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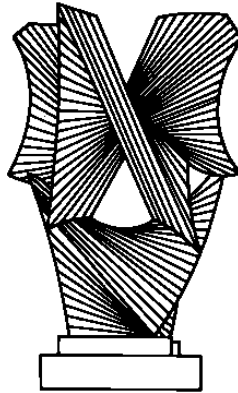
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FEDERALISTS, FEDERALISM, AND FEDERAL JURISDICTION

ALISON L. LACROIX*

This Article provides a new interpretation of the origins of three central obsessions of federal-courts and constitutional-law scholarship: the question whether lower federal courts are constitutionally required; the relative powers of Congress, the Supreme Court, and the lower federal courts to define federal jurisdiction; and judicial supremacy. The Article argues that the extension of federal judicial power to the lower 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 who were affiliated with the Federalist Party, viewed the lower federal courts as essential to the establishment of a union in which national supremacy was instantiated through judicial structure. Marshall and his fellow federalists/Federalists shared a substantive commitment to structure – namely, a judiciary-centric federalism. In the early nineteenth century, most notably in two cases involving the Second Bank of the United States – Bank of the United States v. Deveaux (1809) and Osborn v. Bank of the United States (1824) – the Marshall Court carried out through case law what the political branches had been unable to do following the election of 1800: grant the lower federal courts the power to hear all cases arising under federal law. Judge-made doctrines therefore operated as a substitute for a legislative grant of jurisdiction, and federal courts throughout the period opposed Congress's attempts to claim ultimate authority over federal 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 early republican beliefs about federal structure.

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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)

INTRODUCTION

The story of the Supreme Court under Chief Justice John Marshall is typically told in terms of a handful of familiar themes: nationalism, the growth of centralized governmental power, and the rise of the Court as ultimate constitutional arbiter.¹ Internally focused accounts of the Court's activities between 1801 and 1835 tend to emphasize doctrinal developments such as judicial review, vested rights, and the explication of the commerce and contracts clauses of the Constitution.² Externalist accounts, meanwhile, focus on the Court's relationship to broader societal and cultural changes in the early Republic – most notably, the expansion of the national economy, changing conceptions of democracy and political membership, and growing sectional tensions centering on the issue of slavery.³ For the internalists, the Court was the driving force behind the nationalist effort; for the externalists, the Court was one among

¹ See, e.g., ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 37 (4th ed. 2005) (describing Marshall Court's "great task" of "shaping the Constitution into a charter for nationalism).

² See, e.g., CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1922); GEORGE LEE HASKINS AND HERBERT JOHNSON, *FOUNDATIONS OF POWER: JOHN MARSHALL 1801-1815* (1981).

³ See G. Edward White, *Constitutional Change and the New Deal: The Internalist/Externalist Debate*, 110 AM. HIST. REV. 1094 (2005) (discussing the internalist-externalist distinction in legal historiography).

many institutions responding to a broader moment of societal transformation. In both cases, the dominant narrative of the Court in the early Republic is one of nationalism – both in terms of substantive constitutional values of union and in more process-based notions of federal jurisdiction and national supremacy.

In this Article, I seek to move beyond these binaries by bringing the techniques of intellectual history to U.S. constitutional history – thereby taking the Court’s decisions seriously, on their own terms and in their own temporal and ideological context. Such an approach avoids both a quest for an elusive original meaning and a reductive surrender to radical indeterminacy. Instead, my approach seeks to understand how *they* – Marshall and his contemporaries – understood their acts of constitutional interpretation *then*, with the assumption that the choice of the relevant “then” is all-important for the ultimate question of meaning.⁴

This Article situates the Marshall Court’s constitutional jurisprudence within the framework of early-nineteenth-century political and social turmoil while also tracing the subtle arguments and doctrinal shifts that underpinned the Court’s decisions. I seek to avoid the internalist-externalist dichotomy because it often has the unfortunate consequence of replicating another interpretive binary, that of law versus politics.⁵ Some externalist interpretations of judicial action tend to attribute judges’ decisions to politics, implying that courts’ actions are epiphenomenal of broader political dynamics. The peril for internalist accounts, meanwhile, is that they can pay too little attention to politics, sealing judges inside their own pronouncements without situating those pronouncements in the political, social, and economic context in which they were uttered. To paraphrase Morton Horwitz, the externalist account treats law as a dependent variable, while the internalist account assumes that it is a

⁴ See generally Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. AND THEORY 3 (1969) (discussing the difficulties of interpretation across time); cf. Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. __ (forthcoming 2010) (examining the Supreme Court’s efforts to interpret its decisions across time).

⁵ See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 112 (1992) (elaborating on the law-politics distinction and its limitations).

wholly independent variable.⁶ Both these dualities are limited, not least because they ignore contemporary legal actors' sense of themselves as existing in a particular political, social, and economic context and, at the same time, as engaging in the act of legal interpretation, an act that seeks legitimacy from its aspiration to transcend the limits of a particular moment.

Intellectual history provides a way out of these binaries – a third way around the externalist-internalist, dependent-independent dialectics. An intellectual history of the Marshall Court provides a corrective to accounts of the Court as either a nakedly political entity driven by larger forces, or a hermetic group of eminences divining the fundamentals of the national compact and handing them down to a benighted populace. Such non-nuanced views of the Supreme Court have long caused dismay among legal historians, yet they manage to persist among scholars of constitutional law. One purpose of this Article is to refine this blunt view of Marshall and his brethren, and of the role of constitutional law in the early Republic.

