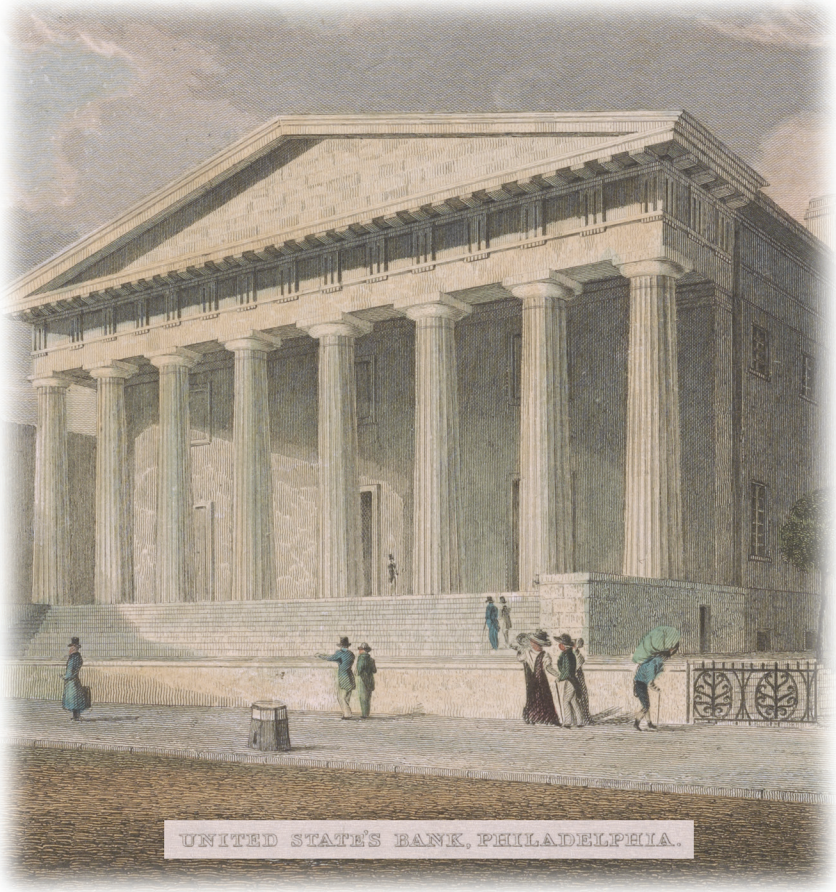
Cases that Shaped the Federal Courts

# *Osborn*
# *v.*
# *Bank of the United States*

## 1824

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# Central Question

Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?

## Historical Context

As part of Alexander Hamilton's plan to turn the United States into a major commercial and manufacturing power, Congress established the Bank of the United States in 1790. The bank, although a private corporation, served as the financial agent of the federal government, holding public funds, issuing currency, and making loans. Thomas Jefferson and others believed the bank to be illegitimate because its creation did not fall within the enumerated powers granted to Congress by the Constitution. Many in the South, who shared Jefferson's vision of America as a nation of farmers, opposed an institution they believed was intended to enrich private commercial interests in the Northeast. When its charter expired in 1811 and was not renewed, the bank ceased operations.

President James Madison proposed a new national bank in 1815 as part of a larger plan for economic development, and the Second Bank of the United States was founded in 1816 with a twenty-year charter. The new bank caused controversy as well; like its predecessor, it was seen by many as a tool of the elite. When the United States experienced a brief financial depression known as the Panic of 1819, many blamed the Second Bank, accusing it of engaging in excessive speculation related to the nation's westward expansion. The bank printed large amounts of paper money to issue loans for the purchase of land. When land prices fell, the bank was forced to demand repayment of those loans, sending many into bankruptcy.

The Second Bank's unpopularity caused several states to pass laws imposing taxes upon it. In *McCulloch v. Maryland* (1819), the Supreme Court held these laws to be invalid, declaring that a state lacked the power to tax an entity of the federal government. "The power to tax," wrote Chief Justice John Marshall, "involves the power to destroy," and states could not be permitted to exercise such a power over the bank. The *Osborn* case arose from an attempt by the state of Ohio to collect tax payments from the Second Bank.

