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FOR some time I have been reading and listening to criticisms directed toward decisions which the Supreme Court has rendered in cases involving federal question jurisdiction. The general tenor of this criticism is that these decisions demonstrate a surprising lack of uniformity and conscious purpose.[1] Writers profess to search in vain for sound logic in the Court's opinions. They point up instead the anomaly which is reflected when cases involving a substantial federal issue are tried in state courts,[2] while those in which no real federal issue is involved are nevertheless accepted for trial in the federal courts.[3] This result, however, cannot be regarded as happenstance. The Court must be as fully aware of the result as the rest of the legal community. That it persists in its interpretation is evidence that it believes its decisions fully comprehend the Constitutional and Congressional policies underlying the federal question. If that be so, the policy behind this type of jurisdiction cannot be to insure an initial trial in the federal courts for every controversy involving a federal question, as some have apparently thought. The real policy or policies behind the decisions relating to federal question jurisdiction can be ascertained only with the help of history. The legal analyst too often forgets that his logic must be applied in context. Whether or not the decisions of the Supreme Court follow a pattern which has elements both of reason and of sound policy depends upon the historical ingredients. It seems useless to criticise decisions for their lack of reason without first estab-

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[1] In particular I have in mind the scholarly work by Messrs. Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 (1942); two works by Forrester, "The Nature of a 'Federal Question,'" 16 TULANE L. REV. 362 (1942); "Federal Question Jurisdiction and Section 5," 18 TULANE L. REV. 263 (1943); and a comment, 40 ILL. L. REV. 387 (1945).

[2] Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 29 S. Ct. 62 (1908), discussed, infra, p. 39.

[3] The Fair v. Kohler Die and Specialty Co., 228 U.S. 22, 33 S. Ct. 410 (1913), discussed, infra, p. 44.

lishing the policy criteria by which those decisions are to be judged. Until we establish the real meaning of "federal question" and learn what prompted its statutory treatment we cannot judge the actions of the Court when it deals with this matter. In order, therefore, to side intelligently either with the Court or its critics we must follow the emergence and development of "federal question" through the historical periods in which it has taken shape.

I

THE EARLY PERIOD OF CONSTITUTIONAL INTERPRETATION

The Constitution of the United States defines the limits of federal judicial power. It declares, inter alia, that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. . . ."[4] This is the head-stream from which flows all the tributary problems involving federal question jurisdiction. For almost nine decades following the adoption of the Constitution the Congress had not seen fit to confer upon the federal courts the plenary jurisdiction which this passage authorized,[5] but the problem of when a case or controversy could properly be said to "arise" under the Constitution or laws of the United States, appeared early enough in our history to receive the attention of the great John Marshall. It has ever after borne the impress of his genius, and none of the later developments can be understood properly unless the contribution of the great Chief Justice is oriented in our thinking precisely as it was conceived—to accord with the grand strategy of the master policy maker.

In *Osborn v. Bank of the United States*[6] we see the staunch Federalist at his best. Congress had incorporated the Bank of the United States and had given it the right "to sue and be sued" in the circuit courts of the United States. Appellants contested the jurisdiction of the circuit court on the ground that Congress had no power under the Constitution to give the bank the right to sue in the federal courts. The Chief Justice was determined to uphold this right. To do otherwise would run counter to his entire philosophy of government. If he could show that a suit involving a federal corporation of this nature was one "arising" under a law of the United States he could uphold the right of

[4] U.S. Const., Art. III, § 2.

[5] The "Midnight Judges Bill," passed Feb. 13, 1801, 2 Stat. L. 89, and repealed March 8, 1802, 2 Stat. L. 132 may be safely disregarded.

[6] 22 U.S. 738 (1824).

Congress to confer this jurisdiction on the circuit courts. In order to do so he had to interpret the Constitutional provision in its broadest sense. By declaring at this time the very most that could be subsumed under the language of the Constitutional grant, he could leave to Congress and the Court the choice in the future of limiting the jurisdiction within those broad confines.[7]

Any understanding of the ruling in the *Osborn* case requires an understanding of the precise meaning which the majority and dissenting opinions attributed to the terms which appear in the Constitutional grant. When, for example, does a case "arise" under the federal law? Did the Chief Justice rule that a case so arises as soon as it appears from the pleading that a federal question *may* be involved in the trial? [8] Was Justice Johnson alone in contending that only those federal questions which *do* appear in the course of the trial are adequate under the Constitution to bring a case within its terms? [9] These questions are at the very heart of our understanding of the problem. Unless we answer them with great care and discernment no real progress can be made in its resolution.

Fortunately, Justice Johnson left no room for doubt as to his understanding of the Constitutional passage. As he viewed it, a case did not "arise" under federal law until an actual dispute arose over the interpretation or application of a federal law. If the federal law itself were not the subject of a controversy between the parties he did not believe that the federal courts were entitled to take jurisdiction over controversies in a case which involved only questions of state law or questions of fact.[10] He admitted that it was sometimes possible to determine from the plaintiff's pleading alone that the dispute between

[7] Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 649 (1942), express this notion succinctly when they observe that "in the *Osborn* case Marshall was construing for the future, and characteristically he construed broadly in order to allow future change and growth."

[8] Forrester, "Federal Question Jurisdiction and Section 5," 18 TULANE L. REV. 263 at 270 (1943), suggests that this is a fair analysis of the holding by quoting with approval from Chadbourn and Levin, ibid., where the learned authors set forth this distinction between "may" and "do."

[9] See note 8, supra.

[10] "No one can question, that the court which has jurisdiction of the principal question, must exercise jurisdiction over every question. [But] . . . until a question involving the construction or administration of the laws of the United States did actually arise, the *casus foederis* was not presented, on which the constitution authorized the government to take to itself the jurisdiction of the cause . . . 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." Osborn v. Bank of the United States, 22 U.S. 737 at 883 (1824).

the parties must involve a construction of the federal law, but he contended that as a general rule this was not possible until the defendant's pleading at the earliest, and more often not until the trial itself.[11] Moreover, Justice Johnson believed that a question could not be "raised" except by the parties themselves. He seemed to argue that if the parties did not raise the question the courts could not construe it, and if the courts did not construe it, there could be no basis upon which to take jurisdiction. Apparently a party could not "raise" a question which the other party did not dispute.[12] The position taken by Justice Johnson can be summed up briefly. The federal courts could take jurisdiction of all questions involved in a particular case, provided the *principal* question was a federal question.[13] And for there to be a federal question the parties had to dispute the meaning of a federal law. This could not be known until the defendant's pleading or at the trial itself; it was, therefore, impossible, as a practical matter, for the court to assume jurisdiction on the basis of the plaintiff's complaint alone.

There seems to be sound logic in the reasoning of the Johnson opinion. If there is no argument over the meaning of the federal law, why should the courts rule upon that law? And if the courts do not rule upon the federal law, why should the federal courts have jurisdiction over controversies involving state questions? Chief Justice Marshall, however, had some ready answers for these queries. Words which meant one thing to the dissenting Justice meant another to him. However much one might favor the logic of Justice Johnson, the fact remains that it is the opinion of the Chief Justice which embodies the

[11] "To me, the question appears susceptible of a very simple solution; that all depends upon the identity of the case supposed; according to which idea, a case may be such, in its very existence, or may become such, in its progress . . . [Such would be the case] in which the pleadings or evidence raised the question on the law or constitution of the United States. . . . Where no question is raised, there can be no contrariety of construction; and what else had the constitution to guard against?" Id. at 887, 888.

