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# NOTES

## THE TIDEWATER CASE AND LIMITED JURISDICTION OF FEDERAL "CONSTITUTIONAL" COURTS

In the recent case of *National Mutual Insurance Co. v. Tidewater Transfer Co.*,<sup>1</sup> the Act of April 20, 1940,<sup>2</sup> allowing citizens of the District of Columbia and of the territories to sue and be sued in the district courts on the basis of diverse citizenship, was held constitutional insofar as it applies to citizens of the District of Columbia. The practical effect of the decision, in allowing Congress to remove a basic inequality among citizens of the United States, is perhaps commendable.<sup>3</sup> However, there are broad theoretical implications in this holding, emphasized by sharp debate among the justices, which could go far toward eliminating important limitations upon the capacity of federal courts to receive jurisdiction through congressional enactment. Some of the implications of the decision will be discussed in this Note, without attempting to give complete or positive answers to the questions raised or to treat fully the historical development of the federal court system. As a basis for this discussion certain postulates of constitutional law which have long been accepted as ultimate limitations upon the jurisdiction of the federal courts must be noticed.

### COURTS OF LIMITED JURISDICTION

Fundamental to the philosophy of the American federal system is the proposition that the Federal Government is a government of limited powers.<sup>4</sup> In general, it has no powers except those which are granted to it by the Constitution. As agencies of that Government, the federal courts may not receive jurisdiction except by the authority of the Constitution.

Only the Supreme Court is created by the Constitution itself. All other

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1. 337 U. S. 582, 69 Sup. Ct. 1173 (1949).

2. "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy . . . is between: (1) Citizens of different states. . . .

"(b) The word 'States,' as used in this section, includes the Territories and the District of Columbia." 28 U. S. C. § 1332 (1948).

3. But *quaere*, if it may not be an extension of a type of jurisdiction which is today unsound in theory. If diversity jurisdiction was provided originally because of fears that sectional prejudices would subvert justice, might not the subsequent unification of the nation through two world wars render it an anachronism? See *Bank of the United States v. Deveaux*, 5 Cranch 61, 87, 3 L. Ed. 38, 45 (U. S. 1809); Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492-97 (1928). And see discussions in Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L. Q. 499 (1928); and Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States*, 19 A. B. A. J. 71, 149, 265 (1933).

4. U. S. CONST. AMEND. X. See 1 COOLEY, CONSTITUTIONAL LIMITATIONS 66, 67 (8th ed. 1927); 2 STORY, COMMENTARIES ON THE CONSTITUTION §§ 1906, 1907 (3d ed. 1858).

federal courts owe their existence to statutes enacted pursuant to constitutional authority. Of the powers which by the Constitution the federal courts are authorized to receive, Congress may grant or withhold such as it chooses.<sup>5</sup> Thus the jurisdiction of federal courts is based upon two sources: an act of Congress conferring jurisdiction, and constitutional authority to receive that jurisdiction.

The authority under which Congress may act in conferring jurisdiction is derived from Article I, Article III, or Article IV of the Constitution. Article I and Article IV enumerate the constituents of the legislative power of the United States. Congress may make such laws as are "necessary and proper" to effectuate a valid legislative policy.<sup>6</sup> Hence, to carry out its power to pay the debts of the United States, Congress may establish a Court of Claims; and to effectuate its power to legislate for the territories, it may establish territorial courts and vest them with such powers as a state may vest in her courts. These are examples of what are commonly called "legislative" courts, because they are created under the legislative power granted by the Constitution.<sup>7</sup>

But the courts created pursuant to this authority are not the repositories of the judicial power of the United States, as described in Article III. That Article provides that "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time establish." Courts created under this authority are "constitutional" courts, in the sense that their existence is expressly contemplated in the Constitution.<sup>8</sup>

The "judicial power" which "shall be vested" under Article III is further described and particularized in Section 2 of the Article. Accordingly, the powers which may be received by courts created under this Article are subject to limitations which do not apply to the "legislative courts."

First, it is settled beyond doubt that Article III courts may not receive power which is not judicial in nature; or, to put it another way, that they may hear only "cases and controversies," as those terms have acquired meaning.<sup>9</sup>

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5. *Kline v. Burke Const. Co.*, 260 U. S. 226, 43 Sup. Ct. 79, 67 L. Ed. 226 (1922); *Sheldon v. Sill*, 49 How. 441, 12 L. Ed. 1147 (U. S. 1850). *But see* *Martin v. Hunter's Lessee*, 1 Wheat. 304, 328-30, 4 L. Ed. 97 (U. S. 1816).