## Legal Debates Before *Osborn*

Article III of the Constitution extended the judicial power of the United States to all cases "arising under" the Constitution, federal statutes, and treaties. Although the Constitution set the outer limits of federal jurisdiction, Congress was responsible for defining the courts' jurisdiction within those parameters. In doing so, legislators had to contend with competing principles: that the federal government should not intrude excessively upon the states, and that the nation's laws ought to be enforceable in the national courts. Prior to

1875 (except under the short-lived Judiciary Act of 1801), Congress chose not to endow the federal courts with general original jurisdiction in civil cases arising under federal law, also known as general federal-question jurisdiction. Most federal-law cases were therefore heard in state courts, while the federal courts were limited to hearing cases arising under statutes in which Congress had made a specific grant of jurisdiction. Congress made such a jurisdictional grant in the Patent Act of 1793, for example, which gave the U.S. circuit courts exclusive jurisdiction over patent infringement cases.

In the 1809 case of *Bank of the United States v. Deveaux*, the Supreme Court was called upon to decide whether the federal statute incorporating the Bank of the United States constituted a grant of jurisdiction to the federal courts over suits brought by the Bank. The act granted the bank the right to "sue and be sued … in courts of record, or any other place whatsoever." The bank claimed that this language entitled it to sue in the U.S. Circuit Court for the District of Georgia to recover money the defendants had seized to satisfy a state tax bill the bank had refused to pay. In his opinion for the Court, Chief Justice Marshall explained that the standard language of the incorporating act was intended to allow the corporation to appear in any court that would have jurisdiction over it and not "to enlarge the jurisdiction of any particular court." As a result, the act was not sufficient to permit the bank to sue in federal court. Fifteen years later, in *Osborn*, the Court was presented with the similar question of whether a suit brought by the Second Bank of the United States was within the jurisdiction of the federal courts.

## The Case

In February 1819, the state of Ohio passed a statute declaring that the Second Bank of the United States was operating within the state contrary to state law; unless the bank suspended operations before September 15, the statute provided, the state would impose upon it a tax of $50,000 for each branch within Ohio. The bank applied to the U.S. Circuit Court for the District of Ohio for an injunction prohibiting the state auditor, Ralph Osborn, from carrying out the terms of the act. The court granted the injunction, which was then served on Osborn. Nevertheless, Osborn's agent, John Harper, proceeded to the bank's branch at Chillicothe and collected the tax by seizing $100,000. The bank brought suit in the U.S. circuit court, which ordered Osborn and Harper to repay the bank with interest. The defendants then appealed to the Supreme Court of the United States. Among the arguments they made in seeking to have the lower court's decree nullified was that the bank had not been authorized to bring suit in federal court.

## The Supreme Court's Ruling

The Supreme Court ruled that the circuit court had jurisdiction over the bank's lawsuit and

upheld its decision in favor of the bank. Chief Justice John Marshall—a proponent of a strong national government who had previously ruled in favor of the bank's constitutionality in *McCulloch v. Maryland*—authored the Court's opinion. He began by distinguishing the case at hand from *Deveaux*. Whereas the original bank's incorporating act, at issue in *Deveaux*, had contained only a general reference to "courts of record," Congress had declared in the Second Bank's charter that the bank would be "able and capable in law … to sue and be sued … in any Circuit Court of the United States." The language of the charter was clearly sufficient to confer jurisdiction on the federal courts, Marshall wrote, unless such a grant of jurisdiction was unconstitutional.

The constitutionality of the charter's grant of jurisdiction depended on whether *Osborn* was a case "arising under" federal law and therefore within the ambit of the Article III definition of the judicial power of the United States. Interpreting the meaning of "arising under" for the first time, the Court construed the term broadly. If, Marshall wrote, "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," any other questions involved in the case were "incidental" for purposes of federal jurisdiction. In that event, he continued, a federal question "forms an ingredient of the original cause," and "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."

With those principles in mind, Marshall considered the bank's charter. Not only did the law create the bank, but it endowed the Bank with all of its rights and powers. The bank could not do anything, such as bring a lawsuit, or assert any right, such as the right to recover property, unless authorized to do so by its charter. The charter necessarily formed an ingredient of any case involving the bank, and any such case was therefore one "arising under" federal law.

