

Federalists, Federalism, and Federal Jurisdiction
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Abstract

This Article provides a new interpretation of the origins of three central obsessions of federal-courts and constitutional-law scholarship: the question whether inferior federal courts are constitutionally required; the relative powers of Congress, the Supreme Court, and the inferior federal courts to define federal jurisdiction; and judicial supremacy. The Article argues that the extension of federal judicial power to the inferior federal courts was a crucial element of the Federalists' project of building national supremacy into the Republic's structure. Chief Justice John Marshall, like many other federalist theorists, viewed the inferior federal courts as essential to the establishment of a union in which national supremacy was instantiated through judicial structure. Marshall and his federalist colleagues shared a commitment to judiciary-centered federalism. In the early nineteenth century, most notably in two cases involving the Second Bank of the United States, the Marshall Court attempted to carry out through case law what the political branches had been unable to do following the election of 1800: grant the lower federal courts general federal question jurisdiction. The traditional story of the Marshall Court's nationalism has overlooked both this link between law and politics and the importance of the lower federal courts to beliefs about federal structure in the early Republic.

We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.

- Cohens v. Virginia (1821)

Ohio has begun with reprisals? God grant that some other state may not resort to arms!

- Henry Wheaton, The Dangers of the Union (1821)

Historians and legal scholars generally agree that during John Marshall's tenure as chief justice of the United States Supreme Court from 1801 to 1835, the federal judiciary expanded its power to interpret the Constitution and asserted with increasing force its authority to speak on behalf of the Union. This single story of judicial nationalism, however, contains two distinct and largely non-overlapping strands. Historians have tended to focus on the Supreme Court alone, to the exclusion of the lower federal courts, and have largely treated early national controversies over the lower federal courts as outgrowths of the political turmoil that accompanied the emergence of the first party system. Legal scholars in the fields of federal courts and constitutional law, meanwhile, have devoted significant attention to the lower federal courts but have largely neglected the history of how those courts developed beyond the key early moments of the Constitutional Convention and the First Congress.

This essay returns the lower, or inferior, federal courts to their central place in the story of early national law and politics. The actual work of the lower federal courts occupied the

attention of Federalist and Jeffersonian Republican commentators alike, and technical issues of the courts' jurisdiction proved divisive because they were widely seen as the practical, institutional working-out of fundamental questions of federal structure left incompletely settled after the founding. The extension of federal judicial power to the lower federal courts was a crucial element of the Federalists' project of completing and cementing what they viewed as the essential federalness of the Republic.

Marshall and his fellow federalists/Federalists, most notably Justice Joseph Story,¹ shared a substantive commitment to a particular kind of structure: a judiciary-centric federalism. Marshall and Story were deeply committed to the belief that the inferior federal courts were and ought to be the principal physical embodiment of the national government, reaching into the otherwise highly localized space of the cities, towns, and countryside of the United States.² In an era in which Congress's power to oversee internal improvements such as canals and turnpikes remained highly contested, and before the issue of slavery in the territories had galvanized antislavery arguments for expanding the reach of congressional regulation, the federal legislative power was largely confined to the regulation of international treaties and trade, military affairs, and the post office. Marshall and his colleagues believed that the inferior federal courts--not Congress--were the most important symbolic and institutional nodes by which the people of the nation would encounter the authority of the general government. The justices' goal was to build the power of the inferior federal courts, and through them the judicial power of the United States, and through that a specifically federal form of government, which they understood to mean a two-tiered government with built-in structural guarantees of central supremacy and against centrifugal polycentrism.³

The Federalists' early efforts to vest the inferior federal courts with jurisdiction over cases arising under the Constitution, federal laws, or treaties came to initial fruition in the Judiciary Act of 1801, which for the first time granted the lower federal courts what modern commentators have termed "federal question" jurisdiction.⁴ In 1799, Massachusetts congressman Theodore Sedgwick, a leading Federalist, gave voice to his contemporaries' emphasis on political expedience as well as their belief that they and their Jeffersonian opponents held profoundly conflicting visions of the nature of the Republic. "If the real federal majority can act together much may and ought to be done to give efficiency to the government, and to repress the efforts of the Jacobins against it," Sedgwick observed. "We ought to spread out the judicial so as to render the justice of the nation acceptable to the people, to aid national economy, to overawe the licentious, and to punish the guilty."⁵

Expanding federal judicial power to the inferior federal courts thus had long been a crucial element of the Federalists' project of ensuring national supremacy through the institution of the judiciary.⁶ In 1787, the Virginia Plan presented at the Constitutional Convention by Edmund Randolph and drafted largely by James Madison had called for the establishment of a "National Judiciary" consisting of "one or more supreme tribunals, and of inferior tribunals." According to the plan, the inferior tribunals' jurisdiction would include the power "to hear & determine in the first instance . . . questions which may involve the national peace and harmony."⁷

The 1801 act, however, was repealed by the newly Jeffersonian Congress in the wake of the elections of 1800.⁸ By 1802, therefore, the Federalists' drive to expand the scope of federal cases over which the inferior federal courts could exercise original jurisdiction appeared to have

been utterly stymied. After the repeal of the 1801 act, the statement in Article III of the Constitution that the judicial power of the United States “shall extend to all cases, in law or equity, arising under this Constitution, the laws of the United States, and treaties made . . . under their authority” was matched by a congressional grant of general federal question jurisdiction only to the Supreme Court, and not to the inferior federal courts.⁹

Historical accounts of early national law and politics tend to deemphasize, or even ignore, the brief expansion of federal question jurisdiction under the Judiciary Act of 1801.¹⁰ To the extent the act appears in the narrative of early national legal history, it is as the statutory basis for the appointment of the so-called “midnight judges” that accompanied William Marbury’s abortive commission as a justice of the peace for the District of Columbia.¹¹ The Federalists overreached, we are told, and their partisan attempt to pack the federal judiciary with their own judges cloaked with broad powers of original jurisdiction was beaten back by the forces of Jeffersonian democracy.¹² The real significance of the 1801 act has thus been left out of the orthodox history of U.S. constitutional law, pushed to the sidelines as part of a broader narrative of the Federalists’ eclipse by the Jeffersonians.

Many legal scholars have also overlooked the importance of the early national struggles over the lower federal courts’ jurisdiction, but for different reasons. The dominant account of federal jurisdiction in the early Republic, which remains largely shaped by the theories first articulated by Henry Hart and Herbert Wechsler in the 1950s, treats the first half of the nineteenth century as little more than the working-out of principles laid down between 1789 and 1791 by the delegates to the Constitutional Convention and the members of the First Congress.¹³ The concept of the “Madisonian compromise,”¹⁴ according to which the power to establish

inferior federal courts and to vest them with jurisdiction would rest entirely with Congress, has dominated constitutional law and federal courts scholarship to such a degree that it has obscured the degree to which these founding principles were still in flux in the early national and antebellum periods. But the Court's foundational decisions on the jurisdiction of the inferior federal courts were hardly preordained or inevitable.

On the contrary, between 1801 and 1835, the Marshall Court strove to shape judicial doctrine into a partial remedy for the losses the Federalists suffered in Congress after 1801: namely, to use judicial interpretation of the Constitution and congressional statutes as a means of expanding the inferior federal courts' power to hear cases arising under federal law. Marshall himself had, while in Congress, been a member of the House committee that drafted the Judiciary Act of 1801. Judge-made doctrines of jurisdiction thus partially filled the gap left by the repeal of the 1801 act's legislative grant of jurisdiction. The trajectories of two distinct institutions (Congress, the Court) were thus causally connected. Indeed, the institutions themselves mattered in a way that purely nationalist or jurisdictional stories overlook. The Court's nationalist bent in these years must be seen as deeply connected with political events such as the election of 1800 and Congress's repeal of the 1801 act.

Marshall's and Story's commitment to building the power of the inferior federal courts therefore stemmed from their deeply held belief that the "judicial power of the United States" described in Article III of the Constitution represented the chief bulwark against the wayward, localist tendencies of the states. Rather than focusing on federal jurisdiction in the modern, technical sense of those terms, we must understand these jurists as possessing an almost metaphysical belief in the federal judicial power as at once proceeding from the center and

connecting the peripheries back to the center, and thereby countering the omnipresent threat that the federal republic would revert to a confederation. In the face of mounting challenges to federal supremacy from state sovereigntists such as Virginia judge Spencer Roane, who assailed the Supreme Court for reviewing the decisions of state courts, Marshall and his colleagues insisted that the inferior federal courts were a crucial locus of federal power precisely because they were present in the town square and therefore created a practical, physical connection between the central government and the local polity.

Moreover, the federal judges' power to conduct factfinding, to deliver charges to grand juries and instructions to petit juries, and to engage in rulemaking meant not only that the parties in those cases came face to face with a federal official, but that a cadre of judges who owed their posts to the United States government and who were therefore obliged to place the interests of the Union above those of the states were the agents who ensured that the supreme law of the land was uniformly and reliably carried into the localities. Marshall, Story, and others thus believed that the inferior federal courts had a unique role in the multilayered federal polity that had emerged from the founding period, a role that could not adequately be fulfilled by arguably functionally equivalent mechanisms such as Supreme Court review of state-court determinations of federal questions.

My analysis proceeds in three parts. Part I explores the meaning of the concept of federal jurisdiction for Marshall and his colleagues – in particular, their view of the relationship between judicial and legislative power. For Marshall and Story in particular, procedural questions of jurisdiction were intimately related to the authority of the federal judiciary, and, more important, to the existence of the Union itself. Contemporary debates concerning the existence of a general

federal common law shed some light on the meaning of federal jurisdiction in the early Republic but do not tell the whole story.

In Part II, I examine the concrete moment in which the practical meaning of federal question jurisdiction became salient for the Court and the nation: the Court's companion decisions in Osborn v. Bank of the United States and Bank of the United States v. Planters' Bank in 1824. The Osborn decision and the related controversy concerning the Second Bank of the United States illustrate the changing conception of federal jurisdiction in the first three decades of the nineteenth century. Taken together, these cases and their surrounding controversy suggest that the single year of expanded federal question jurisdiction between 1801 and 1802 must be seen as not an outlier but rather as the first point in a line, a moment that influenced the range of possible ideas available to legal and political actors two decades later.

Following this exploration of the doctrine of federal jurisdiction, Part III takes up the question of institutions--specifically, the mechanisms by which cases involving issues of federal law came before the Court. During the interregnum of 1801-02, federal question cases might theoretically begin in a federal circuit court and then make their way to the Supreme Court.¹⁵ Before 1801 and after 1802, however, when the Court exercised its appellate jurisdiction to take up a civil case based solely on a claim arising under federal law, the court from which the majority of cases came was a state court.¹⁶ The jurisdictional basis for the Court to hear appeals from state courts in this manner was Section 25 of the Judiciary Act of 1789.¹⁷ Although Section 25 had engendered controversy since the act's drafting, attacks on it mounted in the early decades of the nineteenth century, as sectional tensions increased. Marshall and his colleagues became immersed in this mounting conflict, and the debate over Section 25 suggests that the

mechanism by which a given case reached the Court on review, and the court in which that case originated, mattered a great deal to the justices and their contemporaries.

My approach seeks to understand how Marshall and his contemporaries understood the task of interpreting federal jurisdiction then, with the assumption that the choice of the relevant “then” is all-important for the ultimate question of meaning.¹⁸ An intellectual history of the Marshall Court provides a necessary corrective to accounts of the early-nineteenth-century Court as either a nakedly political entity driven by larger forces, or a hermetic group of eminences divining the fundamentals of the national compact.

