April, 1942

University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Copyright 1942, by the University of Pennsylvania

VOL. 90 APRIL, 1942 NUMBER 6

ORIGINAL JURISDICTION OF FEDERAL QUESTIONS

JAMES H. CHADBOURN † and A. LEO LEVIN ‡

"Few subjects are involved in greater perplexity"
—Amidon, J.[1]

The federalism envisioned by the founding fathers quite naturally included the idea of a federal judiciary to decide cases involving federal law. They expressed the thought felicitously in Article III of the Constitution: "The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." The exercise of this power in appellate form, with all the strife it has entailed, makes a spectacular story. But it is a story which has been twice told and is well known. (Even the present generation of law students remember the last hectic episode.) Much less attention has been given to the exercise of this power in the form of original jurisdiction. This story, unlike the other one, does not involve a dramatic

† A. B., 1926, The Citadel; J. D., 1931, University of North Carolina; Professor of Law, University of Pennsylvania; author of LYNCHING AND THE LAW (1933); CASES ON CIVIL PROCEDURE (3d ed., 1939) (with Roswell Magill); *A Summary Judgment Procedure for North Carolina* (1936) 14 N. C. L. REV. 211, and various other articles in legal periodicals.

‡ A. B., 1939, Yeshiva College; member of the third-year class, Law School of the University of Pennsylvania.

1. McGoon v. Northern Pac. R. R., 204 Fed. 998, 1000 (N. D. 1913), discussing criteria for determining the original jurisdiction of the federal district court based on the claim of a federal question.

This article is concerned essentially with the development by the federal judiciary of its original jurisdiction over federal questions, and of the judicial process of defining the controlling statutory provisions. No attempt has been made to restate in detail the substantive law by an analysis of the various factual situations which have arisen and which may arise under this topic. "Federal specialties" such as bankruptcy proceedings, admiralty law, and revenue actions essentially do not present border line problems of jurisdiction. Further, no lengthy consideration has been given to the constitutional problem of the power of Congress, if it should deem it proper, to vest original jurisdiction of all cases arising under varying statutes (e. g., the Federal Employees' Liability Act), even where questions of fact are the sole matters in controversy.

clash of mighty forces over grand issues, but it is not without fascination for those whose interest is intrigued by the tortuous development which has made cases involving the laws of the United States the daily grist of the District Courts of the United States.

I

Prima facie it would be reasonable to expect that the same considerations which impelled the framers of the Constitution to empower Congress to create inferior courts for the enforcement of rights arising out of the Constitution and laws of the United States [2] would have motivated the same men [3] sitting in their legislative capacities to exercise the power in their Judiciary Act of 1789. Yet not until 1875 [4] did Congress make the presence of a federal question ground for original [5] federal jurisdiction.

Undoubtedly there were in the first Congress extremists both for and against such jurisdiction—some who thought failure to vest it undesirable to the point of endangering the success of the second experiment in federalism; [6] others who conceived of the very existence of a system of inferior federal courts as dangerous to the continued independent existence of the governments of the several states.[7] Neither group of alarmists prevailed in the Judiciary Act of 1789, which emerged, not as the triumph of a single political faction, nor as a well-considered expression of the political philosophy of a single

2. For a discussion of some of these considerations, see the argument of counsel in Osborn v. Bank of the United States, 9 Wheat. 738, 808 *et seq.* (U. S. 1824) and particularly at 811.

3. *See* Ames v. Kansas, 111 U. S. 449, 464 (1884). Ellsworth, who was the most important of the draftsmen of the Judiciary Act of 1789, and in fact, five of the ten members of the Senate Committee appointed to draft the bill were members of the Constitutional Convention. See Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, 57; and see also *id.*, note 21, citing Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 297 (1888).

4. The short lived "Midnight Judges Bill", passed on February 13, 1801, 2 STAT. 89, and repealed March 8, 1802, 2 STAT. 132, had provided for original jurisdiction by federal courts over federal questions. However, its history is more a matter of political than legal interest and need not here be considered. For a discussion of the background and story of the Act, see FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT (1927) 24 *et seq.* Patent and revenue cases were a further exception. See p. 653 *infra*.

5. As distinct from removal jurisdiction. See p. 644 *infra*.

6. In another connection Madison had said of the state courts: "In some [states], they are so dependent on State Legislatures that to make the Federal laws dependent on them would throw us back into all the embarrassments which characterized our former situation." Quoted in Warren, *supra* note 3, at 124. See also the statement of Samuel Dexter of Massachusetts. *Id.* at 53.

7. Warren, *supra* note 3, at 65 *et seq.*, 125 *et seq.* In 1922 it was "gravely proposed in the Senate to abolish inferior Federal courts altogether". Senator [later Attorney-General] Walsh was not in favor of this return to the extremities of the early Anti-Federalists, but he did favor elimination of both diversity and federal-question jurisdiction in the lower federal courts. 62 CONG. REC. 8545, 8548 (1922). *Cf.* Mr. Charles Warren's approval of returning to the Judiciary Act of 1789, Warren, *supra* note 3, at 131.

school of thought, but rather as a compromise measure,[8] each provision of which did not stand solely on the two feet of its own merits, but equally on the remains of rejected alternatives.[9] If in truth "the First Judiciary Act has been so smothered in praise" [10] as to have its real significance obscured, it must be emphasized that the praise was decidedly not contemporary.[11] On the contrary, the bill was severely criticized and allowed to pass essentially because of the absence of any other plan which could gain the consent of all who agreed "in disliking the bill." [12]

But if the explanation for the absence of any provision granting the inferior federal courts jurisdiction over federal questions lies in the fact that the bill was a compromise measure, there yet remains to be determined why the federal question as a basis for jurisdiction fell before the axe of concession, rather than the ground of diversity of citizenship between the parties. This question becomes more meaningful in the light of the position taken by Mr. Charles Warren, leading proponent of the compromise theory, that there was "no part of the Federal jurisdiction which had sustained so strong an attack from the Anti-Federalists, or which had received so weak a defense from the Federalists" [13] as diversity jurisdiction.

A possible explanation may well lie in the fact that the possibilities of discrimination in diversity cases were most likely to be realized in the fact-finding aspects of the trial, beyond the reach of review.[14] On the other hand, federal questions were likely to be questions of law, and hence state prejudice in handling them could more readily [15] be corrected on review by the Supreme Court of the United States. It may well be, therefore, that the denial of diversity jurisdiction was the less easily remedied.

More basically, however, it has been contended with much force of reason that the "fear of parochial prejudice, dealing unjustly with litigants from other states and foreign countries, undermined the sense

8. *Id.* at 53, 131. See also FRANKFURTER AND LANDIS, *op. cit. supra* note 4, at 11.

9. Warren, *supra* note 3, *passim.* The Bill as reported allowed for removal by the defendant of federal-question cases, before trial. However, this provision was subsequently deleted. *Id.* at 62.

10. FRANKFURTER AND LANDIS, *op. cit. supra* note 4, at 4.

11. See Warren, *supra* note 3, at 52-53.

12. James Madison in a letter to Edmund Pendleton, September 14, 1789, quoted *id.* at 130.

13. Warren, *supra* note 3, at 81.

14. In this connection it is interesting to note that "one of the chief fears as to the new Federal Government was lest it might infringe on the right to jury trial, . . ." *Id.* at 78-79. Note also the early attempt to present appeals on the facts. *Id.* at 61. See also Jones' letter to Madison. *Id.* at 55, n. 17. The adoption of the Fourteenth Amendment imposing its requisite of due process on the part of the states, of course, came much later.

15. But see Marshall's analysis in this connection, p. 648 *infra.*

of security necessary for commercial intercourse," [16] and as a consequence the establishment of a system of impartial tribunals was an essential to continued economic development and expansion. If this be so, it is clear why, once a compromise was necessitated, the enforcement of rights "arising under the Constitution, laws and treaties of the United States" fell in favor of diversity as a ground for jurisdiction.

In further attempted explanation of the omission of original federal-question jurisdiction from the Judiciary Act, the essential difference should be observed between the problem with which the framers of the Constitution were confronted and that which faced the authors of the Judiciary Bill. Before the Convention was the question of how much power should be granted or denied the federal government—not for a year, nor for a decade, and not under ascertainable political and economic conditions, but rather for so long a period as the Constitution should endure unamended and under all the combinations and variations of socio-economic and political situations which Providence might produce. On the other hand, the question which faced the Congress was how much of this granted power need be exercised at that specific time; to what extent should the potentiality be actualized? To borrow the force of a simple metaphor: Given the gun, was now the time for shooting? This basic differentiation was in vogue after the Constitutional Convention as an argument in favor of the adoption of that instrument despite objections to the very clause here under consideration.[17] Consequently, Story's famous dictum in *Martin v. Hunter's Lessee* [18] notwithstanding, in many quarters it was both expected and demanded of the legislators that they create a judicial system with a jurisdiction more limited than the Constitutional provisions would authorize.[19] The elected representatives of the people were to postpone the exercise by Congress of the full extent of its judicial powers, with the resulting expense and potential friction between governmental units,[20] until such time as the exigencies of a given situation clearly demonstrated the necessity therefor.

One would expect, then, to find such exigencies existing in 1875 when original jurisdiction over federal questions (as distinguished from that conferred by removal statutes) was first given the federal judiciary by the Act of March 3d.[21] However, a study of the history

16. FRANKFURTER AND LANDIS, *op. cit. supra* note 4, at 8-9. *Cf.* Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499, 520. See also Friendly, *The Historic Basis of Diversity Jurisdiction* (1928) 41 HARV. L. REV. 483, 498.

17. See Roger Sherman's statement in 1888, quoted in Warren, *supra* note 3, at 65-66. See also Jones' letter to Madison of October 29, 1787, quoted at 55, n. 17.

18. 1 Wheat. 304, 330 (U. S. 1816).

19. See note 17 *supra*; Warren, *supra* note 3, Part II *passim*.

20. See the objections by Senator Maclay of Pennsylvania and Edward Carrington of Virginia. *Id.* at 109, 110.

21. 18 STAT. 470 (1875).

of the bill as revealed by the Congressional Record yields no reason for its enactment at that time, and may even be said to raise a strong presumption that it was "sneak" legislation. It was originally introduced in the House of Representatives in the form of a bill to amend the removal statute.[22]

The first section of the bill extended removal on the basis of diversity and only that section was debated on the floor of the House. Much of the argument consisted of the stock objection to any enlarging of federal jurisdiction: overcrowded dockets.[23] Perfunctory as it was, this argument sufficed to defeat the section and this was the final House debate on a bill which, in its ultimate form, "opened wide a flood of totally new business for the federal courts." [24]

The second section, providing for minor changes in the procedure governing removal of causes, was passed without debate and sent to the Senate.[25] There, in committee, it underwent a metamorphosis. To be more accurate, a substitute bill was reported,[26] still bearing the old title "regulating the removal of causes from the State courts"—a title which was not changed until after the passage of the bill in the Senate, and then only as an afterthought.[27]

The Senate debate was concerned solely with minor details and the bill was promptly passed the day it was introduced. Rejection of the Senate "amendments" by the House was followed by a conference.[28]

On the third day of March, as deficiency appropriations and similar urgent last minute business occupied the final hours of the Congress, the debates were occasionally interrupted for the rubber stamping of conference decisions. On that day both houses, without discussion, granted their approval [29] and likewise on the same day the Presidential signature was hurriedly affixed.[30] With such casualness did the inferior federal courts cease "to be restricted tribunals of fair dealing between citizens of different states" [31] and become "primary and powerful reliances for vindicating every right given by the Constitution, the laws and treaties of the United States." [32]

---

22. Bill No. H. R. 3511, 2 CONG. REC. 4301 (1874). For a discussion of the diversity problem which gave rise to its introduction see FRANKFURTER AND LANDIS, *op. cit. supra* note 4, at 66 *et seq.*

23. 2 CONG. REC. 4302-4304 (1874), where the other objections to the defeated section are also recorded.

