal courts were of limited subject matter jurisdiction. It was conventional wisdom that for jurisdiction to attach, the pleadings on file at the time jurisdiction was invoked must show its existence. "The courts of the United States are not required to take any suit, until in some form their jurisdiction is made to appear of record. This rule applies to suits coming to them by removal, as well as to those in which they issue original process." J. DILLON, supra note 34, at 98-99 (emphasis in original). Without such a showing, the court could proceed no further. The combination of this first principle of jurisdiction with the common-law pleading rules gave rise to a requirement that jurisdiction had to be visible from the face of the pleadings, properly confined to the allegations showing the party's own claim or defense. When plaintiffs sought to establish jurisdiction based on the nature of their claim (e.g., federal question), and the facts alleged in the complaint did not reveal that they relied on a federally-created cause of action or that it implicated a question of federal law, jurisdiction was not shown. See Hornstein, supra note 31, at 586-88 n.128. The court could not rely on the plaintiff's prediction about the expected answer to raise the requisite federal matter, since that was no part of the plaintiff's pleading.

Metcalf strongly suggests that the reason a complaint that attempted to ground jurisdiction on the expected answer would not confer jurisdiction was that the court, with only the complaint before it, would be without power to bring in the defendant and require an answer, or to enter a default if the defendant failed to plead. See Metcalf v. Watertown, 128 U.S. 586, 587-88 (1888); see also M. REDISH, supra note 4, at 72. But prior to the answer, of course, it was not possible to determine whether the defendant would rely on a federal defense, or raise a question of federal law. The plaintiff seeking to establish jurisdiction based on the status of the parties (e.g., diversity of citizenship) presented a different case, since parties' citizenship could be determined prior to answering. An allegation of the defendant's status, moreover, was always part of a well-pleaded complaint; if it were not, diversity jurisdiction could not have been exercised by a plaintiff as an original matter.
Although the Metcalf rule has itself been criticized as a departure from Congress' intent in the 1875 Act, the rule was largely inconsequential for cases presenting federal defenses while that Act was in force. By the terms of the statute, either party could remove a case that arose under federal law, and an unbroken line of precedent established that a case arose under federal law when either party had raised the federal matter. These principles permitted any suit eventually to be taken to a lower federal court if the federal matter appeared in any of the pleadings up to the time of removal, whether or not the plaintiff could have initially satisfied the Metcalf rule. A plaintiff who purported to base original jurisdiction on the anticipated answer of the defendant would be sent to state court, but if the defendant's answer actually raised a federal defense (or prompted a federally-based reply), then the plaintiff could remove. A defendant also still would be able to remove such a case. The well-pleaded complaint rule of Metcalf did not purport to restrict the statutory meaning of "arising under" to exclude cases from federal court whose only jurisdictional basis was a federally-based defense or reply.

Under the 1875 scheme, therefore, the Metcalf rule served as a housekeeping principle for regulating the timing of the attachment of federal jurisdiction in cases that presented federal defenses. It also screened out cases in which neither of the parties' pleadings revealed the federal question. The rule did not permanently exclude from a federal trial forum any case to which jurisdiction would have attached under the broad definition given to the "arising under" language of the 1875 Act. Any such case could be brought, sooner or later, to a federal forum on the election of either party. For Justice Harlan, the author of the Court's unanimous

These common-law pleading rules, however, did not necessarily limit the jurisdictional inquiry to scrutiny of the plaintiff's complaint. See J. DILLON, supra note 34, at 98-99. If the party seeking federal jurisdiction did not do so initially (by filing a complaint), but instead sought removal after an answer had been filed, the jurisdictional question could be resolved if either the well-pleaded complaint or a well-pleaded answer showed the requisite federal question. Indeed, Gold-Washing, the first case construing the 1875 Act, did not involve the sufficiency of the pleadings in the plaintiff's complaint at all, but the sufficiency of the pleadings in the defendant's answer. See Gold-Washing, 96 U.S. at 201-03, which is discussed supra note 43. On removal there was no issue of the court's power to bring in and require a party to plead since the nonremoving party already would have pleaded in state court.

80. See Chadbourn & Levin, supra note 32, at 645-62. Although their argument is compelling, it is not necessary to the conclusions drawn in this Article, which argues that federal defense removal was perfectly compatible with a pleading rule such as that outlined in Metcalf.

81. See supra text accompanying notes 42-68. Although the Court decided Metcalf after the passage of the 1887 Judiciary Act, section 6 of that Act excepted from its operation any actions that were pending on the date of its enactment. See Act of Mar. 3, 1887, ch. 373, § 6, 24 Stat. 552, 555, amended by Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433, 433-36. Cases such as Metcalf, then, still would be governed by the 1875 Act.

82. If the removed case failed "really and substantially [to] involve a dispute" within the Court's jurisdiction, it could be remanded. See Robinson v. Anderson, 121
opinion in *Metcalf*, this newly announced well-pleaded complaint rule could coexist comfortably with the 1875 scheme of expansive removal rights based on federal defenses. The rub came when the well-pleaded complaint rule was later grafted onto the statutory requirements for removal itself. In *Tennessee v. Union & Planters' Bank*, the Court read the language of the 1887 Judiciary Act to require this construction.

C. Union & Planters’ Bank and the Judiciary Act of 1887

*Tennessee v. Union & Planters’ Bank* was one of three cases heard together in the Supreme Court involving the State of Tennessee’s efforts to recover state and local taxes from two state-incorporated banks. Tennessee had filed two suits in federal court, one against each of the banks. The State filed a third suit in state court that the bank later removed to the federal court. This third suit, against the Bank of Commerce, paved the way for the Court’s ruling on removal jurisdiction. In all three cases the banks offered a two-fold defense: first, they contended that as a matter of state law their charters forbade the assessment of the taxes; second, if Tennessee revenue law allowed assessment despite the banks’ charters, then the law was void under the contract clause of the federal Constitution.

The Supreme Court’s primary focus in the two suits filed initially in federal court was whether the State could invoke the lower federal courts’ original jurisdiction. Since the State’s only federal allegation in those two cases was that the defendant banks would rely on a constitutional defense, *Metcalf* appeared to foreclose original jurisdiction, and all of the justices agreed that it did. In the third suit, the one initially filed

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83. 152 U.S. 454 (1894).
84. See infra text accompanying notes 85-97.
85. Of the two suits filed by the State in federal court, one was against the Union & Planters’ Bank of Memphis, and one was against the Bank of Commerce. See 152 U.S. at 454. In each of these cases, both bills in equity, the State was joined by one of its counties in seeking the recovery of taxes. Id. at 457.
86. The State, joined by the City of Memphis, filed this third suit against the Bank of Commerce in state court. Id. at 458. The Bank removed to the federal circuit court. Id.
87. U.S. Const. art. I, § 10; see 152 U.S. at 456-58. The federal circuit court dismissed on the merits the State’s bills of complaint in each of the three cases. Id. at 457-58. Only in the removed action, however, did the lower court rest its decision on the contract clause. Id. at 458; see *Tennessee v. Bank of Commerce*, 53 F. 735, 736 (C.C.W.D. Tenn. 1892). The lower court decided the cases brought originally in federal court on the ground that Tennessee law forbade the taxes. 152 U.S. at 457. The State appealed all three cases to the Supreme Court. Id. at 457-58.
88. See 152 U.S. at 455-57.
89. See id. at 460-61, 464 (Harlan, J., dissenting). In reaffirming its *Metcalf* rule, the majority cited *Osborn*, 22 U.S. (9 Wheat.) at 819, 823, 824, for the proposition that original jurisdiction could not be made to depend on the defendant’s possible answer. See *Union
in state court, federal question jurisdiction was not an issue; instead, the parties had focused on the merits of the bank's defense under state law and the contract clause. The Court nevertheless proceeded on its own to inquire into the question of removal jurisdiction under the then seven-year-old Judiciary Act of 1887.

The 1887 statute contained various amendments to the 1875 Act's first section, which had conferred original jurisdiction on the lower federal courts. Although the phrasing of the "arising under" language in section 1 of the 1875 Act had remained unchanged, section 2, the removal pro-

& Planters' Bank, 152 U.S. at 459. But in Osborn Chief Justice Marshall's statements to that effect were made only to rebut Justice Johnson's suggestions in dissent—that a case would fail to arise under federal law if the defendant made no contest over the federal matter potentially raised by the plaintiff's complaint and that jurisdiction could only be ascertained after issue was actually joined on the federal matter. See 22 U.S. (9 Wheat.) at 886-89 (Johnson, J., dissenting). Osborn thus set up no constitutional impediment to a statutory scheme of federal trial jurisdiction on removal in which jurisdiction could attach on the basis of pleadings subsequent to the complaint. Indeed, such a statute would appear to have Justice Johnson's blessing. See id. at 887 (Johnson, J., dissenting) (an action "may become [one arising under federal law] in its progress").

Further, even if Marshall's statements could be thought to suggest a constitutional limitation on the exercise of strictly "original" (as opposed to removal, or appellate) jurisdiction when the plaintiff's own complaint did not show that the suit would arise under federal law, his Osborn opinion makes it clear that, at the very least, a case also arises under federal law for the purposes of article III whenever federal law must be construed. See 22 U.S. (9 Wheat.) at 820, 822; cf. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378-79 (1821) (Marshall, C.J.) (actually litigated federal defense makes case arise under within meaning of article III). Union & Planters' Bank does not itself call into question the constitutional propriety of a removal statute based on pleadings first made by way of defense, inasmuch as its rejection of federal defense removal was purely a matter of statutory interpretation. See 152 U.S. at 461-64. The constitutionality of removal schemes dependent upon postcomplaint happenings long had been upheld. See supra note 21; see also Strauder v. West Virginia, 100 U.S. 303, 311-12 (1879).

90. None of the parties argued that the existence or nonexistence of jurisdiction in the two cases filed initially in federal court by the State would dictate the outcome on removal in the third case. This is perfectly understandable since Metcalf itself suggested that removal could be available even though the plaintiff might not initially have been able to file in federal court. See 128 U.S. at 589.


92. Section 1 of the 1887 Act provided in pertinent part:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs
vision, had been amended more substantially.\textsuperscript{93} Whereas the old section 2 allowed for removal by either party in any action arising under federal law, the new section 2 provided for only defendant removal of suits arising under federal law "of which the [courts] are given original jurisdiction by the preceding section."\textsuperscript{94} It was upon this change that the Union & Planters' Bank Court seized. The Court read the change as restricting the defendant's right of removal to those federal question cases that the plaintiff could have brought originally in federal court consistent with the Metcalf doctrine.\textsuperscript{95} Since the first two suits could not have been filed initially in federal court under Metcalf, the similar state court suit could not be removed. The Court therefore denied federal jurisdiction in each of the three suits.\textsuperscript{96}

By this construction of the 1887 Act, removal became tied, as it is today, to the well-pleaded complaint rule. No longer could a federal defense, without more, serve as the basis for removal, since it would have been an insufficient ground for the plaintiff to obtain original jurisdiction. This "change," said the Court, was consistent with the "general policy" of 1887 Act, which was to "contract" federal jurisdiction.\textsuperscript{97}

The author of Metcalf, Justice Harlan,\textsuperscript{98} dissented on the removal question in an opinion joined by Justice Field.\textsuperscript{99} Harlan emphasized that the 1875 statutory language describing the original jurisdiction of the federal
courts had remained unchanged in the new Act.100 Moreover, the drafters did not attempt to alter the meaning of the words "arising under [federal law]," either in the section granting original jurisdiction or in the one authorizing removal, both of which repeated the language.101 Since these words retained their original meaning, Harlan argued, they must have continued to refer to suits in which either party raised the federal matter.102 Metcalfe itself had reaffirmed the principle that suits presenting federal defenses could "arise under" federal law for that reason alone. Congress, the dissent urged, could not have intended to upset the long-standing rule that gave defendants and plaintiffs an equal option to invoke a federal forum.103 All the Metcalfe Court had done was to decide that a plaintiff could not invoke federal court jurisdiction merely by anticipating matters that were not part of the complaint; the plaintiff was simply forced to wait for the defendant to plead the requisite federal matter.104 The Metcalfe rule was not intended to affect defendants raising federal questions in their answer.

The dissent further urged that the specific cross reference in section 2 that allowed removal of suits "arising under federal law... of which the [courts] are given jurisdiction by [section 1]" did not limit the defendant's ability to remove to the plaintiff's ability initially to secure jurisdiction. Whether the plaintiff could or could not satisfy Metcalfe did not bear on the question whether the suit arose under federal law and was thus one over which the lower federal courts continued to have jurisdiction. Instead, Congress inserted the provision to make certain that removal of cases arising under federal law, including cases in which the federal matter was first raised in defense, would be limited by other provisions applicable to original jurisdiction in section 1, such as the recently amended jurisdictional amount requirement.105

The Court in Union & Planters' Bank significantly changed the contours of lower federal court jurisdiction, yet neither Justice Harlan nor the Court majority inquired into the legislative history of the 1887 Act, which the Court had found to dictate this dramatic change. Neither party had briefed the question of congressional intent and thus the Court's ruling on removal rights was both unsought and unexpected. A look at the legislative history, however, would have cast considerable doubt on the majority's ready conclusion that the Act's "general policy" supported its restrictive reading of the removal amendments.106

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100. See id. at 466 (Harlan, J., dissenting).
101. See supra notes 92-93.
102. See 152 U.S. at 468-69 (Harlan, J., dissenting).
103. See id. at 469-70 (Harlan, J., dissenting).
104. See id. at 468-69 (Harlan, J., dissenting).
105. Id. at 471 (Harlan, J., dissenting).
106. See infra text accompanying notes 107-87.
D. The Judiciary Act of 1887 and the Congressional Understanding

1. The Legislative Background

The 1875 Judiciary Act had an immediate impact on the volume of litigation in the federal courts. Not only did the dockets of the lower federal courts begin to swell, but the appellate caseload of the Supreme Court climbed to new and well-publicized levels. While there were several early efforts at curbing the jurisdictional revolution engendered by post-Civil War events, most of them proved to be false starts. The persistent and ultimately successful protagonist of these judicial reforms was Representative David Culberson of Texas, who was recognized by his colleagues as “one of the best lawyers” in the House. It was his 1886 bill, albeit substantially modified, that was ultimately signed into law in 1887.