Having found that the federal court possessed jurisdiction over the case, Marshall's opinion proceeded to explain the Court's ruling on the merits in favor of the bank. Among several issues presented was whether the suit was barred by the Eleventh Amendment grant of sovereign immunity to the states. Asserting that the Eleventh Amendment did not apply unless the state was the party named in the record, Marshall held that a state official could be sued for an improper act. Marshall's opinion also held the Ohio state law imposing a tax on the bank to be unconstitutional, reaffirming the Court's recent ruling in *McCulloch*.

## Aftermath and Legacy

Andrew Jackson, elected President in 1828, was a fierce opponent of the Second Bank of the United States. In particular, Jackson opposed what he saw as the bank's excessive printing of paper money, which led to inflation and caused the value of workers' wages to fall.

Jackson believed that the country should return to "hard" money (i.e., gold and silver) as its only currency.

In 1832, with the bank's charter due to expire in four years, its president, Nicolas Biddle, lobbied Congress for a law extending the charter for an additional twenty years. Congress passed the law, but in one of the most controversial actions of his presidency, Jackson vetoed it. Echoing earlier criticisms of the bank as a tool of the wealthy and powerful, Jackson expressed concern for "the humble members of society." When Jackson was reelected in 1832, the bank's demise was certain.

The legacy of the *Osborn* case was slightly more complicated. Half a century after the case, Congress expanded federal jurisdiction dramatically when it enacted the Jurisdiction and Removal Act of 1875. The Act gave the federal courts jurisdiction over all cases arising under the Constitution and federal law as long as the amount in controversy was at least $500. The creation of general federal-question jurisdiction meant that *Osborn* would apply to a much wider range of cases and would no longer be limited to those arising under laws in which Congress had specifically provided for a federal right of action.

Over the years, however, judges and scholars disagreed as to how broadly to read *Osborn*. In his *Osborn* dissent, Justice William Johnson claimed that the ruling would create federal jurisdiction over a case "merely on the ground that a question might *possibly* be raised in it, involving the constitution, or constitutionality of a law, of the United States." Justice Felix Frankfurter agreed with Johnson, noting in a 1957 dissent that *Osborn* could be construed as permitting federal jurisdiction "on the remote possibility of presentation of a federal question." Others have argued, however, that *Osborn* was meant to provide for "arising under" jurisdiction only in cases where a federal law was actually determinative of the parties' rights.

The Supreme Court has not attempted to define the precise boundaries of the *Osborn* holding or "arising under" jurisdiction. In *Verlinden B.V. v. Central Bank of Nigeria* (1983), the Court explicitly declined to resolve the issue, finding that a federal question had clearly been presented. In both *Verlinden* and *Mesa v. California* (1989), however, the Court noted that purely jurisdictional statutes—that is, statutes that did nothing other than attempt to confer federal jurisdiction over certain types of cases—were not themselves sufficient grounds for "arising under" jurisdiction.

## Discussion Questions

- Why do you think the framers of the Constitution included "arising under" jurisdiction in Article III?

- Why might Congress not have granted the federal courts the full scope of jurisdiction permitted by the Constitution—that is, general federal-question jurisdiction—until 1875?
- What does it mean for a case to "arise under" federal law?
- Can Congress grant the federal courts jurisdiction over any type of case whatsoever? Why or why not?

# Documents

## Statute Establishing the Second Bank of the United States, April 10, 1816

*Congress chartered the Second Bank of the United States in 1816, providing that the charter would expire in twenty years unless it was renewed. The bank was to hold the public funds of the United States, make payments on behalf of the federal government, issue public and private loans, and circulate paper money. Section 7 of the charter, permitting the bank to sue and be sued in the U.S. circuit courts, was the subject of the* Osborn *case.*