24. FRANKFURTER AND LANDIS, *op. cit. supra* note 4, at 65.

25. 2 CONG. REC. 4304 (1874).

26. *Id.* at 4978.

27. *Id.* at 4988.

28. 3 CONG. REC. 1992, H. R. Journal 611, 43d Cong., 2d Sess. (1875).

29. 3 CONG. REC. 2168, 2240 (1875).

30. *Id.* at 2275.

31. FRANKFURTER AND LANDIS, *op. cit. supra* note 4, at 65.

32. *Ibid.* Immediate and persistent attempts to curtail the jurisdiction conferred by the Act of 1875 (*id.* at 89) lend weight to the presumption of "sneak" legislation.

It is of further interest to note that both prior and subsequent to the enactment of the statute there was hardly any discussion of the problem in the legal periodicals,[33] although mention of the Act is made and the wisdom of its adoption questioned in an anonymous article on *Our Federal Judiciary* which appeared in the *Central Law Journal.*[34] A careful analysis of the business of the Supreme Court leads an author of that period, writing in the *American Law Register,* to the conclusion that the scope of federal jurisdiction needs to be curtailed.[35]

The absence of legislative debate and the paucity of journalistic comment need not, however, leave us at a total loss as to the background which made passage of the bill possible.

Frankfurter and Landis have pointed out that the Act "summed up the separate provisions for removal [of previous statutes], and attempted to make the jurisdiction of the federal courts in the original instance analogous to their jurisdiction upon removal. . . ." [36] This position must not be taken as minimizing either the significance or the extent of the ramifications of the Act, for the same authors declare its effect to be a "development in the federal judiciary, which in the retrospect seems revolutionary." [37] The fact is, however, that from the days of the War of 1812, Congress had extended the removal jurisdiction of the inferior Federal courts whenever sectional opposition to national policy was reflected by the State judiciary.[38] The removal provision contained in the "Force Bill",[39] passed as an answer to South Carolina's threats of nullification, was an early example of the willingness of Congress to exercise the Constitutional power of lower court jurisdiction over federal questions to meet that challenge of anti-federal philosophy which subsequently was fought out on the field of battle. Extension followed extension during the war years and in the early reconstruction period.[40] The nationalism produced by the war effort

33. *Id.* at 65, n. 34.

34. A. I., *Our Federal Judiciary* (1875) 2 CENT. L. J. 551. The four-page note, however, does not deal specifically with federal question provision, and in fact makes mention of it only by inference. *Id.* at 553. Of interest is the author's observation that as then constituted, the federal judicial system had no provision for appeal in cases involving between $500 and $2,000, the respective circuit court and Supreme Court jurisdictional amounts. This, however, was not true in the state courts and hence is offered as an objection to the extension of federal jurisdiction.

35. Meigs, *The Relief of the Supreme Court of the United States* (1884) 32 AM. L. REG. 360. Concern with this problem was common. For example, in *The Supreme Court* (1875) 9 AM. L. REV. 668, the suggestion was made that the Justices of the Supreme Court sit in separate sessions, three or four justices to a session, on which point *see* Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499, 504.

36. FRANKFURTER AND LANDIS, *op. cit. supra* note 4, at 63, n. 22.

37. *Id.* at 65.

38. 3 STAT. 195, 198 (1815). See FRANKFURTER AND SHULMAN, CASES ON FEDERAL JURISDICTION (1937) app. A, A(4)*a* at 786; Frankfurter, *supra* note 35, at 508.

39. 4 STAT. 632, 633 (1833). See FRANKFURTER AND SHULMAN, *op. cit. supra* note 38, app. A, A(4)*b* at 786; Frankfurter, *supra* note 35, at 508.

40. See FRANKFURTER AND LANDIS, *op. cit. supra* note 4, at 61 and particularly note 22.

was not to die down after a Northern victory. Neither was the law to develop unaffected by its influence.[41] Not only in the same pages of the Congressional Record which tell the story of the Act of March 3, 1875 is there evidence in abundance of the war days and war-begotten problems, but the same story is told with equal force in the legal periodicals of that, and of the succeeding, decade.[42]

Consequently, the scene was set for the passage of an Act which can be regarded as the "culmination of a movement . . . to strengthen the Federal Government against the states".[43] Therefore, even if this tremendous broadening of the scope of the Federal judiciary came about through legislation consented to by a Congress not fully aware of the meaning of its action, yet, it is patent that the Act is intelligible in terms of the political and economic background of its time, and clearly is part of, rather than an exception to, the trend of the legislation which preceded it.[44]

II

The Act of 1875 used the phrasing[45] of Article III of the Constitution to describe the jurisdiction granted. The Circuit Courts were given:

"original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority".[46]

---

41. *Id.* at 57-59, 64. The economic scene is discussed at 56, 65, and particularly in note 31.

42. Instance Maury, *The Late Civil War, Its Effect on Jurisdiction, and on Civil Remedies Generally* (1875) 23 AM. L. REG. 129; Mister, *Contracts of Life Insurance as Affected by the Late Civil War* (1877) 25 AM. L. REG. 651.

43. FRANKFURTER AND LANDIS, *op. cit. supra* note 4, at 65, n. 34.

44. See, e. g., A. I., *Our Federal Judiciary* (1875) 2 CENT. L. J. 551, 553. Judge Cooley, interestingly enough, lends some importance to the desire of politicians to increase the number of appointments under their control as a factor in the increase of federal jurisdiction. See COOLEY, MICHIGAN, cited by FRANKFURTER AND LANDIS, *op. cit. supra* note 4, at 66, n. 34.

45. It is to be noted, however, that the Constitution used the word "cases", while the statute said "suits". This formed the basis of Mr. Justice Miller's dissent in *Railroad v. Mississippi.* See p. 653 *infra.*

For an early comparison of the difference in judicial treatment acccorded the statutory and the constitutional provisions despite their use of the same language see Willard, *When Does a Case "Arise" Under Federal Laws* (1911) 45 AM. L. REV. 373. See also Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936) 45 YALE L. J. 393, 405, n. 47; *cf.* p. 642 *supra.*

46. 18 STAT. 470, § I (1875).

The currently controlling provision, passed in 1911, has changed the language of the original statute, and of the Acts of 1887 and 1888, so that the district courts are now given cognizance of suits in which "the matter in controversy . . . arises under" federal law. Clearly this was no attempt to enact into law Johnson's dissent in the *Osborn* case, for that would have altogether eliminated the strictly original jurisdiction

This, of course, presented the judiciary with the problem of what was meant by a case "arising under the Constitution or laws of the United States". It was a difficult problem, but it was not a novel one. A half-century earlier, in 1824, the case of *Osborn v. Bank of the United States*[47] had involved the meaning of the similar words of Article III.

The Act incorporating the Bank gave it the right to sue in the Circuit Courts of the United States. The Bank sued Osborn, Auditor of Ohio, in the Circuit Court in Ohio to enjoin the enforcement against it of an Ohio tax. Osborn contested the jurisdiction of the Circuit Court on the ground, *inter alia,* that the charter provision in question was unconstitutional as an attempt to vest jurisdiction over cases to which the judicial power of the United States is not extended by the Constitution. Marshall rejected the contention. Article III, he pointed out, extends the judicial power to cases arising under the laws of the United States and cases brought by the Bank, he argued, arise under its charter. Of the charter, he says: "The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?

"Take the case of a contract, which is put as the strongest against the Bank.

"When a Bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but into any Court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case." [48]

which that section confers. See note 55 *infra.* Conceivably, as a result of the judicial neglect of Section 5 (see Part II, *passim*), it intended to provide for the determination of jurisdiction only after the pleadings had determined the controversy. This change in terminology, however, apparently has had no effect on judicial decision.

47. 9 Wheat. 738 (U. S. 1824).

48. *Id.* at 823-824.

Here an analyst less acute or courageous than Marshall might have stopped, either unaware of or fearful to meet the difficulties ahead. But not the mighty Marshall. He perceived these difficulties and dealt boldly with them.

What if the federal question (*e. g.*, the right of the Bank to sue) has already been decided? That doesn't matter, for "The right to sue, if decided once, is decided forever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided." [49] Then Marshall adds with a touch of realism that the question may be revived and "most probably would be renewed, were the tribunal to be changed".[50]

What if defendant doesn't make that defense? That doesn't alter the situation, for "The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defense, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not." [51]

Johnson dissented. To him Marshall's "principle of a possible occurrence of a question as a ground of jurisdiction, is transcending the bounds of the constitution".[52] Article III, in referring to cases arising under the laws of the United States means, Johnson thinks, cases which *do* so arise, while Marshall's interpretation finds it to mean cases which *may* so arise. Thus, Johnson thinks that Marshall makes "arising" a matter of "mere hypothesis" whereas the Constitution makes it a matter of actuality, and thus Johnson accepts the argument counsel had made that "until a question involving the construction or administration of the laws of the United States did actually arise, the *casus federis* was not presented, on which the constitution authorized the government to take to itself jurisdiction of the cause"; [53] that "neither the letter nor the spirit of the constitution sanctioned the assumption of jurisdiction on the part of the United States at any previous stage".[54]

From a purely etymological point of view Johnson, it seems clear, wins the argument. Literally a case "arising under" federal law con-

49. *Id.* at 824.
50. *Ibid.*
51. *Ibid.*
52. *Id.* at 889.
53. *Id.* at 885.
54. *Ibid.*

notes a case in which a federal issue is actually presented, and any other case is beyond the reach of this branch of federal judicial power. This is a plausible construction. It has the undeniable appeal of giving to the words construed their "natural import". Why Marshall rejected it becomes apparent when the practical consequences of adopting it are considered. The immediate effect of Johnson's view would, of course, have been that the Bank of the United States could not sue in the Circuit Court. Its far-reaching effect would have been to preclude the Act of 1875 or any other act vesting original federal-question jurisdiction.[55] Original jurisdiction of the subject matter, according to notions then current, could not be made to depend upon what defense defendant presented by his plea. Such jurisdiction, like life, must exist at the outset or not at all. If it was lacking at the beginning, no amendment, no plea, no consent of the parties could cure the defect. Indeed, the common law judges could exhaust the vocabulary of negation in emphasizing the utter nothingness of proceedings begun without jurisdiction of the subject matter. With this concept of jurisdiction in mind, Marshall knew that his construction was desirable not only for the narrow purpose then before him of enabling the Bank to sue, but for the larger purpose of leaving Congress free at some future time to make the federal courts guardians, in the first instance, of federal rights. In *Cohens v. Virginia* Marshall had pointed out that the founding fathers intended "that the judicial power should be competent to give efficacy to the constitutional laws of the legislature".[56] Webster and Clay as counsel in the *Osborn* case, after quoting this passage, continued by stating bluntly that "the constitution itself supposes that they [state judicial systems] may not always be worthy of confidence, where the rights and interests of the national government are drawn in question." [57] This distrust, the argument continued, necessitates the federal government's protection of its own institutions by means of a judicial system "co-extensive with the power of legislation", the two inseparably associated "so that where one went, the other might go along with it".[58] That this policy could not always be satisfied by federal review of state decision is emphasized by Marshall in the decision of that very case, in which he refers to such a procedure as "the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which [one] is forced against his will".[59]

55. See Johnson's recognition of this fact, *id.* at 889.
56. 6 Wheat. 264, 414 (U. S. 1821).
57. 9 Wheat. 738, 811 (U. S. 1824).
58. *Id.* at 809.
59. *Id.* at 822-823.