[12] This is reasonably evidenced by a discussion in which he amplifies his previous statement that the question could appear either in the pleadings or in the evidence at the trial: "As to the cases of the first description, *ex necessitate rei*, the courts of the United States must be susceptible of original jurisdiction; and as to all other cases, I should hold them also susceptible of original jurisdiction, if it were practicable, in the nature of things, to make out the definition of the case, so as to bring it under the constitution judicially, upon an original suit. But until the plaintiff can control the defendant in his pleadings, I see no practical mode of determining when the case does occur, otherwise than by permitting the cause to advance until the case for which the constitution provides shall actually arise. . . . It is not, therefore, because Congress may not vest an *original* jurisdiction . . . that I object to this general grant of the right to sue; but because that the peculiar nature of this jurisdiction is such, as to render it impossible to exercise it, in a strictly original form. . . ." Id. at 888, 889.

[13] See the first sentence, note 10, supra.

interpretation accepted by the majority of the Court, and no case has ever purported to overrule his opinion. If we would understand the Constitutional bases of the jurisdiction, therefore, we must understand the opinion of the Chief Justice and the terminology which it employed.

Four words in particular require our attention before we can proceed with any thorough analysis. These are, "cause," "action," "question," and "controversy." The familiar term "cause of action" means all things to all people. But to the Chief Justice it had a special meaning. In most instances he interpreted "action" to mean the action of the court, rather than the action of the party, although occasionally he used the word in the latter sense. In the mind of the Chief Justice, therefore, the word "cause" referred to that which caused the court to take its "action." And that which causes a court to take action in any law suit is the *claim* of the party. When the party sets forth his "claim of right" the court must act upon it. The court may reject the claim outright, or it may hold a hearing and render a decision, but in either event it has acted upon the claim of the party. It follows from this that the word "cause" must have been synonymous in Marshall's mind with the word "claim." Occasionally he uses the word "cause" to mean "trial of the claim," but in most instances the word "claim" alone can be substituted for the word "cause," and the sentence will make good sense.

The word "question" is similarly related to the action of the court. It is frequently used in conjunction with the word "controversy," but must be carefully distinguished, since a question may or may not be controverted. Every case usually involves a number of questions which must be determined before the case can be decided. A "question," for Marshall, was precisely what the word implies; it was that which the court had to ask itself before it could sustain or defeat the party's claim. The "action" of the court, therefore, consisted principally of asking and deciding certain questions. This was the responsibility of the courts whether or not the questions were put in issue by the parties. Thus, Marshall's view differed from Johnson's in that he considered the court to be just as competent to "raise" a question as were the parties. It was part of the court's responsibility as well as its prerogative to act *sua sponte* in this respect. For example, when a plaintiff sues on a contract the first question the court must ask itself is whether the plaintiff has a right to sue at all. It must ask this question even if the defendant does not contest the plaintiff's right. And it must ask the question—at least tacitly—even though it has given an affirmative

answer in a thousand cases before. *The very act of accepting the case and going on with the trial is an affirmative answer to this question.* In Marshall's terms, the question is an "ingredient" of the case even though it is not controverted by the parties or articulated by the court. In his words, "The right to sue, if decided once, is decided for ever . . . but the question respecting the right . . . belongs to every particular case. . . ."[14] The court is never foreclosed from reversing its previous decisions and denying the right as long as it is not prevented from doing so by law. Marshall, therefore, rejects Johnson's fundamental assumption that a question can be raised only by the parties.

If there is a "controversy" there is, of course, always a question involved, but it is not necessarily such a question as would entitle the court to take jurisdiction. It will be remembered that Justice Johnson had said that if the federal question were a *principal* question the federal courts could take jurisdiction of the other questions in the case. But he did not distinguish between those questions which were principal and those which were incidental. The Chief Justice, on the other hand, was careful to make this distinction. A question was principal only when the case could be said to turn upon it. A case could be said to turn upon a question (for jurisdictional purposes) whenever one of the possible rulings on that question would sustain or defeat the claim of right. For example, in a suit to recover damages under federal law, if the court ruled that the law did not apply, the claim would be defeated. If such a ruling were possible, therefore, the case would be said to turn upon that question, even though the court were *actually* to decide that the law did apply, and the plaintiff were later to lose his case on a question of fact. There are many possible questions upon which a case might turn, and any one of them is sufficient to vest jurisdiction. The fact that the judge actually makes a ruling which permits the case to proceed to a further question before it is finally decided, does not transform the original question into an incidental one. It is sufficient that an alternative ruling would have ended the case at that point.

Where the question is incidental, however, in the sense that the case *cannot* turn upon it, the federal court is not entitled to take jurisdiction. For example, suppose that *A* is suing *B* in State *Y* upon a tort committed in State *X*. *A* claims that the law of State *Y* should apply. *B* claims that it would be a denial of full faith and credit under the Constitution for the court to refuse to apply the law of State *X*. Granting, for the sake of the illustration, that there is current validity

[14] Id. at 823, 824.

to the claim, the court must decide whether the full faith and credit clause applies in this instance. Even though previous cases amply indicate what its decision will be, as long as the possibility remains for it to reverse itself, it cannot proceed without ruling on this question. The very act of proceeding one way or another constitutes such a ruling (assuming—again for the sake of the illustration—that there are no alternative grounds). But no matter what it decides, the case *cannot* turn upon that decision. The court can either decide that the law of State *X* applies, or it can decide that the law of State *Y* applies. These are the only possibilities open to it. In either event the case must proceed upon its merits. The decision, without more, can neither defeat the claim nor grant recovery under it. The ruling, therefore, is incidental rather than principal, and the question which prompted it is likewise incidental. The fact that it is a question raised by the parties, and the fact that it is a question which must be decided, are not enough to make it the kind of question which can vest jurisdiction in the federal courts.

With these distinctions in mind an intelligent appraisal can be made of certain passages which we find in the opinion of the Chief Justice. It has seemed wise to group the general propositions to be found there into four "Rules," which serve as guides in identifying the kind of federal question which can give jurisdiction of a case to the federal courts. These four rules are supplemented by a fifth, which will be considered in the following section. The five rules together embody the sum total of the propositions which are to this day the authoritative expression of federal question jurisdiction. The propositions expressed therein have never been overruled in any case, although they have been modified in practice, and have been copiously misapplied. Our study, therefore, should identify the pertinent modifications of these propositions and suggest instances where they have been subverted to some other use than that which was originally intended.

Rule 1: *The Federal Question may appear* (a) directly *as a claim of right set up in the pleading, or* (b) indirectly *as an essential ingredient of the claim of right.*

"When a bank sues," said the Chief Justice, "the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? . . . 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. . . . 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 . . . must depend on the state of things when the action is brought. The questions which the case involved, then, must determine its character, whether those questions be made in the cause or not." [15]

This passage tells us, among other things, that the right of the plaintiff to sue—and presumably to sue in a particular forum—depends upon the state of things when the action is brought. In other words, it is the initial pleading and nothing else from which the facts necessary to *vest* jurisdiction must appear. In the *Osborn* case this necessarily means the plaintiff's complaint, since that is the initial pleading in an original suit. But as Justice Johnson pointed out in his dissent, the defendant's answer had always served this purpose in a removal suit. The statement of the Chief Justice did not alter this, since the answer could readily be conceived, along with the petition for removal, as the original pleading in the federal court, under the existent rules for pleading a removal case.