*Be it enacted by the Senate and the House of Representatives of the United States of America, in Congress assembled*, That a bank of the United States of America shall be established, with a capital of thirty-five millions of dollars, divided into three hundred and fifty thousand shares, of one hundred dollars each share. Seventy thousand shares, amounting to the sum of seven millions of dollars, part of the capital of said bank, shall be subscribed and paid for by the United States, in the manner hereinafter specified; and two hundred and eighty thousand shares, amounting to the sum of twenty-eight millions of dollars, shall be subscribed and paid for by individuals, companies, or corporations, in the manner hereinafter specified.…

SEC. 7. *And be it further enacted*, That the subscribers to the said bank of the United States of America, their successors and assigns, shall be, and are hereby, created a corporation and body politic, by the name and style of "The president, directors, and company, of the bank of the United States," and shall so continue until the third day of March, in the year one thousand eight hundred and thirty-six, and by that name shall be, and are hereby, made able and capable, in law . . . to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction, and in any circuit court of the United States ….

SEC. 11. *And be it further enacted*, That the following rules, restrictions, limitations, and provisions, shall form and be fundamental articles of the constitution of said corporation, to wit:…

*Tenth*. No loan shall be made by the said corporation, for the use or on account of the government of the United States, to an amount exceeding five hundred thousand dollars, or of any particular state, to an amount exceeding fifty thousand dollars, or of any foreign prince or state, unless previously authorized by a law of the United States.…

*Thirteenth*. Half yearly dividends shall be made of so much of the profits of the bank as shall appear to the directors advisable; and once in every three years the directors shall lay before the stockholders, at a general meeting, for their information, an exact and particular statement of the debts which shall have remained unpaid after the expiration of

the original credit, for a period of treble the term of that credit, and of the surplus of the profits, if any, after deducting losses and dividends.…

*Seventeenth*. No note shall be issued of less amount than five dollars.…

SEC. 15. *And be it further enacted*, That during the continuance of this act, and whenever required by the Secretary of the Treasury, the said corporation shall give the necessary facilities for transferring the public funds from place to place, within the United States, or the territories thereof, and for distributing the same in payment of the public creditors ….

SEC. 16. *And be it further enacted*, That the deposits of the money of the United States, in places in which the said bank and branches thereof may be established, shall be made in said bank and branches thereof, unless the Secretary of the Treasury shall at any time otherwise order and direct ….

Document Source: An Act to incorporate the subscribers to the Bank of the United States, 3 Stat. 266, 269, 271–74 (1816).

## Supreme Court of the United States, Opinion in *Osborn v. Bank of the United States*, March 19, 1824

*In his opinion for the Supreme Court in the* Osborn *case, Chief Justice John Marshall took a broad view of the "arising under" language of Article III. Because the Second Bank's charter, a federal statute, endowed it with all of its legal rights and responsibilities, he reasoned, any case involving the bank was automatically one "arising under" federal law. Congress had therefore acted within its constitutional authority in granting the bank the right to sue and be sued in the U.S. circuit courts.*

The suit of *The Bank of the United States v. Osborn and others*, is a case, and the question is, whether it arises under a law of the United States?

The appellants contend, that it does not, because several questions may arise in it, which depend on the general principles of the law, not on any act of Congress.

If this were sufficient to withdraw a case from the jurisdiction of the federal Courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the constitution, laws, or treaties of the United States.…

We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? 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. Those other questions cannot arrest the proceedings.…

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, although other questions of fact or of law may be involved in it.

The case of the Bank is, we think, a very strong case of this description. 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?…

Upon the best consideration we have been able to bestow on the subject, we are of opinion, that the clause in the act of incorporation, enabling the Bank to sue in the Courts of the United States, is consistent with the constitution, and to be obeyed in all Courts.

Document Source: *Osborn v. Bank of the United States*, 22 U.S. 738, 819–23, 828 (1824).

## Justice William Johnson, Dissenting Opinion in *Osborn v. Bank of the United States*, March 19, 1824

*In his dissenting opinion, Justice William Johnson characterized the majority's holding as an overbroad interpretation of federal "arising under" jurisdiction. Although the bank's charter brought it into existence and endowed it with its legal rights and obligations, Johnson considered it a remote possibility that a question regarding the charter would actually arise in the case. Such a possibility, in his view, was insufficient to give the federal courts jurisdiction over a case that turned on questions of state law.*

[The defendants] contended, 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 the jurisdiction of the cause. That until such a question actually arose, until such a case was actually presented, *non constat*, but the cause depended upon general principles, exclusively cognizable in the State Courts; 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.