I. The Meaning of Federal Jurisdiction: Retreat and Redefinition

The first three decades of the nineteenth century were a time of exuberance, ferment, and uncertainty in the United States. To be sure, many of the leading figures of the founding generation continued to dominate public life; for the first fifty years of the Republic, until 1825, every American president had served in the Continental Army or the Continental Congress. James Monroe, who served in both, later had the distinction of being the last president to wear knee breeches.¹⁹

This sartorial turning point captured a larger transition in American society and politics that took place in the early nineteenth century. Between the election of Thomas Jefferson to the presidency in 1800 and Marshall’s death in 1835, Americans engaged in a second war against the preeminent military and imperial power of the day; endured the country’s first major financial panic; witnessed the expansion of large-scale cotton cultivation, and with it large-scale slave labor; marveled at the new Erie Canal; chatted about prisons, juries, and town meetings with a

visiting French aristocrat of the house of Tocqueville; forcibly removed the people of the Cherokee Nation from the old southwest to territory west of the Mississippi; mourned the death of Charles Carroll of Carrollton, the last surviving signer of the Declaration of Independence; and enjoyed the fruits of, while also expressing anxiety about, the market revolution taking place around them.²⁰

The transformation in politics and government during this period was no less revolutionary.²¹ On March 2, 1801, Jefferson and Marshall exchanged letters in which the president-elect inquired whether the chief justice might be available at noon the next day, and whether he might also be able to ascertain the words of the appropriate oath and bring them to the Senate chamber. (In a request that would prove fateful for the development of American constitutional law, Jefferson ended his note by asking Marshall, who was also serving as acting secretary of state, to send his department's chief clerk to assist Jefferson, the latter "[n]ot being yet provided with a private Secretary, & needing some person on Wednesday to be the bearer of a message or messages to the Senate."²²) Twenty-eight years later, by contrast, the protocol surrounding a change in administration had become so entrenched that the popular outpouring of enthusiasm that greeted Andrew Jackson's inauguration elicited horrified commentary from some members of the political and social elite. Following the ceremony, Jackson "went to the palace to receive company, and there he was visited by immense crowds of all sorts of people, from the highest and most polished down to the most vulgar and gross in the nation," Justice Joseph Story wrote to his wife. "I never saw such a mixture. The reign of King 'Mob' seemed triumphant."²³

Many of the thorniest constitutional questions that the Marshall Court confronted

concerned federal jurisdiction--that is, the power of the Supreme Court and the inferior federal courts to hear cases involving particular types of subjects or parties. One especially provocative issue was the extent to which the Supreme Court might permissibly hear appeals from state courts on issues concerning the Constitution or federal statutes or treaties. With respect to both civil and criminal cases, the Court ruled in the affirmative,²⁴ basing its reasoning on the combination of the statutory grant of jurisdiction in Section 25 of the Judiciary Act of 1789,²⁵ Article III's grant of jurisdiction to the Supreme Court,²⁶ and the Supremacy Clause of the Constitution.²⁷ Elsewhere, the Court took up the question whether Congress might add to the Court's original jurisdiction, holding in Marbury v. Madison that it could not permissibly do so.²⁸

The issue of the scope of the inferior federal courts' jurisdiction was deeply intertwined with these questions of the nature and extent of the Supreme Court's power. These courts, which had been created by the First Congress in the Judiciary Act of 1789, comprised two species: district courts, which had exclusive jurisdiction over certain crimes cognizable under federal law, admiralty suits, and cases under federal law involving forfeitures or penalties relating to seizures on land; and circuit courts, with jurisdiction over other crimes under federal law, civil suits in which the United States was a plaintiff and the amount in controversy was greater than \$500, suits in which an alien was a party, and suits between citizens of different states.²⁹ Between 1801 and 1802, these circuit courts entertained the additional, larger category of cases arising under federal law.

As was the case for the federal judiciary as a whole, the inferior federal courts were understood by contemporaries to possess only a specific quantum of jurisdiction. "The courts of

the United States are all of limited jurisdiction, and their proceedings are erroneous, if the jurisdiction be not shown upon them,” Marshall wrote in 1809.³⁰ This limited jurisdiction grew out of the circumstances of the lower federal courts’ birth. Unable to agree on the existence or composition of federal courts besides the Supreme Court, the delegates to the Constitutional Convention in 1787 had left those questions for the First Congress to take up.³¹ Congress did so, turning immediately to the issue of the lower federal courts at its initial meeting in April 1789. The result--the Judiciary Act of 1789--became law upon the signature of President Washington in September 1789.

The lower federal courts thus sprang into being in the Republic’s first months. For decades thereafter, commentators continued to assault the courts as vehicles of centralization that threatened to drain the state courts of their power. The inferior federal courts would “Swallow by degrees all the State Judiciaries,” Pennsylvania congressman William Maclay argued in 1791. Although he had served on the drafting committee for the 1789 act, Maclay termed the regime that statute established “a Vile law System, calculated for Expence, and with a design to draw by degrees all law business into the federal Courts.”³²

If the lower federal courts were potential engines of centralization, jurisdiction was the grease that allowed the pistons to move ever more quickly. The Supreme Court’s rulings on the jurisdiction of the lower federal courts offer crucial insights into the architecture of the factory, as understood by its managers: the way the components fit together, the relationship between the raw materials and the goods created, and--most important--the beliefs and ideas that the human operators brought to their work of production.

One of the central points of disagreement concerning the jurisdiction of the lower federal

courts in the early Republic was the structural relationship between the judicial and legislative powers of the United States. Was the scope of the federal judicial power coextensive with the scope of Congress's power, including the potentially broad grants set forth in the Commerce Clause and the Necessary and Proper Clause? On this view, the judiciary and the legislature operated as complementary instruments of an overarching federal power. But if this was so, then how should the broad category of the federal judicial power be allocated between the Supreme Court and the lower federal courts? If, on the contrary, the judicial power was not necessarily coextensive with, and therefore might be broader or narrower than, the legislative power, where might one look to derive the correct parameters to guide the lower federal courts? Such questions mattered because they connected theoretical constructs such as "the judicial power of the United States" with the real-world, quotidian practice of the federal district and circuit courts. How, contemporaries wondered, were the inferior federal courts meant to fit into the concentric structure in which multiple layers of federal judicial authority exercised multiple varieties of jurisdiction?³³

Examination of federal courts' treatment of these questions suggests a difference in constitutional worldview between the waning years of the Adams administration and the first decades of the nineteenth century--and, relatedly, between the years before and after the federal question interregnum of 1801-02. Cases such as United States v. Worrall, in which a federal circuit court upheld a conviction for bribery of the federal commissioner of the revenue even though Congress had not explicitly criminalized such conduct, presaged two important themes for the Marshall Court, which convened three years later.³⁴ First, the case demonstrates the central role that the "arising under" inquiry would come to play in the early decades of the

nineteenth century. Attorneys and judges alike were clearly intent on determining whether bribery of a federal official fit the definition of an offense arising under federal law. Alexander Dallas, attorney for the defendant Worrall, invoked variations of the phrase “arising under” four times in the course of his argument to the Court, even though those words appear nowhere in section 11 of the Judiciary Act of 1789--the statutory basis for his client’s indictment (which he cited only once).³⁵ Absent a specific declaration of the offense by Congress, Dallas contended, the case could not be said to arise under the Constitution or federal law.³⁶

Dallas’s use of the “arising under” language in the criminal context suggests a broader vision of the type of case that possessed the necessary nexus to the Constitution and laws of the United States. The “arising under” phrase resonates throughout Dallas’s argument, a marker of a particular species of case with inherently federal qualities that was suitable for the original jurisdiction of the federal courts.³⁷ Dallas’s view thus blended statutory and constitutional bases of jurisdiction, adding a more abstract constitutional dimension to what might otherwise have been a straightforward construction of section 11.³⁸ Already in 1798, then, the constitutional resonance and rhetorical power of the “arising under” idea is evident. The phrase was becoming an organizing concept that guided constitutional thought.

The second theme that cases such as Worrall raise is general federal common law jurisdiction. Enormous swaths of early-nineteenth-century legal commentary examined the question whether the federal courts possessed their own, distinctively federal body of principles, precedents, and caselaw which they could apply even in the absence of specific congressional provisions.³⁹ One’s position on the existence and scope of federal common law implicated deeper questions concerning the respective roles of courts and legislatures, the authority of

federal judges to reason expansively about the scope of their powers, and even the nature of the federal-state relationship. The controversy in the early Republic surrounding the federal common law tended to track party lines, with Federalists generally tending to endorse the notion, and Republicans typically viewing it as a cover for a project of centralization and the subordination of the states.⁴⁰

The federal common law controversy commanded the attention of many prominent early-nineteenth-century constitutional commentators. But it was a part of the debate, not the entire debate, regarding the unsettled status of the federal courts and the scope of the federal judicial power. Modern scholars have tended to conflate the two issues, treating the jurisdictional question as a subset of the common law question.⁴¹ On this view, “arising under” jurisdiction operated simply as a procedural tool, secondary to the larger determination of the substantive rule of decision to be applied. The issue of federal courts’ ability to define offenses on their own was the real story, and the “arising under” language was simply a convenient hook that those courts sometimes used when they wanted to claim the maximum power to act absent a specific statute. Early national courts’ struggles with jurisdiction, therefore, are seen as essentially mechanical debates in which the judges and justices used jurisdiction to carry out their overarching constitutional commitments--whether to federal uniformity alone or to a more robust notion of a union knit together by judicial supremacy.⁴² Yet contemporary commentators did not necessarily assume that answering the question whether federal common law existed also solved the problem of defining the lower federal courts’ jurisdiction. On the contrary, many early-nineteenth-century theorists explicitly distinguished between the two concepts and treated them as analytically distinct.⁴³

Indeed, Peter Du Ponceau, a leading Philadelphia lawyer, took pains to assure the readers of his Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States that the category of federal common law cases was distinct from the category of “arising under” cases. “By the second section of the third article of the Constitution it is provided ‘that the judicial power shall extend to all cases in law and equity arising . . . under the laws of the United States,’” Du Ponceau observed. “Now it may be said, that if the common law is a law of the United States, it necessarily follows that the federal Courts are bound to take cognisance of all offences committed against it, whether or not Congress has made provision by statute for their trial and punishment.”⁴⁴

Du Ponceau distinguished between the common law as a “general system of jurisprudence,” a kind of background norm of interpretation, and the constitutionally created class of cases denominated as arising under the laws of the United States.⁴⁵ By so defining the category, the framers of the Constitution “only meant the statutes which should be enacted by the national Legislature,” Du Ponceau maintained. “[I]f they had intended to include the common law, they would have expressed themselves otherwise.”⁴⁶

Thus, for Du Ponceau, the question whether a particular case was to be classified as arising under federal law was an essential, constitutionally mandated step for determining the scope of the federal judicial power. A commitment to a federal common law did not interfere with this fundamental Article III inquiry. As Du Ponceau’s comments suggest, by the early years of the nineteenth century, the concept of “arising under” jurisdiction began to appear in constitutional discourse in a way that suggests it had real resonance for contemporaries.

The content of federal jurisdiction itself, unclouded by the common law issue, came

squarely before the Supreme Court in 1809, in Bank of the United States v. Deveaux.⁴⁷ At issue was the seizure by Georgia officials Peter Deveaux and Thomas Robertson of two boxes of silver to satisfy state taxes that the Savannah branch of the First Bank of the United States had refused to pay. Bank officials filed suit in federal circuit court, but the court dismissed their claim for lack of jurisdiction. The Bank then appealed to the Supreme Court, which took the case to answer two questions: (1) could a corporation situated in one state bring suit against citizens of that state based on a diversity claim that the corporation's members were all citizens of another state?; (2) aside from diversity jurisdiction, could the Bank rely on any other head of jurisdiction to bring its action in federal circuit court?

The Court's answer, in brief, was that the citizenship of the individuals who compose a corporation, not the location of the corporation itself, was dispositive for purposes of diversity jurisdiction.⁴⁸ Therefore, the fact that the Bank branch's officers were citizens of Pennsylvania, and Deveaux and Robertson were citizens of Georgia, was sufficient to meet the diversity requirements; consequently, the decision of the circuit court was overruled, and the Bank's suit was allowed to go forward.⁴⁹

The more interesting issue for our purposes, however, was the second question: was there any source of federal jurisdiction besides diversity that might serve as a basis for the Bank's suit? Marshall took up this question first, before addressing the diversity issue. In response to the Bank's claim that, as Marshall put it, "a right to sue in [federal] courts is conferred on this bank by the law which incorporates it," the chief justice distinguished between the right or capacity to sue, and the capacity to sue in federal court.⁵⁰ The legislation establishing the Bank had granted it the capacity to make contracts, acquire property, and otherwise conduct its affairs as a

corporate entity. It had not vested the Bank with the right to claim a federal forum for its claims, he maintained. The bare fact that Congress had incorporated the Bank and instilled it with legal capacity therefore did not amount to a decision to give the Bank special access to the federal courts. “Unless, then, jurisdiction over this cause has been given to the circuit court by some other than the judicial act” of 1789, Marshall asserted, “the bank of the United States had not a right to sue in that court, upon the principle that the case arises under a law of the United States.”⁵¹ The Bank might be a creature of federal law, but for Marshall, the circumstances of its formation were conceptually distinct from the question of access to the federal courts. Congressional parentage did not ensure ongoing federal custody.