The passage also tells us that the question which the case involves, must determine its character, whether those questions be made out as such, or not. The first part of the quotation explains this further. When a corporate entity, such as the bank, sues, it may claim only the right to recover on a contract or the right to an injunction as in the *Osborn* case. It may not actually allege that it has the right to sue. But whether it makes this claim or not, and whether or not the defendant alleges that the particular corporate entity does *not* have the right to sue, the question is an ingredient of the claim which is set forth. Unless it is answered in the affirmative the plaintiff cannot recover on the contract or be given the equitable relief it seeks. Thus, although a question does not appear *directly* as a claim, it appears *indirectly* as an ingredient of the claim. In Marshall's opinion this is sufficient, under the Constitution, to give jurisdiction to the federal courts.[16]

Rule 2: (a) *The federal question must appear from bona fide facts in the pleading—not from a conclusion of law—to be one which the courts must necessarily rule upon, and* (b) *it must appear that of*

[15] Ibid.

[16] He says, "We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an *ingredient* of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause. . . ." (Italics supplied). Id. at 823. Emphasizing the "claim of right" notion over that of mere "controversy" the Chief Justice says, in reference to the Constitution, the "words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal Courts. . . ." Id. at 822.

the possible rulings which could be made, one would sustain or defeat the party's claim without any further proceedings.

Some have understood Marshall to say that the federal question need not actually be ruled upon by the court, but need appear only as one which the court *may* rule upon.[17] This is not borne out, however, by the facts of the *Osborn* case, or by the words of the Chief Justice. He relied for his ruling upon the fact that the courts *must* determine whether or not a bank of the United States can sue before the case can be heard on its merits. There was nothing conjectural about this.[18] The federal question *must* be ruled upon—tacitly or expressly—but in order to vest jurisdiction it is sufficient that one of the possible rulings be capable of sustaining or defeating the claim at that point in the proceedings. This is the distinction, which has already been made, between a principal and incidental question. It should be noted also that the Chief Justice required that the facts necessary to support the action of the court be substantially set forth.[19] In other words, it must not appear simply as a conclusion of law in the party's pleading that the court must decide a federal question upon which the case could turn, but it must appear rather in a bona fide claim established by sufficient facts.

Rule 3: (a) *The appearance of a federal question in the pleading will vest jurisdiction in the federal court of all other questions in the case, but* (b) *initial appearance of the federal question at the trial will not vest such jurisdiction.*

Counsel in the *Osborn* case contended that even if the federal courts were entitled to jurisdiction of the federal question, they were not entitled to jurisdiction of the remaining questions, which were purely state questions or questions of fact. This proposition was rejected by both the Chief Justice and Justice Johnson.[20] The Chief Justice said, "We think, then, that when a question to which the judicial power of

[17] See note 8, supra; also note 45, infra.

[18] Perhaps the statement which has misled many scholars on this point appears in the following passage: "A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, *may* be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction." (Italics supplied.) Osborn v. Bank of the United States, 22 U. S. 738 at 821 (1824). It will be seen that the conjectural element is not whether the question will be ruled upon, but only whether one ruling or another will be made.

[19] See the last part of quotation in note 18, supra.

[20] See Johnson's remarks, note 10, supra.

the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of congress to give the circuit courts jurisdiction of that cause, *although other questions of fact or of law may be involved in it.*"[21] This passage implies that the Congress could, if it so desired, limit jurisdiction of the federal courts to the federal question alone. But in the absence of such a limitation, all other questions revealed in the claim are within the federal jurisdiction, notwithstanding the fact that they depend entirely upon state law or the facts of the case for their determination. This proposition becomes especially significant in connection with Rule 5.[22] The proposition expressed in 3 (b) is nothing but the corollary of that which is set forth broadly in Rule 1—that jurisdiction must vest at the time of the pleading.

Rule 4: (a) *The federal question need not appear as a controversy in order to* vest *jurisdiction in the federal courts, and* (b) *failure to controvert the federal question in the defendant's pleading or at the trial will not* oust *jurisdiction.*

Since the essential elements of this rule have already been discussed, it remains only to relate these propositions, and the opposing ones of Justice Johnson, to the pertinent passages in the opinions. The Chief Justice supports his position (that a case arises under federal law when there is an inherent federal question, even though it is not controverted or spelled out in the trial) by observing that "the clause in the patent law, authorizing suits in the circuit courts, stands . . . on the same principle. Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the construction of an act of congress. He may rest his defense exclusively on the fact, that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause, cannot oust the jurisdiction of the Court, nor establish the position, that the case does not arise under a law of the United States."[23]

Justice Johnson does not think the analogy an appropriate one.[24]

[21] (Italics supplied.) Osborn v. Bank of the United States, 22 U.S. 737 at 823 (1824).

[22] See Rule 5, p. 32, infra.

[23] Osborn v. Bank of the United States, 22 U.S. 737 at 826 (1824).

[24] "As to the instance of the action given under the patent law, it has been before remarked, that so entirely is its existence blended with an act of Congress, that to prosecute it, it is indispensable, that the act should be set forth as the ground of action. I rather think it is an unfortunate quotation, since it presents a happy illustration of what we are to understand by those cases arising under a law of congress, which in their nature admit of an exercise of original jurisdiction. The plaintiff must [to?] recover, must count upon the act of congress; the constitutional characteristic appears on the

But it will not serve our discussion to side with either of the learned jurists; it is too late to consider the merits of their respective positions. It is sufficient for our purpose to observe that under the ruling of the Court a federal question *can* appear in a case without being the subject of a controversy, and it can and must appear in the pleading of the party when he sets forth his claim of right.

II

THE RECONSTRUCTION PERIOD AND ACT OF 1875

It was not until 1875 that Congress conferred original jurisdiction upon the federal courts in federal question cases. It would seem that the Congress of that day had some special reason for this, which was not apparent in the earlier period. As one work aptly puts it, "the elected representatives of the people were to postpone the exercise by Congress of the full extent of its judicial powers . . . until such time as the exigencies of a given situation clearly demonstrated the necessity therefor."[25]

It has been suggested that the change which was brought about in 1875 was engineered by means of "sneak legislation," designed to expand what was initially a mere removal statute.[26] And it has further been suggested that the purpose of the Congress is not to be discovered in the Congressional Record of that period.[27] But it seems unlikely that Congress had no better reason for its action at this time than a sudden desire to extend the judicial power to the limit of the Constitutional grant. It is true that the language in the Congressional Record would seem to substantiate such a view, since the only explanation offered by the proponents of the measure reveals no other purpose.[28] But if we accept the thesis that this was a "sneak" measure, it follows that the proponents of the measure would avoid a detailed

record, before the defendant is called to answer; and the repeal of the statute before judgment, puts an end to his right altogether. Various such cases may be cited. But how the act of congress is to be introduced into an action of trespass, ejectment or slander, before the defendant is called to plead, I cannot imagine." Id. at 902, 903.

[25] Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 642 (1942). The authors go on to say, "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." But they then say, "However, a study of the history of the bill as revealed by the Congressional Record yields no reason for its enactment at that time. . . ."

[26] Id. at 643.

[27] See note 25, supra.

[28] "The Act of 1789 did not confer the whole power which the Constitution

explanation on the floor of Congress. Open debate might reveal more urgent reasons against the measure than those favoring it. Such reasons are not difficult to imagine. For many years the dockets of the federal courts had been increasingly burdened by the extension of federal jurisdiction. Such measures, it is true, had carried in the face of heated opposition, but only because Congress had been convinced that the necessity of evading local prejudice was greater than the necessity of relieving the federal courts of their heavy burden.[29] There seems little doubt that this same fear of local prejudice motivated the proponents of the change in 1875. The late war had fanned the flames of sectional distrust so that considerations of this nature were greater than at any other time in the nation's history. It is not surprising, therefore, that legislation was introduced to meet the threat of local bias. For some, at least, the exigencies of the moment "clearly demonstrated the necessity therefor." But certainly it would have been unwise to defend such an argument at a time when the southern states were being welcomed back into the national fold. Opponents would quickly declaim that this measure demonstrated lack of confidence in the reconstructed states and would tend to split the Union. This, added to the traditional argument that any increase of federal jurisdiction unduly burdened the federal courts, might well have defeated the measure. Wisdom dictated, therefore, that it be introduced as an appendage to the removal bill, and the least said about it the better.