And this doctrine has my hearty concurrence in its general application.…

I attach much importance to the 25th section of the judiciary act, not only as a measure of policy, but as a cotemporaneous exposition of the constitution on this subject; as an exposition of *the words* of the constitution, deduced from a knowledge of its views and policy. The object was, to secure a uniform construction and a steady execution of the laws of the Union. Except as far as this purpose might require, the general government had no interest in stripping the State Courts of their jurisdiction; their policy would rather lead to avoid incumbering themselves with it. Why then should it be vested with jurisdiction in a thousand cases, on a mere possibility of a question arising, which question, at last, does not occur in one of them? Indeed, I cannot perceive how such a reach of jurisdiction can be asserted, without changing the reading of the constitution on this subject altogether. The judicial power extends only to "cases arising," that is, actual, not potential cases.…

I have never understood any one to question the right of Congress to vest original jurisdiction in its inferior Courts, in cases coming properly within the description of "cases arising under the laws of the United States;" but surely it must first be ascertained, in some proper mode, that the cases are such as the constitution describes. By possibility, a constitutional question may be raised in any conceivable suit that may be instituted; but that would be a very insufficient ground for assuming universal jurisdiction; and yet, that a question has been made, as that, for instance, on the Bank charter, and may again be made, seems still worse, as a ground for extending jurisdiction. For, the folly of raising it again in every suit instituted by the Bank, is too great, to suppose it possible. Yet this supposition, and this alone, would seem to justify vesting the Bank with an unlimited right to sue in the federal Courts. Indeed, I cannot perceive how, with ordinary correctness, a question can be said to be involved in a cause, which only may possibly be made, but which, in fact, is the very last question that there is any probability will be made; or rather, how that can any longer be denominated a question, which has been put out of existence by a solemn decision.…

But, dismissing the question of possibility, which, I must think, would embrace every other case as well as those to which this Bank is a party, in what sense can it be

predicated of this case, that it is one arising under a law of the United States? It cannot be denied, that jurisdiction of this suit in equity could not be entertained, unless the Court could have had jurisdiction of the action of trespass, which this injunction was intended to anticipate. And, in fact, there is no question, that the Bank here maintains, that the right to sue extends to common trespass, as well as to contracts, or any other cause of action. But suppose trespass in the common form instituted; the declaration is general, and the defendant pleads not guilty, and goes to trial. Where is the feature in such a cause that can give the Court jurisdiction? What question arises under a law of the United States? or what question that must not be decided exclusively upon the *lex loci*, upon State laws? Take also the case of a contract, and in what sense can it be correctly predicated of that, that in common with every other act of the Bank, it arises out of the law that incorporates it? May it not with equal propriety be asserted, that all the crimes and all the controversies of mankind, arise out of the fiat that called their progenitor into existence? It is not because man was created, that he commits a trespass, or incurs a debt; but because, being indued with certain faculties and propensities, he is led by an appropriate motive to the one action or the other. Sound philosophy attributes effects to their proximate causes. It is but pursuing the grade of creation from one step to another, to deduce the acts of this Bank from State law, or even divine law, with as much correctness as from the law of its immediate creation. Its contracts arise under its own acts, and not under a law of the United States; so far from it, indeed, that their effect, their construction, their limitation, their concoction, are all the creatures of the respective State laws in which they originate.

Document Source: *Osborn v. Bank of the United States*, 22 U.S. 738, 885–87, 889–91 (1824).

## President Andrew Jackson, Veto Message Regarding the Bank of the United States, July 10, 1832

*Andrew Jackson's veto of a charter extension for the Second Bank of the United States—based on his belief that the bank was unconstitutional and unfairly privileged the wealthy at the expense of the public—was one of the most controversial events of his presidency. In taking this action, Jackson was undeterred by Supreme Court rulings that the bank was constitutional, asserting that each branch should "be guided by its own opinion of the Constitution." Two years after his veto, Jackson was formally censured by Congress for withholding documents related to his efforts to defund the bank.*

The bill "to modify and continue" the act entitled "An act to incorporate the sub-

scribers to the Bank of the United States" was presented to me on the 4th July instant. Having considered it with that solemn regard to the principles of the Constitution which the day was calculated to inspire, and come to the conclusion that it ought not to become a law, I herewith return it to the Senate, in which it originated, with my objections.