So in the *Osborn* case Marshall was construing for the future, and characteristically he construed broadly in order to allow future change and growth. In fact, Marshall's bequest of judicial power was lavishly generous, for as Johnson aptly says: "the principle of a possible occurrence of a question as a ground of jurisdiction . . . will admit of an enormous accession, if not an unlimited assumption, of jurisdiction".[60] The task of identifying the limits has proved a baffling problem.

The draftsman of the Act of 1875, however, appears to have been aware of both the *Osborn* case and of its implications in the field of original jurisdiction. Clearly, if this radical legislation was to prove practicable and if a Congress already aroused over crowded federal dockets was to suffer it to survive, provision had to be made to protect the lower federal courts from a flood of litigation technically within the broad limits staked out by Marshall, but actually unrelated to the the purpose of the Act.

One possible solution was to limit the definition of a federal question in a way to reach an intermediate position between the extremes of Marshall's and Johnson's views. But this formidable task of redefinition was fraught with all the perils of exploring the unknown, of supplying legislative stimulus for a judicial Odyssey uncertain both in itinerary and in destination.

Still it required unusual resourcefulness to find a substitute for redefinition. By what other means could Marshall's approach be followed without precipitating the inundation forecast by Johnson? The draftsman had an ingenious answer. Shrewdly he provided in Section 5: "That if, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court . . . . the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require. . . ." [61]

Thus, although in a given case, because of possible, albeit totally improbable, federal issues, the words of the Constitution, and, by adoption, the words of the statute, confer original federal jurisdiction, yet the court must refuse to continue with the case if in fact the controversy actually presented for determination does not "really and substantially" turn upon a matter essentially federal in nature.[62] The tra-

60. *Id.* at 889. Italics of the original omitted.
61. 18 STAT. 470, 472 (1875), 28 U. S. C. A. § 80 (1927).
62. The early conception was that Section 5 was intended to change the prior practice by which jurisdictional defects such as deficiency in amount or lack of the requisite

ditional requirement that jurisdiction must exist at the beginning of the suit was not violated. There was only involved the refusal to exercise a power admittedly existent. In other words, the Act, by its terms, presented two distinct and clearly differentiated requisites to be met in a given case. First, the suit must be shown to "arise under the laws of the United States". For this purpose, Marshall's test, presumably, was intended to remain in force. This met, the court still had to be satisfied, after formulation of the issues, after the introduction of evidence, in fact at every stage of the proceedings, that there actually was a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved.

Soon after the passage of the Act, at the October Term, 1877, the Supreme Court was given its first opportunity to wrestle with the statute, and the opinion in that case [63] was all too prophetic of the judicial treatment that the "federal question" problem was destined to receive. Decision on a technicality of pleading, gratuitous dictum, contradictory language and a dissent—these were its distinguishing features.

Suit in the nature of a bill in equity was brought in the state court by a lower riparian owner to restrain defendant company, engaged in hydraulic mining, from depositing debris in the river. Defendant secured removal on the ground that since it was operating the claims in the only way possible, the Congressional grants of the mining lands authorized the deposits. The Court, speaking through Mr. Chief Justice Waite, proclaimed the platitude that "The office of pleading is to state facts, not conclusions of law",[64] and denied the jurisdiction of the circuit court for violation of the rule, in that "The statutes referred to [by defendant] contain many provisions; but the particular provision relied on is nowhere indicated." [65]

---

diversity, had to be attacked by a timely plea in abatement. Williams v. Nottawa, 104 U. S. 209, 211 (1881). That such was its exclusive purpose is of course a *non sequitur*, which its position in the Act, its phraseology and its practical utility belie.

The language of Section 5, therefore, bears careful scrutiny. Defects of parties, either because of information as to citizenship disclosed subsequent to the pleadings or as regards suit by others than the real parties in interest, would be completely covered by the clause "or that the parties to said suit have been improperly or collusively made or joined . . . for the purpose of creating a case cognizable or removable under this act". For the fate which even this clause suffered see Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U. S. 518 (1928); also *see* Devost v. Twin State Gas & Electric Co., 252 Fed. 125, 126 (C. C. A. 1st, 1918).

The language "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court" appears to apply to the federal-question situation, as it is this situation which, in the light of the *Osborn* test, involves problems of substantiality. It is, of course, also applicable to the question of jurisdictional amount. See footnote 141 *infra*. However, the language "properly within the jurisdiction" is unfortunate as tending towards circuity of reasoning.

63. Gold-Washing and Water Co. v. Keyes, 96 U. S. 199 (1877).

64. *Id.* at 202.

65. *Id.* at 203.

Dissenting with clarity and cogency, Mr. Justice Bradley found the federal question "clearly raised by the allegations of the petition", and succinctly phrased it to be: "When the government determined to sell mining propert[ies] as such . . . did it, or did it not, intend to confer a right of working them in the only way in which they could be worked?" [66] Further, he finds that "This question depends upon the construction of the titles given by the United States." [67] That the leading case interpreting an American statute should be decided on a point of pleading (citing Chitty) is made somewhat comprehensible by the expressed desire of the court to deal cautiously with legislation which had made such "radical changes in the law". Accordingly, posterity is warned that "the present case is not to be considered as conclusive upon any question except the one directly involved and decided".[68] Posterity, however, chose to construe caution as misplaced modesty and decades later the opinion was still being cited, almost as a matter of form, in all types of federal question cases.

Partially the explanation for this lies in the fact that contradictory language in the case is such as to meet the needs of counsel on more than one side of a given controversy. Says the court: "A cause cannot be removed from a State court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction." [69] It is to be noted, however, that if it does become *necessary* to construe federal law, then obviously, the decision *must* depend upon that construction, for if it did not so depend, the construction would be pure dictum, and hence unnecessary. And the reason for the fallacy, it may be observed parenthetically, lies in the attempt to determine at the time of removal whether the decision must involve a federal question.

But the problems raised by the oft-quoted language of this opinion go deeper still. The Court, after paying lip service to the *Osborn* test by reverential reference early in the opinion, here in obiter proceeds to render meaningless Marshall's reasoning by substituting the inevitable for the possible—by changing "may be involved" to "must be involved". Basically, this resulted from a failure to differentiate between the first and second requisites for exercising federal-question jurisdiction—between the test for determining whether the suit has "arisen" under federal law, and between that for determining whether, having so arisen, it is "really" being argued on the potential federal

66. *Id.* at 204.
67. *Ibid.*
68. *Ibid.*
69. *Id.* at 203.

problem or whether actually some inconsequential issue of fact or of local law is the sole controversy involved.

The language of the opinion clearly exhibits this confusion. "The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. That this was the intention of Congress is apparent from sect. 5 of the act of 1875, which requires the Circuit Court to dismiss the cause, or remand it to the State court, if it shall appear, 'at any time after such suit has been brought or removed thereto, that such suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court'." [70]

Thus, the Court takes cognizance of Section 5, and evidences an understanding of its general purpose. Yet, it fails completely to demarcate and delineate its functions from those of Section 1, and, in thus failing, introduces the terminology "real and substantial controversy" into the judicial definition of the phrase "arising under the Constitution and laws of the United States".

This confusion became more and more hallowed as time made possible citation and repetition and there was born what may almost be termed the judicial tradition of paying meaningless formal tribute to Marshall's *Osborn* case while using as the basis of decision essentially contradictory doctrines.

The next case to be presented to the Supreme Court, *Railroad v. Mississippi,*[71] although not involving Section 5, is also significant in laying solid foundations for future confusion, this time in the dissenting opinion. The suit involved removal on the basis of an admittedly federal question in the defense. Ingenious counsel apparently urged upon the Court that a suit *arises* only from the plaintiff's cause of action, and hence cannot be said to arise under given laws if this does not necessarily appear in the plaintiff's complaint. In other words, how can a suit be said to *arise* under federal laws when such laws enter the case only at a point distant from that of origin—a point not reached until long after the suit is in progress? [72] The premise, however, appears to be fallacious, for nothing can be clearer than that the wording of the controlling statute does not *necessitate* the result. This

70. *Ibid.*

71. 102 U. S. 135 (1880).

72. *Cf.* Brown, *Jurisdiction Based on the Claim of a Federal Question* (1917), unpublished thesis in the Harvard Law School Library, at p. 3. In criticising *Railroad v. Mississippi,* he finds it "hard to see how a case arises out of the United States Constitution when the plaintiff makes out his case without reference to the Constitution". This author, who finds the Judicial Code "admirably drawn", and who urges that "a careful following of its provisions will obviate all difficulty" (*id.* at 16), makes no mention whatever of Section 5 of the Act of 1875.

is irrefutably demonstrated by the early construction of the same words, which appear in the judicial article of the Constitution. Said Mr. Chief Justice Marshall, dealing with the problem of what constitutes a federal question for purposes of Supreme Court review of State decisions, "If it be, to maintain that a case arising under the constitution, or a law, must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think, the construction too narrow. A case in law or equity consists of the right *of the one party, as well as of the other,* and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either." [73] The removal provisions of the controlling statutes during the Civil War period, since they provided for removal on the basis of certain federal questions presented by defendant's plea, were necessarily based on the same interpretation applied to the jurisdiction of the inferior courts.

Substantiated by this tradition of what constitutes a case arising under federal law, the majority held the case removable. To escape renouncing the tradition, and yet accept the contradictory idea that a suit arises only from plaintiff's cause of action, Mr. Justice Miller resorts in his dissenting opinion to an elaborate etymological discussion which attempts to distinguish the terminology of the Constitution and that of the statutory provision.[74] Disavowing any intent to be "captious" he differentiates the word "cases" and the word "suits", the former allowing for federal question defenses, and the latter precluding them. The basic idea of the dissent was soon to prove popular (not, of course, its etymology). Shortly it was to become judicially fashionable to reject defenses in determining under what law the suit arose.

Railroad v. Mississippi was the Supreme Court's single contribution to the problem of original federal jurisdiction from the *Gold-Washing & Water Company* case until 1882. In that year *Albright v. Teas* [75] was decided. It will be recalled that the Court in the *Gold-Washing & Water Company* case had at least taken notice of the fact that Section 5 was on the statute books. The *Teas* case was the first of a series of Supreme Court decisions to ignore it completely.

It is significant that the suit involved a contract of assignment of patent rights because there had been previous statutory authorization for the jurisdiction of the Circuit Courts over "all suits at law or in equity arising under the patent or copyright laws of the United

73. Cohens v. Virginia, 6 Wheat. 264, 379 (U. S. 1821). (Italics supplied.)
74. 102 U. S. 135, 143 (1880).
75. 106 U. S. 613 (1882).