6. U. S. CONST. Art. I, § 8, cl. 18.

7. "They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States." *American Insurance Co. v. Canter*, 1 Pet. 511, 546, 7 L. Ed. 242 (U. S. 1828). See, in general, Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894 (1930).

8. Of course, all of the courts of the United States are constitutional courts in the sense that their ultimate authority is derived from the Constitution. As used in the text of this Note, the term "constitutional courts" indicates courts created under Article III.

9. *Hayburn's Case*, 2 Dall. 409, 1 L. Ed. 436 (U. S. 1792); see *Muskrat v. United*

This is true both because of the underlying postulate that the three branches of government shall be separate,<sup>10</sup> and because the express settlement of judicial power upon them is held to be exclusive.<sup>11</sup>

It is clear, then, from a sound theoretical standpoint, that the "constitutional" courts may not exercise administrative or quasi-legislative power. Hence, it has been held that a "constitutional" court may not rehear a determination of power rates by an administrative tribunal and take such action as that tribunal should have taken.<sup>12</sup>

The Supreme Court will not render advisory opinions,<sup>13</sup> or decisions which will be subject to review by another governmental branch,<sup>14</sup> because finality is indispensable to the judicial nature of an exercise of power. On the same principle, a constitutional court may not take an appeal from a decision of a "legislative" court over which Congress has reserved to itself a right of review.<sup>15</sup> Moot cases, or cases "made up" by statutory authority to determine rights which are not actually adverse or in issue, are not within the judicial power of the United States.<sup>16</sup>

In addition to providing for the vesting of "the judicial power of the United States," Article III specifies that classes of cases which it includes, of which the principal two are cases "arising under" the Constitution, laws, or treaties of the United States and controversies between citizens of different states.<sup>17</sup> Such an express particularization of the content of the judicial power seems upon its face to exclude types of jurisdiction not set out in the Article. On this ground it has been generally assumed that the constitutional courts are subject to a further limitation, *viz.*, to the particular types of cases and controversies enumerated in Article III.<sup>18</sup>

States, 219 U. S. 346, 356, 31 Sup. Ct. 250, 55 L. Ed. 246 (1911); *In re Pacific Ry. Commission*, 32 Fed. 241, 255 (N. D. Cal. 1887).

10. See note to *Hayburn's Case*, 2 Dall. 409, 410, 1 L. Ed. 436 (U. S. 1792).

11. See *Cohens v. Virginia*, 6 Wheat. 264, 405, 5 L. Ed. 257 (U. S. 1821).

12. *Federal Radio Comm'n v. General Electric Co.*, 281 U. S. 464, 50 Sup. Ct. 389, 74 L. Ed. 969 (1930); *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 43 Sup. Ct. 445, 67 L. Ed. 731 (1923).

13. See *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U. S. 103, 113-14, 68 Sup. Ct. 431, 92 L. Ed. 568 (1947); 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486 (Johnston ed. 1891); 10 WRITINGS OF GEORGE WASHINGTON 542-45 (Sparks ed. 1840).

14. See *Gordon v. United States*, 117 U. S. 697, 700, 76 L. Ed. 1347 (1885).

15. *Gordon v. United States*, *supra* note 14.

16. *Muskrat v. United States*, 219 U. S. 346, 31 Sup. Ct. 250, 55 L. Ed. 246 (1911).

17. "The judicial power shall extend to all cases, in Law or Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdictions;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizen of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U. S. CONST., Art. III § 2. See DOBIE, FEDERAL PROCEDURE § 18 (1928).

18. See *Williams v. United States*, 289 U. S. 553, 566, 53 Sup. Ct. 751, 77 L. Ed. 1372 (1932); *Federal Radio Comm'n v. General Electric Co.*, 281 U. S. 464, 469, 50

In *Hodgson v. Bowerbank*,<sup>19</sup> it was held that, although the Judiciary Act of 1789 was broad enough to embrace suits between aliens, the Court could not take jurisdiction, for the constitutional provision does not extend beyond suits between aliens and states or citizens of a state. And in *Osborn v. Bank*,<sup>20</sup> it seems to have been assumed by Chief Justice Marshall that if the broad grant of jurisdiction over suits involving the United States Bank could not be brought within the "arising under" jurisdiction of Article III it would be unconstitutional.