A bank of the United States is in many respects convenient for the Government and useful to the people. Entertaining this opinion, and deeply impressed with the belief that some of the powers and privileges possessed by the existing bank are unauthorized by the Constitution, subversive of the rights of the States, and dangerous to the liberties of the people, I felt it my duty at an early period of my Administration to call the attention of Congress to the practicability of organizing an institution combining all its advantages and obviating these objections. I sincerely regret that in the act before me I can perceive none of those modifications of the bank charter which are necessary, in my opinion, to make it compatible with justice, with sound policy, or with the Constitution of our country.

The present corporate body, denominated the president, directors, and company of the Bank of the United States, will have existed at the time this act is intended to take effect twenty years. It enjoys an exclusive privilege of banking under the authority of the General Government, a monopoly of its favor and support, and, as a necessary consequence, almost a monopoly of the foreign and domestic exchange. The powers, privileges, and favors bestowed upon it in the original charter, by increasing the value of the stock far above its par value, operated as a gratuity of many millions to the stockholders.…

Every monopoly and all exclusive privileges are granted at the expense of the public, which ought to receive a fair equivalent. The many millions which this act proposes to bestow on the stockholders of the existing bank must come directly or indirectly out of the earnings of the American people. It is due to them, therefore, if their Government sell monopolies and exclusive privileges, that they should at least exact for them as much as they are worth in open market.…

It is not conceivable how the present stockholders can have any claim to the special favor of the Government. The present corporation has enjoyed its monopoly during the period stipulated in the original contract. If we must have such a corporation, why should not the Government sell out the whole stock and thus secure to the people the full market value of the privileges granted? Why should not Congress create and sell twenty-eight millions of stock, incorporating the purchasers with all the powers and privileges secured in this act and putting the premium upon the sales into the Treasury?

But this act does not permit competition in the purchase of this monopoly. It seems to be predicated on the erroneous idea that the present stockholders have a prescriptive right not only to the favor but to the bounty of Government. It appears that more than a fourth part of the stock is held by foreigners and the residue is held by a few hundred

of our own citizens, chiefly of the richest class. For their benefit does this act exclude the whole American people from competition in the purchase of this monopoly and dispose of it for many millions less than it is worth. This seems the less excusable because some of our citizens not now stockholders petitioned that the door of competition might be opened, and offered to take a charter on terms much more favorable to the Government and country.

But this proposition, although made by men whose aggregate wealth is believed to be equal to all the private stock in the existing bank, has been set aside, and the bounty of our Government is proposed to be again bestowed on the few who have been fortunate enough to secure the stock and at this moment wield the power of the existing institution. I can not perceive the justice or policy of this course. If our Government must sell monopolies, it would seem to be its duty to take nothing less than their full value, and if gratuities must be made once in fifteen or twenty years let them not be bestowed on the subjects of a foreign government nor upon a designated and favored class of men in our own country. It is but justice and good policy, as far as the nature of the case will admit, to confine our favors to our own fellow-citizens, and let each in his turn enjoy an opportunity to profit by our bounty. In the bearings of the act before me upon these points I find ample reasons why it should not become a law.…

It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress, in 1791, decided in favor of a bank; another, in 1811, decided against it. One Congress, in 1815, decided against a bank; another, in 1816, decided in its favor. Prior to the present Congress, therefore, the precedents drawn from that source were equal. If we resort to the States, the expressions of legislative, judicial, and executive opinions against the bank have been probably to those in its favor as 4 to 1. There is nothing in precedent, therefore, which, if its authority were admitted, ought to weigh in favor of the act before me.

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitu-

tionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

Document Source: "President Jackson's Veto Message Regarding the Bank of the United States," Avalon Project, Yale Law School.