States".[76] Those statutes, however, had had no provisions relative to the substantiality of the controversy comparable to Section 5 of the Act of 1875 and it had long since been decided that an action on a contract concerning letters-patent was not one arising under the patent laws.[77] The legal reasoning of these authorities, however, was of necessity to the effect that the cases never *arose* under the patent laws, and their citation in the *Teas* case, thoroughly understandable in the light of the subject matter, was in support of an identical interpretation of the words "arise under" as used in Section 1 of the Act of 1875. The invocation of Section 5 was obviated, but the reasoning and interpretation of the *Osborn* case received a further setback.

Furthermore, Marshall was invoked to defeat himself. Paraphrasing his then popular language in *Cohens v. Virginia* the Court says: "The case cannot . . . be said to be one which grows out of the legislation of Congress. Neither party asserts any right, privilege, claim, protection, or defence founded, in whole or in part, on any law of the United States." [78] But here Marshall had been speaking of the appellate jurisdiction of the Supreme Court. His reasoning in reference to original jurisdiction had been precisely the reverse. In the *Osborn* case he had stated unequivocally that whether a federal question defense be in fact relied on or not it nevertheless remains part of the cause, and thus confers jurisdiction.[79]

The practical effect of this confusion soon becomes evident. At the next term the Court decided in *Feibelman v. Packard* [80] that suit on a United States marshal's official bond [81] was removable under the Act of 1875. Again, no consideration was given to Section 5 [82] and

76. REV. STAT. § 629(9) (1875).
77. Wilson v. Sandford *et al.*, 10 How. 99 (U. S. 1850).
78. 106 U. S. 613, 618 (1882).
79. The instant case, having been removed after the answers, of course differs somewhat from the *Osborn* case, which involved strictly original jurisdiction. However, the fact that the courts have not sharply differentiated these two situations and have applied the language and the holdings of both interchangeably makes the introduction of a case of an appeal from a state supreme court undesirable, especially since Section 5 applies equally to both the strictly original and to the removal situations.
80. 109 U. S. 421 (1883).
81. There had been removal of marshal-bond cases under previous statutes giving rise to judicial "authority", the effect of which is evident in the opinion. The extent to which Congress intended to allow for initial federal cognizance of such suits even where no federal issues are involved is, of course, another problem. Conceivably, economic or political backgrounds making such a course desirable may exist. *Quære,* whether Section 5 is flexible enough to meet such situations without further legislative aid? *Quære,* whether such flexibility is desirable? See note 1 *supra.*
82. Perhaps none was necessary on the particular facts since the defense was one concerning the federal bankruptcy power. But the opinion disregarded the defense, and its reasoning made it settled law that an action "plainly upon the bond . . . arose directly under the provisions of an act of Congress", giving the circuit court both removal and original jurisdiction. Instance Bachrack v. Norton, 132 U. S. 337 (1889), in which jurisdiction was found solely on the authority of the *Feibelman* case, after which the Supreme Court devoted the rest of the opinion to a problem of Texas law. Bock v. Perkins, 139 U. S. 628 (1891) is another example, with the difference that the problem was one of Iowa law.

therefore the case having "grown out" of federal law, the Circuit Court had original or removal jurisdiction for the purpose of determining problems of general or local law—the only ones actually involved.

In the light of the decision, and more particularly of the *ratio decidendi,* of the *Feibelman* case it is not surprising to see it urged in *Provident Savings Life Assurance Society v. Ford* at the next term of Court [83] that the fact that the suit was upon a federal judgment was a basis for federal lower court jurisdiction.

The Court, however, denied jurisdiction. Totally oblivious either of the existence of Section 5 or of its function, the Court proceeds to deny the suit's having *arisen* under federal law. In keeping with tradition, Marshall's analysis is revered as "masterly", and promptly made the subject of a distinction without a difference. The Court says: "What is a judgment, but a security of record showing a debt due from one person to another? It is as much a mere security as a treasury note, or a bond of the United States. If A brings an action against B, trover or otherwise, for the withholding of such securities, it is not therefore a case arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being the obligations of the United States. . . . It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might be raised in any of the cases specified), distinctly involving the laws of the United States—such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised then it is conceded it would be a case arising under the laws of the United States.

"These considerations show a wide distinction, as it seems to us, between the case of a suit merely on a judgment of a United States court, and that of a suit by or against a United States corporation; which latter, according to the masterly analysis of Chief Justice Marshall in *Osborn v. Bank of the United States,* 9 Wheat. 738, is pervaded from its origin to its close by United States law and United States authority." [84] But what of the reasoning which led Marshall to conclude that the corporation case is so pervaded? Is it not equally applicable to the instant case? Is not a suit on a federal judgment one in which federal law is "an ingredient of the original cause"—one in which federal law is involved because an issue may be made respecting it? The Court thinks not because plaintiff did not raise by his com-

83. 114 U. S. 635 (1885). In considering whether counsel in this case was inspired by the *Feibelman* holding, it is interesting to note that the removal of the cause was claimed solely on another ground, and the federal-question contention was first introduced at the argument. *Id.* at 641.

84. *Id.* at 641-642.

plaint any "distinct question of a federal nature". It is to be noted, further, that the marshal's bond situation is not even accorded the courtesy of mention.

Decided the same day by the same court, speaking in both instances through Mr. Justice Bradley, were the famous *Pacific Railroad Removal Cases*.[85] The issue was clear cut. Did incorporation by the United States, without more, give a corporate defendant the right to remove a suit against it into the federal judicial system? Yes, it was answered, because "The exhaustive argument of Chief Justice Marshall in the case of *Osborn v. Bank of the United States* . . . delivered more than sixty years ago, and always acquiesced in, renders any further discussion unnecessary to show that a suit by or against a corporation of the United States is a suit arising under the laws of the United States." [86] And Mr. Justice Bradley proceeds to quote the venerated Chief Justice at great length, language which would have sounded very strange in the *Provident Society* opinion, echoes of which had hardly died down in the court room.

The dissent quibbled. Right or wrong on the particular point of statutory construction which Mr. Chief Justice Waite and Mr. Justice Miller insisted upon is unimportant. What is significant is this: in a series of cases involving private tort claims, cases in which at the various trials on the merits already held not a single federal controversy actually arose, cases in which there does not appear a single one of the policy arguments applicable to the normal federal question suit, as to these cases neither the majority of the Court, nor the dissenting minority who argued so vehemently against jurisdiction, even so much as turned to the specific statutory provision which was apparently intended to take care of the precise situation—Section 5.

Obviously, not one of the *Removal Cases* "really and substantially" involved a dispute or controversy turning upon federal law. Admitting that they arose under the laws of the United States, and this fulfilled the first requisite of the trial court's competence to determine the cases, what of the second requirement? Clearly it was not met. Clearly, too, no policy was subserved by the decision.[87] For as a result of the decision, "negligence suits against the Pacific railroads and like litigation cluttered the federal courts and aroused strong local animos-

85. 115 U. S. 1 (1885).
86. *Id.* at 11.
87. For a discussion of the difference in the political background of the *Osborn* case (which accentuates the importance of the changed statutory picture), see Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936) 45 YALE L. J. 393, 405. Clearly differentiated is the constitutional question from that of statutory construction, and it is asserted that the problem is not one "to be solved by logomachy". *Id.* at n. 47. However, that Congress had, in Section 5 of the Act of 1875, made adequate provision for the difference in the requirements of the respective periods, appears not to have been considered.

ities" [88] against federal courts. Consequently, by successive steps [89] Congress legislated out of existence the decision in the *Pacific Railroad Removal Cases,* until in 1925 incorporation by or under an Act of Congress was eliminated as a ground of federal jurisdiction.[90]

After having progressed from misconstruction of Section 5 to totally ignoring it, the Supreme Court had not as yet run the gamut of possibilities. In *Robinson v. Anderson* [91] Mr. Chief Justice Waite, speaking for a unanimous court, once again invoked that section, this time in a manner which gave evidence of a comprehension both of its purpose and its efficacy. The action, which was in the nature of ejectment, was begun in the Circuit Court between citizens of California. Plaintiff's complaint based his claim on a United States patent and alleged that defendants were also claiming under a patent. The several defendants answered either denying possession or justifying possession by alleged license from the plaintiff. The Circuit Court's ruling dismissing for want of jurisdiction was affirmed by the Supreme Court, using the following reasoning: "Even if the complaint, standing by itself, made out a case of jurisdiction, which we do not decide, it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defences against the title of the plaintiffs would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defences were relied on. The Circuit Court cannot be required to keep jurisdiction of a suit simply because the averments in a complaint or declaration make a case arising under the Constitution, laws, or treaties of the United States, if, when the pleadings are all in, it appears that these averments are immaterial in the determination of the matter really in dispute between the parties, and especially if, as here, they were evidently made 'for the purpose of creating a case' cognizable by the Circuit Court, when none in fact existed. The provision in § 5 of the act of 1875, requiring the Circuit Court to proceed no further, and dismiss the suit when it satisfactorily appears that, 'such suit does not really and substantially involve a dispute or controversy properly within' its jurisdiction, applies directly to this case as it stands on the pleadings. The answers show that the case made by the complaint was fictitious and not real. The defendants either disclaim all interest in the land, or claim title under and not adverse to that of the plaintiff".[92]

88. FRANKFURTER AND LANDIS, *op. cit. supra* note 4, at 69.
89. See FRANKFURTER AND SHULMAN, *op. cit. supra* note 38, at 787 *et seq.*
90. 43 STAT. 941, 28 U. S. C. A. § 42 (1927).
91. 121 U. S. 522 (1887).
92. *Id.* at 524.

Here, at last, the utility of Section 5 was perceived. This done, the occasion called for an opinion strong enough to prevail against the accumulated confusion of past decisions. There was needed something to establish itself as the "landmark decision"—the "leading case". Instead, Section 5 is considered and applied in two curt paragraphs ostensibly dealing with the obvious and oblivious of the past and future. *Robinson v. Anderson,* therefore, represented a fleeting moment of inspiration, destined soon to be forgotten.[93]

Within a year and a half the Supreme Court returned to confusion. In *Shreveport v. Cole*[94] Mr. Chief Justice Fuller, citing *Gold-Washing & Water Co. v. Keyes,* apparently lost sight altogether of the double nature of the jurisdictional requirements and expressly included the requisite of substantiality as part of the definition of "arising under." Quoting the language of Section 5 without citing it, he

93. Within a few years the Circuit Court of Appeals for the Eighth Circuit, in an alternative holding, adopted the reasoning of *Robinson v. Anderson,* without citing either that case or Section 5. Said the court in Fergus Falls v. Fergus Falls Water Co., 72 Fed. 873, 876 (C. C. A. 8th, 1896): "Even if the averments of the complaint had brought the case within the jurisdiction of the court, the suit should have been dismissed when it appeared upon the trial, as it clearly did, that . . . only the question whether the city had authority, under the laws of Minnesota, to enter into the contract" was involved. The sole citation of authority is Bank of Arapahoe v. Bradley & Co., 72 Fed. 867 (C. C. A. 8th, 1896), which opinion did cite Section 5, applying it to jurisdictional amount. See note 141 *infra.*