Prior to Marshall’s disposition of the “arising under” jurisdiction question, the attorneys for both sides had spent considerable amounts of each of their arguments addressing the issue. Horace Binney, attorney for the Bank, insisted that his clients possessed “a peculiar right to sue in the federal courts” because the act of Congress granting the Bank capacity required a corresponding grant of power when the Bank came before the federal courts.⁵² Binney followed this appeal to coterminous power theory by concluding that the capacity to sue in courts of record necessarily included the courts of the United States.⁵³ By vesting the Bank with capacity to sue, Binney argued, Congress had implicitly opened the doors of the federal courts to the Bank. Capacity of the party, therefore, translated into jurisdiction of the courts.⁵⁴

Representing the Georgia officials, Philip Barton Key rebuffed the Bank’s congressional-creation claim with a structural argument of his own. Bank officials had erred in filing their suit in federal court, Key contended, because their vague nexus to federal law was insufficient to give them special access to those courts. The proper forum for a claim in which “the only ground of

jurisdiction is a question upon the construction of the constitution, or of a law, or treaty of the United States,” Key argued, was state court, with the subsequent possibility of a writ of error from the Supreme Court pursuant to Section 25 of the Judiciary Act of 1789.⁵⁵ Moreover, Key went on, the very notion that Congress possessed the power to expand federal jurisdiction as it pleased ran afoul of the states’ plenary authority to determine the vast majority of federal claims.

If an act of congress could authorize any person to sue in the federal courts, on the ground of its being a case arising under a law of the United States, it would be in the power of congress to give unlimited jurisdiction to its courts. But it is only when the state courts disregard or misconstrue the constitution, laws, or treaties, of the United States, that the federal courts have cognisance under that clause of the constitution which declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States.⁵⁶

According to Key’s reasoning, then, the Article III requirements for the federal judicial power could properly be fulfilled by permitting state-court decisions to be appealed to the Supreme Court. This view minimized the importance of the Madisonian compromise insofar as it gave Congress little meaningful ongoing role to play in setting the parameters for federal jurisdiction. The provisions of the Judiciary Act of 1789 had become the exclusive and final authority on federal jurisdiction, a quasi-constitutional restatement of Article III and a barrier to further congressional attempts to add to the courts’ jurisdiction.

Ultimately, as we have seen, Marshall was unwilling to accept Key’s argument for

stripping not only the courts, but also Congress, of the power to determine federal jurisdiction. With his statement that the Bank could not bring suit in federal court “[u]nless . . . jurisdiction over this cause has been given to the circuit court by some other than the judicial act,” Marshall implied that some act of Congress could conceivably create jurisdiction – just not the particular act that had established the Bank.⁵⁷ In contrast to the circuit judges’ opinions in Worrall, which had together endorsed a relatively wide array of potential sources of jurisdiction (Congress for Justice Samuel Chase, Congress or the courts themselves for district judge Richard Peters), Deveaux appeared to prohibit the inferior federal courts from cloaking themselves in broad “arising under” jurisdiction.⁵⁸ Marshall therefore recognized Congress as the source and arbiter of federal question jurisdiction.⁵⁹

Marshall’s emphasis on statutory definition of “arising under” jurisdiction, however, did not determine the outcome of the case. Recall that his denial of the Bank’s claimed right to sue in federal court as a matter of federal question jurisdiction was followed immediately by his determination that the Bank could bring a federal action against the Georgia officials under diversity jurisdiction. As was so often the case with Marshall’s decisions, the opinion disposed of the questions presented in what one might think was reverse order, taking up broad questions of legal rights or constitutional text before reaching a conclusion based on altogether different principles.⁶⁰ In some sense, then, the discussion of “arising under” jurisdiction was a classically Marshallian digression on the way to a decision.

Yet although the detour might be dismissed as dictum, it provides a window into the chief justice’s worldview. Marshall delivered his apparently strict reading of “arising under” jurisdiction in the shadow of diversity jurisdiction. In some sense, it cost him little to read the

statutory jurisdiction narrowly, since he could still fall back on diversity jurisdiction and order the Bank's case to proceed. But Marshall did more than simply argue in the alternative. He accompanied his narrow reading of "arising under" jurisdiction with a subtle suggestion that Congress might consider granting jurisdiction to the Bank "by some other than the judicial act."⁶¹ As Key had suggested in his argument on behalf of the Georgia officers, in a world with broad federal question jurisdiction, the issue would then become relatively straightforward. If the lower federal courts' jurisdiction extended to matters arising under the Constitution, federal statutes, and treaties, then the Bank would likely be free to bring suit in federal circuit court. Key had invoked the specter of broad federal question jurisdiction as an impossibility, a reason to conclude that the Bank's claim belonged in state court and could reach a federal court only via a writ of error from the Supreme Court under Section 25.⁶² Marshall, however, implied that Key's use of the subjunctive ("If an act of congress could authorize any person to sue in the federal courts, on the ground of its being a case arising under a law of the United States") might be recast as a more open-ended invitation to Congress to change the jurisdictional ground rules.⁶³

Why should Marshall have attempted to define federal question jurisdiction narrowly in the same breath in which he granted diversity jurisdiction and raised the possibility of congressional intervention? Because, in a word, of chronology. Deveaux was decided in 1809 – seven years after the repeal of the Judiciary Act of 1801, and therefore seven years after the statute's brief experiment with broad federal question jurisdiction. "Arising under" jurisdiction no longer existed in 1809, but it had existed in the very recent past, a fact of which all the justices, lawyers, and commentators surrounding Deveaux would have been aware. On Key's view, the 1801-02 interregnum was a dead letter, a constitutional nullity. Marshall rejected this

view, holding that diversity jurisdiction afforded the Bank an entrée into federal circuit court (and noting that Congress possessed the power to give future Banks more options).

Evidence of Marshall's dismay at the repeal of the 1801 act, and with it the termination of "arising under" jurisdiction, comes from his correspondence at the time. His reactions were expressed subtly, befitting his role as chief justice (and acting secretary of state), but they demonstrate unmistakable support for the 1801 act's expansion of the lower federal courts' jurisdiction and a corresponding disapproval of the act's repeal. As the 1801 act was moving through Congress, Marshall wrote to Justice William Paterson, "The question on the judicial bill will probably be taken in the Senate tomorrow, and we hope it will pass." Marshall mentioned approvingly the bill's move to end the Supreme Court justices' circuit-riding duties (which the justices had protested since the 1790s), connecting this reform with what he regarded as the need for a more robust system of lower federal courts. The bill's "most substantial feature is the separation of the Judges of the supreme from those of the circuit courts, & the establishment of the latter on a system capable of an extension commensurate with the necessities of the nation," he wrote.⁶⁴ The expansion of the federal circuit courts' personnel, powers, and jurisdiction were essential to the nation's expansion and development, Marshall maintained.

Thirteen months later, in the aftermath of the 1801 act's repeal, Marshall expressed a muted foreboding at the repeal itself and at the prospect of a Jeffersonian-controlled Congress. In a letter to Oliver Wolcott, Marshall noted darkly the iconoclastic mood that had seized Washington in the wake of the election of 1800. "I consider the bill for repealing the internal revenue as pass[e]d, as I do every other measure which is reported, & which is favor[e]d by those who favor[e]d the bill for repealing the late judicial system," he wrote. "The power which

cou[l]d pass that act can fail in nothing.”⁶⁵ The chief justice’s circumspect language did not quite conceal his sober assessment of the omnipotence of the new party in control of the legislative and executive branches, nor his unease at its agenda.

Marshall’s colleague Samuel Chase was more direct in his criticism. In a letter to Marshall, Chase insisted that Congress was constitutionally required to establish inferior federal courts, “for the trial and decision of all cases, to which the Judicial power of the United States is extended by the Constitution . . . and of which the supreme court by the Constitution has not Original Jurisdiction; for I much doubt, whether the Supreme Court can be vested, by law, with Original Jurisdiction, in any other Cases, than the very few enumerated in the Constitution.”⁶⁶ For both Marshall and Chase, then, the expansion of the lower federal courts’ jurisdiction was both practically and constitutionally desirable.

Contemporary commentators and modern scholars alike have noted that Federalists regarded the judiciary as their last redoubt following the rout of 1800.⁶⁷ This retreat to and embrace of the federal judiciary was not motivated solely by political expediency or animus toward reform, however. As Marshall’s letter to Paterson illustrates, Federalists such as the chief justice tended to have a deep conviction that the Republic contained latent centrifugal tendencies. They therefore believed that the job of the federal courts was to ensure uniformity of law across the nation, minimize the opportunities for states to behave opportunistically toward one another, and maintain an institutional and juridical separation between the specific set of matters that were defined as federal in nature and the vast majority that were not federal and therefore did not require special jurisdictional grants. Inferior federal courts were a crucial piece of this architecture, and “arising under” jurisdiction offered a vital analytical tool to sort out the special,

essentially federal category of legal issues from those that concerned only state issues, or that were only incidentally federal.⁶⁸ The Federalists' flight to the judiciary after 1801, therefore, reflected an ideological commitment to the judicial power of the United States as a linchpin of the still-fragile federal structure.

Returning to Deveaux, we can now situate that case in its particular intellectual and legal context. After 1802, the concept of "arising under" jurisdiction possessed a meaning and content that it had not possessed before the 1801 act made it salient for constitutional and political debate. Although the jurisdiction itself was no longer available after 1802, the recurrence of the phrase in cases such as Worrall and Deveaux--and in the writing of Du Ponceau and other commentators--suggests that the phrase had transcended the limited realm of the legal term of art to become an organizing frame for constitutional discourse. Despite the repeal of broad federal question jurisdiction, the "arising under" category endured in Americans' constitutional consciousness. An awkward locution that had begun as a general descriptor of a characteristic had transformed into a standard, a phrase with almost talismanic power to shape thought and discussion.⁶⁹

Thus, even though Marshall ultimately held that the jurisdiction in Deveaux was based on the parties' diversity, en route to that conclusion he first ruminated on the possibility of "arising under" jurisdiction. Diversity jurisdiction in Deveaux filled the gap left by the absence of general federal question jurisdiction. But the knowledge of the gap remained, as Marshall's exploration of the "arising under" issue demonstrates. Congress might decide to fill in the gap with a future grant of jurisdiction; or perhaps the Court would actively search for indicia that Congress had filled the gap. Looking back longingly on the brief career of the 1801 act, some

early-nineteenth-century Federalists resembled Jacobites in exile after the Glorious Revolution, nursing memories of past triumphs as they plotted their return to glory. Others, however, remained inside the realm, seeking new ways to spread their ideology as they watched the stakes become ever greater.

II. The Quiet Return of Arising Under Jurisdiction

The period between 1801 and 1802 had caused a fundamental rupture in the law of federal jurisdiction, a rupture brought about in part by the political upheaval of 1800. Indeed, in the 1803 case of Stuart v. Laird, the Court went so far as to uphold the repeal of the Judiciary Act of 1801.⁷⁰ By the time Jefferson was standing for reelection to the presidency in 1804, one might reasonably have concluded that “arising under” jurisdiction was a relic of the prior regime.