But the very factors which suggested that it would be impolitic to advertise the measure, impressed its proponents with the need for such legislation. It was apparent by 1874, when the measure was first advanced, that the mood of the country was for a return to normalcy. The sooner the southern states could take control of their own destiny,

conferred; . . . this bill does . . . This bill gives precisely the power which the Constitution confers—nothing more, nothing less." Statement of Matthew H. Carpenter, 2 CONG. REC. 4986-7 (1874).

[29] 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 680-685 (1937), reviews federal litigation. Stating in the text at 684, 685 that "the United States Courts soon became overwhelmed with litigation," the author observes in the footnote that "early Removal Acts had grown out of fear of prejudice in State Courts against the National Government. See Act of Sept. 24, 1789, Act of Feb. 2, 1815, Act of March 9, 1815, Act of April 27, 1816, growing out of opposition of New England to the War of 1812; Act of March 2, 1833, growing out of nullification in South Carolina; Act of July 27, 1866, and Act of March 2, 1867, growing out of conditions in the Southern States; see also Civil Rights Act of March 1, 1875." The obvious implication is that Congress was strongly influenced by the local prejudice; no other consideration would have impelled it to increase the burden on the federal courts at times when they were known to be heavily burdened already.

the better the nation would like it. Most of these states had already taken up the reins of government, and it was evident, both from the actions of the President and from the sentiment of the country, that most, if not all, of federal control in the southern states would be withdrawn by the end of the Grant Administration a few years hence. Astute observers undoubtedly wondered what the fate of a plaintiff's claim in a southern court would be if he were to seek recovery under some of the reconstruction legislation. Perhaps his plight would be no more difficult than that of any other plaintiff, but more likely his cause would be prejudiced, and caution dictated that no chance be taken. In 1824 Chief Justice Marshall had said, "it is not insinuated, that the judicial power . . . must first be exercised in the tribunals of the state; tribunals over which the government of the Union has no adequate control, *and which may be closed to any claim asserted under a law of the United States.*"[30] While it is true that the Fourteenth Amendment to the Constitution gave grounds for an argument that this observation of the Chief Justice was no longer valid, the Fourteenth Amendment was still new and untried, and few were prepared to test its strength to the utmost. Its chief use was in the field of civil rights, and there was already legislation requiring prejudiced cases to be tried in the federal courts.[31] But civil rights constituted only a small part of potential litigation, and some additional protection was needed for cases of a different type. At that time no one had heard of the Federal Employers Liability Act and that group of cases which suggest that state courts may be forced to assume jurisdiction over a federal cause. If such a proposition were to be abstracted from the Fourteenth Amendment no one had yet suggested it, and if it were to be related to the supremacy clause, the statement of Chief Justice Marshall was still considered good law. The situation in 1875 provided ample justification for a real fear that state courts might simply refuse to entertain a suit in which the plaintiff sought recovery under a claim of federal right. It seemed apparent to many that if the federal laws were not to lose their vitality the plaintiff must be provided with a forum. Even if it were conceded that the state courts would accept the plaintiff's case,

[30] (Italics supplied.) Osborn v. Bank of the United States, 22 U.S. 737 at 821 (1824).

[31] The Civil Rights Act of 1866 provided "that the . . . courts of the United States . . . shall have, exclusively of the courts of the several States, cognizance . . . of all causes . . . affecting persons who are *denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be* any of the rights secured to them by the first section of this act. . . ." (Italics supplied.) 14 Stat. L. 27 (1866).

they could, nevertheless, defeat his claim. They could decide in his favor on the federal question but decide against him on a state question, thus preventing any appeal to the federal courts. Or, having decided against him on the federal question, they could so shape the record that the federal court on appeal would be obliged to affirm.[32] These may seem to be exaggerated considerations in this day and age, but there is little doubt that they were sufficiently real in 1875 to impress some with the advisability of providing an impartial forum for the consideration of those federal question cases which might be subject to bias in the state courts.[33]

It would serve no useful purpose to multiply authority on behalf of this proposition. My object is simply to suggest that the change, which the act of 1875 introduced, was brought about largely, if not entirely, in order to provide an impartial forum for those cases in which the federal question might be prejudiced in state courts. It seems to me unlikely that there was any desire to remove those cases which were assured of impartial treatment. The long history between 1789 and 1875 proved that when their decisions were not colored by sectional interests the state courts were fully as competent to handle federal questions as were any of the federal courts. In fact, the only excuse for any appeal in such cases was to insure uniformity throughout the country.[34] There was no fear that the decisions of impartial state

[32] Commenting on counsel's argument that the federal court is restricted to mere appellate review of the precise federal question, Chief Justice Marshall observes that in such a case, "a trial in the federal courts, will be restricted to 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 he [plaintiff] is forced against his will." (Italics supplied.) Osborn v. Bank of the United States, 22 U.S. 737 at 822, 823 (1824).

[33] Although professing not to see the purpose of the act of 1875, it was only natural that these considerations should find expression in the careful research of Messrs. Chadbourn and Levin. They say, "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. The removal provision contained in the "Force Bill," 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." Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 644 (1942).

[34] Cf. the statement of Justice Johnson in Osborn v. Bank of the United States, 22 U.S. 737 at 888 (1824), that "where no question is raised, there can be no contrariety of construction; *and what else had the constitution to guard against?*" (Italics supplied.)

courts would reflect unsound judicial treatment. The federal courts had no monopoly on the general principles of American law. And as long as the state courts remained unbiased, the record which they sent to the federal courts on appeal would be ample to present fairly any problem which arose in the case. On that record the federal courts could always correct an error of law or make the decision conform to the national pattern. Moreover, by allowing the state courts to retain jurisdiction of those federal question cases in which there was no bias, the burden on the federal courts was correspondingly reduced.

The question of congressional intent in 1875, however, has its greatest significance for us in section 5 of the act, since it is from this section that we derive the final rule in our jurisdictional quintet.[35] It is not surprising that the somewhat vague phraseology of this section should have occasioned some confusion in its interpretation. Some read in it a provision that the federal courts must give up valid jurisdiction if the controversy in the case does not really involve a dispute over the federal question.[36] This notion that the court must be *ousted* of jurisdiction subsequent to the complaint if it becomes apparent that the federal question will not be controverted at the trial seems to run directly counter to the policy underlying Marshall's ruling that jurisdiction may *vest* notwithstanding that it appears from the complaint that the federal question will never be controverted at the trial.[37] Others interpret section 5 to mean that jurisdiction can never *vest* if the court, subsequent to the complaint, determines that the facts alleged therein are not true.[38]

[35] By the terms of this section the circuit court was obliged to dismiss a case or remand it to the state court if "it shall appear to the satisfaction of the 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, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiff's or defendants, for the purpose of creating a case cognizable or removable under this act. . . ." 18 Stat. L. 470 at 472, § 5 (1875), 28 U.S.C. (1940) § 80.

[36] ". . . 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. The traditional 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." Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 649, 650 (1942).

[37] See Rule 3, p. 25, supra.