In their classic study, The Business of the Supreme Court, Professors Frankfurter and Landis systematically and sympathetically chronicled the efforts of legislators such as Culberson to improve the administration of the ailing federal judicial system during the quarter of a century following the Civil War. They noted that the fundamentally different outlook concerning the reach of federal judicial power held by the two houses of

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107. See infra text accompanying notes 115-29, 149-54.
108. See F. Frankfurter & J. Landis, supra note 19, at 77-78.
109. There were at least a half a dozen proposals to amend the 1875 Act within a short time after its passage. F. Frankfurter & J. Landis, supra note 19, at 89 & nn.147-48. The authors noted that “the legislation of 1875 reflected the attitude of what was the last overwhelmingly Republican post-war Congress,” and that “[a]fter 1875 the House frequently was Democratic and the Senate ceased to be sweepingly Republican.” Id. at 88.
110. Id. at 90 & n.152 (quoting 13 Cong. Rec. 3639 (1882) (statement of Sen. Frye)). Culberson had been in charge of four unsuccessful bills before his 1886 effort. See infra note 112 and accompanying text.
111. See H.R. 2441, 49th Cong., 2d Sess., 18 Cong. Rec. 613 (1887). The bill was introduced on January 6, 1886, 17 Cong. Rec. 487, and it was reported from the House Judiciary Committee over two months later. Id. at 2454.

113. See generally F. Frankfurter & J. Landis, supra note 19, at 56-102; see also Hart & Wechsler, supra note 35, at 39 (referring to 1870-1891 period as “nadir of federal judicial administration”).
Congress hindered the achievement of judicial reform. The House of Representatives after 1876 was dominated by heavily Democratic constituencies from the more rural and agricultural South and West, while the Senate, still largely Republican, was more closely allied to eastern financial and industrial concerns, many of which conducted their business on a nationwide scale. They observed that the House generally tended to be much more hostile to the expansion of lower federal court jurisdiction and dissatisfied with the loss of state court control that had resulted from the 1875 Act. The Senate, on the other hand, was reluctant to decrease the immediate availability of federal courts, particularly for out-of-state or federally-chartered business concerns that otherwise would be remitted to local tribunals. This political alignment assured that most efforts to restructure the 1875 regime would enjoy only uncertain chances of success.

Representative Culberson modeled his 1886 bill on earlier ones that had been rejected in each of the previous four Congresses. Like the other proposals, the 1886 bill sought to amend the first section of the 1875 Act by quadrupling the jurisdictional amount in both diversity and federal question suits from $500 to $2000, to relieve the federal courts "of a large amount of business which can be as satisfactorily disposed of by the State courts . . . and with more dispatch and less cost to litigants." The bill also sought to eliminate the diversity jurisdiction conferred in section 1 in favor of assignees and to restore the law to what it had been under the Judiciary Act of 1789. The House Report accompanying Culberson's 1886 bill saw the 1875 Act's assignee clause innovations as "a fruitful source of fraud" on the courts and a source of "annoyance and expense" to debtors.

In addition, the 1886 bill, like its predecessors, attempted to amend section 2 of the 1875 Act by abolishing the plaintiff's right to remove in diversity and federal question cases. As Culberson explained on the floor of the House just before the passage of his bill, it was only just and proper to make plaintiffs abide by their initial choice of forum. His scheme

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114. See F. Frankfurter & J. Landis, supra note 19, at 88-89, 91-93; see also supra note 109.
116. Id. at 92-93 nn.159-60. Similar concerns have been thought to lie behind the 1875 statute itself. See supra notes 54-62 and accompanying text.
117. See supra note 112.
120. See id.
121. See id.
122. See 18 Cong. Rec. 614 (1887) (statement of Rep. Culberson). The House Committee on the Judiciary observed:

The next change proposed is to restrict the right to remove a cause from the state to the federal court to the defendant. As the law now provides, either plaintiff
still would have allowed a defendant to remove diversity suits, and it would have continued to allow for a defendant to remove federal question suits, but only if "he shall make it appear to the court in which the case is pending that his defense depends upon a proper construction of the Constitution . . . or some [federal] law or treaty . . . ."\textsuperscript{123} Culberson proposed adding specific language to that effect.\textsuperscript{124}

Finally, Culberson's bill and its predecessors proposed amendments to section 3 of the 1875 Act greatly restricting the access of state-created corporations to federal courts. At that time, a corporation was considered to be of diverse citizenship from anyone who was not a citizen of its state of incorporation.\textsuperscript{125} Culberson proposed to eliminate diversity jurisdiction for suits "between a corporation and a citizen of any State in which such corporation, at the time the cause of action accrued, may have been carrying on any business authorized by the law creating it . . . ."\textsuperscript{126} This amendment was designed to give states more control over tort litigation involving foreign corporations doing business and causing injuries within their boundaries. When sued on injuries arising out of in-state activities, such corporations were to be treated for diversity purposes under this proposal as though they were citizens of that state.\textsuperscript{127} The 1886 bill also attempted to restrict similarly the existing free availability of removal by federally-chartered corporations when sued in state courts on state law causes of action.\textsuperscript{128} Some of the major railroads were federally-chartered, and removal of state court litigation against them was considered to be their "daily practice."\textsuperscript{129} Insofar as preserving state court jurisdiction was concerned, such federally-created corporations presented a problem no different from that presented by state-created corporations. The proposal sharply curtailed removal by either type of corporation.

\begin{itemize}
  \item or defendant may remove a cause. This was an innovation on the law as it existed from 1789 until the passage of the Act of 1875.
  \item In the opinion of the committee it is believed to be just and proper to require the plaintiff to abide his selection of a forum. If he elects to sue in a state court when he might have brought his suit in a federal court there would seem to be, ordinarily, no good reason to allow him to remove the cause.
\end{itemize}

123. 18 Cong. Rec. 614 (1887) (statement of Rep. Culberson); see also infra note 146.
127. See H.R. Rep. No. 1078, 49th Cong., 1st Sess. 2 (1886). The 1880 debates over Culberson's second bill, see supra note 112, reveal the fervor with which certain members of the House championed state regulation of corporations doing interstate business. See, e.g., 10 Cong. Rec. 723-24 (1880) (statement of Rep. Willits); id. at 725 (statement of Rep. Weaver); see also infra note 151.
128. See H.R. Rep. No. 1078, 49th Cong., 1st Sess. 2 (1886); see also infra notes 167-77 and accompanying text.
Prior to Culberson’s 1886 bill, each of the earlier proposals had met a similar fate: the bills were reported favorably by the House Judiciary Committee, which detailed the reasons for passage; they were debated, passed by the House, and were then promptly buried in the Senate Judiciary Committee. The 1886 bill survived, but not before undergoing substantial modifications in the Senate, where a member of its Judiciary Committee dubbed the bill “altogether extreme.” The most far reaching of the House’s amendments to the 1875 Act were either rejected or revised. The Senate completely eliminated the provisions that would have expanded corporate citizenship in diversity cases and rejected in substantial part the assignee clause reform. It likewise refused to restrict removal for federally-chartered corporations, although it did make a partial concession to the House by declaring that for diversity purposes national banking associations were citizens of the states in which they were located. The Senate did approve two reforms proposed by the House: the increase in the amount-in-controversy requirement and the elimination of plaintiff removal.

The Senate, however, deleted the House bill’s additional and explicit language regarding defendant removal. In the original version of Culberson’s bill, as in each bill the Senate rejected in earlier years, the House had amended section 2 of the 1875 Act to provide for defendant removal.

130. Congress never voted on the first of these proposals restricting the availability of a federal forum for corporations based on their citizenship; similar bills passed the House in the 47th, 48th, and 49th Congresses. See supra note 112.
132. See id. at 613. The Senate eliminated the reference to suits “founded on contract” and substituted by amendment the language in section 1 that was finally enacted, which included within it a proviso excepting, inter alia, promissory notes made by corporations. See id. at 2542.
133. See id. at 2542-45.
134. Id. at 2542-43. The bill as passed by the House had provided in section 1 that no “circuit or district court [shall] have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of bills of exchange” See id. at 613. The Senate eliminated the reference to suits “founded on contract” and substituted by amendment the language in section 1 that was finally enacted, which included within it a proviso excepting, inter alia, promissory notes made by corporations. See id. at 2542.
135. See F. Frankfurter & J. Landis, supra note 19, at 94-95.
136. See 18 Cong. Rec. 2543 (1887). The provision added by the Senate by way of amendment to the House Bill was enacted as section 4 of the 1887 Act.
137. The Senate’s amendments also revised section 5 of the 1875 Act, a task that the House had not undertaken, by providing for immediate remand whenever the lower court found that the suit was “improperly removed,” and by eliminating the availability of immediate Supreme Court review of these orders. See 18 Cong. Rec. 2543 (1887); see also supra note 40 and accompanying text. Section 6 of the 1887 Act also provided “[t]hat the last paragraph of section 5 of the [1875] act” be repealed, with a proviso that the new Act would not affect jurisdiction of suits removed from state court or commenced in federal court before its passage. See Act of Mar. 3, 1887, ch. 373, § 6, 24 Stat. 552, 555, amended by Act of Aug. 13, 1888, ch. 886, § 1 25 Stat. 433. 433-36.
of diversity and federal question suits "of which the [federal] courts . . . are given original jurisdiction by the preceding section."\textsuperscript{138} The Senate left this language untouched. The House amendments for that section had also added, however, that defendant removal of cases arising under federal law would be possible "whenever . . . [the] defense depends . . . upon a correct construction of" the Constitution or federal law.\textsuperscript{139} The 1887 Act, of course, does not contain this language.\textsuperscript{140} The Senate Judiciary Committee reported the House bill with an amendment striking this final phrase,\textsuperscript{141} and the Senate unanimously accepted the amendment without debate.\textsuperscript{142} Although the House apparently objected to certain of the Senate's amendments, it later receded from its objections in conference.\textsuperscript{143}

The unexplained deletion of this provision that explicitly permitted removal by defendants based on federal questions raised in defense would appear to support the \textit{Union & Planters' Bank} conclusion—that the 1887 Act eliminated federal defense removal. This suggestion is made even more appealing given the Metcalf decision and the wording change in the 1875 Act's removal provision (section 2) that had incorporated a reference to the "original jurisdiction" (section 1) in defining the scope of removal. Initially tempting though it may be, such a conclusion is unwarranted. If anything, this and other aspects of the legislative history of the 1887 Act tend to support Justice Harlan's \textit{Union & Planters' Bank} dissent.

\section*{2. Congress' Intent}
\subsection*{a. The Struggle over Out-of-State and Federally-Chartered Corporations}

It must be remembered that each of the various bills for reform of the 1875 Act arose in the House, and died in the Senate Judiciary Committee. The Senate, not the House, was the reluctant party in the effort to restrict the scope of lower federal court jurisdiction. If the Senate's deletion of a reference to removal by the raising of federal defenses was meant

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\item \textsuperscript{138} \textit{See supra} note 93.
\item \textsuperscript{139} \textit{See} 18 Cong. Rec. 613 (1887). As proposed, the second section of the bill read:
\begin{quote}
That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, . . . may be removed by the defendant or defendants therein to [federal court] whenever it is made to appear from the application of such defendant or defendants that his or their defense depends in whole or in part upon a correct construction of some provision of the Constitution or law of the United States, or treaty made by their authority. . . .
\end{quote}
\textit{Id.}
\item \textsuperscript{140} The omission of the removal language and the events leading up to it were first noted by Hornstein, \textit{supra} note 31, at 607-08 n.234.
\item \textsuperscript{141} \textit{See} 18 Cong. Rec. 2542 (1887). No report accompanied the Committee's action.
\item \textsuperscript{142} \textit{See id.}
\item \textsuperscript{143} \textit{See id.} at 2727; F. Frankfurter & J. Landis, \textit{supra} note 19, at 95 & n.172.
\end{itemize}
to further restrict federal question jurisdiction in the lower courts beyond what the House had recommended, it would be the sole instance of role reversal in a long and drawn out legislative struggle. In addition, a consistent string of House Reports suggests that the purpose of the 1887 amendments of the 1875 Act’s removal provision was simply to eliminate the possibility of plaintiff removal because it was thought “just and proper to require the plaintiff to abide by his selection of forum.”144 There was concern that permitting a plaintiff to remove would be unfair to defendants who would be faced with the inconvenience and expense of litigation in the often remote federal court.145 Calls for abolition of plaintiff removal, moreover, were repeatedly advanced with explicit and consistent reservations of defendant removal in diversity and federal question suits, so that in no event would a party, even a foreign corporation, that raised an issue of federal right or privilege in defense, be denied the opportunity to remove to a federal forum.146

The debates and the committee reports plainly disclose that Congress sought to remedy abuses and overloaded dockets in the federal judicial system, but not a single voice suggested that federal defense removal in

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144. See H.R. REP. No. 1078, 49th Cong. 1st Sess. 1 (1886); see also H.R. REP. No. 196, 48th Cong., 1st Sess. 2 (1884); H.R. REP. No. 680, 47th Cong., 1st Sess. 2 (1882).

145. See H. R. REP. No. 680, 47th Cong., 1st Sess. 2 (1882). See also the remarks of Representative Waddill of Missouri decrying the onerous travel burdens placed on litigants in the less populous West whenever removal was had from the state to the federal courts. 10 CONG. REC. 1014-15 (1880) (statement of Rep. Waddill).