The period between 1819 and 1824, however, showed that the idea of federal question jurisdiction was alive and well, if existing in somewhat straitened circumstances. If Deveaux was a crypto-federal-question case, the 1824 decision in Osborn v. Bank of the United States represented an overt effort by the Marshall Court to resuscitate the doctrine altogether.⁷¹ The two moments of 1801-02 and 1819-24, therefore, were connected across more than a decade, forming not two isolated points but a line cutting through early national time. Indeed, the fact that the justices, commentators, and other observers had experienced the debates of 1801-02 provided a necessary background to the events of 1819-24. In short, the rise and fall of the Judiciary Act of 1801 led to the later reemergence of a version of federal question jurisdiction.

The facts of Osborn caused a sensation at the time.⁷² In September 1819, three agents of Ohio state auditor Ralph Osborn seized \$100,000 in specie and bank notes from the Chillicothe

branch of the Second Bank of the United States. The officials were acting pursuant to an Ohio statute of the same year that levied an annual \$50,000 tax on each of the Bank branches in the state and directed the auditor to collect any laggard funds. Osborn's agents loaded the funds into a wagon and moved them to a state bank, eventually delivering them to the state treasurer in Columbus. Along the way, the agents were harried by officials of the Bank of the United States, who--in anticipation of the visit from Osborn's men--had obtained a temporary injunction from a federal judge ordering the state to halt its efforts to collect the taxes. After a series of confused encounters in which the initial injunction papers proved defective, the state agents were jailed and then released, and the federal court issued a show-cause order against the state, the Bank brought a cause of action against Osborn in federal circuit court. Supreme Court Justice Thomas Todd, riding circuit, upheld the validity of the injunction against Osborn and ruled that Ohio could not constitutionally tax the Bank. Upon Osborn's appeal, the questions before the Court concerned (1) the constitutionality of the tax, and (2) an Eleventh Amendment challenge to the suit, on the theory that Osborn's role as state auditor meant that the Bank was improperly attempting to sue the state of Ohio.

These were not the most important issues in Osborn for our purposes, however. A third question came before the Court, stemming from a case that was at that moment before the federal circuit court in Georgia. That case, Bank of the United States v. Planters' Bank of Georgia, involved a claim by the Savannah branch of the Bank for payment of state bank notes that had been assigned to it by Georgia citizens.⁷³ The Planters' Bank had refused to redeem the notes -- again, as part of a coordinated campaign by the state to resist the Bank. When the Bank initiated an action in federal circuit court, the Planters' Bank raised a jurisdictional challenge, arguing that

the Bank had no basis for bringing suit in federal court because its claim derived from the original Georgia noteholders, who were incapable of suing in federal court. The Planters' Bank also contended that the Eleventh Amendment immunized it from suit because of its status as a Georgia corporation.

The Court requested reargument of Osborn in conjunction with the argument in Planters' Bank. The reargument focused solely on the question whether the Second Bank of the United States could bring a federal cause of action based on the provision in its charter authorizing it to sue in federal circuit court. Osborn's counsel had not challenged jurisdiction on this point in the first round of arguments. At the reargument on March 10 and 11, an all-star roster of early-nineteenth-century advocates appeared on behalf of the parties. Daniel Webster (then a Massachusetts congressman), Henry Clay (then a Kentucky congressman and candidate for president), and Pennsylvania congressman John Sergeant appeared for the Bank and argued for jurisdiction, while Ohio politicians John C. Wright and Ethan A. Brown and former Maryland senator Robert Goodloe Harper represented Osborn and the Planters' Bank. (Clay had appeared on behalf of the Bank in the first Osborn round and subsequently engineered the rehearing of Osborn with Planters' Bank.)⁷⁴ The combined Osborn-Planters' Bank argument confronted the Court with an opportunity to take up a set of questions that it had begun to contemplate fifteen years earlier, with respect to claims of the First Bank of the United States in Deveaux.

At the rehearing, Osborn's counsel offered a pair of challenges to the circuit court's jurisdiction: "1st. That the act of Congress has not given it. 2d. That, under the constitution, Congress cannot give it."⁷⁵ Osborn's attorneys thus deployed the full panoply of statutory and constitutional weapons in their efforts to repel the Bank's efforts to force their client into federal

court. The attorneys for the Bank, meanwhile, insisted that Deveaux could be distinguished because the statute establishing the Second Bank, unlike the one at issue in the earlier case, specifically granted the Bank the power “to sue and be sued in all State Courts having competent jurisdiction, and in any Circuit Court of the United States.”⁷⁶ This power in the Bank translated into jurisdiction on the part of the federal courts, the attorneys argued. “Power in the party ‘to sue,’ confers jurisdiction on the Court. Jurisdiction is always given for the sake of the suitor, never for the sake of the Court.”⁷⁷ Therefore, because the Bank itself arose under a statute in which Congress granted federal jurisdiction for cases in which it was involved, there “could be no case, where the Bank is a party, in which questions may not arise under the laws of the United States.”⁷⁸

Counsel for Osborn disputed the equation between the rights of a party and the jurisdiction of a court. They also maintained that even if Congress had intended to vest the Bank with the power to sue, and therefore to create jurisdiction, such an action was invalid because it attempted “to extend the jurisdiction of the federal Courts beyond the constitutional limits.”⁷⁹

The legislative history of the act establishing the Second Bank suggests that the jurisdictional provision had been the subject of some debate in Congress. In the version of the bill introduced in the House of Representatives by John C. Calhoun in January 1816, the Bank was granted the power “to sue and be sued . . . in all courts and places whatsoever.”⁸⁰ On March 12, Daniel Webster moved “to amend the clause which declares that the bank may sue and be sued ‘in all courts whatsoever,’ by designating the State courts.”⁸¹ In response to a colleague’s query whether Congress had the power to grant jurisdiction to the state courts, Webster replied that the bill was “objectionable as it stood, because it gave the bank the power to appear in ‘all

courts whatsoever.”⁸² After further discussion (not elaborated in the Annals of Congress), the amendment was adopted.⁸³ The Bank bill passed in the House on March 14 and moved to the Senate, where it was debated on March 25 and passed on April 3. President Madison signed it into law on April 10.⁸⁴

At some point between March 12 and April 3, the jurisdictional language changed again, to its final form: “to sue and be sued . . . in all state courts having competent jurisdiction, and in any circuit court of the United States.” From the broad jurisdiction outlined in the House’s January draft bill (“in all courts and places whatsoever”) to Webster’s amendment (in the state courts, presumably exclusively) to the final version (competent state courts plus circuit courts), the jurisdictional realm within which the Bank was to operate changed from all courts to state courts to state and federal courts. Yet the surviving records do not provide a clear sense of when the language granting original jurisdiction to the circuit courts was added to the bill. All we can say with certainty is that the amendment was made sometime between March 12 and April 3, 1816.⁸⁵

Eight years after the Bank bill passed, a few weeks before the Osborn reargument, Clay expressed in a letter to the Bank’s president Nicholas Biddle his belief that the Bank clearly had the power to sue in federal court. Clay--who as speaker of the House had observed the debates over the Bank bill in 1816--appeared confident that the Bank would prevail. “We argued the other day the cause of the Bank with the State of Ohio, and I entertain strong hopes of success. But the Court has since directed an argument of the question whether the Bank has a right to institute suits in the Federal Courts.” Clay continued: “I think I can get along very well with that question in the particular cause; because it is undoubtedly one arising under the Constitution and

Laws of the U. States. In regard to the general right of the Bank to sue in those Courts, in all cases, that is a question, which I argued for the Bank in Kentucky, and which was there decided in its favor.”⁸⁶

Despite these assurances, however, Clay warned his client that the question of the Bank’s ability to bring suit in federal court was “one about which I have never ceased to entertain the most serious apprehensions. Its importance you will readily perceive. Decided against the Bank it sweeps the dockets of Kentucky and Ohio, and calls in question all that has been decided for the Bank in that State.”⁸⁷ Cases involving the Bank had been percolating in the circuit courts for years, as the busy litigator knew only too well, and several circuits had permitted both the First and Second Banks to bring suit in a variety of cases under various theories that all amounted to arising under jurisdiction, even without a clear statutory grant.⁸⁸ Indeed, Clay’s emphasis on the Bank’s case as “arising under the Constitution and laws of the United States”--a phrase that echoed the Constitution, not the statute establishing the Bank--suggests that he regarded Article III jurisdiction as more dispositive than statutory jurisdiction. Applied to a case such as Deveaux, where the facts supported Article III but not statutory jurisdiction, Clay’s comments suggest that he might have been willing to go farther than Marshall in broadening the power of the inferior federal courts.

When the Osborn decision came, Clay’s hopeful predictions, rather than his anxious forebodings, were vindicated. Writing for the Court, Marshall began with the specific language of the statute establishing the Bank. The words of the act “cannot be made plainer by explanation,” he stated. “They give, expressly, the right ‘to sue and be sued,’ ‘in every Circuit Court of the United States,’ and it would be difficult to substitute other terms which would be

more direct and appropriate for the purpose.”⁸⁹ Marshall thus concluded that the language of the act therefore conferred jurisdiction--assuming that Congress had the power to do so as an initial matter.

Marshall next took up this foundational question of Congress’s authority to bring the Bank within federal jurisdiction. The Bank’s original circuit court case against Osborn, he stated,

is a case, and the question is, whether it arises under a law of the United States The appellants contend, that it does not, because several questions may arise in it, which depend on the general principles of the law, not on any act of Congress. If this were sufficient to withdraw a case from the jurisdiction of the federal Courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance . . . would be construed to mean almost nothing.⁹⁰

In this passage, Marshall probed one of the unstated premises behind the challenges to the Bank’s jurisdiction. According to Marshall, Osborn and the Planters’ Bank had argued, in essence, that although “arising under” jurisdiction might be required by Article III, the jurisdiction extended only to specific issues that arose under federal law, rather than to the entire case in which such issues emerged.⁹¹ Marshall dismissed this interpretation of Article III, suggesting that to do otherwise would be to strip “arising under” jurisdiction of any practical meaning. “There is scarcely any case, every part of which depends on the constitution, laws, or

treaties of the United States,” he noted.⁹² Therefore, the key inquiry for purposes of assessing a congressional grant of jurisdiction was whether “a question to which the judicial power of the Union is extended by the constitution[] forms an ingredient of the original cause.”⁹³ If such a federal ingredient could be found, then Congress might permissibly confer jurisdiction over that cause upon the federal courts.

Marshall next took up the constitutional issue: whether the statute granting the right to sue to the Bank was itself constitutional. Had the Bank simply claimed a right to sue based on its character as a federal entity, it would not have succeeded in opening the doors of the circuit courts. But in this case, the connection between the Bank and federal power extended beyond the moment of creation, giving rise to an ongoing relationship, Marshall insisted. “[T]he act does not stop with incorporating the Bank. It proceeds to bestow upon the being it has made, all the faculties and capacities which that being possesses. Every act of the Bank grows out of this law, and is tested by it. To use the language of the Constitution, every act of the Bank arises out of this law.”⁹⁴ In other words, Marshall stated, the statute was a constitutional grant of jurisdiction to the Bank because every case or issue involving the Bank “grows out of, and is tested by” federal law.

In dissent, Justice William Johnson lobbed a volley of critiques at Marshall’s opinion. He quibbled with the majority’s effort to distinguish Osborn from Deveaux, arguing that the cases were similar in that they involved a statutory grant of corporate capacity in which an artificial entity received the ability to “personate the natural person.”⁹⁵ Both charters, then, should be seen as simply declaring the parameters of the two Banks’ powers and duties, including the power to sue and be sued (like a person), rather than charging the federal courts

with special obligations to provide the Banks with a forum for their claims.⁹⁶

Ultimately, Johnson appears to have been most troubled by what he regarded as the bootstrapping aspect of Marshall's argument. Where, he asked, was the federal law under which the case arose? He questioned whether it could originate in the nature of the Bank itself, since the nature of the Bank was precisely the issue in the case.⁹⁷ Surely it was not sufficient to say that the Bank's cases necessarily arose under federal law. No one could reasonably argue, Johnson maintained, that the Bank would be able to claim federal jurisdiction for its suits "unless the suits come within the description of cases arising under a law of the United States, independently of the grant of the right to sue."⁹⁸ In the post-repeal world of no general federal question jurisdiction, then, Johnson rejected the notion that some inherently federal quality associated with the Bank gave it access to the federal courts.