Support for this viewpoint may be drawn also from the rule that in petitions addressed to the original jurisdiction of the United States Supreme Court, the type of controversy must be one which fits into the general grant of jurisdiction in Article III and the enumeration in the second section of that Article of cases within the original jurisdiction of that Court.<sup>21</sup>

The federal "constitutional" courts are thus seen, in a series of progressive restrictions to be courts whose jurisdiction is sharply limited. Their jurisdiction is dependent upon statutory authorization; and their capacity to receive jurisdiction is limited to "cases and controversies" of the types enumerated in Article III.

#### THE BACKGROUND FOR THE TIDEWATER CASE

This logical structure is disparaged by the opinion of Mr. Justice Jackson in the *Tidewater* case; and the opinion of Mr. Justice Jackson is particularly important in view of the peculiar manner in which the case was decided.

The setting for the *Tidewater* decision was laid in a case decided over a century ago. The Judiciary Act of 1789 made no provision in terms for citizens of the District of Columbia to sue or be sued in the regular federal trial courts on the basis of diverse citizenship. However, suit was brought in a circuit court by citizens of the District against a citizen of Virginia, on the theory that, in the contemplation of the act, the District was a "state," and hence the suit was one between "citizens of different states." On certification, Chief Justice Marshall dismissed the suit, applying a more restricted meaning to the word "states" in the act, and stating that the matter was one for "legislative" cognizance.<sup>22</sup> Since constitutional amendment as well as statutory enactment is a legislative process, it is not clear whether Marshall meant that

Sup. Ct. 389, 74 L. Ed. 969 (1930); *Ex parte Bakelite Corp.*, 279 U. S. 438, 449, 49 Sup. Ct. 411, 73 L. Ed. 789 (1929). "But if Congress passes a statute presuming to authorize the federal courts to handle cases which are not within the terms of Article III the statute is unconstitutional." Forrester, *The Jurisdiction of the Federal Courts in Labor Disputes*, 13 LAW & CONTEMP. PROB. 114, 121 (1948).

19. 5 Cranch 303, 3 L. Ed. 108 (U. S. 1809).

20. 9 Wheat. 738, 6 L. Ed. 204 (U. S. 1824).

21. *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (U. S. 1803). The reasoning applied by Marshall to the second clause of Article III, section 2, should apply with equal strength to the first clause.

22. *Hepburn and Dundas v. Ellzey*, 2 Cranch 445, 2 L. Ed. 332 (U. S. 1805).

a statute extending to citizens of the District would be constitutional or not.

By the Act of 1940, a decision on the constitutional question was made inevitable. Congress had enacted a statute which clearly gave District of Columbia citizens entrée to the federal district courts based on diverse citizenship.<sup>23</sup> The act was quickly challenged.<sup>24</sup>

In the instant case, a District of Columbia corporation sued a Virginia corporation in the district court of Maryland. The district judge held the act unconstitutional and dismissed the complaint for want of jurisdiction. A divided court of appeals affirmed.<sup>25</sup>

#### A RESULT WITHOUT A THEORY

In a series of opinions remarkable for the deeply divergent views of the Court as to the proper basis for the decision, the court of appeals was reversed, and the constitutionality of the act upheld in its application to the case at bar. Mr. Justice Rutledge and Mr. Justice Murphy thought Article III should be construed so as to include the District of Columbia as a "state." Mr. Justice Jackson, Mr. Justice Black, and Mr. Justice Burton disagreed with this view, but thought the act supportable as a "necessary and proper" exercise of the Article I power of Congress to legislate for the District. Justices Rutledge and Murphy disagreed with their reasoning very forcibly. The remaining four justices dissented, feeling that the act could not be supported under Article III, and that no powers from outside Article III may be granted to the district courts.