146. See, e.g., 10 CONG. REC. 702 (1880) (statement of Rep. Wellborn); id. at 814 (statement of Rep. New); id. at 723-24 (statement of Rep. Willits). Culberson described the scope of his bill as follows:

The methods employed by the bill are, first, to raise the minimum amount giving the circuit courts jurisdiction from $500 to $2,000. In the second place, we propose to take away from the circuit courts of the United States all jurisdiction of controversies between the assignees of promissory notes and the makers thereof, unless suit could have been maintained in such courts had no assignment been made. In the next place, the bill proposes to take away wholly from the circuit courts the jurisdiction now exercised by them over controversies in which one of the parties is a corporation organized under the laws of one State and doing business in another State.

These are the three methods by which the jurisdiction of the circuit courts of the United States, in respect to the subject-matter, is proposed to be diminished. There is another provision in the bill, in relation to the removal of causes from State to Federal courts. The provisions of the bill take away all right on the part of the plaintiff in a suit to remove his cause from a State to a Federal court after he has elected the forum in which to bring suit. The bill further provides that wherever the cause of action arises under the Constitution of the United States, or a law or treaty thereof, the defendant who is sued in a State court upon such a cause of action may remove the cause to a Federal court, provided he shall make it appear to the court in which the case is pending that his defense depends upon a proper construction of the Constitution of the United States, or some law or treaty thereof.

18 CONG. REC. 613-14 (1887). The House Reports are consistent with the preservation of this right. See supra note 112.
particular, or original federal question litigation in general, posed a problem of either abuse or overload. Rather, the hue and cry after 1875 was unfailingly raised over the burdens imposed by diversity cases, particularly those involving foreign corporations. Although the 1875 Act’s grant of general federal question jurisdiction can be blamed for part of this burden, the swollen dockets of the federal courts in significant part resulted from increased interstate business activity after the Civil War. ‘‘[O]ver one-third’’ of the cases in the lower federal courts were suits between citizens of one state and corporations formed under the laws of another. Although foreign corporations can routinely invoke diversity jurisdiction today, that possibility evoked great concern in the House, which sought to make these newly emergent ‘‘legal Goliaths’’ accountable in local courts. Removal must have been particularly irritating

Although Culberson speaks here of allowing removal of causes of action arising under federal law in which the defendant shows that his or her defense will call for the construction of federal law, he did not contemplate a dual requirement in which a defendant could remove a case with a federal defense only if it already arose under because of the plaintiff’s complaint. He indicates elsewhere that it was enough for removal that the defendant raised such a defense to a state law claim. See infra note 172. In fact, Culberson’s language here suggests that he understood a case to arise under federal law simply because it raised a federal issue by defense, just as the federal courts had understood it. The particularity with which the federal issue would have to be raised under Culberson’s plan, however, was something new. See infra text accompanying notes 155-76. Culberson’s plan did mean, however, that a defendant could not remove a case from state court, even if the plaintiff’s own claim arose under federal law, unless the defense implicated the construction of federal law.

147. See generally Hornstein, supra note 31, at 607-08 n.254 (rightly observing that federal question removal was not subject of any of ‘‘major changes’’ wrought by bill). Of course, the raising of the amount-in-controversy requirement affected both diversity and federal question jurisdiction, and the attempt to limit removal by federal corporations (which the Senate rejected) was itself aimed at a subcategory of federal question litigation.

148. See infra text accompanying notes 163-72.


150. 23 U.S.C. § 1332(c) (1982) (for purposes of diversity jurisdiction, corporation is deemed citizen of state of its incorporation and state where it has its principal place of business). Culberson’s bill had made the following proposal:

That the circuit courts of the United States shall not take original cognizance of any suit of a civil nature, either at common law or in equity, between a corporation created or organized by or under the laws of any State and a citizen of any State in which such corporation at the time the cause of action accrued may have been carrying on any business authorized by the law creating it, except in cases arising under the patent or copyright laws, and in like cases in which said courts are authorized by this act to take original cognizance of suits between citizens of the same State; nor shall any such suit between such a corporation and a citizen or citizens of a State in which it may be doing business be removed to any circuit court of the United States, except in like cases in which such removal is authorized by the foregoing provision in suits between citizens of the same State.

18 Cong. Rec. 613 (1887).

151. See 10 Cong. Rec. 725 (1880) (statement of Rep. Weaver). There were a number
to the states since, under the regime of *Swift v. Tyson*, the federal court could apply its own general common law and exclude state law in deciding the liability of out-of-state corporations for their ordinary torts. Observers also suspected that collusion surrounding the assignment of debts in efforts to manufacture diversity under the 1875 changes in the assignee clause had "multiplied the business in [the federal courts] enormously." By contrast, federal question litigation, and more particularly, federal question removal by defendants, was not a target or even a subject of debate during the discussion of the 1887 reforms.

In this historical context, what is to be made of the elimination of the explicit provision for removal based on federal defenses? Arguably, since the law after 1875 always had allowed for defendant removal of federal question defenses, the Senate eliminated the explicit removal language proposed by Culberson not because it intended to abolish federal defense removal, but merely because it viewed the language as superfluous. The courts had upheld defendant removal of these cases even in the absence of an explicit statutory reference to federal defenses in section 2 of the 1875 Act on the ground that they arose under federal law within the meaning of that section and the first section to the Act. Under this view the 1887 Act's elimination of plaintiff removal rights could not be presumed to negate the defendant's preexisting removal rights.

of colorful speeches denouncing corporate power in the course of initial debate over these removal provisions. See, e.g., id. at 950-54, 990-92 (statement of Rep. Knott); id. at 816-20 (statement of Rep. McMillin); id. at 723-24 (statement of Rep. Willits). Representative Townsend of Illinois dubbed the law permitting corporate removal "un-American in its tendencies," see id. at 1276 (statement of Rep. Townsend), and lamented that a litigant entering a forum "as an antagonist of corporate capital may well tremble with fear that justice is not only a blind but a deaf goddess," see id. at 1277; see also id. at 1278-79 (statement of Rep. Townsend). The problem of corporate removal was said to have "aroused a considerable sentiment of jealous opposition in the States," particularly in the western states. See 3 C. Warren, The Supreme Court in United States History 408 (1922); see also infra note 161.

152. 41 U.S. (16 Pet.) 1 (1842).
153. See 41 U.S. (16 Pet.) at 17-21; see also 10 Cong. Rec. 723 (1880) (statement of Rep. Willits) (noting that removal was problem in diversity cases because federal courts would give "different constructions of the law" than would state courts). As a way to get around removal by nonresident corporations sued in state courts, some states tried (unsuccessfully) to outlaw this removal by statute. See, e.g., Barron v. Burnside, 121 U.S. 186, 197, 200 (1887); see also 3 C. Warren, supra note 151, at 408-09.
155. See Hornstein, supra note 31, at 607-08 n.234.
Yet it is more likely that the Senate rejected the House language not to abolish federal defense removal or even because it was superfluous, but because the new language was too restrictive of defendant removal rights as they had existed under the 1875 Act, particularly with respect to federally chartered corporations. According to the language of the House proposal, once the plaintiff had chosen a state forum, removal based on a nondiverse defendant’s answer was possible only when the defense depended upon “a correct construction of some provision of the Constitution or law of the United States.”

This proviso, like the others in the proposed bill,

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Ill. 1883) (same); Connor v. Scott, 6 F. Cas. 313, 314-15 (C.C.W.D. Ark. 1876) (No. 3119) (bankruptcy).

157. See 18 Cong. Rec. 613 (1887); see also id. at 614 (statement of Rep. Culberson). The Constitution probably did not require that federal question jurisdiction be founded upon an actual issue of the “construction” of federal law. In Osborn itself, for example, Chief Justice Marshall’s opinion for the Court can be read to suggest at one point that a case “arises under” within the meaning of the constitutional grant whenever there is a potential federal question. See Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 874 (1824); see also id. at 874 (Johnson, J., dissenting) (arguing that Constitution does not vest arising under jurisdiction over cases “merely on the ground that a [federal] question might possibly be raised in it”) (emphasis in original). Indeed, some have considered that reading Osborn to say that a case arises under federal law within the meaning of article III whenever there is a potential federal question is the traditional reading. See, e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 481-82 (1957) (Frankfurter, J., dissenting). More recently, however, the Supreme Court skirted the question of whether article III would permit jurisdiction to be based merely on the existence of a “potential” federal question. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 492-93 (1983).

Others, however, have focused on the earlier statement by Chief Justice Marshall in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 379 (1821), that “[a] case . . . may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either.” See supra note 43 and accompanying text. This phrasing arguably requires that the decision “actually depend” on such a construction rather than that it conceivably or “possibly” depend on it. See HART & WECHSLER, supra note 35, at 867. Of course, for Supreme Court review of state court decisions (the issue in Cohens), the requirement that the state courts actually have faced the federal question at the time of review seems a necessary condition for jurisdiction. See Osborn, 22 U.S. (9 Wheat.) at 822; cf. Cohen, supra note 4, at 892-93 n.18.

Still others have focused on the language suggesting that the suit against the Bank arose under federal law because its congressional charter was in some sense an original “ingredient” of the Bank’s “original cause,” see Osborn, 22 U.S. (9 Wheat.) at 823. See also Mishkin, supra note 32, at 187. Thus, the Bank’s status to sue could be seen as a necessary allegation in the plaintiff’s complaint to show jurisdiction, whether or not its status was actually contested. Because its rights and duties were created and defined by federal law, any suit to enforce a federally-defined right necessarily implicated a federal ingredient in the plaintiff’s claim, quite apart from actual or possible constructions of federal law. Perhaps this is just another way of saying that jurisdiction may extend over cases in which a party seeks to enforce a federal right. Cf. id. (arguing that Osborn’s purpose was to protect Bank as federal instrumentality).

Although decisions such as the Pacific R.R. Removal Cases indicated that no construction of federal law would be necessary to secure federal jurisdiction, courts often fastened on the “construction” language like that which Culberson was proposing. See supra note 43
was meant not to enlarge, but to restrict, the lower federal courts' jurisdiction. In the 1885 *Pacific Railroad Removal Cases*, the Court had held that the mere existence of a federal charter sufficed to justify the defendant's removal under the 1875 Act, even in the absence of question regarding the charter's actual "construction," or the construction of any other matter of federal law.\(^{158}\) Under a generous reading of *Osborn*, the charter alone brought that case within article III and within the "arising under" language of the 1875 statute's removal provision.\(^{159}\) By imposing a requirement that defendants show that their defense presented a federal issue for construction, the House could effectively reverse the Court's decision to allow removal solely on the basis of an allegation of the railroad's federal charter.\(^{160}\)

It is quite consistent with the Senate's philosophy in this period for it to have rejected this proposal to avoid overturning the Court's holding in the *Pacific Railroad Removal Cases*. It could thus preserve a federal forum for instrumentalities affected with a national interest and shield them from the perceived hostility of local courts.\(^{161}\) It is likewise consistent with the House's philosophy for it to have proposed elimination of a federal forum for federally-chartered corporations, the most conspicuous of which were

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and accompanying text. One congressman supporting Culberson's original bill suggested that in light of such cases, Culberson's additional "construction" language might not even be necessary. See 10 Cong. Rec. 816 (1880) (statement of Rep. Philips) (discussing Gold-Washing).

158. See 115 U.S. at 11.

159. See id.; supra note 66.

160. Whether suit against a federally-chartered corporation arose under federal law because of the plaintiff's complaint, or whether it arose under by virtue of the corporation's answer, Culberson's proposal would have worked a basic change in the then-existing jurisdictional scheme by restricting federal jurisdiction over such entities. If, on the one hand, a case against a federal corporation was thought to arise under federal law because the charter was implicated in the federal corporation's defense, the proposed language would have required more than the simple raising of the charter by the corporation in its answer. If, on the other hand, the plaintiff's complaint against a federally-chartered corporation was itself thought to make the case one arising under federal law because the complaint properly alleged the defendant's federal status, then the proposed language would have still required the federal entity to raise some additional matter involving the construction of federal law in its answer in order to obtain removal. From either perspective the Senate's eventual elimination of the House language added to the federal courts' jurisdiction when compared to what the House had proposed.

161. See supra text accompanying notes 115-16, 128-29. For the politics surrounding the 1871 bill to federally charter the Texas & Pacific Railway, one of the best known beneficiaries of the federal corporation removal rules (along with the previously incorporated Union Pacific Railway), see C. Woodward, *Reunion & Reaction: The Compromise of 1877 and the End of Reconstruction* 51-67 (3d ed. 1967). Other, nonfederally-chartered railroads and corporations benefited from a comparable form of protective federal jurisdiction for ordinary state law claims by means of the diversity clause, which they could invoke against all persons not citizens of their state of incorporation. On the strife that had developed between the midwestern (and southern) states and the railroad industry generally, see G. Miller, supra note 57.
federally-incorporated railroads. Most importantly, if the Senate rejected the House proposal because it might be too restrictive of removal rights, it would mean that Congress agreed to retain jurisdiction over cases in which the federal matter was first presented by the answer (whether or not calling for the construction of federal law), and that it wished to adhere to the broad federal question removal framework of the 1875 Act.

b. Corporations and Jurisdiction: The House Version

This reading of the elimination of Culberson's novel removal language is supported by the House's approach to both state- and federally-chartered corporations, the Senate's rejection of that approach, and the fate of another jurisdictional statute that was expressly repealed by the 1887 Act. With respect to corporate entities that did business on an interstate scale, the 1887 Act as originally drafted had a two-fold goal. First, diversity jurisdiction over state-created corporations was to be severely restricted by making them citizens of any state in which they did business when sued for injuries arising out of that business. Second, as observed in the House Reports, other proposed changes in the law would have a comparable effect on congressionally-created corporations and would prevent them from continuing to sue freely in federal court or to remove when sued in state court. As the House Judiciary Committee explained, "the change in the law proposed embraces all such [federally-chartered] corporations, as well as corporations created or organized under the laws of a State."