The Court's decision in Planters' Bank provides a slightly different angle on the disagreement between Marshall and Johnson, who again in that case wrote the majority and dissenting opinions, respectively. Citing Osborn, Marshall stated in two sentences that the circuit court had jurisdiction to hear the Bank's claim on the promissory note.⁹⁹ As several commentators have noted, the decision in Planters' Bank arguably went even further than Osborn, inasmuch as the Court in Planters' Bank found federal jurisdiction despite the absence of any congressionally created right.¹⁰⁰ Unlike Osborn or McCulloch, in which the underlying claim clearly implicated a federal question (the power of a state to tax the Bank), the underlying issue in Planters' Bank was a state-law claim for payment of bank notes that the Bank derived from state noteholders who could not themselves bring suit in federal court.

Taken together, Osborn and Planters' Bank spelled a tentative, quiet return of the pre-

repeal conception of the contours of “arising under” jurisdiction, albeit only for cases involving one special federal party, the Bank. This subtle shift is evident in Johnson’s Osborn dissent--in particular, his critique of Marshall’s reasoning as circular. Johnson’s frustration stemmed from a suspicion that the majority was simply saying that all cases involving the Bank arose under federal law and were therefore subject to federal jurisdiction. To Johnson, such an argument ignored the fact that “arising under” jurisdiction had no statutory basis after 1802. Johnson’s suspicion was in fact correct: Marshall was in essence saying that all cases involving the Bank arose under federal law. But Marshall’s analysis differed from Johnson’s with respect to the consequences that followed from that statement. For Marshall, all cases involving the Bank arose under federal law not only because the Bank was the creature of federal law, but because Congress had said that all cases involving the Bank arose under federal law. The renaissance of federal question jurisdiction, then, was a limited one, because it applied only to cases involving the Bank. But it was nevertheless a reassertion through caselaw of an aspect of the federal judicial power that had been lost through legislative overruling.¹⁰¹

In Osborn, Marshall succeeded in his efforts to empower the inferior federal courts, an aim that dated at least back to his involvement in the drafting of the 1801 act. In Deveaux, he was unable to expand federal jurisdiction as far as he might have liked because Congress had not created a sufficient statutory basis in its authorization of the First Bank. The explicit grant of jurisdiction in the 1816 statute establishing the Second Bank, combined with state sovereigntists’ renewed resistance to both the Supreme Court and the inferior federal courts, convinced Marshall that the attack on the federal courts was in fact an assault on the Union. The statute at issue in Deveaux simply could not support jurisdiction; that was why Marshall ended the first part of his

inquiry with a subtle call for Congress to issue a clearer jurisdictional grant. In Osborn, despite the statute's repetition of the "sue and be sued" phrase that had caused so much uncertainty in Deveaux, Marshall was able to find a clear statement by Congress that cases involving the Second Bank could be brought in the circuit courts.

Reading the 1801 act in 1801, one might reasonably have thought that its "arising under" language referred to a case that arose under a particular federal law unrelated to the case. In Osborn and Planters' Bank, however, the relevant federal law was also the law that had created one of the parties--hence Johnson's difficulty in identifying the particular federal law under which the claim arose in each case. Even as the Marshall Court chipped away at the limited jurisdiction of their post-repeal world, therefore, they adapted the "arising under" concept to the changed circumstances of the 1810s and 1820s.

III. Institutional Questions

As the decisions in Osborn and Planters' Bank suggest, Marshall, Story, and many of their fellow judges and commentators were committed to a broad vision of the jurisdiction of the federal courts, not only to a broad vision of the jurisdiction of the Supreme Court. Here, again, the nationalist narrative falls short, insofar as it presents the Marshall Court as institutionalizing its commitment to nationalism by expanding the reach of the Supreme Court itself.¹⁰² While perhaps analytically helpful as a basis for modern-day arguments about judicial supremacy, such arguments overlook the contemporary framework in which such arguably Court-expansionist cases were decided. Certainly, establishing the interpretive primacy of the Court was central to Marshall and his colleagues on the Court, as demonstrated by such landmark decisions as

Marbury v. Madison,¹⁰³ Martin v. Hunter's Lessee,¹⁰⁴ and McCulloch v. Maryland.¹⁰⁵ The empire that Marshall and Story sought to fortify in these decisions, however, was not exclusively defined by the boundaries of the Court's own powers. Rather, these classics of the Marshall Court oeuvre reflected a broader commitment to building the power of the federal courts, plural. The Supreme Court was the capitol in this new federal judicial landscape, but it was surrounded by and dependent on other similarly federal edifices that shared a commitment to structure in the service of the substantive federalist goal of maintaining a union constituted of multiple levels of governmental authorities.¹⁰⁶

The best evidence of this commitment to federal courts as a category rather than to a single supreme federal court comes from Marshall and Story's attitudes toward Section 25 of the Judiciary Act of 1789, which established the writ of error procedure by which the Supreme Court could hear appeals from the highest court of a state.¹⁰⁷ In the scheme of parallel state and federal judiciaries contemplated by the Judiciary Act of 1801 and by Marshall, Story, and their colleagues, a case involving a federal question might originate in either a federal circuit court or a state court; in either posture, it might ultimately be decided in an appellate procedure before the Supreme Court. The tracks ran alongside each other, but whichever track a particular case followed, the case had the potential to reach final resolution before the Court.¹⁰⁸

Applying a modern, institutionalist perspective, one might ask why the route by which a given case reached the Supreme Court mattered. After all, one could easily imagine the facts in *Osborn* leading to a proceeding in Ohio state court, followed perhaps by a hearing in the Supreme Court on a writ of error. Why did it matter to Marshall and Story how the case reached them, as long as it could ultimately reach them? As long as the Court maintained its Section 25

power to review state-court decisions, surely that practice would allow the Court ample opportunity to correct erroneous interpretations of the federal Constitution or to pay due regard to issues of uniformity. From a purely structural standpoint, Supreme Court review of state-court decisions under the Supremacy Clause might be sufficient to prevent state courts from straying too far from desirable national norms or engaging in questionable interpretations of the federal Constitution.¹⁰⁹

But it did matter to Marshall and Story how the case reached them, and they did not regard the Section 25 state-court route as a suitable substitute for the companion track of federal-court trial and appeal. Indeed, the fact that they insisted on the availability of both routes suggests the importance they and their colleagues attached to the lower federal courts. If the ostensibly nationalist decisions of the Marshall Court had stemmed primarily from the Court's desire to build its own power--whether out of a conviction that the Court had a unique role in the constitutional scheme or, more cynically, out of an impulse to aggrandize--one might expect the justices to be largely indifferent as to the route a particular case took on its way to their tribunal. On this view, one might conclude that the repeal of the 1801 act should have made little practical difference to the cases that came before the Court. Indeed, in the years between Deveaux and Osborn, the Court's robust statements of its power of appellate review over state-court cases, as in Martin v. Hunter's Lessee¹¹⁰ and Cohens v. Virginia,¹¹¹ might have signaled the justices' determination to devote themselves to winning the battle with the states instead of pushing for a coordinate federal-court path to the Court.

Even after Martin and Cohens demonstrated the Court's determination to insist on its Section 25 powers of review in the face of resistance from the states, however, the writ of error

appears to have been inadequate to Marshall and his colleagues' vision of a federal structure built on distinct judiciaries that in turn would reflect the coordinate powers and spheres of the general government and the states.¹¹² Despite the rapidly receding memory of arising under jurisdiction under the 1801 act, in the 1810s and 1820s the federalist justices continued to chivy away at creating an approximation of that lost jurisdictional grant. The functional equivalent of applying the Section 25 power broadly enough to sweep all state cases involving a federal question into the Supreme Court might have resulted in a similar outcome, but the federalists' commitment to structure convinced them that the means by which a case reached the Court, not just the fact that it arrived, was of the utmost consequence for the project of maintaining the proper balance between layers of government.¹¹³ Moreover, shrinking or eliminating the lower federal court's original jurisdiction and relying on Section 25 review would have placed the justices in the position of depending on state court judges' factfinding, grand jury charges, and petit jury instructions, rather than on a more reliably and uniformly federal cohort of judges (many of them the justices themselves sitting on circuit).¹¹⁴

To see the importance of the lower federal courts to Marshall and Story's vision of the proper structure of the Republic, consider Story's opinion for the Court in Martin. The central issue in that case was the validity of Section 25, which the Virginia Court of Appeals had held unconstitutional in the context of a land dispute. Writing for Virginia's Supreme Court of Appeals, Judge Spencer Roane insisted that Section 25 by its very nature violated principles of dual sovereignty that he argued underpinned the entire constitutional structure.¹¹⁵

Writing for the Supreme Court, Story firmly rejected the Virginia court's argument, and with it Roane's vision of the vertical separation of sovereign authority within the federal

republic. Although Roane had arguably thrown a bone to nationalist interests by treating lower federal courts as a viable alternative, and by suggesting that the most worrisome invasion of state sovereignty was review by the Supreme Court, Story refused to cede that mode of review to the states. On the contrary, Story argued: the dispositive fact was not the forum in which a case arose but rather the nature of the case itself. “The appellate power is not limited by the terms of the third article to any particular courts,” Story insisted. “The words are ‘the judicial power (which includes appellate power) shall extend to all cases,’ &c., and ‘in all other cases before mentioned the supreme court shall have appellate jurisdiction.’ It is the case, then, and not the court, that gives the jurisdiction.”¹¹⁶ For Story, then, the fact that a case arose in state court was largely irrelevant for determining whether the Supreme Court could permissibly exercise appellate jurisdiction over it. Rather, the crucial inquiry was whether the case was “within the scope of the judicial power of the United States”--or, in other words, whether it was a case “arising under the constitution, the laws, and treaties of the United States.”¹¹⁷ The Supreme Court’s power to review state-court decisions was therefore not only congressionally prescribed by Section 25 but constitutionally required by Article III.

With this forceful statement, Story set forth an expansive vision not only of the Court’s power to review state-court cases, but of the nature of federal cases themselves. Story’s statement that “[i]t is the case . . . and not the court, that gives the jurisdiction” illustrates his commitment to federalness as a quality that some cases possessed and others did not.¹¹⁸ A case “arising under the constitution, the laws, and treaties of the United States” was a special category of case that required special supervision by federal courts. Even in Martin, the high-water mark of the Court’s insistence on the centrality of Section 25 review to the structure of the Union, the

argument hinged on what the Court regarded as the essentially federal quality of the case rather than more mechanical supremacy-based notions of the relationship between state courts and the Supreme Court. The breadth of Story's opinion therefore seemed to be speaking to issues beyond the specific one before the Court at that moment.