[38] ". . . the purpose of Section 5 is to permit the court to go beyond the pleadings of the parties and on its own motion to investigate the facts. *And even though it may have assumed jurisdiction on the allegations of the parties, if the facts found by the court do not sustain the allegations the court has no jurisdiction and never had any and must dismiss the case* . . . In applying Section 5 the court determines if there is or ever was 'original federal jurisdiction.' It is not determining if it 'must refuse to continue'

This proposition seems to violate Marshall's ruling that jurisdiction *vests* at the time of the complaint.[39] If the Constitution of the United States, as interpreted by the Supreme Court, authorizes the federal courts to assume jurisdiction over a case at the time of the complaint, how can the Congress declare that such jurisdiction has never vested? Obviously the Congress cannot; and as a matter of fact, it did not. Section 5 purports to guide the trial court, and it is axiomatic that the trial court must have decided that there *was* federal jurisdiction in order for it to proceed to the trial stage. If, at that time, it reconsiders the question of jurisdiction it is not concerned with the past, but only with the present. It is only at the appeal stage that the court reviews the propriety of the vesting of jurisdiction as well as the propriety of its retention. That there *was* jurisdiction, i.e., that jurisdiction had previously *vested*, is not questioned by the trial court, since it proceeded to trial on that assumption. That there no longer *is* jurisdiction, i.e., that jurisdiction has subsequently been *ousted*, is another question entirely, which section 5 makes possible. The real significance of section 5, therefore, is to be found in the additional question which it authorizes. This proposition may be best translated into the following terms:

Rule 5. Whenever the facts in subsequent pleadings or at the trial reveal to the satisfaction of the court that the case does not presently *involve a ruling upon a federal question which could sustain or defeat a bona fide claim, the federal jurisdiction will be* ousted.

Chief Justice Marshall had said that jurisdiction would *vest* in the federal courts at the time of the pleading, if it appeared from a bona fide claim that the court must rule upon a federal question which could determine the cause at the moment of that ruling. He had nothing to say about the ousting of that jurisdiction, except to observe that it could not be brought about by the mere fact that the federal question was not itself the subject of a controversy. He did *not* say that the jurisdiction could not be ousted if the facts necessary to vest it had *disappeared* from the case. His failure to make such a ruling opened the way to many difficulties, and Congress took upon itself the task of closing the breach. It will be remembered that Marshall considered it sufficient to vest jurisdiction in the federal courts if the necessary facts appeared in the *original* pleading. But what if the party later amended his pleading so that the facts no longer appeared? Unless there were some provision for ousting jurisdiction the case would remain in the federal

even though there is and was original federal jurisdiction." Forrester, "Federal Question Jurisdiction and Section 5," 18 TULANE L. REV. 263 at 283 (1943).

[39] See discussion, p. 24, supra.

courts. A similar result would be reached if the facts appeared in all of the pleadings but were no longer present at the trial. Such a result would suggest that the party had not brought his case into the federal courts in good faith. Marshall had said that it must appear from the pleading that the party brought his claim in good faith, but nothing he said would cover the situation where the claim appeared bona fide in the original pleading and later did not. It is more than likely, of course, that the courts would construe this as a fraud upon their jurisdiction and oust the case of their own accord, but Congress turned this likelihood into a certainty by imposing the duty on the court. In so doing, it did not contradict what Marshall had said; it did not attempt to redefine "federal question" but merely supplemented the *Osborn* ruling by introducing what had been left unsaid. The pointed reference to the joinder of parties "collusively" made, is a strong indication that the purpose of section 5 was to prevent the parties from enjoying federal jurisdiction where it had been sought and obtained in bad faith. A controversy was certainly not "properly within the jurisdiction of said Circuit Court" when the parties had caused that jurisdiction to vest, even though the necessary fact situation was not a bona fide element in the case. Under such circumstances it was only proper that jurisdiction should be *ousted.* The provision in section 5, therefore, makes no attempt to alter the meaning of "federal question" as it was conceived and spelled out by Chief Justice Marshall. It simply gives the courts a second chance at bat.

III

THE EARLY PERIOD OF STATUTORY INTERPRETATION

Subsequent to the act of 1875 the first case to present the problem of the federal question was *Gold-Washing and Water Co. v. Keyes.*[40] Chief Justice Waite, who delivered the opinion of the Court, was called upon to decide whether the jurisdiction had been properly taken, and if so, whether it had been properly retained. As was noted in connection with Rule 5, these two questions are the opposite sides of the same coin. The criteria are the same. The only difference is that in the one instance the necessary facts must appear in the original pleading, whereas in the other they must appear in the later stages of the case.

The Chief Justice ruled that the jurisdiction had not been properly taken, and that even if it had been properly taken, it had not been

[40] 96 U.S. 199 (1877).

properly retained. His first ruling, it should be noted, simply reflects the propositions expressed above in Rule 2 (a)—that the claim which appears in the original pleading must be supported by sufficient facts rather than appear as a mere conclusion of law.[41] This was Marshall's rule for the vesting of jurisdiction, and the Chief Justice was observing it faithfully.[42] Although he might have been content with this ruling, since the facts of the case were strictly confined to it, he felt obliged to make some mention of section 5, which would have applied if the Court had decided that jurisdiction had properly vested, and had then proceeded to review the propriety of retaining the case on the basis of the subsequent pleadings or evidence at the trial.[43] He argued simply that where the controversy which was the subject of the trial did not involve a *right* which was itself dependent upon a federal question, the court had no reason to retain the case.[44] This is just another way of saying that the federal question must be principal, i.e., capable of re-

[41] The Chief Justice said, "It is well settled that in the courts of the United States the special facts necessary for jurisdiction must in some form appear in the record of every suit . . . the record in the State Court, which includes the petition for removal, should . . . show jurisdiction in the court to which it goes. If . . . not . . . the suit must be remanded. The attempt to transfer this cause was made under that part of sect. 2 of the act of 1875 which provides for the removal of suits 'arising under the Constitution or laws of the United States.' . . . Upon the pleadings alone, it is clear the defendants had not brought themselves within the statute. . . . The office of pleading is to state facts, not conclusions of law. It is the duty of the court to declare the conclusions and of the parties to state the premises." Id. at 201, 202.

[42] He concluded, "In this petition the defendants . . . state no facts to show the right they claim, or to enable the court to see whether it necessarily depends upon the construction of the statutes. . . . In pleading the statute, therefore, the facts must be stated which call it into operation. The averment that it is in operation will not be enough; for that is the precise question the court is called upon to determine." Id. at 202, 203.

[43] Apparently in reply to counsel, the Chief Justice said, "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. 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." Id. at 203.

[44] This notion he expresses in the following passage: "Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear . . . that the suit is one which 'really and substantially involves a dispute or controversy' as to a *right which depends* upon the construction or effect of the Constitution, or some law or treaty of the United States." (Italics supplied). Id. at 203, 204.

solving the claim of right one way or the other, rather than incidental.

Nothing could better reflect a faithful adherence to the rules of the *Osborn* case, but partly because his critics have misinterpreted the *Osborn* opinion,[45] and partly because they have misinterpreted the *Keyes* opinion,[46] Chief Justice Waite has been accused of departing from the Marshall code. Certainly it is not true that the requirements of the *Osborn* case are met by the mere fact that it *may* become necessary to give a construction to the Constitution or federal laws. The case *must* involve such a construction. While it is true that the actual ruling need not sustain or defeat the claim, the alternative ruling must, and it is this notion that Chief Justice Waite expresses when he says, "the decision of the case must depend upon that construction."[47] Conjecture enters a case, according to the *Osborn* opinion, only when the court is actually called upon to construe the federal question. At that point it is uncertain whether the court will follow one construction or another, but that it must follow one or the other is already a certainty. The mere possibility that a court *may* be obliged to rule on a federal question is never sufficient to vest jurisdiction, and it is this possibility which the Waite critics erroneously insist the *Osborn* opinion dignifies. The *Keyes* opinion, in its turn, has been misconstrued to mean that the dispute in the case must involve a federal question. But when the Chief Justice insists that there must be a controversy between the parties as to a *right which depends upon a construction of the federal law*, he is not saying that the federal law must itself be the subject of controversy. The parties may only dispute a question of fact, whereas the claim of right may be defeated on a question of law. The significant requirement reiterated by Chief Justice Waite is simply that the federal question must be a principal question, whether or not it be controverted. This is certainly not an unfamiliar notion.