Somewhat mysteriously, however, no provisions in the House bill speak directly about restrictions on federal jurisdiction over congressionally-created corporations. Instead, the bill apparently tried to accomplish this result indirectly—by repeal of section 640 of the Revised Statutes, an 1868 law that had permitted federally-chartered corporations to remove in certain cases, and by adding to section 2 of the 1875 Act the above-noted language that conditioned defendant removal on the presentation of a defense requiring a "construction" of federal law.

162. See infra text accompanying notes 163-72.
163. See supra text accompanying notes 125-27.
165. See id.
166. After its discussion about subtracting federal jurisdiction over corporations created under the laws of one state who did business in and injured persons in other states, the 1886 House Report, as did its predecessors, added:

Again, there are corporations created under the laws of Congress.

There has been no judicial ascertainment of the domicile of such corporations, but under existing law such corporations are permitted to sue in the Federal courts, and when sued in a State court are authorized under section 640, Revised Statutes, to remove the cause to the circuit court of the United States. The change in the law proposed embraces all such corporations, as well as corporations created or organized under the laws of a State.

The repeal of section 640 was critical to the House's efforts to restrict the availability of a federal forum to federal corporations. The 1868 statute had been enacted before the 1875 grant of general federal question jurisdiction, and it had permitted removal by any "corporation organized under federal law" when its removal petition showed that it had "a defense arising under or by virtue of [federal law]." At first glance, it would appear that this statute offered the precise restriction sought by Culberson: removal would be available only when the defendant corporation, being federally-chartered, also raised a federal defense. The force of section 640, however, was not altogether clear. Several lower federal courts had construed it to allow a federal corporation to remove even though the only federal matter alleged in the answer was the corporate charter. This expansive reading was exactly what prompted the initial efforts in the House to secure its repeal. In addition, this construction of section 640 predated the similar result under the 1875 Act in the Pacific Railroad Removal Cases, which could have only heightened the need for reform in the eyes of the House members.

167. See Act of July 27, 1868, ch. 255, § 2, 15 Stat. 226, 227; Rev. Stat. § 640 (1873), repealed by Act of Mar. 3, 1887, ch. 373, § 6, 24 Stat. 552, 555, amended by Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433, 433-36. This statute provided in part: Sec. 640. Any suit commenced in any court other than a circuit or district court of the United States against any corporation...organized under a law of the United States...may be removed, for trial, in the circuit court for the district where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the Constitution or of any treaty or law of the United States.


As a matter of statutory construction the court's opinion in Magee had the better of the argument. Section 640 conferred jurisdiction over federally-chartered corporations when their defense arose under federal law. If, under that provision, the federal charter were itself enough to confer removal jurisdiction, the additional provision in the statute that the corporation must also have a defense that arose under federal law would be rendered superfluous. The 1868 statute, enacted seven years before the grant of general federal question jurisdiction, reads more like a specific grant of federal question removal jurisdiction for congressionally-chartered corporations that raised a federal defense. See infra note 170.

169. The House was well aware of the expansive decisions under section 640. See, e.g., 10 Cong. Rec. 723, 724 (1880) (statement of Rep. Willits).

170. See 115 U.S. at 11, 23. The attorneys for the federally-chartered railroads in that case had urged removal jurisdiction both under the 1875 Act and under section 640. Id. at 3. The Court, however, disposed of the case on the basis of the 1875 Act alone. See id. at 23. The dissent objected not only to the construction given to the 1875 Act, see
It also is clear from the extensive House debates that in repealing section 640 the House was willing to continue to allow defendants, even defendant federal corporations, to remove when they actually raised a question concerning the construction of federal law in the answer. For federal corporations, the House's goal was to be achieved not simply by eliminating the expansively construed section 640, but by qualifying federal defense removal in the amendments to section 2 of the 1875 Act with the "construction" requirement. Making these federally-chartered entities either raise some question concerning the construction of federal law or their charter in their defense would have made removal harder by putting a stop to removal based simply on an allegation of the federal charter in the pleadings. The proposed alteration of the 1875 Act would also have effectively reversed the Court's construction of that Act in the Pacific Railroad Removal Cases, which had similarly allowed removal by a federally-chartered corporation without requiring it to raise any issue calling for the actual construction of federal law. Culberson himself recognized the connection between these two changes, when he observed just before the passage of his 1886 bill that although section 640 was to be repealed, the amendments to section 2 had further provided that "whenever a corporation, or any one else," is sued in a state court and the defense "depends upon a right construction" of federal law, then the party could remove.

supra note 66 and accompanying text, it also found the issue of removal foreclosed by section 640, see 115 U.S. at 24-25 (Waite, C.J., dissenting). It read this provision to require a federally-chartered corporation to raise a defense that itself arose under federal law. See id. (Waite, C.J., dissenting).

Section 640, observed the dissent, gave authority over suits brought against the company in a State court "upon the petition of such defendant, verified by oath, stating that such defendant has a defence arising under or by virtue of the Constitution or of any treaty or law of the United States." If all suits by or against, and all defences by, a federal corporation necessarily arise under the laws of the United States "because the charter of incorporation not only creates it, but gives it every faculty which it possesses," why require the corporation, when asking for a removal, to cause an oath to be filed with its petition that it has a defence in the suit which arises under the Constitution or laws? If . . . every suit by or against, and every defence to such a suit by, a federal corporation must arise under the laws of the United States, why require it to set forth in its petition for removal that its defence does arise under such a law? If such a corporation cannot "have a case which does not arise literally, as well as substantially, under the law," what the necessity for saying more than that it is such a corporation?

Id. at 24-25 (Waite, C.J., dissenting); cf. Magee v. Union Pac. R.R., 16 F. Cas. 390, 390-91 (C.C.D. Nev. 1873) (No. 8945), which is discussed supra note 140. Section 640's provisions, which the dissent read as limiting federal corporation removal, were also thought to control the scope of the 1875 Act's arising under language. See 115 U.S. at 25 (Waite, C.J., dissenting).

171. See supra note 146; see also infra note 172.


There is another provision in the bill to which I wish to call attention, and that is, it repeals section 640 of the Revised Statutes, which empowers or
c. Corporations and Jurisdiction: The Senate Reaction

Predictably, the Senate balked. When it took up Culberson’s bill for the last time, it rejected most of the House’s more radical reforms. Although the Senate concurred with the House in the repeal of section 640, it also eliminated the qualifying language concerning defendant removal that was added to section 2 by the House. By accepting only half of Culberson’s package for dealing with jurisdiction over federally-chartered corporations, the Senate accomplished dramatically different results. The Senate was no less concerned with clearing up the uncertain meaning of section 640, but not because of any worry that it might be read as permitting removal of all suits against federally-chartered corporations; the Senate was more likely concerned with the barriers that the old provision might create for such removal. On its face, section 640 imposed a requirement that federally-chartered corporations seeking removal also raise a federal defense arising under federal law, a requirement not unlike that which Culberson was now seeking to make more explicit. In addition, although some cases had construed section 640 to permit removal on the mere showing of a federal charter, others had construed the section to require more than that to secure removal. More importantly, the Supreme Court had expressly left open the question of the force and scope of the older removal provision, which had arguably been rendered superfluous by the broad federal

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authorizes a corporation created under an act of Congress, whenever sued in a State court, to remove the cause from such court to a Federal court upon a mere suggestion that the defense of such corporation to the cause of action arises under an act of Congress, or under the laws of Congress. We repeal that statute, and the bill provides whenever a corporation, or any one else, is sued in a State court and the defense of such corporation or individual depends upon a right of construction of the laws of Congress, or of the Constitution of the United States, then such cause may be removed.

*Id.; see also* 10 Cong. Rec. 702 (1880) (statement of Rep. Culberson) ("[N]o national corporation can complain at the repeal of section 640, because if such corporation has a meritorious federal defense springing or arising under [federal law] an ample method is provided by that amendment to remove the cause to a Federal court.").

In some respects, Culberson’s plan echoes Justice Johnson’s dissent in *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 888-89 (1824) (Johnson, J., dissenting), insofar as he adopts a wait-and-see approach to determining federal jurisdiction—that is, unless the answer shows the necessity of construing a question of federal law there is no federal forum via removal. That similarity, however, would not have run afoul of any constitutional limitation decreed by the *Osborn* majority opinion. *See supra* note 89.

173. See 18 Cong. Rec. 2542 (1887); *see also* id. at 613.


question jurisdiction conferred in the 1875 Act. By the repeal of section 640 and the subsequent deletion of the House's restrictive removal language from section 2, federal corporations would be relieved of the task that Culberson had planned for them, of presenting a defense calling for the construction of federal law when seeking removal. The Senate thereby removed any cloud that may have remained over unencumbered removal arising from section 640 and frustrated the legislative attempt to overturn the Pacific Railroad Removal Cases.

It is generally understood that the Senate rejected the House's effort to curb removal by federally-chartered corporations, but just how the rejection was accomplished has been left unexplained. The confusion is easy to understand because the Senate's elimination of the additional federal defense removal language does not appear to have conferred a benefit on federally-chartered entities. Against the backdrop of the House's motives, however, the Senate's rejection of the explicit removal provision indicates its desire to add back part of the jurisdiction subtracted by the House and to preserve the status quo of federal defense removal.

3. Congress and the Court

Viewing the 1887 Act in this light suggests that Union & Planters' Bank was at odds with Congress' intent on the question of removal of suits presenting federal defenses. The majority found it significant that revised section 2 limited defendant removal to those cases in which the federal courts had original jurisdiction under section 1, and it held that this cross reference limited removal to cases in which the plaintiff could have invoked the federal court's original jurisdiction consistent with the Metcalf rule. This construction worked to exclude from federal trial court jurisdiction an entire class of claims based on federal right or privilege, or an interpretation of federal law. Yet, if such was Congress' intent, it strangely went unmentioned in the legislative history of an Act containing other thorough and extraordinarily well-explained proposals. The House under Culberson's leadership had itself offered this change in language, and it is clear that

176. See Pacific R.R. Removal Cases, 115 U.S. 1, 23 (1885).
177. See F. Frankfurter & J. Landis, supra note 19, at 94-95 (noting that Senate refused to accept House proposal to eliminate federal corporation removal). There were also efforts, after 1887, to eliminate jurisdiction over federally-chartered corporations. Id. at 136-37. By deleting Culberson's additional language it is at least theoretically possible to conclude that the Senate meant to eliminate removal of cases where federal questions were presented only in the answer. This interpretation assumes that the proposal's elimination was the Senate's way of restoring freely available removal jurisdiction over federal corporations and simultaneously subtracting federal defense removal for all other litigants. Although that was the net result of the Court's later decisions construing the 1887 Act, see infra notes 220-24 and accompanying text, it seems to be an unusually schizophrenic reason to attribute to that single and otherwise unexplained action of the Senate.
178. See 152 U.S. at 460-61.
the House never supposed that its inclusion would take away from the federal courts those cases in which federal questions were actually raised in defense. In fact, the only reason offered in the record for any change in the wording of section 2 was the desire to eliminate the possibility of plaintiff removal of diversity and federal question suits. Given the lack of any congressional antipathy toward removal based on federal defenses, and given the absence of any suggestion that the new reference to “original jurisdiction” in the amendments to section 2 was meant to impose the Metcalf rule on removing defendants, the significance attributed by the Court to the cross reference seems unjustified.

As Justice Harlan suggested, the language was probably inserted to ensure that removed cases, whether federal question or diversity, would be limited by the amount in controversy, the assignee clause, and the other newly-added limitations imposed in section 1 on original jurisdiction. The need for an explicit cross reference in the removal provision to the congressional alterations on original jurisdiction was a real one. Under the 1875 Act, the Court had construed the absence of such a cross reference in section 2 to mean that the limits on original jurisdiction set forth in section 1 did not apply on removal. Now that Congress, for example, had beefed up the assignee clause by reimposing most of the restrictions of 1789 and had raised the amount in controversy requirement for both federal question and diversity suits, it was even more important to ensure that the new restrictions on original jurisdiction would not be ignored on removal. Indeed, various members of the House emphasized that the new limitation on jurisdictional amount was to apply to removal as well.

179. See supra text accompanying notes 115-37.
180. See 152 U.S. at 471 (Harlan, J., dissenting). Harlan’s suggested reading has recently been convincingly resuscitated. See Hornstein, supra note 31, at 606-08 n.234.
181. The phrase “of which the [courts] are given jurisdiction by [section 1]” is used twice in section 2 of the 1887 Act—once in referring to removal of cases arising under federal law, and once in referring to removal of “all other cases.” See supra notes 92-93.
182. See Clafin v. Commonwealth Ins. Co., 110 U.S. 81, 88-93 (1884). It was therefore possible under the 1875 Act for an assignee of a chose in action who could not sue originally in the federal courts to secure otherwise forbidden diversity jurisdiction by filing suit in the state court and then removing. See, e.g., Bell v. Noonan, 19 F. 225, 225 (C.C.N.D. Iowa 1884) (dictum). But see Berger v. County Comm’rs, 5 F. 23, 24-25 (C.C.D. Neb. 1880) (noting possibility and explicitly rejecting any construction of 1875 Act that would permit such a result).
183. Although the assignee clause limitations under section 1 of the 1875 Act were found not to control on removal because of the lack of any reference to them in the removal provisions of section 2, courts still found that the $500 amount in controversy requirement applied both to cases filed initially in federal court and to those removed to it. See, e.g., Whitman v. Hubbell, 30 F. 81, 81-82 (C.C.S.D.N.Y. 1887). The reason monetary restrictions on original jurisdiction in the 1875 Act were held to apply on removal, however, was simply that the 1875 version explicitly mentioned the jurisdictional amount limitation in both section 1 (original jurisdiction) and section 2 (removal). Unlike the 1875 Act, the 1887 version failed to repeat the new dollar amount for original jurisdiction ($2000) in the removal provision. See supra notes 92-93. Without the use of the additional language
as to original jurisdiction.\textsuperscript{184} Nothing in the legislative history, moreover, suggests an intent to limit the reference to "original jurisdiction" in section 2 to the plaintiff's ability to secure a federal forum. Nor can it be assumed that the specific limitation announced in \textit{Metcalf v. Watertown} on the plaintiff's ability to invoke original jurisdiction under section 1 of the 1875 Act was on the minds of Congress' members when they passed the

in the second section that allowed removal of cases "of which the [courts] are given jurisdiction in the preceding section," there would have been no monetary limitation on removal in any case, diversity or federal question, over which the first section gave original jurisdiction.