Despite its pervasiveness, the nationalism story fails to offer a satisfying explanation of why Marshall and his colleagues were intent on committing themselves to a nationalist project. The strongest version of the nationalist story suggests that the justices shared a prior substantive commitment to expanding national power against state claims of sovereignty, and that the decisions they handed down were in some sense mere emanations from this underlying commitment. Indisputably, by the end of Marshall's chief justiceship in 1835, the American constitutional landscape had changed dramatically from the situation in 1801. Congress's power to regulate the national economy pursuant to the Commerce Clause had expanded; the supremacy of the federal government over the states, while still controversial, had received repeated doctrinal affirmation; and the Court had cemented its role as chief constitutional interpreter. The years between 1801 and 1835 thus witnessed increased nationalization in which the Court was deeply involved. Moreover,

⁶ See HORWITZ, *supra* note __, at vii-viii.

the justices appear to have understood themselves to be operating on at least two levels: fleshing out the meaning of the Constitution as a matter of substantive law, and conducting a second-order project of building the institutional legitimacy of the Court (and, although certain justices might have been loath to admit it, the legitimacy of the federal government). In these senses, then, the nationalism story is accurate.

The strong form of the nationalist claim argues that Marshall and his colleagues wanted a powerful central government with a powerful Supreme Court at its center, and that they carried out that project through caselaw. But the nationalism story is incomplete. It is a theme, certainly, but not the whole narrative. The nationalism story is incomplete insofar as it assumes that the nationalist outcomes described above should be taken as evidence of the justices' motivations and goals. To be sure, Marshall and his colleagues expanded the commerce power, solidified federal supremacy, and established the Court's interpretive authority as a means of promoting the greater nationalist program. Yet we should not take the outcomes of the process as equivalent to the ideas and beliefs that informed the actors who participated in and shaped that process. In other words, even accepting that the trajectory of the Court's decisions in this period pointed toward nationalism as that term has come to be understood, why should we read that outcome backward as evidence that the justices intended all their actions to serve that single ultimate goal?

The Court's doctrine on federal jurisdiction suggests that the story is more complicated than scholars have recognized. The Marshall Court's jurisdictional decisions emerged from a complex array of causes that cannot be attributed simply to an overarching nationalist project. My claim is that the extension of federal judicial power to the lower 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 who were also affiliated with the Federalist Party, viewed the lower federal courts as essential to the establishment of a union in which national supremacy was constituted through judicial

structure. Marshall and his fellow federalists/Federalists shared a substantive commitment to structure – namely, a judiciary-centric federalism. Investing the lower federal courts with original jurisdiction over cases involving federal questions thus mattered more to Marshall, Joseph Story, and other justices than scholars have previously recognized. Indeed, Marshall and his colleagues consciously used substantive judicial doctrine to fill in where they believed Congress’s jurisdictional grants had fallen short. The jurisdictional cases grew out of the intersections between doctrine and politics, substance and process, and formalism and functionalism.

The Marshall Court’s jurisprudence on federal jurisdiction demonstrates that the familiar nationalism story is only a partial explanation of the doctrinal and ideological developments of the 1810s and 1820s. A complete picture requires the companion tale of the Court as a body of individuals attempting to carry out what they believed to be a not entirely political mission within the confines of their political and legal moment, and perhaps in a way other than they would have liked.⁷ Neither hagiography nor debunking exercise, my argument combines an internalist belief that what the justices thought they were doing matters with an externalist awareness of the broader political and cultural context in which they were operating – and in which they knew themselves to be operating.

My analysis proceeds in four parts. First, I sketch the background of the early republican political and constitutional debates about the establishment of the inferior federal courts and the scope of their power. In previous work, I have examined the effort by Federalists in Congress to vest the inferior federal courts with jurisdiction over cases arising under the Constitution, federal laws, or treaties.⁸ In the same year that Marshall joined the Supreme Court,

⁷ See Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 *YALE L.J.* 1959 (1999) (discussing the “logic of political change” in the context of early republican culture).

⁸ See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010); ALISON L. LACROIX, *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic*, 2007 *S.CT. REV.* 345 (2008).

the Federalist Congress passed the Judiciary Act of 1801, which granted the federal circuit courts the power to hear cases arising under federal law. That same year, the inauguration of Thomas Jefferson as president heralded the demise of the new judiciary act, as the new Jeffersonian Congress moved to repeal the act – and with it the broad jurisdictional grant. Congress’s 1802 repeal act, I argue, was the proximate cause for the Supreme Court’s project of expanding federal jurisdiction.

Part II 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 his fellow justice Joseph 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. Contemporary debates concerning the existence of a 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 III, 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 cases and parsing of the meaning of federal jurisdiction, Part IV takes up the question of institutions. Specifically, I explore 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.⁹ 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.¹⁰ The jurisdictional basis for the Court to hear appeals from state courts in this manner was Section 25 of the Judiciary Act of 1789.¹¹ 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.

The Marshall Court was neither a paragon of judicial practice against which all others should be measured nor a cravenly political gang of Federalist holdouts. This article attempts to provide a more complicated story about an institution that existed simultaneously in the worlds of law and politics. Throughout its history, the Court has functioned both as a branch of the federal government and as arbiter of federal power. The intellectual history of federal jurisdiction sheds new light on these interconnected modes in which the Court operates.