In all, the Chief Justice was faithful to the propositions of the

[45] "The . . . words . . . set forth a rule which is much narrower than the rule of the *Osborn* case. Under the *Osborn* case there does not have to be a 'controversy *between the parties* in regard to the operation and effect of the Constitution or laws.' The mere fact that '. . . it may become necessary to give a construction to the Constitution or laws' would seem to meet the broad requirements of the *Osborn* case." Forrester, "The Nature of a 'Federal Question,'" 16 TULANE L. REV. 362 at 379 (1942). The first sentence of this analysis is, of course, sound; but the concluding sentence misinterprets the Marshall opinion.

[46] "The theory of the *Gold-Washing* case is that federal jurisdiction never exists unless there is a real and substantial dispute arising under federal law upon which the decision in the case depends. . . ." Forrester, "Federal Question Jurisdiction and Section 5," 18 TULANE L. REV. 262 at 275 (1943).

[47] See quotation, note 43, supra.

Osborn case, as he himself observed. Marshall had said that certain facts must appear in the initial pleading to *vest* jurisdiction. Waite said that these facts did not appear, and therefore jurisdiction had not properly vested. Section 5 of the act of 1875 provided that jurisdiction must be *ousted* if the facts necessary in the original pleading were not present in the subsequent proceedings as well. Waite observed that the initial pleadings had not contained the requisite facts, and since section 5 would have required jurisdiction to be ousted when those facts no longer appeared in the case (even if they had originally so appeared), there could be no basis for retaining the case pending the appearance of the kind of federal question (incidental) which would have been insufficient to vest jurisdiction in the first place. Moreover, where jurisdiction has not vested at the time of the original pleading, the appearance of the necessary facts at the trial cannot vest such jurisdiction (Rule 3b) even though their presence would have justified a retention of the case had such jurisdiction originally vested. But in any event, the fact that the court *might* be obliged at the trial to give a construction to the federal law is insufficient either to vest or to retain jurisdiction. Even if it appears, however, that such a construction *must* be given, it must also appear that the case will turn upon it, since jurisdiction cannot be based upon an indeterminate contingency; to take or to retain jurisdiction the federal question must be principal rather than incidental. This is a faithful application of the basic tenets which were developed in the *Osborn* case.

Two other cases which faithfully observed the ruling in the *Osborn* case were *Railroad Company v. Mississippi*[48] and *Metcalf v. Watertown*.[49] In the *Railroad* case the question was whether the defendant's answer could properly introduce the claim upon which federal jurisdiction was based. Marshall had said that this claim must appear in the *original* pleading. But there was a long history, as Justice Johnson had observed, during which the answer in removal cases had served this function. It was reasonable, therefore, for the Court to find that the answer was the original pleading as far as the removal proceedings were concerned, and jurisdiction could vest on that basis. In the *Metcalf* case the Court distinguished between removal and original cases and held, as Marshall had held, that the necessary facts must appear in the plaintiff's complaint where the suit was originally brought in the federal courts.

[48] 102 U.S. 135 (1880).

[49] 128 U.S. 586, 9 S. Ct. 173 (1888).

The result in the *Railroad* case seemed perfectly reasonable at the time the ruling was made. But the Court soon realized that if it had required the facts to appear in the complaint in removal cases as well as in the original cases, the federal dockets would be somewhat relieved. At a time when the dockets were being increasingly burdened this was no small consideration. The Court, of course, could not relieve the federal dockets at the expense of the policy which Congress had in mind when it conferred jurisdiction upon the federal courts in the first place. But if it could reconcile the policy of Congress with its own self-interest there would be nothing to stand in the way of such a salutary result. No such compromise could be worked out, however, if the real purpose of the act was to insure an initial federal trial for every federal question case. But if the purpose were only to insure that injured parties might bring *prejudiced* cases into the federal courts, a solution could be worked out. The presumption is that the plaintiff is the principal injured party, and although it is conceivable that prejudice will arise where the federal question is raised in the defendant's answer, it is much more likely to occur where the plaintiff seeks affirmative recovery. A convenient distinction, therefore, could be drawn between a federal claim appearing in the plaintiff's complaint, and one merely raised by way of defense. Moreover, by permitting the defendant to remove to the federal courts on the basis of his own claim, the law would confer an advantage upon him which it denies the plaintiff in a like situation. The plaintiff is entitled to bring his suit in the federal courts if he fears local bias; but if he believes that he will be given an impartial hearing in the state court he *can* bring his case there. (This choice allowed the plaintiff effectively refutes the notion that Congress wanted *every* federal question case to be tried initially in the federal courts.) Should the plaintiff, however, bring his case in the state court solely to avail himself of some advantage, the defendant can remove to the federal court on the basis of the plaintiff's complaint, and thereby cancel the unfair advantage which the plaintiff seeks. Yet under the ruling of the *Railroad* case the defendant is allowed a similar advantage. Where a plaintiff brings a bona fide claim under state law the defendant has only to plead a defense under federal law to remove the case to the federal courts. This he might do solely for some advantage to him in the federal courts—not out of fear of local prejudice—and the plaintiff could not prevent it. The fact, then, that defendants are usually not prejudiced in state courts when they defend on federal grounds, and that the right to remove to the federal courts on the basis of the answer greatly bur-

dens the federal dockets[50] and gives the defendant an unfair advantage, naturally influenced the thinking of the Court. It soon became apparent that self-interest, congressional policy, and fair-play favored a rule restricting the right of the defendant to remove to the federal courts. The sole basis would have to be the claim in the plaintiff's complaint.

The act of March 3, 1887, amended in 1888, provided a convenient occasion for the Court to correct its previous stand. This act provided that only the defendant could remove to the federal courts, and then only those cases "of which the circuit courts of the United States are given original jurisdiction in the preceding section."[51] It was this sentence which gave the Court the opportunity to change the ruling which it had laid down in the *Railroad* case only seven years before. In *Tennessee v. Union and Planters' Bank*,[52] the majority held that since the claim of right had to appear in the plaintiff's complaint in cases originally brought in the federal courts, the new act would restrict removal to the same kind of case. Justice Harlan, who had delivered the opinion in the *Metcalf* case, dissented on the ground that the new enactment limited the defendant's right to remove to the new jurisdictional amount which was established in the "preceding Section" and did not refer to the procedural means by which the claim was determined. Apparently Justice Harlan was not concerned with such practical considerations as the relief of the federal dockets. But the failure of Congress to clarify its position following this case would seem to support the majority interpretation of the Congressional intent, both as to the act of 1875 and that of 1887.