Obviously, this is a decision without a supporting theory. Seven justices refused to follow Rutledge's reasoning; six could not acquiesce in Jackson's; yet the act was upheld. Frankfurter summarized the situation aptly: "And so, conflicting minorities in combination bring to pass a result—paradoxical as it may appear—which differing majorities of the Court find insupportable."<sup>26</sup>

#### THE JACKSON OPINION

Under this state of affairs, important legal consequences may flow from judicial selection, in the future, of the theory for which the case should be regarded as authority. The Rutledge opinion is closely restricted to the facts of the case; but the views expressed in the Jackson opinion are broad enough, if accepted, to produce a radical change in the traditional view of the capacity of federal "constitutional" courts to receive jurisdiction.

Jackson apparently would place no further limitation upon permissible

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23. See note 2 *supra*.

24. All but three of the lower federal courts passing on the act held it invalid. The cases are collected in 337 U. S. at 583-84 nn. 4 and 5.

25. *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 165 F. 2d 531 (4th Cir. 1947) (per Dobie, J., with Parker, J., dissenting).

26. 337 U. S. at 655.

grants of jurisdiction than the restriction to "cases and controversies." He rejects the limitation to the particular types of "cases and controversies" enumerated in Article III.<sup>27</sup> Perhaps Frankfurter and Vinson are right when they say, however, that these two limitations must stand or fall together, that if one is to be disregarded, the other might as well be also.<sup>28</sup> Rutledge, perhaps feeling the same way, delivered this sharp criticism:

"What is far worse and more important, the manner in which this reversal would be made, if adhered to by a majority of the Court, would entangle every district court of the United States for the first time in all of the contradictions, complexities, and subtleties which have surrounded the courts of the District of Columbia in the maze woven by the 'legislative court—constitutional court' controversy running through this Court's decisions concerning them."<sup>29</sup>

The possibility that acceptance of the Jackson theory would render the district courts "hybrid" courts on the order of the courts of the District of Columbia is clear. Such a result should be avoided unless it follows necessarily from the cases applying Article III.

In this connection the three principal arguments adduced by Mr. Justice Jackson to support his conclusions must be examined.

The first argument is presented in his words:

"It is too late to hold that judicial functions incidental to Art. I powers of Congress cannot be conferred on courts existing under Art. III for it has been done with this Court's approval. *O'Donoghue v. United States*, 289 U. S. 516, 53 S. Ct. 740, 77 L. Ed. 1356. In that case it was held that, although District of Columbia courts are Art. III courts, they can also exercise judicial power conferred by Congress pursuant to Art. I."<sup>30</sup>

If this argument were pressed to its logical conclusion, it would prove that district courts existing under Article III may exercise administrative and quasi-legislative powers, a result which Jackson himself is unwilling to accept.<sup>31</sup> This is itself a powerful objection to the argument.

The analogy is objectionable in other ways. The result of the *O'Donoghue* case is not to hold, necessarily, that the District of Columbia courts are constitutional courts in the sense that the district courts are constitutional courts. Actually, the Court held only that, in spite of the fact that District of Columbia

27. *Id.* at 590-91.

28. Thus Frankfurter says, "what justification is there for interpreting Article III as imposing one restriction in the exercise of those other powers of the Congress—the restriction to the exercise of 'judicial power'—yet not interpreting it as imposing the restrictions that are most explicit, namely, the particularization of the 'cases' to which 'the judicial power shall extend'?" 337 U. S. at 648. For Chief Justice Vinson's statement, see *id.* at 628.

29. *Id.* at 604-05.

30. *Id.* at 591-92.

31. 337 U. S. at 590-91. The court of the District may exercise quasi-legislative powers. *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 43 Sup. Ct. 445, 67 L. Ed. 731 (1923).

courts exercise Article I powers, their judges are entitled to fixed salaries and tenure during good behavior. It may be rationalized on the ground that since these courts are also empowered to receive Article III powers, they ought to have the benefit of those provisions of Article III designed to protect judicial independence. If the case is unsound upon this ground, it certainly ought not to be extended beyond its bare facts.<sup>32</sup>

The second argument is stated by Mr. Justice Jackson as follows:

"Congress is given power by Art. I to pay debts of the United States. That involves as an incident the payment of disputed claims. We have held unanimously that congressional authority under Art. I, not the Art. III jurisdiction over suits to which the United States is a party, is the sole source of power to establish the Court of Claims and of the judicial power which that court exercises. *Williams v. United States*, 289 U. S. 553, 53 S. Ct. 751, 77 L. Ed. 1372. In that decision we also noted that it is this same Art. I power that is conferred on district courts by the Tucker Act which authorizes them to hear and determine such claims in limited amounts. Since a legislative court such as the Court of Claims is 'incapable of receiving' Art. III judicial power, *American Insurance Co. v. Canter*, 1 Pet. 511, 546, 7 L. Ed. 242, it is clear that the power thus exercised by that court and concurrently by the district courts flows from Art. I, not Art. III. Indeed, more recently and again unanimously, this Court has said that by the Tucker Act the Congress has authorized the district courts to sit as a court of claims exercising the same but no more judicial power. *United States v. Sherwood*, 312 U. S. 584, 591, 61 S. Ct. 767, 771, 772, 85 L. Ed. 1058." <sup>33</sup>

There are cogent objections to this line of reasoning also. In the first place, it is a mistake to assume that, because two courts are exercising jurisdiction over the same subject matter, they must derive their jurisdiction from the same source. It proves too much. From such a premise, it could be argued that since federal courts have concurrent jurisdiction with state courts in cases involving citizens of different states, they derive it from the same source. As state courts would presumably be "incapable of receiving" the judicial power of the United States, it would follow that the district courts, in exercising diversity jurisdiction, derive their powers from the state constitutions!

Consequently, even though the Court of Claims was created under Article I, and the district courts exercise jurisdiction concurrently with it under the Tucker Act,<sup>34</sup> it does not follow that the district court is thus exercising Article I powers, particularly in view of the "federal question" jurisdiction.

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32. The *O'Donoghue* case proceeds upon the premise that Congress has a dual authority over the District of Columbia courts, arising out of both Article III and Article I. This is certainly no indication that it likewise has a dual authority to grant jurisdiction to the regular Article III courts. *O'Donoghue v. United States*, 289 U. S. 516, 545, 546, 53 Sup. Ct. 740, 77 L. Ed. 1356 (1932). See Note, *The Restrictive Effect of Article Three on the Organization of Federal Courts*, 34 COL. L. REV. 344, 353 (1934); Note, *The Distinction Between Legislative and Constitutional Courts*, 43 YALE L. J. 316, 322-23 (1933); Note, *Federal Courts—Legislative or Constitutional*, 28 ILL. L. REV. 569 (1933).

33. 337 U. S. at 592-94.

34. 28 U. S. C. § 1346 (1948).



of Article III.<sup>35</sup> The statement in the *Sherwood* case, mentioned in the quotation from Justice Jackson, to the effect that under the Tucker Act the district courts sit as courts of claims, is merely a way of saying that their jurisdiction extends only to cases which might have been brought in the Court of Claims. The context makes this clear.<sup>36</sup>

It is arguable, moreover, that the powers of the Court of Claims are as much administrative as judicial, and that *if* the same powers exactly were exercised by the district courts in Tucker Act cases, then the district courts would not be restricted to "cases and controversies." This is a result to which Mr. Justice Jackson does not subscribe. Could Congress command the district court to liquidate and give judgment against the United States for a certain claim, as it did the Court of Claims?<sup>37</sup>

In connection with the other two cases relied upon by Justice Jackson, the *O'Donoghue* and *Williams* cases, it should be pointed out that both contain statements that militate strongly against the conclusions drawn from them by Mr. Justice Jackson.<sup>38</sup>

Mr. Justice Jackson's third contention is that suits by trustees in bankruptcy under section 23(b) of the Bankruptcy Act<sup>39</sup> to recover assets of the estate from persons other than the bankrupt are frequently not within the "federal question"<sup>40</sup> jurisdiction of the district courts as that concept has been defined in the decisions, and therefore can be justified only as an implementation of the congressional power to legislate on the subject of bankruptcy—an Article I power.<sup>41</sup>

35. See 2 MOORE, FEDERAL PRACTICE 1633 (2d ed. 1948), in which the jurisdiction of district courts under the Tucker Act is stated to be "federal question" jurisdiction.

36. Just preceding the statement referred to by Mr. Justice Jackson, the Court said, "Congress prescribed that the jurisdiction thus conferred should be 'concurrent' with that of the Court of Claims." And immediately after it, the court referred to "the embarrassment which would attend the defense of suits brought against the Government if the jurisdiction of district courts were not deemed to be as restricted as is that of the Court of Claims." *United States v. Sherwood*, 312 U. S. 584, 590, 591, 61 Sup. Ct. 767, 85 L. Ed. 1058 (1941).