I. BACKGROUND: FEDERALISTS IN RETREAT?

The Federalists' effort to vest the inferior federal courts with jurisdiction over cases arising under the Constitution, federal laws, or treaties came to fruition in the Judiciary Act of 1801, which for the

⁹ See Wythe Holt, *The First Federal Question Case*, 3 L. AND HIST. REV. 169 (1985) (discussing the sole federal question case brought under the Judiciary Act of 1801 that survived the 1802 repeal).

¹⁰ 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.

¹¹ An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789).

first time granted the lower federal courts what modern commentators have termed “federal question” jurisdiction.¹² A combination of pragmatic and ideological impulses lay behind the drive to expand federal jurisdiction. Massachusetts congressman Theodore Sedgwick, a leading Federalist, gave voice to his contemporaries’ emphasis on political expedience as well as their belief that what we would now identify as proto-partisan conflict was rooted in 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.”¹³ Expanding federal judicial power to the inferior federal courts was thus a crucial element of the Federalists’ project of ensuring national supremacy through the institution of the judiciary.¹⁴

This expanded jurisdiction endured for only one year, however. The 1801 act was repealed by the newly Jeffersonian Congress in the wake of the elections of 1800.¹⁵ By 1802, therefore, the Federalists’ drive to expand the scope of federal cases over which the inferior federal courts could exercise original jurisdiction

¹² 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 LACROIX, *supra* note ___, at __179; MAEVA MARCUS, 4 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 123(1992); Kathryn Turner [Preyer], *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY Q. 3 (3d ser. 1965).

¹³ Sedgwick to Rufus King, Nov. 15, 1799, in 3 THE LIFE AND CORRESPONDENCE OF RUFUS KING 145 (Charles R. King ed., 1896).

¹⁴ See LACROIX, *supra* note ___, at 212; cf. Larry D. Kramer, *But When Exactly Was Judicially-Enforced Federalism “Born” in the First Place?*, 22 HARV. J.L. & PUB. POL. 123 (1998).

¹⁵ 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”).

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” provided in practice a jurisdictional basis only for the Supreme Court, and not for the inferior federal courts.¹⁶ An observer in 1802 could reasonably have determined that the inferior federal courts’ brief grasp of broad original jurisdiction was nothing more than a strange and isolated outlier period, an artifact of the partisan battles that had accompanied the controversial election of 1800.

Modern accounts of the Judiciary Act of 1801 tend to deemphasize, or even ignore, the act’s brief expansion of federal question jurisdiction.¹⁷ To the extent the act appears in the conventional narrative of constitutional history, it is as the statutory basis for the so-called “midnight judges” that accompanied William Marbury’s abortive appointment as a justice of the peace for the District of Columbia.¹⁸ The pre-history of federal question jurisdiction before 1875 fades from the picture. 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

¹⁶ 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*, 66 HARV. L. REV. 1362 (1953) (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 (1833); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

¹⁷ See Turner, *supra* note ___, at 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”); see also William E. Nelson, *The Province of the Judiciary*, 37 JOHN MARSHALL L. REV. 325, 336 (stating that “[t]he 1801 Act, as we know, was a failure”).

¹⁸ See Kathryn Turner [Preyer], *The Midnight Judges*, 109 U. PA. L. REV. 494 (1961).

democracy.¹⁹ 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.

Yet the dominant account of Federalist political failure after 1801 sits uneasily alongside the equally dominant narrative of Federalist jurisprudential triumph in the hands of the Marshall Court during the same period. The expansion of federal question jurisdiction under the 1801 act ultimately failed. The prospects for extending federal power through the institution of the judiciary – via the mechanism of jurisdiction – appeared exceedingly grim after 1802. And yet somehow, at the same time, the Court began to press a program of nationalism, centralization, and the strengthening of federal power.

It is possible to bring together these divergent accounts – Federalist political failure on one hand, nationalist judicial triumph on the other – while challenging the premises that keep the accounts separate. Federalists in Congress did indeed fail to establish permanently their vision of broad federal question jurisdiction. The decisions of the Marshall Court did strengthen national economic and judicial institutions. Rather than being at odds with each other, the two stories are intimately connected. Between 1801 and 1835, the Marshall Court carried out in caselaw and doctrine what the Federalist political branches had been unable to do in 1801: namely, to expand the power of the inferior federal courts to hear cases arising under federal law. Judge-made doctrines of jurisdiction thus operated as a substitute for a legislative grant of jurisdiction, and actors in both institutions understood themselves to be in dialogue with each other. The two trajectories of two distinct institutions (Congress, the Court) were thus causally connected. Indeed, the institutions themselves

¹⁹ *But see* Turner (*Federalist Policy*), *supra* note __, at 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* 136 (1970) (“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.”).

mattered in a way that the crude nationalist story overlooks. 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.

II. 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, in 1825.²⁰

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 won 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 de 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

²⁰ 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 AND JOHN FRANKLIN JAMESON, *JAMES MONROE* 215 (1883) (quoting Mrs. Tuley).

revolution taking place around them.²¹

The transformation in government during this period was no less revolutionary. 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

²¹ See CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815-1846* (1991) (describing the widespread social, economic, and cultural transformations of the years after 1815).

²² Jefferson to Marshall, Mar. 2, 1801, in 6 *THE PAPERS OF JOHN MARSHALL* 86 (Charles F. Hobson ed., 1990). 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 signed & sealed but for the extreme hurry of the time & the absence of Mr. Wagner who had been called on by the President to act as his private Secretary." Marshall to James M. Marshall, Mar. 18, 1801, in 6 *PAPERS OF JOHN MARSHALL* at 6:90.