Sanborn, J., dissented in the *Fergus Falls* case, *inter alia,* on the question of dismissal after the pleadings. His opinion evidences the effect of *Tennessee v. Planters' Bank* on the operation of Section 5. In this, he cites and follows St. Paul, M. & M. Ry. v. St. Paul & N. P. R. R., 68 Fed. 2 (C. C. A. 8th, 1895). In that case, the court had said: "The necessary result of this [*Tennessee v. Union Planters' Bank*] doctrine is that, when a complaint filed in the circuit court of the United States discloses a controversy arising under federal laws, the jurisdiction of the court will not be defeated by any defense or plea that the defendant may see fit to make. If the plaintiff's right to sue in the national courts is to be tested solely by his complaint or declaration, and is not aided by any plea interposed by the defendant, no matter how clearly the latter may show that the construction or application of federal laws is involved, then it follows that, if jurisdiction is fairly disclosed by the plaintiff's statement of his own cause of action, it cannot be defeated by an answer or plea so conceived and drawn as to avoid the consideration of any federal question or questions." *Id.* at 9-10. It is submitted that the reasoning of the *St. Paul Ry.* case is an obvious *non sequitur.* On the question of determination of non-federal issues, see Note (1926) 40 HARV. L. REV. 298; and authorities cited note 146 *infra.*

It is not to be inferred from the above, however, that the *Anderson* case was either repudiated or read out of the reports by the simple expedient of persistent refusal to cite and to follow. As early 1892 and as recently as 1938 it has been cited with approval by the Supreme Court—but so often in different factual situations. Torrence v. Shedd, 144 U. S. 527, 533 (1892) (diversity case); Saint Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283, 288, n. 10 (1938) (jurisdictional amount). For a specific refutation of the doctrine of the *St. Paul Ry.* case, *supra,* see the opinion of Mr. Justice Brandeis in Lambert Run Coal Co. v. Baltimore & Ohio R. R., 258 U. S. 377 (1922). *Robinson v. Anderson* is cited with approval at 383. For cases which have applied *Robinson v. Anderson* to federal-question situations, in which the plaintiff anticipated a defense not in fact relied upon by defendant, see note 121 *infra.*

The trend in the lower courts was much the same. Industrial & Mining Guarantee Co. v. Electrical Supply Co., 58 Fed. 732, 743 (C. C. A. 6th, 1893) (jurisdictional amount and collusion); Bane v. Keefer, 66 Fed. 610, 612 (C. C. Ind. 1895) (diversity case); Devost v. Twin State Gas & Electric Co., 252 Fed. 125, 126 (C. C. A. 1st, 1918) (subsequent joinder of party in diversity case); Haas v. Burton, 25 F. (2d) 938, 940 (C. C. A. 5th, 1928) (jurisdictional amount); and for the significance of some recent decisions see note 141 *infra.*

94. 129 U. S. 36 (1889).

says: "Unless this suit was one 'arising under the Constitution or laws of the United States', the Circuit Court had no jurisdiction; and if it did not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or some law, upon the determination of which the recovery depended, then it was not a suit so arising." [95]

Then came *Tennessee v. Union and Planters' Bank.*[96] In that case the Supreme Court was confronted with a revision of the Act of 1875, passed in 1887 [97] and further corrected by the Act of August 13, 1888.[98] Squarely raised was the same question that had confronted the court in *Railroad v. Mississippi,*[99] whether an admittedly substantial federal question, raised as a defense, could confer jurisdiction on the lower federal tribunals upon removal from state courts. The court held them impotent so to do.

Obviously motivating the decision was the "general policy . . . recognized by this court, to contract the jurisdiction of the Circuit Courts of the United States." [100] However, to lend some measure of support by authority for the distinction between a federal question raised in the complaint and one raised by answer, Mr. Justice Gray quotes from the dissenting opinion of Mr. Justice Miller in *Railroad v. Mississippi:* "Looking to the reasons which may have influenced Congress, it may well be supposed that while that body intended to allow the removal of a suit where the very foundation and support thereof was a law of the United States, it did not intend to authorize a removal where the cause of action depended solely on the law of the State, and when the Act of Congress only came in question incidentally as part (it might be a very small part) of the defendant's plea in avoidance. In support of this view, it may be added, that he in such case is not without remedy in a Federal court; for if he has pleaded and relied on such defence in the state court, and that court has decided against him in regard to it, he can remove the case into this court by writ of error, and have the question he has thus raised here." [101] The concluding phase of the argument, offering the alternative of an appeal to the Supreme Court after adverse decision by the highest state judicial body, had long before been considered and rejected by Marshall on the grounds of impracticality.[102]

95. *Id.* at 41.
96. 152 U. S. 454 (1894).
97. 24 STAT. 552 (1887).
98. 25 STAT. 433 (1888).
99. 102 U. S. 135 (1880), discussed p. 652 *supra.*
100. 152 U. S. 454 (1894).
101. *Ibid. Cf.* subsequent attempts to change the rule by legislation. 35 CONG. REC. 514, 564, 4227, 6685, 7113 (1902).
102. See p. 648 *supra.* A further ground of impracticality is present in those jurisdictions where appeal through a state system is only possible through an intermediate

But what of the body of Miller's argument? If suit on a United States marshal's bond, where the only dispute is over a question of fact, has federal law as its "very foundation and support" was this not likewise true in the instant case in which a constitutional right—real and substantial—was the only point at issue? Yet, the court claimed a strong public policy in favor of allowing federal jurisdiction in the former case and denying it in the latter. Obviously, the presence in a particular case of the reasons of policy underlying federal jurisdiction are independent of which party introduces the federal question. In a very real sense, however, they do depend on the actual issues formulated by the totality of the pleadings—the disputes and controversies actually presented for determination.

At any rate, it was now established that (in a removal case, as had heretofore been true of a case instituted in the circuit court [103]) the requirement of "arising under", must be met by the plaintiff's complaint alone, unaided by further pleading. This was clearly possible, as Marshall had shown in the *Osborn* case. Furthermore, Section 5, having remained unchanged, was still theoretically available as the safety-valve for disposition of the multitude of cases in which it later became evident from the formulated issues (and realistically, to both parties often long before the pleadings) that no dispute, federal in nature was actually present for decision.

Now the *Shreveport* case and the line of cases which it sired assumed added significance. The requisite of a "real dispute" and a "substantial controversy" [104] having become part of the definition of

appellate state tribunal, thus entailing a time-consuming and expensive four-court procedure before final determination of the cause is had. Contrast this with the federal system, especially in situations allowing for appeal to the Supreme Court directly from the district court.

103. Metcalf v. Watertown, 128 U. S. 586 (1888), discussed at p. 661 *infra*.

104. In many cases the Court has substituted "question" for "controversy". E. g., "Jurisdiction depends upon the presentation by the bills of complaint of a substantial federal question." Hughes, C. J., in Mosher v. City of Phoenix, 287 U. S. 29, 30 (1932). *Cf.* "The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." Water Service Co. v. Redding, 304 U. S. 252, 255 (1938). This change in terminology nominally avoids the logical difficulty referred to in the text. It appears, however, to be in vogue essentially in the "relitigation" cases and in those situations where the plaintiff's claim is "obviously without merit". The difficulty pointed out in the text retains significance, first, because of the many cases which, following the Supreme Court's acceptance of that language in Gully v. First National Bank in Meridian, 299 U. S. 109 (1936), discussed p. 670 *infra*, use the term "controversy". Further, adoption of the phrase "question" in situations other than those mentioned above will not obviate the substantive difficulty.

When Marshall referred to the federal question in the *Osborn* case as arising "substantially" under the federal law, he may well have had in mind as its converse a case in which the federal question raised in the complaint is "obviously without merit". Marshall's use of the phrase need not, in any event, affect the construction of Section 5, which clearly states that it is the dispute and controversy which are required to be substantial.

With the above-quoted reiteration of a now well-accepted "relitigation" doctrine, compare Marshall's analysis of the same problem, discussed p. 647 *supra*. The original Section 5, on which the *Osborn* case could be distinguished, is ignored in this situation

"arising under" these were now to be looked for in the plaintiff's complaint. Obviously, they could never be found, for *no* controversy ever exists until the issues have been framed. The lower courts floundered —recognized the logical impossibility,[105] let alone sheer impracticability, of the definition, but the Supreme Court persisted in directing them to perform the impossible.

The difficulty was accentuated by a second holding in the *Tennessee* case, this time by an undivided court. The opinion was concerned with three cases which included two types of situations, both involving federal-question defenses, but each differentiated from the other procedurally. In the one situation which has already been dealt with, the defendant had already pleaded in the state court before a petition for removal was filed. This confined the problem to the removal section of the Act. In the other the plaintiff brought suit originally in the federal court, anticipating in the complaint the defendant's reliance on a federal right. Thus, essentially, the case turned upon the section governing original jurisdiction, and the right of the plaintiff to anticipate a defense.

Earlier, Mr. Justice Harlan had decided in *Metcalf v. City of Watertown* [106] that in cases originally brought in the federal courts, as differentiated from removal cases, jurisdiction must be established by the allegations of the plaintiff's complaint. "It has been often decided by this court that a suit may be said to arise under the Constitution or laws of the United States, within the meaning of that act, even where the Federal question upon which it depends is raised, for the first time in the suit, by the answer or plea of the defendant. But these were removal cases, in each of which the grounds of Federal jurisdiction were disclosed either in the pleadings, or in the petition or affidavit for removal; in other words, the case, at the time the jurisdiction of the Circuit Court of the United States attached, by removal, clearly presented a question or questions of a Federal nature." [107]

also. Its proper function, however, is illustrated by the Circuit Court of Appeals in Ray v. Marion County, 71 F. (2d) 509 (C. C. A. 5th, 1934). It was there decided that the action, based on the claim of state violation of the due process clause, did not present a substantial federal question, i. e., was obviously without merit, and the court relied on 28 U. S. C. A. § 80 (the original Section 5 and now Section 37 of the Judicial Code) to dismiss. Interestingly enough, the Supreme Court decisions cited as authority make no mention of this clearly applicable statutory provision.

105. "It cannot be that the jurisdiction of a suit originally brought in the District Court . . . must depend upon whether in the actual trial of the case a controversy will arise as to the effect or construction of the federal Constitution or law . . . because it never can be determined from the complaint alone . . ." McGoon v. Northern Pac. R. R., 204 Fed. 998, 1001 (N. D. 1913). See also (1937) 37 COL. L. REV. 1402, 1403, where it is said: "Since it is impossible for the complaint itself to raise any issues, the complaint test is logically inconsistent with the requirement of a substantial federal *issue*." To the same effect see 1 HUGHES, FEDERAL PRACTICE (1931) § 535, at 391.

106. 128 U. S. 586 (1888).

107. *Id.* at 588, 589.

Underlying this distinction was the theory that jurisdiction "must depend on the state of things when the action is brought." [108] Consequently if it does not appear on the face of the complaint that jurisdiction over the subject-matter is present then the court cannot retain the case "in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend. . . . If the city had not answered in the present suit, and judgment by default had been rendered against it, this court, upon writ of error, would have been compelled to reverse the judgment, upon the ground that the record did not show jurisdiction in the Circuit Court." [109]

It is significant that, despite the language used in the paragraph just quoted, the suit was not dismissed. It was remanded "for the court below to determine whether the pleadings can be so amended as to present a case within its jurisdiction".[110] Thus, the court differentiated between no allegation of a federal question until some stage of the proceedings beyond the complaint, and between anticipated defenses.