Where matters of policy are involved it is impossible to say that there is a "right" and a "wrong." There is simply a "majority" and a "minority." It is sufficient to observe, therefore, that the majority of the Court in this formative period, interpreted the Congressional acts of 1875 and 1887 in such a way as to refute any notion that either or both of these acts were designed to bring *every* federal case into the federal courts. The decision in every instance as to what constituted a "federal question" remained precisely what it was in the *Osborn* case. To *vest* jurisdiction the federal question had to appear in the original pleading. After the Tennessee case this meant the plaintiff's complaint. By the terms of section 5 of the act of 1875, jurisdiction would be *ousted* if the necessary facts did not also appear in the subsequent pro-

[50] See Meigs, "The Relief of the Supreme Court of the United States," 23 AM. L. REG. (n.s.) 360 at 361 (1884).

[51] 24 Stat. L. 552 (1887); 25 Stat. L. 433 (1888).

[52] 152 U.S. 454, 14 S. Ct. 654 (1894).

ceedings of the case. These propositions were to be carried forward into the succeeding and final period of court interpretation. But with the advance of time the policy of Congress in 1875 became less and less a matter of active concern to the Court. There remained, therefore, only a duty to enforce the act, regardless of the policy which occasioned it. The natural presumption was that previous decisions embodied this policy and that reliance upon precedent would perpetuate it. Whatever changes were to be made, therefore, had to be on the basis of self-interest and trial convenience. Accordingly, the language to be found in the early cases was faithfully repeated in the later ones; but out of context it would be purely a matter of chance whether the effect of that language in any given case would be the same as it had been originally. As we move into the modern period of interpretation, therefore, we sometimes find a distorted reflection of the earlier periods, and it becomes important to distinguish between distortion which time alone has brought about, and that which is the result of conscious change.

IV

THE MODERN PERIOD OF INTERPRETATION

The language of section 5 of the act of 1875, as interpreted by Chief Justice Waite in the *Keyes* case, finds repeated expression in the cases of the twentieth century. Yet taken out of context and out of historical perspective, selected passages could very well suggest something altogether different from that which the Chief Justice had in mind.[58] We have already noted how some have interpreted the Waite opinion to mean that the federal question must itself be the subject of controversy, and this has been the fate of similar language in later cases. But a precise reading of the passages in question will reveal that most of them provide only that a dispute or controversy must involve a *right* which depends upon a construction of the Constitution or laws of the United States. This distinction, tenuous though it may seem, makes the

[58] In Defiance Water Co. v. Defiance, 191 U.S. 184 at 190, 191, 24 S. Ct. 63 (1903), we find this language quoted: ". . . when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determinaiton of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground." The reader will immediately recognize this as a near quotation from the Keyes case.

whole difference between sense and nonsense. Chief Justice Marshall had long ago declared that the controversy need not involve the federal question itself, and although in most instances it would, for purposes of Constitutional interpretation it must not be included as a requirement. Language which loosely embodies it, therefore, must be read in light of other language which qualifies it.

Most of the passages which cause difficulty of this nature are concerned with conditions for the *rétention* of jurisdiction.[54] They simply advise that when certain conditions do not exist (the same which are necessary for vesting of jurisdiction) the court is not justified in ruling that "jurisdiction can be maintained." From this some have argued that if such conditions *do* exist at any time in the proceedings the court is entitled to *vest* jurisdiction, notwithstanding that such jurisdiction could not have vested previously. This, as Judge Amidon points out in *McGoon v. Northern Pacific Railway Company*[55] is a *non sequitur*. The language is never employed to justify the vesting of federal jurisdiction, but only the ousting or retention thereof. It is well settled that the vesting of jurisdiction can take place only at the time of the original pleading. If the facts necessary for the vesting of jurisdiction do not appear in the pleading, their appearance at any later stage in the proceedings cannot vest jurisdiction in the federal courts, but can serve only as the basis for appellate review.

In *Gully v. First National Bank in Meridian*[56] Justice Cardozo brings together all of the various phraseology and arguments which have appeared in the course of the long history of "federal question," and gives us a perfect picture of the current status of this subject. Many have seen fit to criticize the opinion on the ground that it reflects confusion and indecision.[57] None, of course, can deny the excellence of the writing. No other jurist in American history has delivered himself with the clarity of thought and beauty of expression which habitually characterized the opinions of Justice Cardozo. The confusion in the *Gully* case, I am satisfied, was not in the mind of the Justice, but rather in the variegated reading which was bestowed upon it.

The *Gully* case is almost wholly a resumé of the classical doctrines of federal question jurisdiction. None of the more recent cases have

[54] See note 53, supra.

[55] (D.C. N.D. 1913) 204 F. 998 at 1001.

[56] 299 U.S. 109, 57 S. Ct. 96 (1936).

[57] Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 670, 671 (1942); Forrester, "The Nature of a 'Federal Question,'" 16 TULANE L. REV. 362 at 382 (1942); 40 ILL. L. REV. 387 at 396, 397 (1945).

added anything to this compendium, nor have they introduced any modifications which are not to be found here. Justice Cardozo reviews the history of the subject from the *Osborn* case down to 1936. After stating the usual propositions (that the facts necessary for vesting jurisdiction must appear in the original pleading, and that they must reveal a dispute or controversy as to a right which depends upon the construction of federal law), he goes on to explain the further developments which have taken place since the early statement of the law. As to the early period he notes that "if a federal right was pleaded, the question was not always asked whether it was likely to be disputed."[58] It should be especially noted that he refers to the "right" being in dispute, and not to the federal question itself. This is a clear recognition of the distinction which has been drawn throughout this work. Justice Cardozo obviously had in mind what Congress had in mind when it adopted section 5 of the act of 1875. Jurisdiction vested when an apparently bona fide federal claim appeared in the pleading. In the early cases jurisdiction was retained even though the federal claim subsequently disappeared from the case. This was a matter to be remedied, and Justice Cardozo observes that it was remedied in the later decisions. He says, "partly under the influence of statutes disclosing a new legislative policy, partly under the influence of more liberal decisions, the probable course of the trial, the real substance of the controversy, has taken on a new significance."[59] He then quotes with approval from *Shulthis v. McDougal;*[60] but here again we have nothing more than a paraphrase of the essential proposition in section 5, that jurisdiction ought not to be retained if it appears that the right which is the subject of controversy in the case cannot be sustained or defeated by a construction of federal law.

Having announced this proposition of section 5 as an integral part of the modern law of federal question jurisdiction, Justice Cardozo went on to discuss a modification of the law as it was developed in the *Osborn* case. It will be remembered that the *Osborn* case itself depended upon the proposition that a federal question could appear

[58] Gully v. First National Bank in Meridian, 299 U.S. 109 at 113, 57 S. Ct. 96 (1936).

[59] Id. at 113, 114.

[60] Id. at 114: "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." Shulthis v. McDougal, 225 U.S. 561 at 569, 32 S. Ct. 704 (1912).

indirectly in the claim of right. This, of course, continues to be the law to the present day. It remains the only justification for suits which obtain federal jurisdiction solely on the basis of federal incorporation, even as amended by the act of February 13, 1925.[61] But the Justice observes that as a practical matter "the doctrine of the charter cases was to be treated as exceptional, though within their special field there was no thought to disturb them."[62] In other words, the Court would no longer allow the ordinary plaintiff to present a federal question *indirectly*. It had to appear directly in the claim of right itself. Thus, although Rule 1 (b) above was not disturbed as a constitutional proposition, as a practical matter the courts would now apply Rule 1 (a) in all except charter cases. This was evidenced in the facts of the *Gully* case itself. There the claim of the plaintiff was for the collection of taxes authorized by state statute. The defendant sought removal to the federal court on the ground that a federal question was involved, since the right of the state to tax the shares of national banks was derived from a federal statute. In short, before the state could collect its taxes it had to show that it had the right to impose them under federal law. This was similar to the situation in the *Osborn* case where the plaintiff had to show that it had the right to sue before it could press its claim. In the *Gully* case Justice Cardozo did not deny that the federal question might, in fact, prove to be the main issue in the case. But he pointed out that the claim of right itself was a state claim. Although the right which the state conferred was itself derived from federal law this would not influence the Court in its decision, since otherwise every claim could ultimately be traced to some federal law or to the Constitution. As a practical matter, therefore, the proposition propounded by Chief Justice Marshall was too broad to serve as a guide in the mine run of cases. As Justice Cardozo said, "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."[63]

The rules, therefore, which Justice Cardozo announced in the *Gully* case were those which had been laboriously developed through the years; they modified the classical doctrine only to the extent required by practical considerations of trial convenience, and incorporated

[61] 43 Stat. L. 936 at 941 (1925), 28 U.S.C. (1940) § 42.