²³ Story to Sarah Story, Mar. 7, 1829, in 1 *LIFE AND LETTERS OF JOSEPH STORY* 563 (William W. Story ed., 1851). Story followed this observation by remarking that he had immediately left Washington following the inauguration.

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

Each of these storied cases concerned the jurisdiction of the Supreme Court itself. Several of them centered on its appellate jurisdiction over state courts – that is, its power of vertical judicial review. This body of cases occupies a central place in the nationalist narrative, insofar as they established the Court as an institutional force for centralization and a source of national law. But they do not give a complete picture of the Marshall Court’s treatment of federal jurisdiction. Certainly, the jurisdiction of the Supreme Court constituted a large portion of the federal judicial power in the early Republic. The inferior federal courts, however, also became an important jurisdictional battleground during the first decades of the eighteenth century. 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 of land; and circuit courts, with jurisdiction over other crimes under federal law,

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*, 5 U.S. at 176, 180.

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 These were the circuit courts that between 1801 and 1802 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 Expenche, and with a design to draw by degrees all law business into the federal Courts.”³² Critics of the lower

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

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

³¹ See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 124-25 (Max Farrand ed., 1966); 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*, 124 U. PA. L. REV. 45, 52-56 (1975) (describing the “Madisonian compromise”).

³² See 4 MARCUS, *supra* note ___, at 473.

federal courts insisted that the 1789 act had created a potentially enormous federal edifice that would render established state courts superfluous while also sucking power away from the states themselves and into the national government.³³

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 among early republicans with regard to the jurisdiction of the lower federal courts 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. Just what was it, contemporaries wondered, that the lower courts were supposed to be doing? And, more important, what did that mandate

³³ See LACROIX, *supra* note ___, at 184-201 (discussing the 1790s debates concerning reforms to the 1789 act).

say about how those courts fit into the concentric structure in which multiple layers of federal judicial authority exercised multiple varieties of jurisdiction?

The majority of early republican commentators took the position that scope of federal judicial power was and ought to be coterminous 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 even 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.”³⁴ Whether one hoped for increased centralization or a return to confederation, coterminous power theory provided a lens through which to evaluate the actions of each institution.³⁵ The decisions of the Marshall Court, with their articulation of meta-principles governing not only the cases at hand but the nature of constitutional union, attracted comment and criticism at the level of structural as well as particular outcomes.

Two decisions – one from the federal circuit court for Pennsylvania in 1798, the other from the Supreme Court in 1809 – offer especially illuminating discussions of coterminous power theory’s salience for the question of the lower courts’ jurisdiction. These cases limn the intellectual pathways along which early republican judges traveled as they attempted to fix the jurisdiction of the lower federal courts. In particular, the cases suggest a difference in constitutional worldview between the waning years of the Adams

³⁴ See WHITE (MARSHALL COURT AND CULTURAL CHANGE), *supra* note __, at 122. *But cf.* PETER S. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES (1824) (offering a non-coterminous account of the relative power of Congress and Court).

³⁵ See WHITE, *supra* note __, at 124-27 (discussing the theories of St. George Tucker, Thomas Jefferson, John Taylor of Caroline, and John C. Calhoun versus those of Alexander Hamilton, John Marshall, and Joseph Story). Given the expansion of congressional power that the Marshall Court undertook in cases such as *McCulloch v. Maryland*, 17 U.S. 316 (1819) (construing the scope of the Necessary and Proper Clause) and *Gibbons v. Ogden*, 22 U.S. 1 (1824) (construing the scope of the Commerce Clause), there is no reason to think that tying judicial to legislative power would necessarily operate as a limit on the scope of the federal judicial power.

administration and the first decades of the nineteenth century – and, relatedly, between the years before and after the federal question interregnum of 1801-02.

The first case, *United States v. Worrall*, involved a criminal indictment of one Robert Worrall for the attempted bribery of Tench Coxe, the U.S. commissioner of revenue.³⁶ Following the jury's return of a guilty verdict, Worrall's attorney, Alexander Dallas, moved to arrest the judgment on the ground that the circuit court lacked jurisdiction. Dallas's argument began with the coterminous power theory and then applied the theory to the "arising under" language of Article III's description of the judicial power of the United States. As an initial matter, Dallas acknowledged Congress's broad power to pass laws under its enumerated and necessary and proper powers; he then allowed that it might also pass criminal statutes, which would then be cognizable by the federal courts under section 11 of the Judiciary Act of 1789.³⁷ Nevertheless, Dallas insisted, the particular offense at issue here – bribery of the commissioner of the revenue – had never been codified by federal statute. 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. "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," Dallas argued.³⁸

Representing the government, William Rawle countered that adopting Dallas's approach would "str[ike] at the root of the whole system of the national government." The attempted bribery had occurred because of Coxe's office, which was a federal office; therefore, federal law was necessarily implicated in activities relating to the office. "[T]he offence was strictly within the very terms of the Constitution, arising under the laws of the United States," Rawle

³⁶ *United States v. Worrall*, 2 U.S. 384 (Cir. Ct. Penn. 1798).

³⁷ 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.