The 1887 Act had also limited the places in which a plaintiff originally could sue a defendant in both federal question and diversity litigation. \textit{See} Act of Mar. 3, 1887, ch. 373, \textsection 1, 24 Stat. 552, 552, amended by Act of Aug. 13, 1888, ch. 866, \textsection 1, 25 Stat. 433, 433-36; J. Dillon, \textit{Removal of Causes from State Courts to Federal Courts} 46-47 (5th ed. 1889); \textit{see also} Vinal v. Continental Constr. & Import Co., 34 F. 228, 229 (C.C.N.D.N.Y. 1888) ("That phrase ['of which the Circuit Courts are given original jurisdiction by the preceding section'] was apparently used to dispense with a recapitulation of the several conditions which determine the jurisdiction of the subject-matter in the first section.").

To be sure, it would not be possible to read the similar language in the current federal question removal statute as merely incorporating the explicit limitation on the jurisdictional amount in the section covering original federal question jurisdiction, since the amount in controversy requirement for original federal question jurisdiction has recently been eliminated \textit{See} Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486 \textsection 2(a), 94 Stat. 2369, 2369 (amending 28 U.S.C. \textsection 1331(2)(a) (1976)); \textit{see also} Comment, \textit{supra} note 5, at 638 n.16. The recent elimination of the jurisdictional amount requirement tells us little, however, about Congress' desire to keep or reject federal defense removal in 1887.

184. \textit{See}, \textit{e.g.}, 10 CONG. REC. 724 (1880) (statement of Rep. Culberson); \textit{id.} at 702, 723 (statement of Rep. Willits); \textit{id.} at 846 (statement of Rep. Robinson); \textit{id.} at 992 (statement of Rep. Hurd); \textit{id.} at 1083-84 (statement of Rep. Lapham). If there was a particular congressional desire in 1875 for a federal trial forum for the resolution of federal questions raised in defense to state court proceedings, the intervening dozen years should not have diminished it. During the time that the Act had been in effect, removal had been a useful tool in raising constitutional and other federal law challenges to state action, and the pace of constitutionally vulnerable legislation did not show any signs of abating. On the contrary, the pace of Supreme Court invalidations of state legislation more than doubled after the 1890's. B. Wright, \textit{supra} note 59, at 108. The Senate's rejection of the one major proposal to cut back on the diversity jurisdiction over foreign corporations also suggests a continuing and unresolved mistrust of state courts. In addition, major figures of the bar were openly questioning whether the popularly accountable state judiciaries would be "sufficiently firm in resisting unconstitutional measures." \textit{See} A. Pal, \textit{Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895}, at 28-29 (1960).

Although the "compromise" of 1877 and the informal conclusion to Reconstruction had been reached soon after the passage of the 1875 Act, simple disenchantment with "civil rights" cannot explain why Congress might have wanted to restrict federal defense removal. First of all, the major judicial dismantling of the substantive civil rights legislation of Reconstruction had been pretty well accomplished before 1887. \textit{See generally} Gressman, \textit{supra} note 27. Second, those particular substantive provisions (or whatever was left of them) were, by section 5 of the 1887 Act, expressly excluded from its operation. \textit{See infra} note 185; \textit{see also} \textit{Union & Planters' Bank}, 152 U.S. at 463; \textit{id.} at 467-68 (Harlan, J., dissenting). Third, the 1875 statute's federal question and removal provisions seem not so much

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1887 Act, since that case was decided well after the new legislation had been signed into law.\textsuperscript{185}

Justice Harlan’s plausible, but not altogether obvious, construction of the change in section 2’s language is also consistent with the interpretation given to the 1887 Act’s amendments by the lower federal courts and contemporary scholars shortly after the latter Act’s passage. Seven years elapsed between the 1887 Act’s passage and the decision in \textit{Union & Planters’ Bank}. During that time many courts had occasion to construe the removal provisions of the Act, but not a single reported opinion even hinted that the

to have been used by parties enforcing the Reconstruction civil rights laws (which had their own jurisdictional and removal provisions) as by parties seeking constitutional protection for commercial interests—parties for whom the 1887 Congress still seemed willing to provide a federal forum.


185. \textit{See} Fraser, \textit{supra} note 4, at 78. The qualification on removal to cases arising under federal law “of which the . . . courts [were] given original jurisdiction” should not have been read as excluding removal of cases in which the federal question arises only by defense for additional reasons. First, Culberson’s original proposal had allowed for removal, under the same qualification, “whenever” the defense depended on a correct construction of federal law. This suggests that cases raising federal defenses were thought to be among those over which the courts were given original jurisdiction by section 1. Culberson himself actually referred to cases with federal defenses as being within the “original” jurisdiction of the federal courts. \textit{See} 10 \textit{Cong. Rec.} 1304 (1880) (statement of Rep. Culberson).

Second, the limitation language has to be read as excluding removal of such cases only if the phrase “original jurisdiction” is restricted to those cases in which the plaintiff could successfully invoke jurisdiction on the filing of a complaint complying with good pleading rules. That, of course, is the way we are accustomed to reading the phrase. The Act, however, leaves open a reading of “original jurisdiction” that includes not just cases the plaintiff could file, but also the class of potential cases in which original jurisdiction could be exercised on removal, assuming removal were elsewhere granted in the statute.

The 1875 Act’s innovation was to confer federal trial jurisdiction over those cases that theretofore could only be heard on appeal in a single federal forum—in the Supreme Court on review from the state courts. Trial or “original jurisdiction” could be exercised directly by the plaintiff, or “acquired indirectly by a removal from the state court.” \textit{Dennistoun v. Draper}, 7 F. Cas. 488, 490 (C.C.S.D.N.Y. 1866) (No. 3804); \textit{see also Railway Co. v. Whitton’s Adm’r}, 80 U.S. (13 Wall.) 270, 287 (1871) (removal before trial is “an indirect mode by which the Federal court acquires original jurisdiction”). The 1875 and 1887 statutes were simply Congress’ way of saying that all cases arising under federal law could be tried in federal court and could get there either initially or on removal. The result of the \textit{Union & Planters’ Bank} decision was to make it appear as if the scope of the statutory “arising under” language had shrunk, since even if it was meant to include cases in which the only federal questions were raised by defense, no one could any longer take such a case into federal court initially (because of the well-pleaded complaint rule) or on removal (because removal had become tied to the plaintiff’s ability to satisfy good pleading rules).
changes in section 2 constricted defendant removal, or that defendants could remove only cases in which the plaintiff might have invoked original jurisdiction under good pleading rules. Quite to the contrary, removal by defendants who raised federal defenses went on just as it had before the 1887 Act, the Metcalf well-pleaded complaint rule notwithstanding.\textsuperscript{186} Treatise writers who took specific account of the 1887 Act's changes also assumed that removal based on federal defenses remained available.\textsuperscript{187} The Supreme Court's contrary conclusion, then, must have come as a surprise, albeit a welcome one, to the lower federal courts, who obligingly fell into line with the new and historic reading of the 1887 reforms.


\textsuperscript{187} Two of the major treatises of the period were republished after the passage of the 1887 Act and before the 1894 decision in \textit{Union & Planters' Bank}, and explicitly took account of the 1887 Act's changes. In \textit{Removal of Causes from State Courts to Federal Courts}, the author noted that the 1887 Act, "both in prescribing the original jurisdiction of the Circuit Courts... and in describing the class of cases which may be removed... follows the language of the Constitution..." and stated that a case may arise under federal law because of either the plaintiff's or defendant's claim. J. DILLON, supra note 183, at 91; \textit{see also} id. at 92-93 n.1. In R. FOSTER, \textit{FEDERAL PLEADING AND PRACTICE IN EQUITY} (1890), the author seemed to think that section 2 of the 1875 Act was not amended in substance by the 1887 Act in regard to federal question removal. \textit{See id.} at 567-68 n.1.

There was remarkably little reaction to the decision in the leading legal periodicals of the day. William D. Guthrie complained, although not at great length, that the "rigid" rule of \textit{Union & Planters' Bank} might result in "years of delay" in getting constitutional questions decided by a federal court. See W. GUTHRIE, \textsc{Lectures on the Fourteenth Article of Amendment to the Constitution of the United States} 169 (1898); \textit{cf.} B. TWISS, \textit{supra} note 59, at 215-29 (discussing Guthrie's leading role in nineteenth-century constitutional litigation). Another writer observed, inaccurately as it later turned out, that the decision could have the effect of reversing the \textit{Pacific R.R. Removal Cases}. \textit{See infra note 220.}
III. THE JUDICIAL UNDERSTANDING IN RETROSPECT

A. Traditional Jurisdictional Concerns

Although the Court in *Union & Planters' Bank* probably got it wrong when it held that Congress had grafted the *Metcalf* rule onto defendant removal of cases raising federal defenses, other traditional jurisdictional concerns arguably explain the result. First, the well-pleaded complaint rule usually is justified by the practical function it serves in saving trial courts from the uncertain and costly guesswork of predicting whether a suit will raise such an issue. By requiring a plaintiff to show that the suit will raise a federal issue on the basis of the unaided complaint, the judge's task is confined to looking at that pleading alone; jurisdiction can be decided expeditiously, at the outset of litigation. Either the cause of action must be federally-created or resolution of a plaintiff's state-created cause of action must be shown "necessarily [to depend] on resolution of a substantial question of federal law." The rule is underinclusive of course, since some cases raising or likely to raise federal questions will not be heard initially in a federal forum. But at least it guarantees that those courts will hear no case that lacks the requisite federal matter.

Yet, as others have noted, this practical advantage does not explain why the jurisdictional inquiry must be decided before the filing of an answer, or, more importantly, why removal based on federal defenses (or replies) should not be allowed. Justice Harlan envisioned a removal scheme that would have served the policies and have preserved the practical advantages of the well-pleaded complaint rule and still have permitted removal of cases presenting federal defenses. He would have had the federal court determine jurisdiction at the outset either by looking only at the complaint in cases in which a plaintiff sought to invoke the court's original jurisdiction, or by looking at all of the pleadings on file when removal was sought. Making a jurisdictional determination based on both parties' pleadings rather than on the plaintiff's alone would not have added significantly to the cost of that inquiry. It could have avoided the inevitable consequence of the pleading rule—the elimination from the lower federal courts of those cases in which there was a strong likelihood of the case actually turning on an issue of federal law.

A second possible goal of *Union & Planters' Bank* may have been federal judicial economy. Subtracting a portion of article III jurisdiction from

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188. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 28 (1983); *see also* id. at 13 (federal jurisdiction is available when claim is created by state law only if "it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or that one or the other claim is 'really' one of federal law").

189. See M. Redish, *supra* note 4, at 72-73 & n.135, 269-70; Comment, *supra* note 5, at 634, 638-44.

190. See Comment, *supra* note 5, at 643 n.38.
the federal courts inevitably achieves that end, but it does so only by imposing other costs. The suit presenting a federal defense will be heard, but its trial will be in the state rather than the federal system. While the no-removal rule meant that the federal courts were relieved of hearing those cases in which the defendant who raised a federal defense ultimately won, or when the case was resolved on nonfederal grounds, the first available federal input came at the level of the Supreme Court—a costly use of federal resources even if fewer cases overall made it into the federal system. The Court can to a great extent control its appellate docket today, but that was not possible in the latter part of the nineteenth century when review of state court decisions was largely obligatory.

The economy rationale also does not explain why defendants can remove well-pleaded federal question suits that plaintiffs are quite content to litigate in state court. Although defendants can no longer take state law actions presenting their own federally-based defenses into federal court, they can remove suits in which the plaintiff has presented a federally-based claim but has opted to litigate in the state courts. Culberson’s rejected model that allowed the defendant to remove only on the additional showing that the defense depended on a construction of federal law would have partly avoided that anomaly and would have provided an evenhanded removal option. Under his proposal, the plaintiff’s decision to litigate a federal claim in the state courts would have been honored, and the defendant would have been unable to remove without presenting a defense that itself raised a question of federal law.

Apart from practical and economic considerations, there are federalism concerns that also undergird the rule. States have an obvious interest in enforcing state-created causes of action in their own courts. The Metcalf rule works to channel a plaintiff’s state-created cause of action into the state courts in the first instance, unless the plaintiff can show in the complaint that the suit will necessarily implicate a federal question. This is in contrast to cases in which the cause of action is federally-created, since they will generally arise under federal law even if they only present factual issues rather than questions of federal law. By this rule of thumb,

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191. See Wechsler, supra note 4, at 234. Judicial economy would most readily be served if neither party could remove. Of course, frivolous federal claims made for the purpose of securing federal jurisdiction present a recurrent problem that would be multiplied if defenses as well as well-pleaded complaints could be used to secure jurisdiction. It even has been suggested that defendants may have a greater incentive to raise a bogus federal question to secure removal than a plaintiff would in order to gain original jurisdiction. See R. Posner, The Federal Courts—Crisis and Reform 190-91 (1985).


doubts as to whether the requisite federal issue will ever materialize in
a state-created claim are readily resolved in favor of state court jurisdi-
cion. Actions based on state law will rarely implicate any interest on
the plaintiff's part in having a federal forum in which to enforce federal
rights since, by definition, no such right is being enforced. Even if ques-
tions of federal law happen to be raised in the pleading and proof of a
plaintiff's state law claim, such questions will at most implicate concerns
over the uniform interpretation of federal law. The uniformity problems
can theoretically by remedied by the availability of direct Supreme Court
review of necessarily-decided federal questions.