## Anthony J. Bellia, Jr., *Duke Law Journal*, 2007

*Anthony Bellia, a professor at Notre Dame Law School, explained the historical origins of federal "arising under" jurisdiction in a 2007 law review article. As Bellia's piece indicated, the phrase was subjected to several competing interpretations immediately after the Constitution was drafted, which was a cause of concern to participants in their states' ratifying conventions. The scope of the federal courts' jurisdiction over cases arising under federal law was a point of contention between Federalists, who favored a powerful national judiciary and believed that federal laws should be enforceable in federal court, and Anti-Federalists, who feared excessive federal intrusion upon the domain of the states.*

1. *The Meaning of "Arising Under" Jurisdiction*. This Section explains the different ways in which ratification debate participants defined or understood the phrase "arising under" in Article III. To begin, several participants complained that the phrase "arising under" was vague and indefinite. The debate in the Virginia ratifying convention provides illustrations. There, William Grayson objected "to the Federal Judiciary" on the ground "that it is not expressed in a definite manner." In particular, he argued, "[t]he jurisdiction of all cases arising under the Constitution, and the laws of the Union, is of stupendous magnitude. It is impossible for human nature to trace its extent. It is so vaguely and indefinitely expressed, that its latitude cannot be ascertained." George Mason observed that "[t]he Judicial power shall extend to all cases in law and equity, arising under this Constitution" and rhetorically asked, "What objects will not this expression extend to?" Mason argued that "the general description of the Judiciary involves the most extensive jurisdiction. Its cognizance in all cases arising under the system, and the laws of Congress, may be said to be unlimited." Edmund Randolph similarly observed in the Virginia Convention that

the jurisdiction of the federal judiciary "extends to all cases in law and equity arising under the Constitution" and proceeded to ask, "What do we mean by the words *arising under the Constitution*? What do they relate to? I conceive this to be very ambiguous." Randolph was concerned that "the word *arising* will be carried so far, that it will be made use of to aid and extend the Federal jurisdiction." He explained that if he "were to propose an amendment on this subject, it would be to limit the word *arising*." He "would not discard it altogether, but define its extent. The jurisdiction of the Judiciary in cases arising under the system, I should wish to be defined, so as to prevent its being extended unnecessarily …." Certain participants in ratification debates in other states likewise characterized the words "arising under" as indefinite and not amenable to principled limitation. The claim was not that federal jurisdiction should be unlimited, but that the "arising under" language did not limit federal judicial power with sufficient certainty.

Other participants in ratification debates attributed a more definite operation to the Arising Under Clause. Some described "arising under" jurisdiction to encompass cases involving the construction of a federal law. "Brutus," widely believed to be New York judge Robert Yates, explained that "[t]he cases arising under the constitution must include such, as bring into question its meaning, and will require an explanation of the nature and extent of the powers of the different departments under it." He described Article III as vesting the federal judiciary "with a power to resolve all questions that may *arise on* any case on the construction of the constitution, either in law or in equity." Later, he observed that "the supreme court has the power, in the last resort, to determine all questions that may *arise* in the course of legal discussion, *on* the meaning and construction of the constitution." Luther Martin similarly argued that the supreme and inferior courts in which Article III vested "the judicial power of the United States" would have an exclusive "right to decide upon the laws of the United States, and all questions *arising upon* their construction."

Other participants in ratification debates described "arising under" jurisdiction as extending not only to cases calling for the construction of a federal law, but more broadly to cases in which federal law was determinative of a right or title asserted. Hugh Williamson, who represented North Carolina at the Federal Convention, explained in Edenton, North Carolina, in November 1787 that "those cases which are determinable by the general laws of the nation, are to be referred to the national Judiciary." He described such cases as "those which naturally *arise from* the constitutional laws of Congress." In *The Federalist No. 80*, Hamilton explained that "[i]t seems scarcely to admit of controversy that the judiciary authority of the union ought to extend to … causes … which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation."…

2. *The Reasons for "Arising Under" Jurisdiction*. There is something to be learned not only from the definitions or illustrations of "arising under" jurisdiction that participants

in ratification debates provided, but also from the reasons that they articulated for the existence of federal "arising under" jurisdiction. To understand the reasons that participants in ratification debates offered to support a federal "arising under" jurisdiction, it is useful to call to mind the arguments that the Federalists were trying to refute. As is well known, Federalists tried to refute the Anti-Federalist claim that the federal government, as the Constitution would establish it, would unduly encroach on the domain of state governments. The Anti-Federalist argument that "arising under" jurisdiction was potentially limitless was part of a broader argument that the Constitution would vest federal institutions with excessive powers, susceptible to overreaching and other forms of abuse. A particular concern of Anti-Federalists was that Article III would empower distant federal courts to exercise jurisdiction over state citizens in unduly burdensome ways.