³⁸ 2 U.S. at 390.

maintained. “If no such office had been created by the laws of the United States, no attempt to corrupt such an officer could have been made.”³⁹ Dallas, for his part, objected that the mere fact that Coxe was a federal officer could not subject Worrall to federal jurisdiction. “If . . . it is sufficient to vest a jurisdiction in this court, that a Federal Officer is concerned,” Dallas argued, “a source of jurisdiction is opened which must inevitably overflow and destroy all the barriers between the judicial authorities of the State and the general government.”⁴⁰

In what one imagines must have been a dramatic scene, Justice Samuel Chase – the justice responsible for the Pennsylvania circuit – then intervened. “Do you mean, Mr. Attorney, to support this indictment solely at common law?” Chase inquired of Rawle. “If you do, I have no difficulty upon the subject: The indictment cannot be maintained in this Court.”⁴¹ Chase then halted further arguments on the motion and delivered his opinion. The federal courts, he insisted, could not punish acts that Congress had not defined as offenses. Such an arrangement would amount to a common law of federal crimes, and, Chase stated, “the United States, as a Federal government, have no common law.”⁴² To hold otherwise, Chase maintained, would misunderstand the role of courts, for “[j]udges cannot remedy political imperfections, nor supply any Legislative omission.”⁴³

The other member of the tribunal, district judge Richard Peters, appears to have found the government’s arguments persuasive. “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,” he stated.⁴⁴ Therefore, the court could properly exercise jurisdiction over Worrall, even absent a specific criminal statute to

³⁹ 2 U.S. at 392.

⁴⁰ 2 U.S. at 390.

⁴¹ 2 U.S. at 393 (Chase, J.).

⁴² Id. at 394 (Chase, J.).

⁴³ Id. at 395 (Chase, J.).

⁴⁴ Id. at 430 (Peters, J.).

define his offense. In the end, apparently at a loss as to how to resolve their division of opinion, the two-judge panel engaged in what the reporter termed “a short consultation.” The result was a sentence for Worrall of three months’ prison time and a two-hundred-dollar fine.⁴⁵

Despite its inelegant conclusion, *Worrall* presaged two important themes for the Marshall Court, which convened for the first time three years later. 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. (Recall Dallas’s demand as he argued against jurisdiction: “Can the offence, then, be said to arise under the Constitution, or the laws of the United States?”⁴⁶) Such a line of argument is not surprising, given section 11’s explicit grant to the circuit courts of exclusive jurisdiction over “all crimes and offences cognizable under the authority of the United States.”⁴⁷ Compare Dallas’s language with that of section 11, however. Dallas 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 – the statutory basis for his client’s indictment (which he cited only once). Dallas could have simply argued that Congress had made no provision to designate bribery of a federal official as an offense and stopped his argument there. Yet he pressed further, insisting that not only had Congress not identified bribery as a crime, but that if the court felt inclined to recognize bribery as an offense, it must meet the “arising under” standard set forth in Article III of the Constitution.

⁴⁵ Id. at 430-31.

⁴⁶ Id. at 390.

⁴⁷ Judiciary Act of 1789, § 11. Cf. *U.S. v. Coolidge*, 14 U.S. 415 (1816) (finding no common law criminal jurisdiction in the federal courts in a case involving forcible recue of a prize in the 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) (discussing the 1789 act’s grant of jurisdiction over federal crimes); 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*, 19 Vt. L. Rev. 673 (1995) (comparing the 1789 act’s grants of jurisdiction in civil and criminal cases).

Dallas's argument thus blended statutory and constitutional bases of jurisdiction, adding the more abstract and potentially riskier constitutional argument to what might otherwise have been a straightforward construction of section 11.⁴⁸ Moreover, 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 phrase "arising under" 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.⁴⁹ 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 *Worrall* raises is the issue of 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. As the exchange between the attorneys and judges in *Worrall* demonstrates, 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.⁵⁰ Along with later Supreme Court cases such as *United States*

⁴⁸ Cf. Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); Hart, *supra* note __ (distinguishing between statutory and constitutional bases of jurisdiction).

⁴⁹ Cf. 3 STORY, *supra* note __, at 500-517 (elaborating meaning of "arising under").

⁵⁰ See KERBER, *supra* note __, at 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

*v. Hudson and Goodwin*⁵¹ and circuit-court cases such as *United States v. Coolidge*,⁵² in which the justices attempted to hash out the status of federal common law, *Worrall* frequently appears in constitutional history to illustrate early-nineteenth-century judges' profound lack of agreement on this question.

Certainly, 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.⁵³ 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. Early republican 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.⁵⁴ According to this view, 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

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* (1975); Kristin A. Collins, "Foreign Law" in *the Federal Courts: Federal Equity Power and Judicial Lawmaking in the Early Nineteenth Century* (unpublished manuscript, on file with the author).

⁵¹ 11 U.S. 32 (1812) (denying federal courts the power to punish the common law crime of libel) (Johnson, J.).

⁵² 25 F. Cas. 619 (Cir. Ct. Mass. 1813) (recognizing a federal common law of crimes) (Story, J.), *rev'd*, 14 U.S. 415 (1816).

⁵³ See, e.g., Anthony J. Bellia, *The Origins of Article III 'Arising Under' Jurisdiction*, 57 DUKE L.J. 263 (2007) ("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.")

⁵⁴ See, e.g., *id.* at 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").

used when they wanted to claim the maximum power to act absent a specific statute.

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. 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 in his *Coolidge* decision, "and particularly those which regard the judicial power, in which the legislative will cannot be effectuated, unless by the adoption of the common law."⁵⁵ Story's observation suggests that the jurisdictional decision (is this a case arising under the laws of the United States?) was the initial framing question, and that the common law might provide guidance as to the outcome of the merits of the case.