By contrast, federalism is a less forceful justification for automatically
disallowing defendant removal in civil suits involving federally-based
defenses. Such defendants may have enforcement interests, including
the need for a federal fact finder, that are not easily remedied by the pros-
pect of Supreme Court review alone. Without question, there is a strong
state interest in resolving legal and factual claims surrounding federal
defenses to state-based claims filed in state courts even in the context of
civil litigation. And when the state or its proxy is itself the complaining
party, those interests may nearly always counsel against federal interference,
by removal or otherwise. Yet noncriminal state court defendants, as Justice

194. Indeed, Holmes forcefully argued that state courts ought to be the masters of such
nonfederal claims. See Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 214-15
(1921) (Holmes, J., dissenting).

195. Section 25 of the Judiciary Act of 1789, like its successors, provided for review
only where the state court decision had rejected the claim of federal right or privilege.
See Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85-87. Where the claim of federal
right or privilege had been upheld by the state's highest court, review was not possible
even though uniformity concerns could be implicated by such a decision. See Missouri
Only in 1914 was the Supreme Court given jurisdiction to review all dispositive questions
of federal law in cases decided by the state courts. See Act of Dec. 23, 1914, ch. 2, 38
Stat. 790, 790 (permitting review by certiorari of cases in which federal right was upheld)
(current version at 28 U.S.C. § 1257(3) (1982)). Before 1914 uniformity in the interpreta-
tion of federal law by the state courts could only be achieved in cases in which a litigant's
efforts to vindicate federal rights in the state courts had been unsuccessful. The 1887 Act
and its interpretation in Union & Planters' Bank increased the need for certiorari jurisdic-
tion, since, to the extent there was a cutback in removal, there was an increase in the
possibility of overenforcement of federal rights in the state courts.

Agitation for an avenue of Supreme Court review of cases in which the federal claim
had been decided favorably to the party raising it came about during the era of Lochner
v. New York, 198 U.S. 45 (1905), when state courts were sometimes deciding in favor
of parties on substantive due process grounds, but were not subject to review. See, e.g.,
Landis, supra note 19, at 187-98.

196. State criminal or civil enforcement proceedings prosecuted by the state or its proxy
to vindicate important governmental interests present weighty and special federalism con-
cerns of their own. See, e.g., Trainor v. Hernandez, 431 U.S. 434, 444 (1977); Younger
Harlan and the Congresses of 1875 and 1887 recognized, have as strong a claim as plaintiffs to an original federal forum in which to litigate and enforce their own federal rights, privileges, or immunities. As initially designed, the 1887 removal scheme provided for symmetry in the treatment of plaintiffs and defendants by providing both parties the option of having their own, but not their adversary's, federal claim or defense decided in the forum that they believed would better be able to handle it. Furthermore, it is at least open to question whether the Reconstruction and post-Reconstruction Congresses might not have perceived a stronger need for an original federal forum for the trial of federally-based defenses than is felt today.

B. Some Additional Unspoken Concerns

Given the weaknesses in the removal context of these traditional justifications for the well-pleaded complaint rule, how can the Union & Planters' Bank Court's insensitivity to the reasonableness of Congress' scheme be explained? Although the answer may simply be that the Court truly felt compelled by what it perceived to be the statute's plain meaning, it is at least odd that no other federal court had preceded it in experiencing a similar feeling. Harlan's powerful dissent itself suggests that the Court's reading was anything but compelled. However, a different, and potentially more satisfying, explanation may lie in other concerns that the Court failed to articulate.

First of all, the Union & Planters' Bank litigation presented special problems of possible state-federal friction. The case involved enforcement actions by Tennessee to collect taxes alleged to be due to the State—a sensitive area into which federal courts might be especially reluctant to enter. Prior to the decision in Union & Planters' Bank, lower courts had voiced federalism concerns in denying removal, on an ad hoc basis, of enforcement actions filed by the state or its representatives, even while acknowledging the continued validity of the general right of federal defense removal under the

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197. See Union & Planters' Bank, 152 U.S. at 469-70 (Harlan, J., dissenting); see also supra text accompanying notes 107-77.
198. See supra notes 54-62, 184 and accompanying text. A frequently invoked federalism interest in favor of having state courts resolve federal defenses is the supposed "parity" of state and federal courts in handling constitutional and federal law issues. Under the supremacy clause, U.S. Const. art. VI, cl. 2, state courts are under an equal and affirmative obligation to enforce the Constitution and federal law; when they are given concurrent jurisdiction over federal matters, they are presumptively capable of resolving them on a par with the federal courts. See Bator, supra note 196, at 611-12. However, the assertion that state and federal courts are fungible may argue for placing all federal claims and defense in state courts, but it does not, by itself, provide any reason for letting plaintiffs but not defendants invoke a federal trial forum for resolving their own federal rights. For a sharp critique of the parity principle, see Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977); for a gentler criticism, see R. Posner, supra note 191, at 169-92.
1887 Act. 199 Although at that time no statutory bars existed to exercising jurisdiction that might interfere with a state's tax collection efforts, Congress has since set up specific statutory limitations on interference in such cases, 200 and the judiciary has erected barriers to its exercise of its jurisdiction beyond those imposed by Congress. 201 Governmental enforcement actions were explicitly excluded from the American Law Institute's proposal that otherwise approved the basic principle of defendant removal of civil actions presenting federal defenses. Thus, the argument for removal was weaker in such a context, even when the defense urges the unconstitutionality of the underlying state statute.

A second clue to the Court's insensitivity is the fact that, only a few years before, it had begun to register its reluctance to extend lower federal court jurisdiction over claims, including those that were constitutionally-based, which would force states to make good on their contractual obligations. 202 The crux of the Union & Planters' Bank litigation was whether the State had breached its promise not to tax the defendant banks, and if so, whether that breach violated the contract clause. Yet, in a number of cases that reflected the diminishing utility of the contract clause and that had the consequence of permitting many southern states effectively...

199. For example, the court in Dey v. Chicago, M. & St. P. Ry., 45 F. 82 (C.C.N.D. Iowa 1891), denied removal in a state-initiated suit to enforce rate orders made by state railroad commissioners because such jurisdiction would interfere with the state officials' discretionary powers to enforce "public rights or fulfill public duties." See id. at 87-88. Speaking through then-Circuit Judge Shiras, the court conceded that federal defense removal would otherwise have been available under the 1887 Act just as it had been under the 1875 statute. See id. In similar litigation, Shiras denied removal by-applying a strict test to the pleadings accompanying the removal petition in determining whether or not a federal question was clearly shown to be "necessarily involved." See Iowa v. Chicago, M. & St. P. Ry. Co., 33 F. 391, 395-97 (C.C.N.D. Iowa 1887). He again assumed that removal would be available if the federal matter was presented in any of the pleadings. Shiras was later a member of the Court majority that decided Union & Planters' Bank.

200. See Act of Aug. 21, 1937, ch. 726, 50 Stat. 738, 738 (codified at 28 U.S.C. § 1341 (1982)). The impetus for this Act was Congress' perception of a distinct lack of judicial sensitivity about interference with state tax collection schemes growing out of cases such as Ex parte Young, 209 U.S. 123 (1908), which is discussed infra notes 230-31 and accompanying text, and from substantive due process doctrines that were not yet fully in bloom in 1894. See Hart & Wechsler, supra note 35, at 978.


202. In In re Ayers, 123 U.S. 443 (1887), the Court held that the eleventh amendment was a jurisdictional bar to a federal court injunction against the Attorney General of Virginia aimed at preventing him from bringing suits in state court to recover state taxes; it reversed a finding that he was in contempt of federal court when he violated the void injunction. See id. at 507-08. The State previously had agreed to accept coupons from state-issued bonds in payment of taxes, but the Attorney General had commenced suit against those who attempted to do so. The claim of the coupon holders was that the failure to honor these coupons by bringing suit violated the contract clause. Id. at 492-93; see C. Jacobs, The Eleventh Amendment and Sovereign Immunity 128-31 (1972); see also Hans v. Louisiana, 194 U.S. 1, 19-21 (1899).
to repudiate their Civil War indebtedness, the Court had construed the eleventh amendment's ban on federal court suits against states so as to make it difficult if not impossible to obtain specific enforcement of contracts into which the state had entered. Even the device of naming the individual officer did not get the complaining party around the eleventh amendment's strictures when specific enforcement of contracts was at issue. Union & Planters' Bank was not, of course, a suit involving war-related debts, nor was it an action to enforce the state's contract. The constitutional issue was raised only in defense, and the federal courts were not being asked to grant the affirmative relief against the State that the eleventh amendment then seemed to forbid. But there was a danger that if removal were upheld in cases presenting federal defenses under the contract clause, the Court would be letting in—through the back door of removal—initial litigation of matters that it was at the same time hesitant to allow through the front door of original jurisdiction.

Although it might be expected that a Court about to embark upon a due process revolution would think to preserve a federal forum for defenses that might later arise under the fourteenth amendment, there are a number of reasons why it might not have in 1894. The Court's reluctance to shuttle federal defenses through the lower federal courts in the first instance may have been influenced by its long-felt, if decreasing, hostility to the merits of due process challenges to state regulation. From its 1877 decision in Munn v. Illinois upholding state rate regulation of grain elevators against a constitutional attack, the Court had greeted due process challenges with a fairly consistent negative response. To be sure, by the time the Court decided Union & Planters' Bank, some telling inroads on Munn had

203. For a discussion of how the eleventh amendment opinions of the Court during this period may have related to the dismantling of Reconstruction by sanctioning state repudiation of the Reconstruction indebtedness, see Orth, The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power, 1983 U. Ill. L. Rev. 423, 431-50. On the waning of the contract clause at about this time, see B. WRIGHT, supra note 59, at 92.

204. Since the state was the "real party" to any such contract action, the Court viewed such suits as being in effect against the sovereign, even when only the officer was sued. See, e.g., Pennoyer v. McConnaughy, 140 U.S. 1, 10 (1891). A different case arose when the relief sought was for the officer's own personal wrongdoing or tortious activity for which the officer, being stripped of any immunity from the state because of his illegal acts, would himself be held liable. Id. Under Ayers the mere institution of state court proceedings by state officers did not itself amount to trespass or tortious activity traditionally actionable at common law that would be enjoinable in a federal court, even though the underlying legislation for which enforcement was sought was unconstitutional. See C. JACOBS, supra note 202, at 131. The eleventh amendment, however, did not bar removal of suits initially brought by the State in state courts. See Ames v. Kansas ex rel. Johnston, 111 U.S. 449, 463-72 (1884); Railroad Co. v. Mississippi, 102 U.S. 135, 140-41 (1880).

205. 94 U.S. 113 (1877).

206. See id. at 134-35.

been made, and a few members of the Court argued for overruling it. But, despite dropping hints that it might be ready to do so, the Court had yet to strike down a state regulation on the express ground that federal due process served as a substantive check on state action; that remarkable event was still a few years away. Moreover, the occasional decisions of the Court invalidating the process by which a state engaged in regulation were certainly consistent with a preference for initial state resolution of regulatory questions, with federal input controlled by the Supreme Court itself on direct review. Although one can only speculate about the Court’s motives on this issue, Union & Planters’ Bank nevertheless presented it with a unique opportunity to reduce the number of cases in the lower federal courts that might present due process challenges by way of defense to state enforcement and other actions.

It is also important to realize that Justice Harlan’s proposed solution in Union & Planters’ Bank would have put the federal judiciary, and ultimately the Court itself, in the position of having to carve out exceptions to federal defense removal on a case-by-case basis if the scope of such removal jurisdiction proved unworkable. Although at least one member of the Union & Planters’ Bank majority had himself previously made use of such a case-by-case approach as circuit judge, he was content to reject this option as a national solution. By adopting a blanket rule against federal defense removal, the task of narrowing was no longer the Court’s; the statute was instead effectively remanded to Congress for narrowing and reenactment. Of course, all jurisdictional legislation emerged only with difficulty during this period, and the odds were pretty good that the removal statute would not be repaired quickly. Indeed, it never was.

208. After Munn, dicta in Court opinions suggested that rate regulation amounting to confiscation would offend due process, see Railroad Comm’n Cases (Stone v. Farmers’ Loan & Trust Co.), 116 U.S. 307, 331 (1886), and that arbitrary legislative acts did not satisfy due process because they were not “legitimate exertions” of legislative power, see Mugler v. Kansas, 123 U.S. 623, 661 (1887). The first major challenge to Munn came in Chicago, M. & St. P. Ry. v. Minnesota, 134 U.S. 418 (1890). In that case the Court struck down solely on due process grounds a statutory scheme under which a state commission had, absent hearing requirements, set rates whose reasonableness could not be challenged in enforcement proceedings in the state courts. See id. at 458-59. The Court’s objections, however, were geared more to the procedural failings of the regulatory scheme than to the reasonableness of the rates themselves. See id.; see also Currie, supra note 207, at 372; Porter, That Commerce Shall be Free: A New Look at the Old Laissez-Faire Court, 1976 Sup. Ct. Rev. 135, 148-49.

209. See Currie, supra note 207, at 371 n.279, 374 n.302; see also B. Wright, supra note 59, at 103 (characterizing Court’s due process thinking in early 1890’s as in “transition zone”).