Chief Justice Waite earlier had also recognized the possibility of such a distinction, although decision of that point was not essential to the determination of the case in which it arose, which therefore expressly left the problem an open question.[111]

Such was the background when the *Planters' Bank* decision was handed down. It opens with an adoration of Marshall, quoting his language in the *Osborn* case: "The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought".[112] However, the fact goes unmentioned that this language was used by Marshall to arrive at the precise converse of the dogma to which it is here being applied. He proceeded from the premises cited to argue that irrespective of whether a defendant sued by the Bank of the United States might choose to raise the defense of lack of power in the Bank under the federal incorporating act, since that defence *might* be raised it "is still a part of the cause". Original federal jurisdiction is present for Marshall wherever there exists a *potential* federal defense, irrespective of whether it is anticipated by the plaintiff's pleadings. Again a statement of Marshall's is lifted from its context and made to bolster a conclusion contrary to the one it originally supported.

108. Osborn v. Bank of the United States, 9 Wheat. 738, 824 (1824).
109. 128 U. S. 586, 589, 590 (1888).
110. *Id.* at 590.
111. Robinson v. Anderson, 121 U. S. 522, 524 (1887).
112. 152 U. S. 454, 459 (1894).

Fittingly enough, the opinion proceeds to quote the previously criticized language of the *Keyes* case,[113] and thus Mr. Justice Gray needed but the single additional quotation which he found in one of his own opinions to complete a trilogy of misconceptions. In *Central Railroad v. Mills* he had written that "The question whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of its own allegations, and not by the effect attributed to those allegations by the adverse party." [114]

The language was strong, but in terms of the fact situation of its original setting it was totally inapplicable. In the *Mills* case defendant alleged his own right to make a given lease under a New Jersey statute, and alleged further that the plaintiff would argue the Constitutional invalidity of the statute. Plaintiff denied, expressly and unequivocally, his intention so to do, but defendant persisted in arguing that his own allegations of plaintiff's intentions were sufficient to confer federal jurisdiction. The contention was denied in the language quoted. But clearly one may differentiate that situation from the normal anticipated defense case in which the opposing party does not deny his intention of so pleading. Nevertheless, a unanimous court, on this reasoning, established the dogma that anticipation of a defense is unavailing.

Thus today the doctrine persists that a suit "arises under the Constitution and laws of the United States" only when a federal question appears in the plaintiff's statement of his own cause of action unaided by any reference to the defendant's contentions or claims.[115]

Further, anticipation of a defense is unavailing, even though the only matter in actual controversy is an admittedly federal question, because "the suit, that is the plaintiff's original cause of action" has not been shown to arise under the Constitution.[116] And the Court on appeal will take cognizance of this jurisdictional defect of its own motion,[117] relegating the parties to a state judicial system from which an appeal to the Supreme Court of the United States can ultimately be perfected.

This doctrine has produced strange results. Let us instance the recent case of *Marshall v. Desert Properties Co.*[118] in which the Cir-

113. Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 203 (1877), discussed p. 650 *supra* and quoted at 152 U. S. 454, 460 (1894).

114. 113 U. S. 249, 257 (1885).

115. For a collection of cases see 1 HUGHES, FEDERAL PRACTICE (1931) § 543, at 401, n. 64, and Note (1935) 94 A. L. R. 711.

116. Louisville & Nashville R. R. v. Mottley, 211 U. S. 149 (1908). The Court reached this result although recognizing that "such allegations show that very likely, in the course of litigation, a question under the Constitution would arise, . . ." *Id.* at 152.

117. *Ibid.*

118. 103 F. (2d) 551 (C. C. A. 9th, 1939), *cert. denied*, 308 U. S. 563 (1940).

cuit Court of Appeals for the Ninth Circuit denied federal jurisdiction over an action to *quiet title* in a controversy concerning mining claims. The opinion of the court differentiated a prior Supreme Court decision [119] which had upheld jurisdiction in an analogous controversy on the single ground that the bill in the latter case was for the removal of a *cloud on title.* The advantage from the jurisdictional point of view of removing a cloud over merely quieting title consisted of the fact that in the latter case, under accepted rules of pleading, the nature of the adverse claim is immaterial while in the former the very existence, as well as the invalidity, of the cloud sought to be eliminated is an essential of the plaintiff's cause of action. Hence, in the one case the federal question arises in the plaintiff's complaint and may be decided by a federal court in the first instance, while in the second it arises only by way of defense and consequently does not entitle either party to federal consideration of the controversy until the entire gamut of state courts has been run.[120]

---

119. Hopkins v. Walker, 244 U. S. 486 (1917).

120. While it is true that the case may be considered as somewhat indicative of a trend towards the limiting of business of the federal courts, yet the emphasis laid upon this distinction by the Supreme Court itself in the earlier decision lends support to the presumption that the dogma of anticipated defenses is essentially responsible for the result. See also Ter Haar v. Kettleman North Dome Ass'n, 34 F. Supp. 823, 824 (S. D. Cal. 1940), where an analogous distinction was used in allowing federal jurisdiction.

Similarly, in City of Monroe v. Detroit, M. & T. S. L. Ry., 257 Fed. 782 (E. D. Mich. 1919), there was an attempt by a city to enjoin a railway operating under its franchise from enforcing an increase in fare which had been allowed by the Interstate Commerce Commission. Federal jurisdiction was denied despite the fact that the sole controversy was the right of the Interstate Commerce Commission to issue orders concerning defendant railway. The court based its decision on the ground that mention of the Interstate Commerce Commission order by the plaintiff in its complaint was "only because defendant has justified its acts by pointing to such order," and hence this clarification of the issues was bad as anticipating a defense. However, if suit were brought by the railroad to enjoin the city from interfering with its operation under Interstate Commerce Commission order, jurisdiction over the case would exist. Columbus Ry. & Power Co. v. Columbus, 249 U. S. 399 (1919). In that case, which involved raising fares beyond the franchise limits due to problems of a changing economy caused by the last World War, the district court had dismissed the bill of the street railway company for an injunction against the city on the ground that the federal question was not substantial. Said the Supreme Court, reversing on the jurisdictional problem, "We are of opinion that there was jurisdiction in the District Court to entertain the bill as it presented questions arising under the Fourteenth Amendment. . . . We think the elaborate and careful opinion of the District Judge of itself shows that. . . ." *Id.* at 406. *But cf.* Lynchburg Traction & Light Co. v. Lynchburg, 16 F. (2d) 763, 764 (C. C. A. 4th, 1927).

In the case of Campbell v. Chase National Bank, 71 F. (2d) 669 (C. C. A. 2d, 1934), *cert. denied,* 293 U. S. 592 (1934), the court extended the doctrine of anticipated defenses using a functional approach as a means of attaining the conceptualistic end. The suit was for an injunction to restrain the depository bank from otherwise disposing of the gold bullion which the plaintiff has deposited there prior to the executive order under the Act of March 9, 1933, which forbade the purchase or hoarding of gold. The theory of the plaintiff's case was that the executive order was inapplicable to him because his purchase antedated it, and that he was entitled to equity relief because the validity of the order would prevent any subsequent purchase of gold, with the result that money damages would be inadequate. The court denied jurisdiction on the ground that reference to the executive order was solely in the nature of an anticipated defense. The essential ingredients of the plaintiff's claim were merely ownership and the right of possession of the goods involved. Although allegation by the plaintiff of

When a question, admittedly federal in nature, has been determined by a federal tribunal at the trial stage, reviewed on the merits by an appellate court and certified to the Supreme Court of the United States for final appeal, it would seem altogether undesirable for that Court on its own motion, to force the litigants to travel a new road, time-consuming and expensive, back to the very point already reached, solely because the federal question was raised by the plaintiff, not as a necessary part of his own case, but as an anticipated defense.

Courts, however, have been able to talk of the "wisdom of the rule", and have pointed out the impracticability of allowing one party by suggestion of what the other "will or may set up" as a defense to confer jurisdiction.[121]

The problem, as unsatisfactorily as it is currently being handled, is not difficult of solution. If plaintiff really believes that one of the *controversies* involved is a federal question and so states in his complaint, the *Osborn* rationale clearly admits of jurisdiction. Even Mr. Justice Harlan's hypothetical problem of judgment on default will have been satisfactorily met. And if in fact no federal question arises—if the court finds neither "real dispute" nor "substantial controversy"—it must then, under the original Section 5, dismiss or remand the case. Thus the federal courts will remain available for the judicial determination of this class of federal problems, while litigants will be prevented from overcrowding federal dockets with controversies unrelated to United States law. Did not the original draftsman in Section 5 provide the machinery for this procedure, and have not the successive Congresses kept it available?

---

the validity of the executive order was necessary for the purpose of creating equity jurisdiction, yet for the purpose of conferring jurisdiction upon the federal court it would be considered as a mere anticipated defense. Despite the unequivocal admission that, "the claim necessarily rests upon the contention that whatever money appellant might recover at law could not repurchase gold bullion because the statute and orders make purchase impossible," the court concludes that "The cause of the suit cannot depend upon the validity of the statute." *Id.* at 671.

In Pacific Gas Improvement Co. v. Ellert, 64 Fed. 421 (C. C. N. D. Cal. 1894) the court, in dictum refused to alter the rule where a statute, of which the court was obligated to take judicial notice, raised the federal defense.

121. See Lynchburg Traction and Light Co. v. City of Lynchburg, 16 F. (2d) 763, 765 (C. C. A. 4th, 1927). The wisdom of applying the "elementary rules of pleading" has also been emphasized. See, e. g., Boston & Montana Consolidated Copper, etc., Mining Co. v. Montana Ore Purchasing Co., 188 U. S. 632, 639 (1903).

The latter case, however, in an alternative holding is one of a series of opinions which indicates precisely how Section 5 can be utilized in the manner indicated in the text, so that anticipated defenses might be allowed in the first instance, with the provision that "if when the answer come in it is seen that no such defence in fact is set up or insisted upon, it is then seen that no such case exists as stated in the complaint, and no jurisdiction therefor exists to try questions which are not of a kind coming within the statute, and the court should then dismiss for want of jurisdiction." *Id.* at 643-644. See also Florida Central & Peninsular R. R. v. Bell, 176 U. S. 321, 330 (1900); Crystal Springs Land & Water Co. v. Los Angeles, 82 Fed. 114, 122 (C. C. S. D. Cal. 1897), *affirmed memo. opinion*, 177 U. S. 169 (1900). All of these cases rely on Robinson v. Anderson, 121 U. S. 522 (1887), discussed p. 657 and note 93 *supra*.

III

We have observed that the contribution made by the combined doctrines of the *Shreveport* and *Planters' Bank* cases was a test for original federal-question jurisdiction which could never be met—a requisite involving an impasse of ideas. On its face the rule required that from a single pleading the court determine the issues in the case—the real and substantial controversies. A possible and no doubt logical consequence might have been the closing of the lower federal courts to problems arising under the United States law. In view of the statute, however, total denial of jurisdiction would have been a *reductio ad absurdum* that would have necessarily led to early recognition of the underlying fallacy. Such a course was hardly conceivable and it is a matter of history that what logic demanded simply did not take place.