Similarly, 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 need not subsume 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

⁵⁵ *Coolidge*, 25 F. Cas. at 620.

and punishment.⁵⁶

Du Ponceau believed that the common law as a “general system of jurisprudence” inhered in the nation’s Anglo-American heritage.⁵⁷ Nevertheless, he distinguished between this “national law,” which he regarded as a kind of background norm of interpretation, and the constitutionally created class of cases denominated as arising under the laws of the United States.⁵⁸ 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.”⁵⁹ Thus, for Story and 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 Story’s and 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*.⁶⁰ 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

⁵⁶ DU PONCEAU, *supra* note ___, at 98.

⁵⁷ *Id.* at 88.

⁵⁸ *Id.* at 99.

⁵⁹ *Id.*

⁶⁰ 9 U.S. 61 (1809).

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 members of a corporation, not the location of the corporation itself, was dispositive for purposes of diversity jurisdiction. Therefore, the fact that the Bank 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.⁶¹

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*.⁶² 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."⁶³ The Bank might be a creature of federal law, but for Marshall, the circumstances of its

⁶¹ *Id.* at 91-92.

⁶² *Id.* at 86.

⁶³ *Id.* at 85.

formation were conceptually distinct from the legal framework governing its subsequent operations. 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.⁶⁴ 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.⁶⁵ 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.⁶⁶

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 1789.⁶⁷ Moreover, Key went on, the very notion that Congress possessed the power to expand federal jurisdiction as it pleased ran afoul of the states'

⁶⁴ 1809 U.S. LEXIS 418, 15.

⁶⁵ *Id.* at 16.

⁶⁶ 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, *supra* note ____.

⁶⁷ 1809 U.S. LEXIS 19.

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.⁶⁸

According to Key's reasoning, then, the Article III requirements for the federal judicial power could be properly fulfilled by permitting state-court decisions to be appealed to the Supreme Court. On this view, Congress had little meaningful 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 did not move as far as Key toward 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.⁶⁹ In contrast to Chase's and Peters's opinions in *Worrall*, which had together endorsed a relatively wide array of potential sources of jurisdiction (Congress for Chase, Congress or the courts themselves for Peters), *Deveaux* appeared to prohibit the

⁶⁸ 1809 US LEXIS 19.

⁶⁹ 9 U.S. at 85.

inferior federal courts from cloaking themselves in broad “arising under” jurisdiction. Marshall therefore privileged Congress as the source and arbiter of federal question jurisdiction.⁷⁰

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.⁷¹ In some sense, then, the discussion of “arising under” jurisdiction was a classically Marshallian digression on the way to a decision.

While dismissing the detour as dictum might be good law, though, it misses an opportunity for intellectual history. 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 Article III jurisdiction narrowly, since he could still fall back on statutorily created 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.”⁷² As Key had suggested in his argument on behalf of the Georgia officers, in a world with broad federal question jurisdiction, the answers to these questions would be relatively straightforward. If the lower federal courts’ jurisdiction extended to matters arising under the Constitution, federal statutes, and treaties, then the Bank

⁷⁰ 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).

⁷¹ 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).

⁷² *Deveaux*, 9 U.S. at 85.

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 25.⁷³ 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.⁷⁴

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. If Bank officials wished to bring suit to recover the deposits, they would have to seek a remedy in state court, just as would have been their remedy prior to the passage of the 1801 act. 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,

⁷³ *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.")

⁷⁴ *Id.*

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.⁷⁵ 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.”⁷⁶ 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

⁷⁵ Marshall to William Paterson, Feb. 2, 1801, in 6 THE PAPERS OF JOHN MARSHALL 65 (Charles F. Hobson ed., 1990) (emphasis added).

⁷⁶ Marshall to Oliver Wolcott, Apr. 5, 1802, in 6 *id.* at 104.

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.⁷⁷

For both Marshall and Chase, then, the expansion of the lower federal courts' jurisdiction was both practically and constitutionally necessary.

As Marshall's and Chase's discomfort with the actions of the political branches demonstrates, in the aftermath of the 1801 act's repeal, the nature and definition of the federal judicial power was in a state of flux. For observers who shared the new president's suspicion that the federal judiciary had become a bastion of reactionary Federalists bent on using the courts to centralize national power, the 1802 repeal act was a welcome reversal of a last-minute overreach by a party on its way to a deserved oblivion.⁷⁸ For those who believed that the federal courts ought to function as institutional enforcers of the Constitution's substantive commitment to federal supremacy in the sphere of federal law, however, the demise of "arising under" jurisdiction was a harsh blow to the constitutional structure. Marshall and Chase brooded in this latter category.

⁷⁷ Samuel Chase to Marshall, Apr. 24, 1802, in 6 *id.* 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 6 *id.* at 160-61. [Note that Chase had held in *Worrall* that it was up to Congress to define federal crimes, and thus to define federal jurisdiction.]

⁷⁸ See, e.g., James Monroe to Thomas Jefferson, March 3, 1801, in 4 MARCUS, *supra* note ___, at 720 (observing that the Federalist party "has retired into the judiciary in a strong body where it lives on the treasury, & cannot therefore be starved out").

Contemporary commentators and modern scholars alike have noted that Federalists regarded the judiciary as their last redoubt following the rout of 1800.⁷⁹ 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.⁸⁰ 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

⁷⁹ See, e.g., Gouverneur Morris to Robert R. Livingston, Feb. 20, 1801, in 3 THE LIFE OF GOUVERNEUR MORRIS 153-54 (Jared Sparks ed., 1832) (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?").

