

Sec. 2—Judicial Power and Jurisdiction

Cl. 1—Cases and Controversies

Many suits will present federal questions because a federal law creates the action.⁷⁷¹ Perhaps Justice Cardozo presented the most understandable line of definition, while cautioning that “[t]o define broadly and in the abstract ‘a case arising under the Constitution or laws of the United States’ has hazards [approaching futility].”⁷⁷² How and when a case arises ‘under the Constitution or laws of the United States’ has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff’s cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto. . . .⁷⁷³

It was long evident, though the courts were not very specific about it, that the federal question jurisdictional statute is and always was narrower than the constitutional “arising under” jurisdictional standard.⁷⁷⁴ Chief Justice Marshall in *Osborn* was interpreting the Article III language to its utmost extent, but the courts sometimes construed the statute equivalently, with doubtful results.⁷⁷⁵

Removal From State Court to Federal Court.—A limited right to “remove” certain cases from state courts to federal courts was granted to defendants in the Judiciary Act of 1789,⁷⁷⁶ and from then to 1872 Congress enacted several specific removal statutes, most of them prompted by instances of state resistance to the enforcement of federal laws through harassment of federal officers.⁷⁷⁷ The 1875 Act conferring general federal question jurisdiction on the federal

⁷⁷¹ *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). Compare *Albright v. Teas*, 106 U.S. 613 (1883), and *People of Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933), with *Feibelman v. Packard*, 109 U.S. 421 (1883), and *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22 (1913).

⁷⁷² *Gully v. First National Bank in Meridian*, 299 U.S. 109, 117 (1936).

⁷⁷³ 299 U.S. at 112–13. Compare *Wheeldin v. Wheeler*, 373 U.S. 647 (1963), with *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). See also *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

⁷⁷⁴ For an express acknowledgment, see *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 495 (1983). See also *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 n.51 (1959).

⁷⁷⁵ E.g., *Pacific R.R. Removal Cases*, 115 U.S. 1 (1885); see also *id.* at 24 (Chief Justice Waite dissenting).

⁷⁷⁶ § 12, 1 Stat. 79.

⁷⁷⁷ The first was the Act of February 4, 1815, § 8, 3 Stat. 198. The series of statutes is briefly reviewed in *Willingham v. Morgan*, 395 U.S. 402, 405–406 (1969), and in Hart & Wechsler (6th ed.), *supra* at 396–398. See 28 U.S.C. §§ 1442, 1442a.