Against these claims, participants in ratification debates justified "arising under" jurisdiction on grounds that the Constitution should enable federal courts, first, to carry federal laws into execution and, second, to explicate the meaning of federal laws. These reasons comport with the classes of cases, described in the last Section, that participants described the Arising Under Clause as encompassing: cases in which federal law would provide a governing rule of decision, and cases that would call for the explication of a federal law.

The first proffered reason for arising under jurisdiction was that federal courts must be able to enforce federal laws. Federalists and Anti-Federalists alike recognized this as a justification for Article III's "arising under" clause. As Edmund Pendleton asked rhetorically in the Virginia Convention, "Must not the judicial powers extend to enforce the Federal laws . . . ?" Perhaps most famously, John Marshall argued:

> Is it not necessary that the Federal Courts should have cognizance of cases arising under the Constitution, and the laws of the United States? What is the service or purpose of a Judiciary, but to execute the laws in a peaceable orderly manner, without shedding blood, or creating a contest, or availing yourselves of force? If this be the case, where can its jurisdiction be more necessary than here? To what quarter will you look for protection from an infringement on the Constitution, if you will not give power to the Judiciary? There is no other body that can afford such a protection. . . .

Several writers offered more specific reasons why a national government should have the ability to enforce national laws through its own judiciary. One was to prevent the states from encroaching upon the federal government. William Davie argued in the North Carolina Convention that "[e]very member will agree that the positive regulations ought to be carried into execution, and that the negative restrictions ought not to [be] disregarded or violated. Without a judiciary, the injunctions of the Constitution may be disobeyed, and

the positive regulations neglected or contravened." Similarly, Edmund Randolph argued in the Virginia Convention that it was "necessary" that the jurisdiction of federal courts should "'extend to cases in law and equity arising under this Constitution, and the laws of the United States" because "[i]f the State Judiciaries could make decisions conformable to the laws of their States, in derogation to the General Government … the Federal Government would soon be encroached upon." In the Pennsylvania Convention, James Wilson argued that "arising under" jurisdiction would specifically prevent the states from undermining the obligations of treaties of the United States, such as provisions governing debts owed to British subjects.

Some writers argued that state judges could not be trusted to administer federal laws impartially. In *The Federalist No. 81*, Hamilton argued that federal courts should be empowered to judicially enforce federal laws in the exercise of original jurisdiction on the ground that "[s]tate judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws." In the North Carolina Convention, Archibald Maclaine argued in a similar vein that "[i]t is impossible for any judges, receiving pay from a single state, to be impartial in cases where local laws or interests of that state clash with the laws of the Union, or the general interests of America."

In addition to arguing that federal institutions must be capable of enforcing federal laws, participants in ratification debates argued that "arising under" jurisdiction would enable federal courts to explicate the meaning of federal law and thereby maintain its uniformity. In *The Federalist No. 22*, Hamilton asserted:

> Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States to have any force at all, must be considered as part of the law of the land. Their true import as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted in the last resort, to one Supreme Tribunal.

Hamilton returned to this theme in *The Federalist No. 80*, in which he argued, "If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question."

Document Source: Anthony J. Bellia, Jr., "The Origins of Article III 'Arising Under' Jurisdiction," *Duke Law Journal* 57, no. 2 (November 2007): 263, 306–09, 312–15 (footnotes omitted).

# Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of "the judicial power," remedies, judicial review, the relationship between federal judicial power and states' rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn's Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws made by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter's Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCardle* (1869). Could Congress remove a pending appeal from the Supreme Court's jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States v. Allocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?