37. *Pope v. United States*, 323 U. S. 1, 65 Sup. Ct. 16, 89 L. Ed. 3 (1944) (by special statute Congress had required the Court of Claims to determine the amount petitioner claimed and to render judgment therefor; *held*, Congress could do so constitutionally).

38. In the *O'Donoghue* case, referring to the Article III jurisdiction of District of Columbia courts, the Court said, "the judicial power thus conferred is not and cannot be affected by the additional congressional legislation, enacted under Article I, § 8, cl. 17, imposing upon such courts other duties, which, because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere." 289 U. S. 516, 546, 53 Sup. Ct. 740, 77 L. Ed. 1356 (1932). And in the *Williams* case, the Court said, "the judicial power there granted and defined [in Article III] necessarily extended only to the trial of the classes of cases named in § 2. . . ." 289 U. S. 553, 566, 53 Sup. Ct. 751, 77 L. Ed. 1372 (1932) [adopting with approval the language of Judge Sanborn in *Levin v. United States*, 128 Fed. 826, 828-31 (8th Cir. 1904)] (italics added). This latter statement seems to refute completely the inference drawn by Mr. Justice Jackson from both cases, since they were companion cases, decided the same day.

39. 11 U. S. C. A. § 46 (1927).

40. "The judicial Power shall extend to all Cases. . . arising under this Constitution, the Laws of the United States, and Treaties. . ." U. S. CONST. Art. III, § 2.

41. Citing *Williams v. Austrian*, 331 U. S. 642, 67 Sup. Ct. 1443, 91 L. Ed. 1718 (1947); *Schumacher v. Beeler*, 293 U. S. 367, 55 Sup. Ct. 230, 79 L. Ed. 433 (1934).

The authority for this statement is the test laid down by Mr. Justice Cardozo in *Gully v. First National Bank*,<sup>42</sup> that in order to present a case within the jurisdiction of cases "arising under" the Constitution, laws or treaties of the United States, a plaintiff must show a substantial controversy as to the meaning of a provision of the Constitution, a law or a treaty of the United States upon the face of his complaint, unaided by the answer, an anticipatory answer, or a petition for removal.

However, the *Gully* case is very probably not in point on this question. It but expresses the result of the cases construing the Act of 1875,<sup>43</sup> by which for the first time "federal question" jurisdiction was given in a general grant to the district courts. Although the language of the grant is the same in the statute and in the Constitution, apparently the same meaning is not necessarily to be placed upon each.<sup>44</sup> Cases construing the statute have placed a narrow, even unrealistic interpretation upon it, possibly to avoid overcrowding the federal dockets.<sup>45</sup>

The situation is very different where, in a given case, Congress has conferred "specialty" jurisdiction on the courts, and the question is whether the "federal question" grant in the Constitution authorizes it.<sup>46</sup> The leading case on the constitutional grant construed it with tremendous breadth. In *Osborn v. Bank*,<sup>47</sup> it was held that a statute enabling any suit concerning a federal corporation to be brought in the federal courts was authorized by the "federal question" grant in Article III. The corporation having been created by federal law, any case involving it was a case "arising under" federal law. Even cases turning solely on questions of fact, with the relevant law admitted by the parties, fell within the comprehensive language of Marshall's opinion.<sup>48</sup>

Bankruptcy cases, as well as patent cases and other federal "specialty" cases, where jurisdiction has been conferred by a specific statute over certain classes of cases, may be categorized as "federal question" cases by analogy to the broad holding of the *Osborn* case.<sup>49</sup> When Congress has taken control of

42. 299 U. S. 109, 112-13, 57 Sup. Ct. 96, 81 L. Ed. 70 (1936).

43. 18 STAT. 470 (1875), now 28 U. S. C. § 1331 (1948).

44. Schulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L. J. 393, 405 n. 47 (1936).

45. Forrester, *The Nature of a "Federal Question,"* 16 TULANE L. REV. 362, 374-85 (1942); Chadbourn and Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 673 (1942); Forrester, *Federal Question Jurisdiction and Section 5*, 18 TULANE L. REV. 263, 280-86 (1943). If the statute were worded differently, a broader test of "federal question" jurisdiction might have evolved. See Note, *Proposed Revision of Federal Question Jurisdiction*, 40 ILL. L. REV. 387 (1945).