As time went on, however, the old jargon was not discarded, but rather more verbiage was added in a forlorn attempt to lend meaning. One of the most popular phrasings has always been that a case would be cognizable by the district court if "its correct decision depends on the construction of either" the Constitution or federal law—if the plaintiff would be "sustained by one construction and defeated by another." This is Marshall's language in *Cohens v. Virginia.* That case, however, involved the problem of federal review of an already formulated issue, one which had in fact been adjudicated by the Virginia court. When applied to a problem in original jurisdiction when no issues have as yet been formulated the phraseology obviously required modification, and Marshall did modify it in the *Osborn* case so that he spoke of a right set up which "*may* be defeated," etc. This latter language is still paid lip service, but there has been added the proviso that "a genuine and present controversy, not merely a possible or conjectural one, must exist" [122] with reference to this federal law which is to sustain or defeat the plaintiff. This emasculation of Marshall's test was understandable so long as Section 5 remained a statutory museum piece in federal question cases. Instance the example of an ordinary action in ejectment brought in any of the newer states where all titles come from the United States by virtue of Congressional enactments.[123] Undoubtedly, plaintiff's right may be defeated if the original grant to the State be voided, and sustained if that act be upheld. Under the *Osborn* decision there would be federal jurisdiction *non constat* that the issues actually presented turned out to be the normal ones involving state law only. Wishing to avoid jurisdiction

122. Gully v. First National Bank, 299 U. S. 109, 113 (1936) and cases there cited.

123. *Cf.* Mr. Justice Johnson, dissenting, in Osborn v. Bank of the United States, 9 Wheat. 738, 885 (1824), which example has been repeated by the Court with variations.

in these and like cases, the court required a "genuine and present controversy"—"a real dispute" concerning federal law. Yet, then as now this test too could only be so much mumbo-jumbo when coupled with the pretense of finding such controversies and "bona fide disputes" before each party has stated its contentions.

Equally confused, and for much the same reason, is Mr. Justice Brewer's search (confined to the complaint, of course) for a case "necessarily" involving a federal controversy. He says: "Inasmuch, therefore, as the 'adverse suit' to determine the right of possession *may* not involve any question as to the construction or effect of the Constitution or laws of the United States, but may present simply a question of fact . . . or the effect of state statutes, it would seem to follow that it is not one which *necessarily* arises under the Constitution and laws of the United States." [124]

Probably the test most consistent with the concept of determining jurisdiction solely on the basis of the complaint is: "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." [125] Analogous language refers to rights " 'growing out of, created by, or brought into being by,' the laws of the United States." [126]

The basic difficulty of this test lies in the fact that it includes too much if "essential" be given its dictionary meaning, for, as Mr. Justice Cardozo has aptly pointed out, "If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself . . .".[127] On the other hand, if "essential" is not given its dictionary meaning, the phrase is but question-begging.[128] Conse-

124. Shoshone Mining Co. v. Rutter, 177 U. S. 505, 509 (1900). (Italics supplied.)

125. Gully v. First National Bank, 299 U. S. 109, 112 (1936). This language, too, finds its origin in Marshall's *Osborn* decision, in which he speaks of the federal question as "an original ingredient" in the cause. See p. 647 *supra*.

126. Bank of United States v. Roberts, 2 Fed. Cas. No. 934, at 732 (C. C. Ky. 1822).

127. Gully v. First National Bank, 299 U. S. 109, 118 (1936).

128. For example, an action for negligence on a federal post-office site, in which the tort law became federal law by adoption, resulted in a split of the lower court cases. See Jewell v. Cleveland Wrecking Co., 28 F. Supp. 366 (W. D. Mo. 1939), which discusses and analyzes the division. A similar division of opinion appears in the cases which had to determine whether a tort action against the director general of the railroad was one arising under United States law. Jurisdiction was upheld in Blevins v. Hines, 264 Fed. 1005 (W. D. Va. 1920). The Court, however, in Walters v. Payne, 292 Fed. 124, 127 (C. C. A. 3d, 1923), *cert. denied*, 263 U. S. 715 (1923), denied jurisdiction, holding that "The action does not arise under the laws of the United States, because the President under a law of the United States appointed the agent against whom the common-law action might be litigated in the proper court", and analogized the case to Gableman v. Peoria, D. & E. Ry., 179 U. S. 335 (1900), which decided that an action against a receiver of a state corporation does not arise under federal law merely because the receiver was appointed by a federal court. Where the federal legislature, in order to discharge its duty of declaring the substantive law in certain situations, adopted for that purpose the law of a given state and the fact of such adoption

quently, it is not surprising to see that this test, too, has been denied validity as a sole criterion by the Supreme Court's holding that the mere presence of "a right which takes its origin in the laws of the United States" is not sufficient to confer jurisdiction if a controversy respecting the validity, construction or effect of such a law is not also present.[129] Currently fashionable in the opinions, and lending weight to the latter view, is the self-evident proposition that the validity of a statute is not drawn into question every time rights claimed under it are controverted. Again, then, the courts are in search of a controversy, but refuse to look beyond the complaint.

Such a search, however, was not the sole device employed by the Supreme Court to make the "essential ingredient" test at least *prima facie* practicable. As has already been observed, the Court, despite its unwillingness to leave the source of the trouble, recognized nevertheless the necessity of curtailing jurisdiction in as many cases as possible where, although no controversy in fact existed as to the meaning or validity of a federal statute, yet such statute constituted a *sine qua non* of the plaintiff's cause of action. As early as 1900, therefore, it differentiated between statutes merely "authorizing an action to establish a right" and those creating a new "right to be established." [130] The former were not cognizable in the lower federal courts; the latter were.

Virtually the same distinction in different language was made by Mr. Justice Stone in *Puerto Rico v. Russell & Company,* when he speaks of the "nature of the right to be established" and "the source of the authority to establish it." [131] In that case suit was brought by the treasurer of Puerto Rico to collect taxes from defendant company. An act of Congress had provided the particular form of action to be used under the given circumstances. It was contended that this legislation constituted a law of the United States under which the suit arose. In denying jurisdiction, the court explicitly stated "that even though petitioner derived its authority from the Act of Congress," yet the case would not, for jurisdictional purposes, be held to arise under the United

is uncontested, there would appear to be no policy in favor of classifying all litigation under such state-developed principles as federal questions. However, the policy would clearly be contra if the question in controversy was whether in fact the federal system had adopted the law of a particular state to govern the given controversy. Nothing in the enunciated criteria of the courts appears to make possible the indicated difference in result between the two situations. Since whether or not such will in fact be the issue in the case cannot be determined until the defendant, too, has pleaded, the essential difficulty, it is reiterated, lies not so much in the particular rule, as in the major premise that all rules may concern themselves only with the determination of jurisdiction on the basis of a single pleading.

129. See, e. g., Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 203 (1877). "The judicial power extends to all cases in law and equity arising under the constitution, but these are cases actually, and not potentially, arising, and jurisdiction cannot be assumed on mere hypothesis." New Orleans v. Benjamin, 153 U. S. 411, 424 (1894).

130. Shoshone Mining Co. v. Rutter, 177 U. S. 505, 510 (1900).

131. 288 U. S. 476, 483 (1933).

States laws. The stated test would have produced the same result, namely denied jurisdiction, even if in that very suit the validity of the Congressional act would have been attacked by the defendant. This appears even more clearly in the *Shoshone Mining* [132] case. Where the Congressional enactment is a *sine qua non* of the plaintiff's case, that case may be defeated and judgment go for the defendant if he can successfully invalidate the statute in question. Consequently, however improbable is this attack in the normal situation, no test of jurisdiction can be considered adequate if it would deny the federal court's original cognizance of the suit where the sole issue was precisely such an attack. This is so, irrespective of whether that statute be denominated one governing the "nature of a right" or the "source of the authority" for the action to enforce a right.

The attempts to make the accepted definitions workable by the adoption of corollary dogmas, explanatory in nature and confined to the question of "arising" or "not arising", were not limited to the Supreme Court. Confronted with the problem of whether a tort action under Section 20 of the Interstate Commerce Act arises under the laws of the United States, Judge Amidon in *McGoon v. Northern Pacific Railroad* [133] evaluated the several rules for determining federal jurisdiction. Cognizant of the logical impossibilities inherent in what other judicial lexicographers had read into the simple phrase, he proposed this "line of distinction": [134] "When the complaint shows a case which arises out of a contract or a common-law right of property, and only *indirectly* and *remotely* depends on federal law, such a case not only does not, but cannot properly, turn upon a construction of such law. But when the complaint asserts a right created by federal law, it presents a suit which may properly turn upon a construction of that law; and such a suit 'arises out of' the law for purposes of federal jurisdiction, notwithstanding the defendant may raise only issues of fact by his answer." [135]

One may seriously question the assertion that a case indirectly dependent on federal law *cannot* turn upon construction of such law. On the contrary, the very fact of its dependence indicates that its result can be affected by the validity of a given federal statute. On the other hand, mere presence of a suit which "may properly" turn upon United States law as satisfying the jurisdictional requirement is precisely what

132. 177 U. S. 505 (1900), cited note 130 *supra*.
133. 204 Fed. 998 (N. D. 1913).
134. Recognizing that the cases "can be classified but they cannot be harmonized", Judge Amidon offers his rule as one which will only "go far to harmonize" them. *Id.* at 1005.
135. *Ibid.* (Italicization altered.) It is to be noted that the court upholds its own jurisdiction over a tort claim which it recognizes will probably involve only disputes of fact.

the courts had attempted to avoid by means of the requisite of a substantial controversy.

The interesting feature of the opinion for our present purpose, however, is the introduction of, and stress upon, the factor of the directness or remoteness of the federal law which serves as the basis for invoking district court jurisdiction.

It was this consideration of directness and remoteness which Mr. Justice Cardozo subsequently elevated to the level of a criterion in *Gully v. First National Bank in Meridian.*[136] In that case, suit was brought against the grantee of a national bank to recover taxes levied on the capital stock of the bank. Removal to the federal district court was had on the grounds that the power to levy a tax upon the shares of national banks was based upon the express provisions of federal statute. Certiorari was granted by the Supreme Court, limited to the question of jurisdiction, which an undivided Court found to have been lacking.

In one respect Mr. Justice Cardozo's opinion is refreshing. It recognizes, at least, that the *Osborn* case is no longer currently applied law, that a trend was discernible which made it at the same time impossible and unnecessary to attempt to reconcile the instant decision with many of the landmarks of an earlier day. Rejected is the standard under which, once a federal right was pleaded, "the question was not always asked whether it was likely to be disputed." In an effort to devise a workable solution, Mr. Justice Cardozo says: "This Court has had occasion to point out how futile is the attempt to define a 'cause of action' without reference to the context. . . . To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. . . . Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes

136. 299 U. S. 109 (1936). *Cf.* Carson v. Dunham, 121 U. S. 421, 427 (1887) said in Cooke v. Avery, 147 U. S. 375, 385 (1893) to have required United States law to be "directly involved".

that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by." [137]

This is prose so beautiful that it seems almost profane to analyze it. Yet, committing the sacrilege will make it clear that as long as we are forbidden to look at both sides of the pleadings the distinction between "controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible" still have us without compass—lost in a maze.

The essential difficulty is evident from an earlier portion of the opinion, in which even a judge like Cardozo, ordinarily so aware of pitfalls, was beguiled into repeating the old familiar paradox: "A genuine and present controversy, not merely a possible or conjectural one, must exist . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. . . . Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." [138]

How this magic can be performed still remains a mystery of the judicial process.