⁸⁰ See LACROIX, *supra* note ___, at 187-201 (describing the early republican debate over establishing state courts as the initial arbiters of all federal questions versus vesting this power in inferior federal courts).

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.⁸¹

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, a missing tooth to be tongued, 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.

III. 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. Despite the rapid demise of federal question jurisdiction, the idea of “arising under” jurisdiction lingered on, inflecting constitutional debate for decades. The one-year career of federal question jurisdiction might have appeared to be an anomaly immediately upon its repeal. Indeed, in the 1803 case of *Stuart v. Laird*, the Court went so far as to uphold the repeal of the

⁸¹ Cf. Bellia, *supra* note __ (suggesting that Article III’s “arising under” formulation was new in American law and does not appear to have had English antecedents).

Judiciary Act of 1801.⁸² 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.⁸³ 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 republican 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 made possible the later reemergence of a version of federal question jurisdiction.

The facts of *Osborn* caused a sensation at the time.⁸⁴ 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

⁸² 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.

⁸³ 22 U.S. 738 (1824).

⁸⁴ See WHITE, *supra* note __, at 524-26 (describing the facts of *Osborn*); see also Chillicothe *Spectator*, Sept. 22, 1819; *Western Monitor* (Louisville, Ky.), Sept. 25, 1819.

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.⁸⁵ 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 a 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

⁸⁵ See WHITE, *supra* note ___, at 526.

of early republican 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*.)⁸⁶

The combined *Osborn-Planters' Bank* argument thus confronted the Court with an opportunity to revisit two questions that it had begun to contemplate fifteen years earlier, with respect to claims of the First Bank of the United States in *Deveaux*. First, could Congress vest the Bank with the power to bring suit in federal court? Second, if so, did that grant derive from a version of "arising under" jurisdiction?

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."⁸⁷ 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."⁸⁸ 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

⁸⁶ See Editorial Note, in 10 PAPERS OF JOHN MARSHALL, *supra* note ___, at 39.

⁸⁷ *Osborn*, 22 U.S. at 317.

⁸⁸ *Id.* at 305 (reporter's summary).

given for the sake of the suitor, never for the sake of the Court.”⁸⁹ Therefore, because the Bank was the creature of federal law, there “could be no case, where the Bank is a party, in which questions may not arise under the laws of the United States.”⁹⁰ 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.”⁹¹

In a letter to Nicholas Biddle, president of the Bank, a few weeks before the reargument, Clay expressed confidence 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.⁹²

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

⁸⁹ *Id.*

⁹⁰ *Id.* at 307 (reporter’s summary).

⁹¹ *Id.* at 314-15, 313 (reporter’s summary).

⁹² Clay to Biddle, Feb. 17, 1824, in 3 *THE PAPERS OF HENRY CLAY* 646 (James F. Hopkins ed., 1963). 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 federal circuit court’s jurisdiction in action by Bank to recover upon bill of exchange).

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.”⁹³ 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.⁹⁴

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.”⁹⁵ 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 vest the Bank with 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

⁹³ Clay to Biddle, Feb. 17, 1824, in 3 PAPERS OF HENRY CLAY, *supra* note ___, at 646.

⁹⁴ 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”).

⁹⁵ *Id.* at 317.

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.⁹⁶

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 the specific matters that arose under *a specific* federal law – not those that arose under federal law more generally.⁹⁷ 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.⁹⁸ 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."⁹⁹ If such a federal ingredient could be found, then Congress might permissibly confer jurisdiction over that cause upon the federal courts.

In response to appellants' argument that granting the right to sue to a party did not necessarily give rise to jurisdiction on the part of a particular court, Marshall admitted the distinction. 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

⁹⁶ *Id.* at 319-20.

⁹⁷ *Cf.* Bellia, *supra* note __ (arguing that the original understanding of "arising under" jurisdiction was narrower than the modern conception).

⁹⁸ 22 U.S. at 320.

⁹⁹ *Id.* at 323.

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.*¹⁰⁰ Again, Marshall endorsed a broad conception of the nexus between the case and the federal law under which it arose.

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."¹⁰¹ 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.¹⁰²

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.¹⁰³ 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

¹⁰⁰ *Id.* at 327 (emphasis added).

¹⁰¹ *Id.* at 378 (Johnson, J., dissenting).

¹⁰² *Id.* at 383 (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* 242 (4th ed. 1998). This interpretation of the case captures the reasoning in Johnson's dissenting opinion rather than that of the majority. See 22 U.S. at 372 (Johnson, J., dissenting). Cf. Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 Mich. L. Rev. (forthcoming 2010) (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).

¹⁰³ *Id.* at 389-90 (Johnson, J., dissenting).

grant of the right to sue.”¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ 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, *sub rosa* return of pre-repeal “arising under” jurisdiction. 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

¹⁰⁴ *Id.* at 392-93 (Johnson, J., dissenting).

¹⁰⁵ 22 U.S. 904, 906 (1824).

¹⁰⁶ See LOW & JEFFRIES, *supra* note ___, at 242 (“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, it may take the (lesser?) step of creating no substantive rights but permitting a state-law suit to be brought in federal court.”)

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.¹⁰⁷

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.

¹⁰⁷ 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.