46. See *McGoon v. Northern Pacific Ry.*, 204 Fed. 998, 1000 (D. N. D. 1913), and see 2 MOORE, FEDERAL PRACTICE 1633 (2d ed. 1948).

47. 9 Wheat. 738, 6 L. Ed. 204 (U. S. 1824); followed in *Pacific R. R. Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319 (1884).

48. "It would, however, be difficult to conceive a case less likely to involve a construction of federal law . . ." *McGoon v. Northern Pacific Ry.*, 204 Fed. 998, 1000 (D. N. D. 1913).

49. Forrester, *The Nature of a "Federal Question,"* 16 TULANE L. REV. 362, 372-74 (1942). For a discussion of this line of reasoning with possible application to the broad jurisdiction of the federal courts in labor disputes under the Taft-Hartley Act, see For-

an entire subject of law, it is a logical conclusion that any case arising by virtue of its legislation on the subject is a case arising under federal law, even though in a particular case only a question of fact is presented. And if the exercise of bankruptcy jurisdiction can thus be fitted into Article III, it is not authority for the conclusion that the district courts may receive jurisdiction from Article I or other sources.

It is submitted with deference that the conclusions reached by Mr. Justice Jackson are not rendered at all necessary by the arguments he advanced. The reasoning of Mr. Justice Rutledge, although it involves overruling a line of decisions of lower courts following the ambiguous dictum of Marshall,<sup>50</sup> is more in harmony with the pattern of limitations placed upon the jurisdiction of the federal constitutional courts by prior decisions of the Supreme Court. The dissenting opinion of Mr. Justice Frankfurter presents the traditional view very ably and forcibly.

#### THE STATUS OF TERRITORIAL CITIZENS

The validity of the concomitant provision in the Act of 1940 for citizens of the territories<sup>51</sup> is not necessarily established by the *Tidewater* decision. It would follow from the broad theory of Mr. Justice Jackson; but it is not necessarily included in Mr. Justice Rutledge's re-interpretation of the word "states" to include the District of Columbia. If the territorial provision had been before the Court, the decision might well have been six to three against its validity.

In this light, the soundness of a recent court of appeals decision<sup>52</sup> upholding this provision on the authority of the *Tidewater* case may be subject to some question. To the difficulty just pointed out, the argument is addressed that Chief Justice Marshall once said that for diversity purposes the territories and the District occupy the same status.<sup>53</sup> Since he was denying jurisdiction, this reasoning appears perhaps specious.

#### CONCLUSION

Possible effects of the *Tidewater* decision upon the limitation of the jurisdiction of federal constitutional courts to "cases and controversies" of the types enumerated in Article III of the Constitution have been pointed out in this Note with some trepidation. It is felt that this is not the time, if there is

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rester, *The Jurisdiction of Federal Courts in Labor Disputes*, 13 LAW & CONTEMP. PROB. 114 (1948).

50. Construing his interpretation of the word "states" to apply to Article III as well as the Judiciary Act. See, e.g., *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825 (U. S. 1867); *Hooe v. Jamieson*, 166 U. S. 395, 397, 17 Sup. Ct. 596, 41 L. Ed. 1049 (1897).

51. See note 2 *supra*.

52. *Siegmund v. General Commodities Corp.*, 175 F. 2d 952 (9th Cir. 1949).

53. *Corporation of New Orleans v. Winter*, 1 Wheat. 91, 94, 4 L. Ed. 44 (U. S. 1816).

ever such a time, to throw out of balance in any way the fundamental structure of the federal judiciary.

The decision leaves unanswered, however, the questions that it raises. Are the district courts, after all, "hybrid" courts, their possible jurisdiction dependent upon the whim of Congress alone? What is the true basis of federal "specialty" jurisdiction, and the jurisdiction of claims against the United States under the Tucker Act and the Federal Tort Claims Act? Where is the line at present to be drawn between "constitutional" and "legislative" courts, or is there such a line?

Since a majority of the Court,—regrettably not the majority deciding the case,—would answer these questions as they have traditionally been answered, perhaps the happiest course would be to treat the decision as a sort of biological sport, the result of a quirk of the voting process of decision, and to hope that it is incapable of producing offspring after its kind.

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