In his Martin opinion, Story listed several reasons that he believed that cases that fell within the special federal category needed to have access to federal courts at some point in their procedural history. The principal justifications were the need for “uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution”¹¹⁹; concerns that defendants would be disadvantaged by plaintiffs' bringing suit in favorable state courts¹²⁰; and a general worry that “state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.”¹²¹ In Martin, these possibilities militated in favor of upholding Section 25 review because it would provide an ultimate check by the Supreme Court in some portion of the cases decided in state court. But the fervor with which Story described these imperatives, especially the need for uniformity and the fear of state prejudice, also underpinned a conviction that lower federal courts vested with original jurisdiction over the special category of federal cases were necessary to ward off what Story regarded as the self-serving and fissiparous tendencies of the states.¹²²

Thus, in the same year that Martin was decided, Story addressed himself to drafting proposed legislation to restore arising under jurisdiction to the lower federal courts, following the general contours of the grant contained in the Judiciary Act of 1801. Story's “bill further to extend the judicial system of the United States” received editorial suggestions from Marshall and

Bushrod Washington and was endorsed by the other justices, with the exception of Johnson (who, eight years later, dissented in Osborn).¹²³ The proposal granted jurisdiction to the circuit courts “in all cases in law and equity arising under the Constitution, the laws of the United States, and under treaties made or to be made under its authority.”¹²⁴

In his commentary on the draft bill, Story articulated his belief that lower federal courts with a general grant of arising under jurisdiction were essential to uniformity and, more important, to fending off the local prejudices, jealousies, and interests that had concerned him in Martin. “The object of this section is to give to the Circuit Court original jurisdiction of all cases intended by the Constitution to be confided to the judicial power of the United States, where that jurisdiction has not been already delegated by law,” Story explained.¹²⁵ He continued:

If it was proper in the Constitution to provide for such a jurisdiction, it is wholly irreconcilable with the sound policy or interests of the Government to suffer it to slumber. Nothing can better tend to promote the harmony of the States, and cement the Union (already too feebly supported) than an exercise of all the powers legitimately confided to the General Government, and the judicial power is that which must always form a strong and stringent link. It is truly surprising and mortifying to know how little effective power now exists in this department.¹²⁶

Story’s comments demonstrate his belief that the judiciary was the key component in ensuring the functioning of the federal system, and that this goal derived directly from the text

and structure of the Constitution itself. In addition, he offered practical justifications for expanding the jurisdiction of the circuit courts. Because “[n]o Court of the United States has any general delegation of authority” in cases arising under the Constitution, federal laws, or treaties, “[t]he consequence is, that in thousands of instances arising under the laws of the United States, the parties are utterly without remedy, or with a very inadequate remedy.”¹²⁷ The specific grants of federal jurisdiction under the Judiciary Act of 1789--in cases involving federal crimes, penalties and forfeitures, or in which an ambassador was a party--were insufficient, Story argued, because their piecemeal nature meant that “[e]ven the United States themselves have no general power to vindicate their own rights in their own Courts; for the power to sue there is confined by the laws to particular cases.”¹²⁸ The draft bill thus offered the complementary institutional structure to support the Section 25 power of review that the Court had upheld in Martin.

Here was Story’s full-throated response to arguments by Roane and others that the state courts would be bound by the Supremacy Clause, that Congress might provide for removal of certain classes of cases from state to federal court, and that therefore the mechanisms of federal control of state-court decisions about federal law could be relaxed and certainly need not be extended. Story and his federalist colleagues believed that these were half-measures, and that even Section 25 on its own was insufficient to preserve the Union. Promises by the states (even constitutionally mandated ones) and removal were not enough. What was needed was a broad grant of original jurisdiction in the lower federal courts over cases arising under federal law, the Constitution, or federal treaties.

Marshall’s non-judicial writings in the wake of the Court’s 1819 decision in McCulloch v. Maryland--the Bank case that enflamed Ohioans to seize the assets that lay at the

heart of Osborn--suggest urgency with which both he and Story viewed union as the mandate of the Constitution, and federal courts as the guardians of union. Marshall, who had entered into a pseudonymous newspaper debate with Virginia judge Spencer Roane over the merits and legitimacy of the McCulloch decision, feared that if the arguments of Roane and other state sovereigntists succeeded, “the constitution would be converted into the old confederation.”¹²⁹ Roane had indeed written that the federal union was “as much a federal government, or a ‘league,’ as was the former confederation.”¹³⁰

This was precisely Marshall and Story’s fear: that opposition to federal judicial power was the leading edge of a structural assault on the Republic by way of what Marshall called its “weakest department.”¹³¹ In the 1810s and 1820s, federalists such as Marshall and Story believed that Spencer Roane was on the march, and that he and his fellow state sovereigntists fundamentally misunderstood the federal structure that had been established by the Constitution. They regarded the structure as incomplete, truncated by the election of 1800 and the ensuing repeal of the jurisdictional grant contained in the Judiciary Act of 1801. This loss in Congress further strengthened the federalist judges’ resolve to carry out what they regarded as unfinished structural work, and to look to courts as the bulwark of the union. In Marshall’s 1819 newspaper essays, he discussed “the judicial department” of the United States and its place in the constitutional structure.¹³² “I admit explicitly that the court considers the constitution as a government, and not ‘a league,’” Marshall wrote.¹³³ And, for Marshall as for Story, the crucial institution that made the government a federal republic rather than a league was the Article III judiciary. “This government possesses a judicial department, which . . . is erected by the people of the United States,” Marshall wrote. “It is not a partial, local tribunal, but one which is

national.”¹³⁴ The Federalist justices’ commitment to what they viewed as the only correct understanding of federalism therefore led them to insist that the national judiciary must possess the power to hear cases arising under national sources of law.

IV. Conclusion

In a letter to Story in 1821, Marshall mused about the relationship between the federal judiciary--an arm of the United States government--and the Republic itself. In the wake of controversial decisions by the Court to permit Supreme Court review of state-court decisions and state legislation, several congressmen had proposed bills intended to curtail the Court’s power to decide constitutional cases. “A deep design to convert our government into a meer league of states has taken strong hold of a powerful & violent party in Virginia,” Marshall wrote. “The attack upon the judiciary is in fact an attack upon the union. . . . [E]very subtraction from its jurisdiction is a vital wound to the government.”¹³⁵ For Marshall, the battle over jurisdiction was more than a fight about arid process or achieving political victory. Like Story, he truly believed that the fate of the Union hung in the balance as the Court, the lower courts, Congress, and the states wrangled over the scope of federal jurisdiction.

Significant fissures occurred within American constitutional law long before the Civil War or the New Deal shook the regime to its foundations. The political and cultural significance of the revolution of 1800 and the market revolution of the early nineteenth century are well known. But the list of dramatic bouleversements that accompanied those revolutions must include the rise, fall, and rise of broadened federal jurisdiction, and its structural consequences for the Republic. The one-year lifespan of federal question jurisdiction exerted disproportionate

influence decades later by making “arising under” jurisdiction possible in the 1820s.

As Marshall’s letter to Story suggests, feelings of upheaval were widely shared among American observers of politics and law in the early nineteenth century. This article has attempted to provide neither an old-fashioned internalist history of a legal doctrine, nor a revisionist story about politics driving law, but rather an account of the interconnectedness between politics and law--and the instability of that binary, even in the earliest days of the Republic.

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¹ Story was appointed to the Court in 1811 by a Republican president, James Madison.

² On the gradual replacement of “polycentric localism” with a more unitary nationalism in the early national period, see Christopher Tomlins, “Republican Law, 1770-1820,” in The Oxford Handbook of the American Revolution, ed. Ed Gray and Jane Kamensky (forthcoming,).

³ On the importance of the concept of supremacy to American constitutional law and the law of federal jurisdiction, see James E. Pfander, One Supreme Court: Supremacy, Inferiority, and the Judicial Power of the United States (New York: Oxford University Press, 2009).

⁴ An Act to Provide for the More Convenient Organization of the Courts of the United States, §11, 2 Stat. 89 (1801) (Judiciary Act of 1801) (granting the circuit courts “cognizance . . . of all cases in law or equity, arising under the constitution and laws of the United States, and treaties made, or which shall be made, under their authority”). See also Alison L. LaCroix, Ideological Origins of American Federalism (Cambridge: Harvard University Press, 2010), 179; Maeva Marcus, Documentary History of the Supreme Court of the United States (New York: Columbia University Press, 1992), 4:123; Kathryn Turner [Preyer], “Federalist Policy and the Judiciary Act of 1801,” William & Mary Quarterly 22 (3d ser. 1965): 3-32.

⁵ Sedgwick to Rufus King, Nov. 15, 1799, in The Life and Correspondence of Rufus King, ed. Charles R. King (New York: G.P. Putnam, 1896), 3:145.

⁶ See LaCroix, Ideological Origins of American Federalism, 212; cf. Larry D. Kramer, “But When Exactly Was Judicially-Enforced Federalism “Born” in the First Place?,” 22 Harvard Journal of Law and Public Policy 22 (1998): 123-137.

⁷ Resolutions Proposed by Mr. Randolph in Convention May 29, 1787, in Notes of Debates in the Federal Convention Reported by James Madison (New York: W.W. Norton & Co., 1987), 32.

⁸ An Act to repeal certain acts respecting the organization of the Courts of the United States; and for other purposes (March 8, 1802), 2 Stat. 132. Congress reestablished the inferior federal

courts' jurisdiction over federal question cases in 1875, and the grant still stands today. See Act of March 3, 1875, ch. 137, §1, 18 Stat. 470 (granting the federal circuit courts jurisdiction “of all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority”); see also 28 U.S.C. § 1331 (providing that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution”).

⁹ U.S. Const. Art. III, §§ 1-2. Cf. Henry M. Hart, Jr., “The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic,” Harvard Law Review 66 (1953): 1362-1402 (providing a thorough exegesis of Congress’s authority to regulate the scope of federal jurisdiction). Of course, some commentators--both in the nineteenth century and today--dispute the notion that Congress may grant less than the full amount of Article III jurisdiction to the lower federal courts. See Joseph Story, Commentaries on the Constitution (Boston: Hilliard, Gray 1833); Akhil Reed Amar, “A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction,” Boston University Law Review 65 (1985): 205-74; Robert N. Clinton, “A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III,” University of Pennsylvania Law Review 132 (1984): 741-866; Lawrence Gene Sager, “The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts,” 95 Harvard Law Review 95 (1981): 17-89.

¹⁰ See Turner, “Federalist Policy and the Judiciary Act of 1801,” 3 (noting that “awareness of the Act seems to have been kept alive chiefly because it must be summoned to serve as the cause

of its own repeal in March 1802”).

¹¹ See Kathryn Turner [Preyer], “The Midnight Judges,” University of Pennsylvania Law Review 109 (1961): 494-523; see also William E. Nelson, “The Province of the Judiciary,” John Marshall Law Review 37 (2004) (stating that “[t]he 1801 Act, as we know, was a failure”): 336.

¹² But see Turner, “Federalist Policy and the Judiciary Act of 1801,” 3 (arguing that “the Act was clearly not occasioned by the Republican victory in 1800”); Linda K. Kerber, Federalists in Dissent: Imagery and Ideology in Jeffersonian America (Ithaca: Cornell University Press, 1970), 136 (“Contrary to its subsequent reputation, the Judiciary Act of 1801 had been the subject of a full and responsible debate during the preceding session of Congress, and its terms represented an attempt to correct the inadequacies of the first Judiciary Act of twelve years before.”).

¹³ See Henry M. Hart, Jr. and Herbert Wechsler, The Federal Courts and the Federal System (Brooklyn: Foundation Press, 1953).

¹⁴ For the foundational statement of the Madisonian compromise, see Richard H. Fallon, Jr., et al., Hart & Wechsler’s The Federal Courts and the Federal System, 6th ed. (New York: Foundation Press, 2009), 7-9. See also Martin H. Redish and Curtis E. Woods, “Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis,” University of Pennsylvania Law Review 124 (1975): 52–56; Robert N. Clinton, “A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III,” University of Pennsylvania Law Review 132 (1984): 763–64.

¹⁵ See Wythe Holt, “The First Federal Question Case,” Law and History Review 3 (1985): 169-189 (discussing the sole federal question case brought under the Judiciary Act of 1801 that

survived the 1802 repeal).

¹⁶ The Judiciary Act of 1789 contained specific grants of jurisdiction to the lower federal courts for cases involving federal crimes or penalties and forfeitures, and cases in which an ambassador was a party. 1 Stat. 73, 77, § 9.

¹⁷ An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789).

¹⁸ See generally Quentin Skinner, “Meaning and Understanding in the History of Ideas,” History and Theory 8 (1969): 3 (discussing the difficulties of interpretation across time); cf. Alison L. LaCroix, “Temporal Imperialism,” University of Pennsylvania Law Review 158 (2010): 1329-1373 (examining the Supreme Court’s efforts to interpret its decisions across time).

¹⁹ A female visitor to the White House on New Year’s Day 1825 described the president as “tall and well formed[, h]is dress plain and in the old style, small clothes, silk hose, knee-buckles, and pumps fastened with buckles.” Daniel Coit Gilman, James Monroe (Boston: Houghton, Mifflin and Co., 1898), 215 (quoting Mrs. Tuley).

²⁰ See Charles Sellers, The Market Revolution: Jacksonian America, 1815-1846 (New York: Oxford University Press, 1991); Daniel Walker Howe, What Hath God Wrought: The Transformation of America, 1815-1848 (New York: Oxford University Press, 2007) (describing the widespread social, economic, technological, and cultural transformations of the years after 1815).

