

Sec. 2—Judicial Power and Jurisdiction

Cl. 1—Cases and Controversies

ferral of ever-increasing grants of jurisdiction to enforce the guarantees recognized and enacted by Congress.⁷⁶³

When a Case Arises Under.—The 1875 statute and its present form both speak of civil suits “arising under the Constitution, laws, or treaties of the United States,”⁷⁶⁴ the language of the Constitution. Thus, many of the early cases relied heavily upon Chief Justice Marshall’s construction of the constitutional language to interpret the statutory language.⁷⁶⁵ The result was probably to accept more jurisdiction than Congress had intended to convey.⁷⁶⁶ Later cases take a somewhat more restrictive course.

Determination whether there is federal question jurisdiction is made on the basis of the plaintiff’s pleadings and not upon the response or the facts as they may develop.⁷⁶⁷ Plaintiffs seeking access to federal courts on this ground must set out a federal claim which is “well-pleaded” and the claim must be real and substantial and may not be without color of merit.⁷⁶⁸ Plaintiffs may not anticipate that defendants will raise a federal question in answer to the action.⁷⁶⁹ But what exactly must be pleaded to establish a federal question is a matter of considerable uncertainty in many cases. It is no longer the rule that, when federal law is an ingredient of the claim, there is a federal question.⁷⁷⁰

⁷⁶³ For a brief summary, see Hart & Wechsler (6th ed.), *supra* at 743–748.

⁷⁶⁴ 28 U.S.C. § 1331(a). The original Act was worded slightly differently.

⁷⁶⁵ *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). See also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821).

⁷⁶⁶ C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 17 (4th ed. 1983).

⁷⁶⁷ See generally *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

⁷⁶⁸ *Newburyport Water Co. v. City of Newburyport*, 193 U.S. 561, 576 (1904); *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933); *Binderup v. Pathe Exchange*, 263 U.S. 291, 305–308 (1923). If the complaint states a case arising under the Constitution or federal law, then federal jurisdiction exists even though on the merits the party may have no federal right. In such a case, the proper course for the court is to dismiss for failure to state a claim on which relief can be granted rather than for want of jurisdiction. *Bell v. Hood*, 327 U.S. 678 (1946). Of course, dismissal for lack of jurisdiction is proper if the federal claim is frivolous or obviously insubstantial. *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933).

⁷⁶⁹ *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908). See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974).

⁷⁷⁰ Such was the rule derived from *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). See *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986).