211. See supra note 199 (discussing opinion of then-Circuit Judge Shiras in Dey v. Chicago, M. & St. P. Ry., 45 F, 82 (C.C.N.D. Iowa 1891)).

212. Why, if the Supreme Court really got it wrong, did Congress not go back and rework the statute? A few suggestions are possible. The Court’s opinion in Union & Planters’
Even more significant, perhaps, were the pressures the Court was experiencing from within and from without. By the late 1880's complaints against the growth of federal jurisdiction had climbed to a fever pitch. Although Congress eventually offered some relief in 1891 with the passage of the Evarts Act, which, for the first time, established a middle-tier of appellate courts, the Union & Planters' Bank Court had determined, even

Bank came well after enactment of the 1887 statute. In addition, congressional inertia about jurisdictional reform during that era was legendary. See F. Frankfurter & J. Landis, supra note 19, at 73, 85, 103, 128, 130. After 1891, the next major piece of legislation dealing with the subject matter jurisdiction of the federal courts was the Act of Mar. 3, 1911, 36 Stat. 1087, which abolished the old circuit courts. See id. ch. 13, § 289, 36 Stat. 1167. By the time reform might have been considered, many of the safety-valve measures, such as that provided by suits to enjoin threatened unconstitutional action, were already securely in place. See infra text accompanying notes 229-30.

Efforts nevertheless were made in both Houses to restore the law to what it had been under the 1875 Act. One such bill was introduced in the House, see 35 Cong. Rec. 6685 (1902), and was favorably reported by the Judiciary Committee, see H.R. Rep. No. 2459, 57th Cong., 1st Sess. 1 (1902). The House Report observed that failure to allow for a federal forum for federal questions raised in an answer or by way of reply "is a manifest defect in the existing law." See id. at 2. The Report added:

It is obvious that the Federal courts are the proper forums for the determination of questions arising under Federal law, and it is equally obvious that where a suit involving such a question is not brought in the Federal court, either party should have the equal right to remove it there.

Id. The Report noted that the trouble lay in the cross reference to section 2 of the 1887 Act that seemed to permit removal of only those cases "of which the circuit courts are given original jurisdiction by the preceding section." See id. However, the Report made no reference to the Court's decision in Union & Planters' Bank. The Report stated that allowing removal would channel cases raising federal questions out of state courts and thereby help the Supreme Court avoid the "delicate" problem of reversing state courts on issues of federal law. See id.

The Report also noted that a removal option would make a federal forum available for those federal questions that the Supreme Court could not then hear on appeal. In cases in which the decision in state court was in favor of the federal claim, review could be had only if the federal claim of right raised in the state courts had been denied. See, e.g., Jersey City & B.R.R. v. Morgan, 160 U.S. 288, 292-93 (1895); Missouri v. Andriano, 138 U.S. 496, 501 (1891); see also supra note 195. Allowing removal would assure a federal forum for such claims. H.R. Rep. No. 2459, 57th Cong., 1st Sess. 2-3 (1902). In addition, after the decision in Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875), review could not be had in the Supreme Court of federal questions decided by a state's highest court in which there existed adequate and independent state law grounds to support the decision. See id. at 626-27. Allowing removal of federal defenses would, said the House Committee, increase the likelihood of having a federal forum for the resolution of those claims and would help guard against the "embarrassment" of state courts "dodging" the [federal] question and hunting some other [state law] ground of decision." See H.R. Rep. No. 2459, 57th Cong., 1st Sess. 2 (1902). For unexplained reasons, the bill was later dropped. See 36 Cong. Rec. 558 (1903). A previous House bill suggesting dissatisfaction with the no-removal rule was also rejected, as were subsequent ones. See F. Frankfurter & J. Landis, supra note 19, at 139-40 n.160.

The Senate proposed a bill similar to the 1902 House bill at about the same time, but it was reported adversely as offering an "unwise change in the law" that, by then, was quite settled against removal. S. Rep. No. 1077, 57th Cong., 1st Sess. 1 (1902).

213. See F. Frankfurter & J. Landis, supra note 19, at 101-02. The Supreme Court's
before 1891, to fashion a general rule of restrictive construction of the 1887 Act. The Act was undoubtedly meant to restrict the scope of federal judicial power, but the Court's earlier decisions construing it had done little more than confirm the statute's explicit restrictions on diversity jurisdiction, the primary target of the reforms. Nevertheless, the Court chose to use its rule of construction to circumvent any need to resort to legislative history to flesh out the Act's ambiguities, and in the end, through self-help, it succeeded in subtracting an important chunk of potential litigation from the lower federal courts.

It also is not surprising to discover that there had been a nearly complete turnover in Court personnel since the day when Justice Miller had registered his lonely dissent in *Railroad Co. v. Mississippi*. The *Union & Planters' Bank* litigation let the new Court rehabilitate and quote extensively from Miller's opinion in which he had denied to even the 1875 Act any congressional purpose to confer removal jurisdiction based on federal defenses. The Court relied on his views both to justify its restrictive reading of the more recent 1887 Act and, remarkably, to provide a light on what Congress "may well have had in mind" in amending the 1875 Act. Only two members of the *Railroad Co.* majority remained on the *Union & Planters' Bank* Court, and they dissented. The new majority, fueled by a new philosophy and operating without the benefit of briefs on congressional intent, indulged in the luxury of an interpretation of the 1887 Act that restricted federal jurisdiction in a wholesale, rather than retail, manner. Miller's views, which courts and commentators had consistently rejected in their construction of the 1875 Act, were thus pressed into dubious service. They revealed less about the likely desires of Congress than those of the newly constituted Court.

214. A number of cases were cited by the Court for the proposition that the 1887 Act's purpose was "to contract" federal jurisdiction. *See* 152 U.S. at 462. None of those cases, however, had touched on either federal question suits or removal of such suits. Three of them had construed the diversity provisions of the Act. *See* Martin v. Baltimore & O.R.R., 151 U.S. 673, 676 (1894); Shaw v. Quincy Mining Co., 145 U.S. 444, 446 (1892); Smith v. Lyon, 133 U.S. 315, 316 (1890). The other two, Fisk v. Henarie, 142 U.S. 459 (1892), and In re Pennsylvania Co., 137 U.S. 451 (1890), both involved construction of the provisions covering removal of nonfederal question cases for "prejudice or local influence." *See* Fisk, 142 U.S. at 465; *Pennsylvania Co.*, 137 U.S. at 452.

215. *See* 102 U.S. at 142 (Miller, J., dissenting).

216. *Union & Planters' Bank*, 152 U.S. at 462. Although the Court couched its observation in terms of legislative intent, it made no reference to the Act's history.

217. The only two members of the *Railroad Co.* majority still on the Court in 1894 were Justices Harlan and Field, and both dissented in *Union & Planters' Bank*. *See* 152 U.S. at 464 (Harlan, J., dissenting); *see also* G. Guntler, CONSTITUTIONAL LAW app. B, at B-3 to B-4 (11th ed. 1985) (delineating years on Court for each Justice). Twenty different individuals sat on the Court at one time or another during that transitional fourteen-year period from 1880 to 1894. *Id.*

218. *See supra* notes 54-67 and accompanying text.
IV. COPING WITH Union & Planters' Bank

Making removal dependent upon the well-pleaded complaint requirement offers the simple rule that federal defenses by themselves will not confer federal jurisdiction. Yet the decision was not a product of an overt judicial weighing of the policies that are now thought to underlie the well-pleaded complaint rule. Nor was it the result of thorough consideration of the advantages of a contrary rule allowing for federal defense removal in all cases. The decision purported to rest on a formal choice about the plain meaning of the statute. The Court's failure to deal openly with these concerns has produced some curious results.

First, the Union & Planters' Bank rule proved to be manipulable. Not long after that decision the Court once again held that federally-chartered railroads sued in state courts could remove ordinary negligence actions brought against them. The Court easily could have based its decision on the legislative history of the 1887 Act and Congress' demonstrated desire to maintain federal jurisdiction over suits brought against federally-chartered railroads. Instead, it held that such suits arose under federal law, not because the federal charter itself raised the requisite federal matter when alleged in defense, but because the suits necessarily required an allegation of the defendant corporation's status as part of the plaintiff's own well-pleaded complaint. What is more, the Court later would supply such an allegation when the plaintiff forgot or decided not to make one. The fiction was necessary in order for such suits to satisfy the well-pleaded complaint rule and thus be removable even under the Court's narrow interpretation of the 1887 statute. Thanks to this fiction, the breadth of

219. In his Railroad Co. dissent, Justice Miller had mentioned one of the practical problems of a rule permitting removal of suits in which the federal question was revealed in the answer, namely, the fact that that question might be but a "small part" of the defendant's plea. See 102 U.S. at 144 (Miller, J., dissenting). He had also noted that the defendants were not without a federal forum since they could seek Supreme Court review of an adverse decision of a dispositive question of federal law. See id. (Miller, J., dissenting). Beyond repeating these brief comments of Justice Miller, the Union & Planters' Bank majority did not deal with any of the policies that might be thought to support the no-removal rule.

220. See Texas & Pac. Ry. v. Cody, 166 U.S. 606, 607, 610 (1897); see also Ex parte Roc, 234 U.S. 70, 71-73 (1914); In re Dunn, 212 U.S. 374, 376, 389 (1909). Union & Planters' Bank would have altered the rule in the Pacific Railroad Removal Cases and sounded the death knell for removal by federally chartered corporations when sued in state courts on state law claims if jurisdiction over these parties was thought to attach only because of the allegation of corporate charter raised in defense on removal. See supra note 160. That, at least, was the unsuccessful argument made in Cody. See 166 U.S. at 608-10. It was also the point urged in one of the few comments on Union & Planters' Bank to appear in contemporary legal publications. See Jones, Jurisdiction of Federal Courts Over Corporations Created by Congress, 31 Am. L. Rev. 137, 137-40 (1897).

221. See supra notes 166-77 and accompanying text.


223. See In re Dunn, 212 U.S. 374, 386-87 (1909).
the statutory "arising under" language remained undiminished in this particular context.\footnote{224}

Another and bizarre consequence of the decision was that it temporarily prevented many defendant federal officers from removing state court civil actions to federal court, even when their allegedly wrongful actions arose under color of federal law.\footnote{225} Today, of course, federal officers raising such a defense in state court proceedings will be able to remove, but that is solely the result of comparatively recent statutes expressly allowing it.\footnote{226} At the time of the Court's 1894 decision, there were only two ways for federal officers to secure removal when sued in state court under state law for conduct arising out of the performance of their job. Removal was possible if there happened to be a specific statutory removal provision covering that class of official; however, there were only a few such statutes then in force.\footnote{227} Alternatively, under the 1875 Judiciary Act, and, for a while, under the 1887 Act as well, officers could remove, because their defense arose under federal law. \textit{Union & Planters' Bank}, however, had eliminated that second possibility, and many officers found themselves litigating their federal defenses in state courts until Congress much later put a stop to it.\footnote{228}

Around the turn of the century, as the Court became more hospitable to substantive due process claims under the fourteenth amendment, it was spurred to develop a means by which parties with such claims could obtain a federal trial forum rather than be consigned to raising them as constitu-

\footnote{224. It was not until 1915 that Congress eliminated federal jurisdiction over suits brought by or against federally-chartered corporations. \textit{See} Act of Jan. 28, 1915, ch. 22, § 5, 38 Stat. 803, 804. A proviso was later added to this Act that permitted jurisdiction when the government owned more than 50\% of the corporation's stock. \textit{See} Act of Feb. 13, 1925, ch. 229, § 12, 43 Stat. 936, 941 (currently codified at 28 U.S.C. § 1349 (1982)).}

\footnote{225. \textit{See} Walker v. Collins, 167 U.S. 57, 59 (1897). In \textit{Walker}, a federal marshal seized property pursuant to a federal court order and was sued in state court for trespass. \textit{See id.} at 58. The officer removed the case to federal court, where judgment was entered against him. \textit{Id.} On review, the Supreme Court held that the lower federal court lacked jurisdiction because there was no specific removal provision allowing persons acting pursuant to a federal court order to remove suits brought against them on account of that conduct and because the marshal's allegation of a federal defense would not confer removal after \textit{Union & Planters' Bank}. \textit{See id.} at 58-59. The decision caused rumblings in Congress, but it was not legislatively overruled until almost twenty years later. \textit{See infra} note 228; \textit{see also} F. Frankfurter & J. Landis, \textit{supra} note 19, at 139-40 n.160.}

\footnote{226. The provisions governing federal officer removal are currently codified at 28 U.S.C. § 1442(a)(1)-(4) (1982).}

\footnote{227. After the Civil War, removal was made specifically available to federal officers involved in the collection of taxes and import duties and to officers involved in the enforcement of certain civil rights statutes. \textit{See supra} notes 21, 23. For a discussion of the history of federal officer removal, see Hart & Wechsler, \textit{supra} note 35, at 422-23, 1335-38.}

tional defenses to state court enforcement proceedings. After the Court’s seminal decision in *Ex parte Young*, it became clear that a litigant could bring an anticipatory suit in federal court to enjoin state action, including enjoining state judicial proceedings that threatened unconstitutional injury, and thus the litigant could avoid being made a state court defendant unable to remove the suit. The constitutional claimant could obtain a federal forum to resolve the merits of the claim, injunctive relief against the bringing of state court proceedings on a showing of irreparable harm, and enforcement of such relief through the sanction of contempt.