²¹ See Joanne B. Freeman, “The Election of 1800: A Study in the Logic of Political Change,” Yale Law Journal 108 (1999): 1959 (discussing the “logic of political change” in the context of early national culture).

²² Jefferson to Marshall, Mar. 2, 1801, in The Papers of John Marshall, ed. Charles F. Hobson (Chapel Hill: University of North Carolina Press, 1990), 6:86. The seconding to Jefferson of the clerk in question, Jacob Wagner, at the time of the inauguration was the proximate cause of the famous nondelivery of the commission that became the gravamen of the controversy in *Marbury v. Madison*, 5 U.S. 137 (1803). Writing to his brother a few weeks later, Marshall explained, “I should however have sent out the commissions which had been signd & seald but for the extreme hurry of the time & the absence of Mr. Wagner who had been calld on by the President to act as his private Secretary.” Marshall to James M. Marshall, Mar. 18, 1801, in Papers of John Marshall, 6:90.

²³ Story to Sarah Story, Mar. 7, 1829, in 1 Life and Letters of Joseph Story, ed. William W. Story (Boston: Charles C. Little and James Brown, 1851), 1:563. Story followed this observation by remarking that he had immediately left Washington following the inauguration.

²⁴ See *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816) (civil cases); *Cohens v. Virginia*, 19 U.S. 264 (1821) (criminal cases).

²⁵ An Act to Establish the Judicial Courts of the United States, Ch. 20, 1 Stat. 73 (1789), § 25 (hereinafter Judiciary Act of 1789).

²⁶ U.S. Const., Art. III, § 2.

²⁷ U.S. Const., Art. VI, cl. 2.

²⁸ *Marbury*, 176,180.

²⁹ Judiciary Act of 1789, §§ 9 and 11.

³⁰ See *Kempe’s Lessee v. Kennedy*, 9 U.S. 173, 185 (1809).

³¹ See The Records of the Federal Convention of 1787, ed. Max Farrand (New Haven: Yale University Press, 1966), 1:124-25; see also Martin Redish and Curtis E. Woods, “Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis,” University of Pennsylvania Law Review 124 (1975): 52-56. (describing the “Madisonian compromise”).

³² See Marcus, Documentary History of the Supreme Court, 4: 473; LaCroix, Ideological Origins of American Federalism, 184-201 (discussing the 1790s debates concerning reforms to the 1789 act).

³³ The majority of early national commentators took the position that scope of federal judicial power was and ought to be coextensive with that of federal legislative power. This “coterminous power” theory, as G. Edward White refers to it, reflected a sense that Congress, the Court, and the president were agents charged with carrying out an overarching federal interest. The three institutional actors were thus seen as “departmental associates engaged in partisan struggles with the states.” See White, Marshall Court and Cultural Change, 122. But cf. Peter S. Du Ponceau, A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States (Philadelphia: Abraham Small, 1824) (offering a non-coterminous account of the relative power of Congress and Court).

³⁴ United States v. Worrall, 2 U.S. (F. Cas.) 384 (Cir. Ct. Penn. 1798). But cf. United States v. Coolidge, 14 U.S. 415 (1816) (finding no common law federal criminal jurisdiction in a case involving forcible rescue of a prize in possession of American privateers). See generally Wilfred J. Ritz, Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging

Premises, and Using New Evidence (1990); Donald H. Zeigler, “Twins Separated at Birth: A Comparative History of the Civil and Criminal Arising Under Jurisdiction of the Federal Courts and Some Proposals for Change,” Vermont Law Review 19 (1995): 673-793.

³⁵ Section 11 grants the circuit courts “exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides.” Judiciary Act of 1789, § 11.

³⁶ 2 U.S. at 390 (“A case arising under a law, must mean a case depending on the exposition of a law, in respect to something which the law prohibits, or enjoins.”).

³⁷ Cf. Story, Commentaries, 3:500-17 (elaborating meaning of “arising under”).

³⁸ Cf. Akhil Reed Amar, “The Two-Tiered Structure of the Judiciary Act of 1789,” University of Pennsylvania Law Review 138 (1990): 1499-1567; Hart, ““The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic.”

³⁹ See, e.g., United States v. Hudson and Goodwin, 11 U.S. 32 (1812) (denying federal courts the power to punish the common law crime of libel); United States v. Coolidge, 25 F. Cas. 619 (Cir. Ct. Mass. 1813) (recognizing a federal common law of crimes) (Story, J.), reversed 14 U.S. 415 (1816).

⁴⁰ See Kerber, Federalists in Dissent, 170 (distinguishing between the Republican vision of the common law as “something very specific: those features of English law which the colonies had not adopted or which had not been rephrased into American statutes” and the Federalist idea of it as “a metaphor for an extensive and reliable system of national justice . . . a federal law commonly enforced throughout the nation”). Story, a Republican and the leading nineteenth-

century exponent of a robust federal common law, was obviously an exception to this general taxonomy. Cf. William E. Nelson, The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 (Cambridge: Harvard University Press, 1975); Kristin A. Collins, “‘Judges Shall Neither Make Nor Import Law’: Article III, Equity, and Judge-Made Law in the Federal Courts,” 60 Duke Law Journal (forthcoming).

⁴¹ See, e.g., Anthony J. Bellia, “The Origins of Article III ‘Arising Under’ Jurisdiction,” Duke Law Journal 57 (2007): 263 (“In the first decades following ratification, a famous debate ensued regarding whether federal courts, absent congressional action, could exercise jurisdiction (necessarily ‘arising under’ jurisdiction in most instances) over common law crimes against the United States.”)

⁴² See, e.g., *ibid.* 268-69 (arguing that “the Marshall Court came to rely upon English jurisdictional principles as a means of limiting Article III ‘arising under’ jurisdiction to cases implicating the supremacy of actual federal laws”).

⁴³ Even some proponents of a broad federal common law assumed that the categorization of a case as “arising under” federal law was a more fundamental decision than the particular issue of using the common law to fill statutory gaps. “There are a great variety of cases arising under the laws of the United States,” Justice Story wrote, “and particularly those which regard the judicial power, in which the legislative will cannot be effectuated, unless by the adoption of the common law.” *Coolidge*, 25 F. Cas. at 620.

⁴⁴ Du Ponceau, Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States, 98.

⁴⁵ Ibid. 99.

⁴⁶ Ibid.

⁴⁷ 9 U.S. 61 (1809).

⁴⁸ Ibid. 92.

⁴⁹ Ibid. 91-92.

⁵⁰ Ibid. 86.

⁵¹ Ibid. 85.

⁵² 1809 U.S. LEXIS 418, 15.

⁵³ Ibid. 16.

⁵⁴ Marshall's distinction between the capacity or rights of parties and the jurisdiction of courts presaged a recurring tension in the caselaw between rights, or causes of action, on one hand, and jurisdiction on the other. Were they in fact the same, such that one created the other, or was there a distinction between a substantive federal right and access to a federal court? Cf. Du Ponceau, Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States.

⁵⁵ 1809 U.S. LEXIS 19.

⁵⁶ 1809 U.S. LEXIS 19.

⁵⁷ 9 U.S. at 85.

⁵⁸ Compare 2 U.S. at 394-395 (“[T]he United States, as a Federal government, have no common law Judges cannot remedy political imperfections, nor supply any Legislative omission) (Chase, J.) with *ibid.* at 430 (“The power to punish misdemeanors . . . might have been exercised

by Congress in the form of a Legislative act; but, it may, also, in my opinion be enforced in a course of Judicial proceeding.) (Peters, J.).

⁵⁹ See also *U.S. v. Hudson and Goodwin*, 11 U.S. 32 (1812) (holding that Congress must act to make a particular activity (here, libel) a crime before the Court can punish that activity).

⁶⁰ The most famous of these feints came, of course, in *Marbury v. Madison*. *Marbury*, 5 U.S. 137 (1803) (finding that Marbury had a right to the commission, and thus to the mandamus, before determining that the Court lacked jurisdiction to issue the mandamus).

⁶¹ *Deveaux*, 9 U.S. at 85.

⁶² *Deveaux*, 1809 U.S. LEXIS 19 (“If an act of congress could authorize any person to sue in the federal courts, on the ground of its being a case arising under a law of the United States, it would be in the power of congress to give unlimited jurisdiction to its courts. But it is only when the state courts disregard or misconstrue the constitution, laws, or treaties, of the United States, that the federal courts have cognisance under that clause of the constitution which declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States.”)

⁶³ *Ibid.*

⁶⁴ Marshall to William Paterson, Feb. 2, 1801, in *The Papers of John Marshall*, 6:65 (emphasis added).

⁶⁵ Marshall to Oliver Wolcott, Apr. 5, 1802, in *ibid.*, 6:104.

⁶⁶ Samuel Chase to Marshall, Apr. 24, 1802, in *ibid.*, 6:110. Chase’s reference to Congress’s power to expand the Supreme Court’s original jurisdiction anticipated the Court’s decision in

Marbury. The facts of the case were at this point already known to Chase and the other justices, for the repeal act's alteration to the Court's schedule meant that the case had been postponed from December 1801 to February 1803. See Editorial Note in *ibid.*, 6:160-61.

⁶⁷ See, e.g., Gouverneur Morris to Robert R. Livingston, Feb. 20, 1801, in The Life of Gouverneur Morris, ed. Jared Sparks (Boston: Gray and Bowen, 1832) 3:153-54 (commenting on his fellow Federalists' response to the election: "They are about to experience a heavy gale of adverse wind; can they be blamed for casting many anchors to hold their ship through the storm?").

⁶⁸ See LaCroix, Ideological Origins of American Federalism, 187-201 (describing the early national debate over establishing state courts as the initial arbiters of all federal questions versus vesting this power in inferior federal courts).

⁶⁹ Cf. Bellia, "The Origins of Article III 'Arising Under' Jurisdiction" (suggesting that Article III's "arising under" formulation was new in American law and does not appear to have had English antecedents).

⁷⁰ 5 U.S. 299 (1803). The case was decided six days after the decision in Marbury. Marshall, who had heard the case while sitting circuit, recused himself from hearing the case when it reached the Supreme Court.

⁷¹ 22 U.S. 738 (1824). R. Kent Newmyer describes Osborn as "beg[inning] as an attack on *McCulloch* and end[ing] in a frontal challenge to the jurisdiction of the Court." R. Kent Newmyer, John Marshall and the Heroic Age of the Supreme Court (Baton Rouge: Louisiana State University Press, 2001), 299.

⁷² See White, Marshall Court and Cultural Change 524-26 (describing the facts of Osborn)

Ernest L. Bogart, “Taxation of the Second Bank of the United States by Ohio,” American Historical Review 17 (1912): 312-331; see also Chillicothe Spectator, Sept. 22, 1819; Western Monitor (Louisville, Ky.), Sept. 25, 1819.

⁷³ See White, Marshall Court and Cultural Change, 526.

⁷⁴ See Editorial Note, in Papers of John Marshall, 10:39.

⁷⁵ Osborn, 22 U.S. at 817.

⁷⁶ Ibid. 805 (reporter’s summary); see also An Act to Incorporate the Subscribers to the Bank of the United States, April 10, 1816, 3 Stat. 266, § 7.

⁷⁷ Ibid.

⁷⁸ Ibid. 807 (reporter’s summary).

⁷⁹ Ibid. 814-15, 813 (reporter’s summary).

⁸⁰ Annals of Congress, House of Representatives, 14th Cong., 1st Sess., 499 (Jan. 8, 1816).

⁸¹ Annals of Congress, House of Representatives, 14th Cong., 1st Sess., 1203 (Mar. 12, 1816).

⁸² Annals, 14th Cong., 1st Sess., 1204.

⁸³ Ibid.

⁸⁴ The Senate passed a few amendments to the bill; those recorded in the Annals of Congress do not relate to the jurisdictional provision. House members concurred in all the amendments and sent the bill to Madison. According to a leading scholar of the Second Bank, the Senate “would not suffer any amendments touching the essentials of the bill, though slight and unimportant changes were made.” See Ralph C. Catterall, The Second Bank of the United States (Chicago:

University of Chicago Press, 1902), 21.