[62] Gully v. First National Bank in Meridian, 299 U.S. 109 at 114, 57 S. Ct. 96 (1936).

[63] Id. at 118

the proposition expressed in section 5 of the act of 1875. It should be evident at once that the Court could not have announced the stand it took in the *Gully* case unless it had repudiated the notion that the act of 1875, which it was purportedly applying, had been designed to bring every federal question case into the federal courts. If such had been the design of the act, the *Gully* case might properly have been retained; but it was not. Clearly, the Court had satisfied itself that only a certain class of federal question cases were intended to be tried initially in the federal courts. These were the prejudiced cases. Although the Court of 1936 may not have had them in mind by name, in following the lead of the earlier Courts which did, it gave effect to the true policy of the act. The Court was justified in abandoning precedent only where it could limit the number of cases appearing in the federal courts without destroying the basic propositions previously evolved. This it did in refusing to follow Rule 1 (b) as a practical guide. But this was no drastic departure from the underlying philosophy, and it is significant that the Court refused to alter any of the essential elements of federal question jurisdiction. Any other conclusion can be reached only by a process of reading into the Court's language, which was couched in terms of earlier decisions, a meaning other than that which the earlier Courts intended.

The rash of suggestions which have advocated conscious revision in this field, cannot be sustained in light of the historical conditions which have brought the "federal question" to its present stage. A comment in the *Illinois Law Review*,[64] for example, recommends legislative surgery for the Supreme Court. It proposes a change in the statute, which would allow federal courts to take jurisdiction in a case which "involves a substantial dispute, as determined from the pleadings, as to the construction of the Constitution, laws or treaties of the United States."[65] The result of this would be to restore the law as it was in 1880 under the ruling of the *Railroad* case. It would permit the courts to examine the defendant's answer as well as the plaintiff's complaint in vesting federal jurisdiction. Under this proposed legislation the courts might be required to accept a case like *Louisville and Nashville R. R. Co. v. Mottley*,[66] which the Supreme Court, acting *sua sponte*, dismissed because the federal claim appeared in the plaintiff's complaint only by way of anticipation of the defendant's defense. If the defendant actually made the anticipated defense in his pleading the federal

[64] 40 ILL. L. REV. 387 (1945).
[65] Id. at 399.
[66] 211 U.S. 149, 29 S. Ct. 62 (1908).

courts would have jurisdiction under the terms of the legislation proposed above. This same result is advocated by Messrs. Chadbourn and Levin through therapeutic treatment by the Court itself. They say, "The most significant holding of the *Tennessee* decision . . . 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."[67] But when one considers that there are forty-eight state court systems and only one federal court system, the policy seems neither short-sighted nor parochial. It is entirely reasonable and proper for the state courts to absorb their proportionate share of federal question cases, as they are presently doing. And it was undoubtedly this consideration which played a large part in influencing the majority of the Court. Justice Harlan's dissent was, like Justice Johnson's dissent in the *Osborn* case, perfectly logical when considered out of historical perspective. But it was considered inappropriate in 1894, and I find nothing in the history of 1947 which would justify a different conclusion.

Probably the type of case which troubles most observers is that which is typified by *The Fair v. Kohler Die and Specialty Co.*[68] In that case a claim under patent law was set forth in the pleadings. As it was stated, the claim could be sustained or defeated by an interpretation of the federal law. The facts which supported the claim were bona fide; that is, they represented truthfully as much of the situation as was essential to the claim. But it was evident to everyone, including the Supreme Court, that the ultimate determination of the cause would not rest upon a construction of federal law. The pleadings, however, gave jurisdiction to the federal court and the case was retained. It has been argued apparently with reference to this type of situation, that "Marshall's text in the *Osborn* case should be resurrected. . . . Marshall's criterion 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."[69] This is

[67] Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 673 (1942).

[68] 228 U.S. 22, 33 S. Ct. 410 (1913).

[69] Chadbourn and Levin, "Original Jurisdiction of Federal Questions," 90 UNIV. PA. L. REV. 639 at 671, 672 (1942).

precisely the rule which the Court has evolved. Marshall's criterion *was* used in the *Fair* case to vest jurisdiction in the federal courts. Section 5 of the act of 1875 would have been used by the Court to oust jurisdiction if the Court had really been satisfied that the facts which appeared in the pleading no longer existed in the case. But the facts were present in the case; they simply were not the subject of controversy. Section 5 was designed to oust jurisdiction where the subsequent disappearance of the facts necessary for the vesting of jurisdiction indicated a lack of good faith. It was not designed, and, as one writer has demonstrated, it has not been used,[70] to dismiss cases where the facts of the pleading are substantiated by a later examination of the facts by the court. The change which is proposed, therefore, is no change at all, since it is a current rule of the Court; and as applied, it does not have the sweeping effect which is claimed for it. It could have this effect only if section 5 be interpreted to authorize the dismissal of a suit whenever the federal question itself is not controverted in the trial. This, as we have noted, would contradict one of Marshall's basic propositions, and cannot be accepted as a valid statement of Congressional intent.

V

CONCLUSION

The language which is used in modern cases to define federal question jurisdiction derives from classical sources. The *Osborn* case, the *Keyes* case, and section 5 of the act of 1875 may each claim a measure of credit. The import of the language used today is essentially no different from that which it carried at its inception. Modifications have appeared, it is true, but these are minor variations to accord with current notions of trial convenience. They are in no way designed to alter the underlying policies which are reflected in the early decisions. It was the purpose and intent of Congress in 1875 to insure that every federal question case likely to be prejudiced in a state court could find a ready and impartial forum in the federal courts. This was assured by the simple expedient of allowing the plaintiff to choose his forum on the basis of his claim. Considerations of self-interest led the Supreme Court to spare the federal dockets by preventing the defendant from exercising the same right, although his right to remove on the basis of the plaintiff's claim is preserved. The result of these policies has been

[70] Forrester, "Federal Question Jurisdiction and Section 5," 18 TULANE L. REV. 263 at 283 (1943).

to limit federal question jurisdiction beyond what is currently advocated by many text-writers. But nothing is to be gained by extending that jurisdiction. Every federal question case today has an adequate forum. If the federal claim appears in the plaintiff's complaint, jurisdiction of the case vests in the federal courts. If it continues to appear throughout the proceedings it is retained in the federal courts. If it does not appear in the pleadings, but appears in the course of the trial, it serves as the basis for appeal from the state courts to the federal courts. If it appears in the pleadings and does not appear subsequently, it is remanded to the state courts. All of this presents a neat and logical pattern. No suitor is prejudiced by the application of these criteria; yet the policies of the Court and Congress are fully effectuated by them. We can conclude only, therefore, that any further change, whether by legislation or gratuitous interpretation, unaccompanied by a basic change in policy, would defeat the historical and logical purpose of the jurisdiction, and would amount to unjustifiable retrogression.