* * *

Such mystery is inevitable as long as contradictory criteria are announced as the basis of decision. Neither in theory nor in practice can a self-contradictory dogma decide a case. To be sure, the judicial process does not cease to function because of either vagueness or contradiction in the doctrines it proposes to apply. Its *modus operandi* is just the more hidden and mysterious. This may be thought desirable in some situations. But probably all would agree that jurisdiction and procedure (matters apart from "the justice of the cause") are technical matters to be governed by technical rules which should be easy of comprehension and application.[139]

If this be so, it is time to face backward in handling original jurisdiction of federal questions. Marshall's text in the *Osborn* case should be resurrected. Of that case, Johnson in dissenting made the cynical prophecy which history has proved to be all too true. "Few", he said, "will bestow . . . the reflection, that is necessary. . . ." [140] Not only reflection but hindsight as well now shows that Marshall's criterion

137. 299 U. S. 109, 117-118 (1936).
138. *Id.* at 113.
139. See (1937) 37 COL. L. REV. 1402, 1404-1405. "There should be a clarification of the bounds of the vague concept of the case arising under the Constitution or laws of the United States, for the erroneous assumption of jurisdiction by a district court leads to great hardship. After a trial on the merits the losing party may appeal and have the decision invalidated solely on the question of jurisdiction as in the instant case; this is true even though the appellant is the one who originally had the case removed."
140. 9 Wheat. 738, 872 (1824).

should be restored to determine of what cases there is initial jurisdiction. However, to determine when that jurisdiction will be exercised, Section 5 of the Act of 1875 should be applied, and this, in effect, has been attempted in recent lower court cases.[141]

141. Section 5 was thus applied by District Judge Yankwich in the recent case of Allen v. Clark, 22 F. Supp. 898 (S. D. Cal. 1938). Suit was brought against a federal marshal and the sureties on his bonds for damages arising out of the allegedly wrongful release of property held by the marshal under attachment. The marshal-bond authority was both overwhelming and conclusive on the court. Indisputably, the suit was one "arising" from United States law. This alone, however, the court finds not determinative of the question of jurisdiction "For if, notwithstanding the presence in the complaint before us of formal allegations showing jurisdiction, the evidence presented on the inquiry initiated by this motion, should show absence of such jurisdiction, it would be the duty of the court to dismiss the action." *Id.* at 901.

In support of this proposition is cited, together with other authority, McNutt v. General Motors Corp., 298 U. S. 178 (1936). Mr. Chief Justice Hughes, speaking for an undivided court, had said in that case: "The Act of 1875 [Section 5], in placing upon the trial court the duty of enforcing the statutory limitations as to jurisdiction by dismissing or remanding the cause at any time when the lack of jurisdiction appears, applies to both actions at law and suits in equity. The trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, 'inquire into the facts as they really exist'." *Id.* at 184.

The *McNutt* case, however, for all its language, was not a precedent-breaking or creating decision, for its setting was a problem of jurisdictional amount, and hence on its facts as well as on its application of the original Section 5, was supported by a long line of decisions. *Ibid.* That the Supreme Court did not realize the potential application of the same section to federal-question issues appears evident from the *Gully* case, which followed the *McNutt* decision by but a few months.

Not making this distinction, and it is submitted quite properly so, the court in *Allen v. Clark* applies Section 5 to dismiss the suit against the marshal. The rule of law applied in the opinion appears most laudable; its application in that particular fact situation, however, is equally unfortunate.

The absence of a substantial federal question is clear to the court because the marshal in the first instance had acted under a writ illegal on its face. To find the writ illegal on its face, however, the opinion devotes some five pages to an elaborate discussion of the fine points of jurisdictional amount, the Conformity Act and other equally intricate procedural problems raised by the original action which had first involved attachment. To borrow the forcefulness of the argument of the Supreme Court in an earlier case: "We think the elaborate and careful opinion of the District Judge of itself shows that substantial questions arising under [federal law] . . . were presented by the bill and that the court had jurisdiction". Columbus Ry. and Power Co. v. Columbus, 249 U. S. 399, 406 (1919), cited note 120 *supra.*

However, the significance of the decision is that the possibility is perceived of dispelling present confusion by a renewed application of the combined concepts of "arising under" and "substantiality". Disagreement with the court's finding on substantiality is of relatively little importance.

The same approach was used by the court in Solanics v. Republic Steel Corp., 34 F. Supp. 951 (N. D. Ohio, 1940). Suit was brought in a state court for assault and battery resulting from a conspiracy to violate the N. L. R. A. Defendant removed to the federal court on the grounds of the presence of a federal question. Plaintiff amended, deleting the allegation of conspiracy and all reference to the N. L. R. A. and moved to remand. The defendants urged "that the question must be determined by reference to the pleadings at the time of removal; and that the jurisdiction of this court cannot be affected by the second amended complaint." *Id.* at 953. This contention was unequivocally rejected, the court recognizing the presence of the dual test: "The rule has been tersely stated thus: 'the potentiality of originality is a condition precedent to removability', and, . . . the rule seems equally well settled that the case will be remanded or dismissed whenever the 'potentiality of originality' disappears." Furthermore, the court relying explicitly upon Section 5, cites and quotes *Robinson v. Anderson,* discussed p. 657 *supra.* See also notes 93 and 121 *supra.* For a discussion of the policy involved *see* Fischer v. Star Co., 227 Fed. 955, 957 (S. D. N. Y. 1915), which involved the same general problem and was decided the same way on the basis of Section 5.

In Whitney Trust & Savings Bank v. Brelsford, 63 F. (2d) 880 (C. C. A. 5th, 1933) the Circuit Court of Appeals cited *Robinson v. Anderson* and Section 5 in dismissing the bill, after the answer removed all federal law from the case.

Thus, it is submitted that to escape confusion it is but necessary to revive a case, often disregarded but never overruled, and to enforce a statute still on the books. To this extent retrogression would be progress.

Not to be overlooked, however, is the possibility of future legislation. In 1939, Representative Walter Chandler placed before Congress a resolution [142] calling for a thorough study of the federal judicial system and Judicial Code, with a view to an integrated revision, comparable in scope to that effected in the field of Bankruptcy by the Chandler Act of 1938.

In such a study serious consideration may well be given to legislative overruling of *Tennessee v. Union and Planters' Bank*,[143] unless, of course, by that time the Supreme Court has seen fit to place that case alongside *Swift v. Tyson*.[144] The most significant holding of the *Tennessee* decision, it will be recalled, was the interpretation of the phraseology of Section 2 of the Act of 1888 so as to prevent removal to the federal courts of suits involving federal question defenses. This holding, it is submitted is indefensible on policy grounds, as well as on the technicality of statutory construction which is its cornerstone. For it is a short-sighted, parochial policy to keep the federal dockets clear at the expense of cluttering state dockets.[145] Harlan's is one of those dissents of yesterday which deserve to become the law of today.

142. H. J. Res. 388, 76th Cong., 2d Sess., Oct. 5, 1939. Referred to the Committee on Rules. H. R. JOURNAL 20. *Cf.* the Index, *id.* at 1222, from which it appears that the resolution was referred to the Judiciary Committee. See Note, *Chaos of Jurisdiction in the Federal District Courts* (1941) 35 ILL. L. REV. 566, 583.

143. 152 U. S. 454 (1894), discussed p. 659 *supra*. Early attempts at legislative changes are mentioned in FRANKFURTER AND LANDIS, *op. cit. supra* note 4, at 139, n. 160.

144. 16 Pet. 1 (U. S. 1842), overruled almost a century later by Erie R. R. v. Tompkins, 304 U. S. 64 (1938). For the willingness of the Court as presently constituted to effect reforms in the field of federal jurisdiction despite the apparent necessity of changing rules of law considered of long standing, see Toucey v. New York Life Ins. Co., 314 U. S. 118 (1941).

145. *But cf.* Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499, 506, 515-516, in which the enlargement of the federal judiciary is opposed because it "does not make for maintenance of its great traditions. . . . Subtle considerations of psychology and prestige play havoc with the mechanical notion that increase in the business of the federal courts can be met by increasing the number of judges".

To date much of the discussion of the "policy grounds" for or against enlarging federal jurisdiction has been "predominantly on the level of individual, intuitive opinion". For a discussion of a scientific approach to the analysis of the problem, see Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction* (1931) 79 U. OF PA. L. REV. 869, and for a consideration of significant factors to be looked for, see *id.* at 907.

Erie R. R. v. Tompkins obviates the necessity of considering the differences in substantive law being applied by the two forums. This has significance in federal question jurisdiction, since collateral issues of a non-federal nature are often involved.

See Yntema and Jaffin, *supra*, at 912 and at 887, n. 24, 890, n. 32, for an appreciation and citation of Mr. Justice Frankfurter's "suggestive and useful . . . comprehensive series of articles" in this field. See also *Limiting Jurisdiction of Federal Courts —Comments by Members of Chicago University Law Faculty* (1932) 31 MICH. L. REV. 59; Parker, *The Federal Jurisdiction and Recent Attacks Upon It* (1932) 18 A. B. A. J. 433.

The second holding of the *Tennessee* decision disallowed the anticipation of federal-question defenses. This incapacitated the district court to retain the suit even though the defendant admitted that his defense was correctly anticipated and even though he, equally with the plaintiff, was desirous of federal adjudication. This rule, too, appears deserving of a position among the historical relics of the law. Certainly this is true if federal courts are to continue disposing of federal-question cases on non-federal grounds.[146]

Furthermore, provision might be made for removal by a plaintiff who foregoes suit in the federal court because of the apparent impossibility of demonstrating the hidden potentialities of federal issues in his case,[147] only to find that defendant presents such issues and then refuses to remove.

These suggestions are based on the assumption that original federal jurisdiction of federal-question cases is to be retained. That would be an open question under the Chandler resolution.[148] But, making the assumption, this much is clear: there should be an integrated system, correlating initial jurisdiction, jurisdiction on removal by either plaintiff or defendant, and dismissal for want of substantiality. To achieve this much, there is needed both judicial and legislative relief.

---

146. For another typical example, not previously discussed, see Cooke v. Avery, 147 U. S. 375 (1893).

Although the application of Section 5 of the Act of 1875 would, in the normal case, prevent federal adjudication solely on non-federal grounds, an exception exists in the situation presented by Glenn v. Field Packing Co., 5 F. Supp. 4 (W. D. Ky. 1933), *modified*, 290 U. S. 177 (1933). In that case the potential federal question was the constitutionality of a state statute. The court held the statute bad under the state constitution, thus rendering it unnecessary to consider the federal question. Clearly, in such a case the court, having been forced to consider the merits should render a judgment which will be *res judicata*. *But cf.* Allen v. Clark, 22 F. Supp. 898 (S. D. Cal. 1938), cited note 141 *supra*.

This is to be differentiated from the Hurn v. Oursler, 289 U. S. 238 (1933) situation, where the two theories or "causes of action" were not dependent on each other. For a discussion of the *Oursler* case and its ramifications see Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936) 45 YALE L. J. 393; Notes, *Scope of Original Federal Jurisdiction Based on a Federal Question* (1933) 33 COL. L. REV. 296, 699.

147. Instance a suit on a judgment rendered by a state court. It appears clear that even for Marshall no federal question is presented. The answer, however, clearly raises one by alleging lack of due process in the original suit.

148. See Frankfurter, *loc. cit. supra* note 145, at 499, to the effect that "nothing but good can come from a re-examination of the purposes to be served by the federal courts".

For a discussion of the desirability of making particular exceptions to federal-question jurisdiction, see *id.*, Part III. It is of significance that neither Mr. Justice Frankfurter, nor any of the pending legislation in 1932, appeared to favor abolishing the federal-question jurisdiction of the lower courts. Note (1932) 31 MICH. L. REV. 59. For an earlier and more radical point of view, see note 7 *supra*.