To be sure, even the federal removal option for civil suits that would have remained in the absence of *Union & Planters’ Bank* would not have altogether met the needs of parties facing threatened state court proceedings for federally-protected activity. Some parties, including those in the litigation that gave rise to *Ex parte Young*, faced potential criminal, not civil, proceedings. The inability to remove state court criminal proceedings founded on arguably unconstitutional state statutes had not been a consequence of *Union & Planters Bank*. It arose out of the nearly contemporaneous, judge-made elimination in criminal cases of an initial federal trial forum through pretrial habeas corpus—a procedure analogous to federal defense


230. In *Young*, the Court ruled that the eleventh amendment did not bar suit in federal court for injunctive relief against the Minnesota Attorney General to prevent enforcement of railroad rates with ruinous penalties for noncompliance, when the rates were alleged to be confiscatory and violative of the due process clause of the fourteenth amendment. See id. at 150, 158-59. The Court upheld a contempt order against the Attorney General for violating a lower federal court injunction. The case departed from the apparent teaching of *In re Ayres*, 123 U.S. 443 (1887), by making clear that the bringing of judicial proceedings by state officers could itself constitute the individual wrongdoing that could be enjoined without running afoul of the eleventh amendment. See C. Jacobs, *supra* note 202, at 132-46 (discussing antecedents to *Young* and the Court’s not always consistent application of *Ayres*); see also Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 Sup. Cr. Rev. 149, 154-56. Even prior to *Young* it was possible to enjoin official action taken under allegedly unconstitutional statutes that threatened a traditional common-law injury (other than the bringing of litigation) without running afoul of the eleventh amendment. See M. Redish, *supra* note 4, at 155-57. In his *Union & Planters’ Bank* dissent, Justice Harlan noted that the Bank of Commerce might have secured a federal trial forum for its contract clause claim had its property been levied upon and had the bank simply sued to enjoin the levy. See 152 U.S. at 471-72 (Harlan, J., dissenting).

231. In some ways, removal of cases with constitutional defenses would have been more intrusive in federalism terms than *Young*’s grant of prospective injunctive relief against threatened state court proceedings. Removal can easily be effected by a party to the litigation, and all state court proceedings are enjoined by the simple filing of removal papers in the state and federal courts. By contrast, preliminary injunctive relief requires initial input by the federal court following notice and hearing. This equitable relief also requires a showing of irreparable harm. See ALLSTUDY, *supra* note 4, at 206. See generally Bator, *supra* note 196, at 606-17.

In other ways, however, removal might have been less intrusive. Unlike an injunction, removal permits the state to continue to vindicate its interests, albeit in a federal forum. State judges might well view removal of one of their cases as a more commonplace procedure than being enjoined. Rejecting removal in favor of preemptive injunctive relief
removal in civil suits. In addition, a party's frequent predicament, when faced with threatened criminal or civil enforcement proceedings, was to make the hard choice between compliance with state law (and ruinous loss) and noncompliance (and state court liability or sanctions). Although one of the benefits conferred by Ex parte Young was the opportunity for an original federal forum rather than federal appellate review of federal defenses, not even the alternative of removal from state court could have provided the needed anticipatory forum that could obviate the particular dilemma facing the litigant. However, absent a device similar to the Ex parte Young injunction, there would have been no federal trial forum, anticipatory or otherwise, for those cases governed by the rule in Union & Planters' Bank. The availability of removal to federal court would also have mitigated the harshness of the Young dilemma.  

also has the distinct disadvantage of precipitating litigation (in federal court) that might never have actually arisen in the state system. It was, however, out of the question for the Court to permit removal of state law claims with constitutional defenses given its holding in Union & Planters' Bank. The immediate access to a federal forum provided by Young was thus the Court's only available alternative to initial state court adjudication of such defenses.  

232. Congress, through pretrial removal in the Habeas Corpus Act of 1867, see supra note 22, and its successor provisions at Rev. Stat. §§ 751-753 (1873), had probably made available an initial federal forum for state court criminal suits in which the defendant raised a challenge to the constitutionality of the underlying proceeding. See generally Amsterdam, supra note 22, at 883-90. Nevertheless, judicially-created exhaustion doctrines eliminated that option. See Ex parte Royall, 117 U.S. 241, 250-53 (1886). Royall, in which the exhaustion doctrine was first announced, arose out of litigation over Virginia's debt-repudiation crisis. Royall, an attorney, was prosecuted by Attorney General Ayers for having sued to recover on bond coupons without complying with a "license tax," a newly added statutory prerequisite apparently designed to inhibit recovery on the coupons. Objection to the statute's constitutionality was premised on the contract clause. See id. at 244; see also supra notes 202-03.  

233. Justice Peckham pointedly observed that, even if a state forum were promptly available, a jury trial over the reasonableness of rates in a state court criminal proceeding would not be an adequate remedy. See 209 U.S. at 164-65. Exacerbating the consequences of the no-removal rule in civil proceedings brought by the state or its proxy to enforce important governmental objectives, is the fact that, despite Young, federal injunctive relief will not always be available against ongoing state enforcement proceedings owing either to the prohibition of the anti-injunction statute, 28 U.S.C. § 2283 (1982), or to principles of equity, comity and federalism. See Huffman v. Pursue, 420 U.S. 592, 605-06 (1975); Younger v. Harris, 401 U.S. 37, 43-45 (1971). A litigant facing threatened state court action is now given the chance to invoke federal court jurisdiction only when there are no currently pending state court proceedings. Steffel v. Thompson, 415 U.S. 452, 475 (1974); see also Ex parte Young, 209 U.S. 123, 163 (1908). If a party has already violated the law and the state gets to its forum first, the federal option ordinarily disappears. In fact, if the state gets there just a little bit later, it may still be able to effect a "reverse" removal of a suit over which the federal court has properly acquired jurisdiction. See Hicks v. Miranda, 422 U.S. 332, 349 (1975).  

Outside the field of state enforcement proceedings, the no-removal rule has created the prospect of duplicative civil proceedings in the state and federal courts whenever judgment has not been rendered in either, because in most cases neither court will be able
Because of the linkage between the well-pleaded complaint rule and the prerequisites for removal, the modern Court also has had to adjust in other areas in order to avoid the unwanted consequences arising from relegation of federal question defenses to state court.\textsuperscript{234} For example, when defenses are raised in state courts implicating questions over which the federal courts would normally have exclusive jurisdiction, the defense may be heard there, but the state court decision may be accorded something less than fully preclusive effect in a subsequent federal suit.\textsuperscript{235} In addition, when the federal defense urges that the plaintiff’s claim for relief has itself been preempted by federal law, removal may be available on the interesting theory that the underlying action is not a state claim at all, but a federal one,\textsuperscript{236} thus satisfying the well-pleaded complaint rule.

\textsuperscript{234} See Note, The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction, 91 Harv. L. Rev. 1281, 1286-90 (1978); see also Will v. Calvert Fire Ins. Co., 437 U.S. 655, 675-76 (1978) (Brennan, J., dissenting) (doubting whether it ever would be appropriate to accord res judicata effect to state court resolution of claim over which the federal courts are given exclusive jurisdiction). In a federal court preclusive effect would normally be given under the full faith and credit statute, 28 U.S.C. § 1738 (1982), to a state court determination of federal claims and issues properly litigated in state court. See, e.g., Allen v. McCurry, 449 U.S. 90, 99 (1980). The Supreme Court recently avoided deciding whether an exception to section 1738 ever should be created for claims that are otherwise within the exclusive jurisdiction of the federal courts. See Marrese v. American Academy of Orthopaedic Surgeons, 105 S. Ct. 1327, 1334 (1985).

\textsuperscript{235} As previously noted, a parallel development took place in the criminal context. See supra note 232. Although in criminal cases federalism objections are great, so are the liberty interests of the defendant. Thus, state court judgments resolving dispositive federal defenses that result in custody may eventually be heard in a federal court on habeas corpus, and they will not always be accorded fully preclusive effect. See Brown v. Allen, 344 U.S. 443, 463-65 (1953). But see Stone v. Powell, 428 U.S. 45, 49 (1976) (holding that when State has provided full and fair opportunity to litigate fourth amendment search and seizure claim, habeas corpus relief is not required).

\textsuperscript{236} See Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560 (1968); see also Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 22-27 (1983) (discussing and distinguishing Avco). After Franchise Tax Board, removal is available only when federal law has completely ousted any state law claim for relief and has substituted a federal claim in its place. If the preemption defense is simply that the state law claim is prohibited by federal law, removal is not possible. See Comment, supra note 5, at 655-67.
Elsewhere, when the federal defense challenges the very continuation of the state proceeding, the Court has developed doctrines to provide quick access to a federal forum, either by liberalizing the concept of a final judgment to speed up the federal appellate process, or by carving out exceptions from the usual prohibition on federal injunctive relief against ongoing state proceedings.

Despite its simple appearance, the well-pleaded complaint rule, and its supposed incorporation by Congress in the 1887 Judiciary Act’s removal provisions, is hooked into many other rules in the not-so-seamless web of jurisdictional structure that we take for granted. Because of the rule’s drawbacks, the Court has been provoked to make its own piecemeal attempts at the repair job on removal jurisdiction that the Court itself implicitly called for back in 1894.

237. See, e.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 485, 496 (1975) (defense that invasion of privacy claim violated first and fourteenth amendments); Local 438, Constr. & Gen. Laborers’ Union v. Curry, 371 U.S. 542, 546-47, 549 (1963) (defense that exclusive jurisdiction of claim rested with federal agency). 238. The anti-injunction statute, 28 U.S.C. § 2283 (1982), normally is a bar to federal court restraint of state judicial proceedings. Nevertheless, the Court has developed a test to uncover “express” congressional exceptions to the statute for certain federally-created causes of action even when Congress has not been explicit about it. See, e.g., Mitchum v. Foster, 407 U.S. 225, 242-43 (1972) (holding 42 U.S.C. § 1983 to be an “expressly authorized” exception to Act, thereby making injunctive relief against state court proceedings available in proper case); cf. Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 643-45 (1977) (Blackmun, J., concurring); id. at 654-58, 665-66 (Stevens, J., dissenting) (suggesting that section 16 of Clayton Act, 15 U.S.C. § 26, may provide “express exception” to anti-injunction statute, at least to extent of permitting federal courts to enjoin state proceedings that are themselves being used as anticompetitive device).

239. One of the best-known and most problematic spin-offs of the Union & Planters’ Bank no-removal rule is the doctrine of Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950), which places significant restrictions on the availability of declaratory relief in federal court. See id. at 671-72. Under the declaratory judgment statute, 28 U.S.C. § 2201 (1982), a court has jurisdiction to declare the rights of interested parties “[i]n a case of actual controversy within its jurisdiction,” whether or not other relief is or could be sought. At most, Skelly Oil permits such an action only if the underlying, nondeclaratory action between the parties would have been within federal jurisdiction in the absence of the declaratory device. See 339 U.S. at 673-74. Courts have therefore looked behind the declaratory complaint to ascertain whether the declaratory plaintiff could have brought a coercive, nondeclaratory action against (or could have been a defendant in such an action brought by) the declaratory defendant, over which the federal courts would otherwise have had jurisdiction. See 13B C. WRIGHT, A. MILLER & E. COOPER, supra note 3, § 3566, at 89-95. If declaratory plaintiffs merely would have been in the posture of defendants with a federal defense in an action that could have been brought only in state court under the well-pleaded complaint rule, they cannot use the declaratory device to add a case to the federal courts’ jurisdiction that would otherwise not have been there. Skelly Oil, 339 U.S. at 673-74.

The Skelly Oil rule bars jurisdiction despite the fact that the declaratory plaintiff has satisfied the formalities of and policies behind the well-pleaded complaint rule in the declaratory complaint. The plaintiff’s own complaint has shown that it will be necessary to decide a substantial proposition of federal law to prevail, and jurisdiction can be promptly decided on the face of that complaint. See M. REDISH, supra note 4, at 74-75. The doctrine
V. Conclusion

The alternative to the limitation established by Union & Planters' Bank would scarcely require a return to unrestricted federal defense removal. This move might add significantly to the federal courts' already heavy caseload, and it is unlikely that Congress would be tempted to make it.\textsuperscript{240} Even a more finely-tuned and limited version of federal defense removal would meet with the inevitable questions of when a defense may be said to arise under federal law, whether the federal questions appearing after the filing of the complaint must be dispositive or potentially dispositive of the litigation, whether federal defenses should include claims premised on either the Constitution or federal statutes, whether there should be a jurisdictional amount limitation for removed cases, and whether any categorical exceptions to removal should be created in order to honor the plaintiff's initial choice of a state forum. These issues would remain even if removal of the bulk of state enforcement or criminal actions were eliminated at the start.\textsuperscript{241}

But these questions are not new. Not so long ago they generated an intense debate that led to a proposal containing a number of specific and pragmatic limitations on federal defense removal within a jurisdictional framework which, like that in operation before Union & Planters' Bank, accepted such removal as its operative principle.\textsuperscript{242} The pressures on the federal courts may have changed since the American Law Institute's more modest proposal in the late 1960's, and as a practical matter, reform in this area may have to be coupled with the paring back of federal jurisdiction in others. Yet even after decades of acquiescence in decisions such

\textsuperscript{240} As a practical matter, the ball seems to be in Congress' court. See supra note 17 and accompanying text.

\textsuperscript{241} Even those who would not eliminate the structure set up by Union & Planters' Bank have suggested creating new categories of federal defense removal. See H. Friendly, Federal Jurisdiction: A General View 125-27 (1973) (proposing removal for defenses over which federal courts otherwise would have had exclusive jurisdiction, or that relied on treaty, or that involved claim of federal preemption).

\textsuperscript{242} See ALI Study, supra note 4, § 1312(a), (b) commentary at 187-203.
as *Union & Planters' Bank*, Congress could afford to take up the Court's long-standing challenge to come up with a more workable plan for federal question removal than the wide-open scheme created in 1875 and very probably renewed in 1887. The alternative to legislative development of context-specific limitations on this removal is continued dependence on a pleading rule whose connection with sound judicial policy is largely coincidental, and on a removal rule of dubious origin that now causes even the Court some misdirected embarrassment.