IV. INSTITUTIONAL QUESTIONS

As the decisions in *Osborn* and *Planters' Bank* suggest, Marshall, Story, and their fellow Federalist 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.¹⁰⁸ 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*,¹⁰⁹ *Martin v. Hunter's Lessee*,¹¹⁰ and *McCulloch v. Maryland*.¹¹¹ 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 capital of 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.¹¹²

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

¹⁰⁸ See, e.g. MCCLOSKEY, *supra* note __, at 51-52.

¹⁰⁹ 5 U.S. 137 (1803).

¹¹⁰ 14 U.S. 304 (1816).

¹¹¹ 17 U.S. 316 (1819).

¹¹² See generally LACROIX, *supra* note __, at 6-9 (discussing federalism as a normative vision of government based on multiplicity).

Supreme Court could hear appeals from the highest court of a state.¹¹³

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. The twin tracks had only existed between 1801 and 1802, during the brief lifetime of the 1801 act, but the idea of two parallel judicial routes coexisting and separating the great mass of cases into a structurally federal route and a structurally state route appealed to the federalist aesthetic of symmetry, of structural separation of federal from state matters (except, of course, in the ultimate and exceptional situation in which each case reached the Supreme Court).¹¹⁴

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

¹¹³ Judiciary Act of 1789, § 25.

¹¹⁴ 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, *supra* note __, at 103-04. For the single federal question case to survive repeal, see Holt, *supra* note __.

of the federal Constitution.¹¹⁵

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 Lessee*¹¹⁶ and *Cohens v. Virginia*,¹¹⁷ 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.¹¹⁸ Despite the rapidly receding memory of arising under

¹¹⁵ 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, *supra* note ___, at 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 L.J. 2023 (2008).

¹¹⁶ 14 U.S. 304 (1816).

¹¹⁷ 19 U.S. 264 (1821).

¹¹⁸ In the 1820s, proposals to eliminate this species of review surfaced in Congress,

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.

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 the Virginia court, Judge Spencer Roane insisted that Section 25 by its very nature violated principles of dual sovereignty that he argued underpinned the entire constitutional structure. "It must have been foreseen that controversies would somehow arise as to the boundaries of the two jurisdictions," Roane wrote. "Yet the constitution has provided no umpire, has erected no tribunal by which they shall be settled. The omission proceeded, probably, from the belief, that such a tribunal would produce evils greater than those of the occasional collision which it would be designed to remedy."¹¹⁹

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, 1 *THE SUPREME COURT IN UNITED STATES HISTORY* 657 (1922). 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* 60 (Christopher Tomlins ed., 2005) (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 *AM. L. REV.* 1 (1913).

¹¹⁹ *Hunter v. Martin*, 4 *Munf.* 1, 5 (Va. 1815) (Roane, J.). Roane suggested that confining Supreme Court review to cases that arose in federal court would be more compatible with

Writing for the 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.*"¹²⁰ 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."¹²¹

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.¹²² 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

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 9.

¹²⁰ 14 U.S. at 338 (emphasis added).

¹²¹ *Id.* at 342.

¹²² *Id.* at 338.

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”¹²³; concerns that defendants would be disadvantaged by plaintiffs’ bringing suit in favorable state courts¹²⁴; 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.”¹²⁵ 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.

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

¹²³ *Id.* at 347.

¹²⁴ *Id.* at 348-49.

¹²⁵ *Id.* at 347.

exception of Johnson (who, eight years later, dissented in *Osborn*).¹²⁶ 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.”¹²⁷

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.¹²⁸ 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.¹²⁹

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

¹²⁶ See 1 WARREN, *supra* note __, at 442.

¹²⁷ *Id.* 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. *Id.* 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. *Id.* 442 &n.3.

¹²⁸ See 1 STORY, *supra* note __, at 293.

¹²⁹ *Id.* at 293-94.

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.”¹³⁰ 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.”¹³¹ 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.

¹³⁰ *Id.* at 294.

¹³¹ *Id.* 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*, 14 OKLA. CITY U. L. REV. 521, 521 (1989) (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.

Story's comments accompanying the draft bill convey the urgency with which he and his colleagues viewed the question of establishing federal question jurisdiction in the circuit courts. Such jurisdiction was essential, they believed, not only because it would provide stronger support for federal statutes and treaties, but because it would ensure that the structure of the federal republic was centered on courts. 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 the degree to 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.”¹³² Roane had indeed written that the federal union was “as much a federal government, or a ‘league,’ as was the former confederation.”¹³³

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.”¹³⁴ 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

¹³² See 10 PAPERS OF JOHN MARSHALL, *supra* note ___, at 284.

¹³³ *Id.*

¹³⁴ *Id.*

constitutional structure.¹³⁵ “I admit explicitly that the court considers the constitution as a government, and not ‘a league,’” Marshall wrote.¹³⁶ 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.”¹³⁷ 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.

V. 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.”¹³⁸ 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.

¹³⁵ “A Friend of the Constitution” No. 1, in 8 PAPERS OF JOHN MARSHALL, *supra* note ___, at 318.

¹³⁶ “A Friend of the Constitution” No. 6, *in id.* at 348.

¹³⁷ “A Friend of the Constitution” No. 8, *in id.* at 355-56.

¹³⁸ Marshall to Story, Sept. 18, 1821, in 9 PAPERS OF JOHN MARSHALL, *supra* note ___, at 184.

This article has sought to challenge the fallacy of seamlessness that often infects American constitutional history. Not only does constitutional law not run in an unbroken interpretive line back to the founding, but significant fissures broke the supposed continuity 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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