⁸⁵ On March 13, 1816, the day after Webster’s amendment, a bill “further to extend the judicial system of the United States” was reported to the House. Annals of Congress, 14th Cong., 1st Sess., 1207. That bill, which included a proposal to grant the circuit courts jurisdiction over the full scope of Article III cases and controversies, had been drafted by Justice Story. See below Part IV. It was read twice, committed to a committee of the whole, and subsequently postponed indefinitely by the House. See House Journal, Apr. 23, 1816.

⁸⁶ Clay to Biddle, Feb. 17, 1824, in The Papers of Henry Clay, ed. James F. Hopkins (Lexington: University of Kentucky Press, 1963), 3:646. The Kentucky case that Clay had previously argued was *Bank of the United States v. Roberts*, 2 F. Cas. 728 (Cir. Ct. Ky. 1822) (upholding the federal circuit court’s jurisdiction in an action by the Bank to recover upon a bill of exchange).

⁸⁷ Clay to Biddle, Feb. 17, 1824, in Papers of Henry Clay, 3: 646.

⁸⁸ See, e.g., *United States v. Roberts*, 2 F. Cas. at 733 (“This case being one, in our opinion, ‘arising under’ a law of the United States, decided by the supreme judicial tribunal of the nation, to be made pursuant to the constitution, our judgment is, that this court has jurisdiction”); *United States v. Smith*, 27 F. Cas. 1147, 1147-48 (Cir. Ct. Mass.) (1792) (holding, in an action involving four indictments for counterfeiting bank bills of the First Bank, that “by the constitution of the United States the federal courts had jurisdiction of all causes or cases in law or equity arising under the . . . constitution and the laws of the United States” and “that this was a case arising under those laws”).

⁸⁹ Ibid. 317.

⁹⁰ Ibid. 319-20.

⁹¹ Cf. Bellia, “The Origins of Article III ‘Arising Under’ Jurisdiction” (arguing that the original understanding of “arising under” jurisdiction was narrower than the modern conception); Paul J. Mishkin, “The Federal ‘Question’ in the District Courts,” Columbia Law Review 53 (1953): 157-96.

⁹² 22 U.S. at 820.

⁹³ Ibid. 823.

⁹⁴ Ibid. 827 (emphasis added).

⁹⁵ Ibid. 878 (Johnson, J., dissenting).

⁹⁶ Ibid. 883 (Johnson, J., dissenting). Much of the modern commentary on Osborn characterizes it as establishing “protective jurisdiction.” See, e.g., John C. Jeffries and Peter W. Low, Federal Courts and the Law of Federal-State Relations, 6th ed. (New York: Foundation Press, 2008), 287. This interpretation of the case captures the reasoning in Johnson’s dissenting opinion rather than that of the majority. See 22 U.S. at 872 (Johnson, J., dissenting). Cf. Gil Seinfeld, “Article I, Article III, and the Limits of Enumeration,” 108 Michigan Law Review (2010): 1389-1452 (discussing the doctrinal consequences of the Court’s holding in Osborn that federal law “forms an original ingredient in every cause” to which the Bank was a party).

⁹⁷ Ibid. 889-90 (Johnson, J., dissenting).

⁹⁸ Ibid. 892-93 (Johnson, J., dissenting).

⁹⁹ 22 U.S. 904, 906 (1824).

¹⁰⁰ See Low & Jeffries, Federal Courts and the Law of Federal-State Relations, 287-88 (“Of course, Congress can always confer federal-court jurisdiction where it has validly created a federal claim. The fighting issue is whether, where Congress has the power to create federal substantive rights, but does not do so, it may exercise the (lesser?) power of permitting a state-law suit to be brought in federal court.”)

¹⁰¹ Thus, there was some irony in the Court’s pointing to Congress as the source of the “arising under” jurisdiction for cases involving the Bank.

¹⁰² See, e.g. McCloskey, The American Supreme Court, 51-52.

¹⁰³ 5 U.S. 137 (1803).

¹⁰⁴ 14 U.S. 304 (1816).

¹⁰⁵ 17 U.S. 316 (1819).

¹⁰⁶ See generally LaCroix, Ideological Origins of American Federalism, 6-9 (discussing federalism as a normative vision of government based on multiplicity).

¹⁰⁷ Judiciary Act of 1789, § 25.

¹⁰⁸ The idea of distinguishing between federal and state domains based on subject matter dated back to the colonial period, when proto-federalist ideology had begun to develop in response to metropolitan British claims that Parliament was sovereign over both internal colonial affairs and external imperial matters. See LaCroix, Ideological Origins of American Federalism, 103-04. For the single federal question case to survive repeal, see Holt, “The First Federal Question Case.”

¹⁰⁹ On the normative debate in the early 1800s between proponents of Section 25 review on one

hand and supporters of lower federal courts on the other, see LaCroix, Ideological Origins of American Federalism, 187-201. Advocates of each mechanism argued that their approach was most appropriate to maintain a truly federal structure. Some modern commentators have made similar arguments for reconceptualizing or rearranging existing institutions to better support a background commitment to federalism. See, e.g., Gillian E. Metzger, “Administrative Law as the New Federalism,” 57 Duke Law Journal 57 (2008): 2023-2109.

¹¹⁰ 14 U.S. 304 (1816).

¹¹¹ 19 U.S. 264 (1821).

¹¹² In the 1820s, proposals to eliminate this species of review surfaced in Congress, motivated sometimes by outrage at specific decisions by the Court and sometimes by the belief that the Court had tipped toward nationalism and was no longer demonstrating appropriate respect for the states as sovereigns. The first such proposal came from Senator Richard M. Johnson of Kentucky, who in December 1821 offered a constitutional amendment granting the Senate appellate jurisdiction over cases in which a state was a party, “and in all controversies in which a State may desire to become a party in consequence of having the Constitution or laws of such State questioned.” See Charles Warren, The Supreme Court in United States History (Boston: Little, Brown and Company, 1922), 1:657. Other proposals included increasing the number of justices on the Court and requiring a supermajority of justices to strike down a state statute. See Charles F. Hobson, “The Marshall Court (1801-1835): Law, Politics, and the Emergence of the Federal Judiciary,” in The United States Supreme Court: The Pursuit of Justice, ed. Christopher Tomlins (Boston: Houghton Mifflin Company, 2005), 60 (describing early-nineteenth-century

cases in which critics perceived Court as paying insufficient respect to state legislation or state-court decisions); see also Charles Warren, “Legislative and Judicial Attacks on the Supreme Court of the United States – A History of the Twenty-Fifth Section of the Judiciary Act,” 47 American Law Review 47 (1913): 1-34.

¹¹³ During this period, the Supreme Court also expanded its power to hear cases on appeal from the federal circuit courts. In addition to repealing the Judiciary Act of 1801, the 1802 judiciary act established the certificate of division procedure, which gave the Supreme Court appellate jurisdiction over cases in which the circuit judges disagreed on a question of law. Because one of the judges on circuit was typically a Supreme Court justice, the procedure created opportunities for the justices to capitalize on, or even create, disagreements with the district judges with whom they sat on circuit in order to ensure that a given case would reach the Supreme Court. Marshall and Story were particularly adept at using the certificate of division to bring a case before the Court. See White, Marshall Court and Cultural Change, 173-174.

¹¹⁴ On the circuit judges’ substantial duties in overseeing trials, grand juries, and setting procedural rules, see Julius Goebel, Jr., Antecedents and Beginnings to 1801, volume 1, Oliver Wendell Holmes Devise History of the Supreme Court of the United States (New York: Macmillan, 1971), 573-589, 615. On the grand jury charge’s role during the period as both a public event and a vehicle for Federalist Party sentiments, see George Lee Haskins and Herbert A. Johnson, Foundations of Power: John Marshall, 1801-15, volume II, Oliver Wendell Holmes Devise History of the Supreme Court of the United States (New York: Macmillan, 1981), 222. For one example, see Chief Justice John Jay’s 1790 charge to the circuit courts in several states,

in which he observed, “We had become a nation. As such we were responsible to others for the observance of the Laws of Nations; and as our national concerns were to be regulated by national laws, national tribunals became necessary for the interpretation and execution of them both.”

The Correspondence and Public Papers of John Jay, ed. Henry P. Johnston (New York: G.P. Putnam’s Sons, 1891), 3:390.

¹¹⁵ *Hunter v. Martin*, 4 Munf. 1, 45 (Va. 1815) (Roane, J.) (describing Section 25 as “a chimera, existing only in the imagination of a former congress” and an “after-thought, well calculated to aggrandize the general government, at the expence of those of the states”). Roane insisted that Supreme Court review must be confined to cases that arose in federal court. He viewed this judicial structure as the only one that comported with constitutionally required principles of federalism, insofar as it grouped federal courts together and left state-court judges to reach their own decisions, subject to the requirements of the Supremacy Clause but without actual review by the Court. 4 Munf. at 33 (“[N]aturally the jurisdiction granted to a government, is confined to the courts of that government. It does not, naturally, run into and affect the courts of another and distinct government; whether that government operates upon the same, or another tract of country.”).

¹¹⁶ 14 U.S. at 338 (emphasis added).

¹¹⁷ *Ibid.* 342.

¹¹⁸ *Ibid.* 338.

¹¹⁹ *Ibid.* 347.

¹²⁰ *Ibid.* 348-49.

¹²¹ Ibid. 347.

¹²² Roane's colleagues on the Virginia court shared Story's sense that the Fairfax lands dispute implicated sensitive issues touching on the meaning of union, especially given the aggravated sectional divisions that accompanied the War of 1812. Indeed, the Virginia judges held back their decision not to abide by the Supreme Court's order in *Fairfax's Devisee v. Hunter's Lessee* for twenty months, from April 1814 to December 1815, because all except Roane hesitated to issue such a decision at the same time that New Englanders were actively considering disunion. See Papers of John Marshall 8:116-117.

¹²³ See Warren, The Supreme Court in United States History, 1:442.

¹²⁴ Ibid. Warren notes that this was "a jurisdiction which in fact Congress did not grant until sixty years later" – i.e., the 1875 statute that established modern federal question jurisdiction. Ibid. The proposed bill also included a grant of general jurisdiction over federal common law crimes, a version of which – drafted by Story in 1818 – was passed as the Crimes Act in 1825. Ibid. 442 &n.3.

¹²⁵ See Story, Commentaries on the Constitution, 1:293.

¹²⁶ Ibid. 1:293-94.

¹²⁷ Ibid. 1:294.

¹²⁸ Ibid. The conviction that the specific jurisdictional grants in the 1789 act did not amount to a broad grant of arising under jurisdiction was widely shared among contemporary observers. Some scholars have argued that the 1789 act should be understood as amounting to a grant of arising under jurisdiction, given the relatively narrow scope of federal regulatory power in this

period. See, e.g., David E. Engdahl, “Federal Question Jurisdiction Under the 1789 Judiciary Act,” Oklahoma City University Law Review 14 (1989): 521 (arguing that “‘federal question’ jurisdiction was fully vested by the Judiciary Act of 1789”). This view ignores the stated beliefs of commentators, both those who supported and those who opposed federal question jurisdiction, in the early nineteenth century.

¹²⁹ See Papers of John Marshall, 10:284. On the political and economic context of McCulloch, see Mark R. Killenbeck, M’Culloch v. Maryland: Securing a Nation (Lawrence: University Press of Kansas, 2006). For a probing examination of Marshall’s newspaper essays in the wake of McCulloch, see Gerald Gunther, John Marshall’s Defense of McCulloch v. Maryland (Stanford: Stanford University Press, 1969).

¹³⁰ Papers of John Marshall, 10:284.

¹³¹ *Ibid.*

¹³² “A Friend of the Constitution” No. 1, in Papers of John Marshall, 8:318.

¹³³ “A Friend of the Constitution” No. 6, in *ibid.* 8:348.

¹³⁴ “A Friend of the Constitution” No. 8, in *ibid.* 8:355-56.

¹³⁵ Marshall to Story, Sept. 18, 1821, in Papers of John Marshall, 9:184.