

THE WORDS THAT MADE ORIGINAL JURISDICTION

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ABSTRACT

Akhil Amar's *The Words That Made Us*² invites us to consider the practice of constitutional discourse as a transatlantic conversation that began well before, and continued long after, shots were fired at Bunker Hill. This Essay honors Amar's conversational model by using it to evaluate evolving conceptions of the Supreme Court's original jurisdiction. Putting the Chief Justice Marshall of *Marbury* (1803) in conversation with the Marshall of *Cohens* (1821) and *Osborn* (1824), this Essay proposes to trace the development and current resting point of the Court's view of its original jurisdiction.

INTRODUCTION

For years now, the arrival of a new book or article by Akhil Amar has been a matter for academic celebration. Akhil's work, fresh and challenging, has introduced us to new and fruitful ways of thinking and arguing about the law. As a novice in the law of the federal courts, I cut my teeth on Akhil's early papers, *Sovereignty and Federalism*, *Two Tiers*, and *Section 13*.³ These works suggested that, with patience, one might try to enter the

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2. AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760-1840* (2021).

3. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985); Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989) [hereinafter, Amar, *Section 13*].

world of the people who drafted and ratified our eighteenth-century charter, and say something both arresting and true about what they had in mind. Akhil has encouraged students and scholars alike to learn constitutional history, to understand the way our past has shaped the present, and to see with clearer eyes both the genius and the human fallibility of the founding generation.

Lately, folks in the federal courts field have had to share Akhil with a broader audience. His books advance the scholarly debate over constitutional interpretation and speak to issues of constitutional meaning urgently relevant to all the many groups that make up our fractured polity. In *The Words That Made Us*, a kind of popular constitutional history that nicely complements his vision of popular sovereignty, Akhil chronicles the American conversation about how to balance effective governance with individual liberty, how to blend nationalism with localism. In offering a sweeping vision of the constitutional project of the eighteenth century, Akhil shows once more just how much one scholar can accomplish. The words of the Constitution, in Akhil's telling, both drew their inspiration from and gave life to the new nation and continue to inspire our ongoing conversation about what sort of polity we hope to become. Akhil also lets us see that the practice of constitutional discourse—or conversation—was one in which Americans were steeped before they came to think of themselves as American (pp. 114–19). Conversation as a model for constitutional development nicely coheres with a conception of law as a rhetorical or discursive enterprise.

With my customary tendency, following John Adams, to go straight for the capillary (p. 407), this contribution to a discussion of *The Words* will focus on the Supreme Court's original jurisdiction, as set forth in Article III of the Constitution, and implemented in section 13 of the Judiciary Act of 1789.⁴ Original jurisdiction has attracted Akhil's attention,⁵ helping to frame his analysis of *Marbury v. Madison* and the interpretive choices available to Chief Justice John Marshall as he maneuvered to create an independent federal judiciary.⁶ Akhil captured the geographic logic of the Court's limited original jurisdiction, a logic informed by a recognition that litigation at the nation's center,

4. See Judiciary Act of 1789, ch. 20, 1 Stat. 73, § 13 (1789) [hereinafter JA89].

5. See Amar, *Section 13*, *supra* note 3.

6. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

before distant and unknown jurors, was an unwelcome prospect to those in the hinterlands.⁷

In this brief encounter with Akhil’s work, I return to the debate over original jurisdiction, using Akhil’s conversational model of constitutional discourse. This Essay will focus on the way law was understood to unfold within the framework of prior decisions. On this view, the way the Judiciary Act of 1789 imagined original jurisdiction imposed important limits on the potential scope of Article III. Further limits were imposed by the conception of original and appellate jurisdiction as mutually exclusive that emerged in the *Marbury* decision. Later, when confronting the implications of mutual exclusivity, Marshall seemed to shilly-shally—rejecting the idea in 1821, but returning to it a few years later. After sketching these landmarks in what one might describe as the path-dependent development of original jurisdiction law, the Essay reflects on the role of originalist discourse in a conversational model of constitutionalism.

I. WHAT THE WORDS SAY

Article III extends the judicial power to “cases” defined by their subject matter as those arising under the Constitution, laws, and treaties of the United States, to cases of admiralty and maritime jurisdiction, and to cases affecting ambassadors. Next Article III extends judicial power to certain “controversies” between identified parties).⁸ Then it confers jurisdiction, providing that

In all cases affecting ambassadors, other public ministers and consuls and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction [subject to exceptions and regulations].⁹

7. See pp. 495–497; Amar, *Section 13*, *supra* note 3, at 469–76. But did that logic foreclose mandamus to federal officials working in the nation’s capital? For an assessment, see James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1560–88 (2001) [hereinafter Pfander, *Original*] (exploring the coexistence of mandamus at the center and the values that animated a geographically restricted original jurisdiction).

8. See U.S. CONST. art. III, § 2, cl. 1. On the many distinctions between cases and controversies, see JAMES E. PFANDER, *CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS* (2021).

9. U.S. CONST. art. III, § 2, cl. 2.

Today, we see the words through the lens furnished by *Marbury*, with its emphasis on the mutually exclusive character of the two forms of original and appellate jurisdiction assigned to the Court. After setting out an alternative account of the words, we can better see how Marshall Court decisions indelibly shape our understanding of the Court's modern docket, with its narrow original power over state-state disputes and its broad appellate jurisdiction.

A. ORIGINAL JURISDICTION ABSENT LOWER FEDERAL COURTS

In the early 1790s, original matters dominated the Court's docket (including upwards of a dozen suits against states that the Eleventh Amendment later curtailed).¹⁰ We can scarcely imagine such a docket today and even less what that docket would have come to resemble had Congress chosen (under the Madisonian compromise) to rely on state courts as courts of first instance, instead of creating lower federal courts, as it did in 1789.¹¹ In such a state-court world, the Article III grant of original jurisdiction would have secured an original supreme federal docket for a narrow range of matters and left everything else to state courts in the first instance. One can understand the original and appellate jurisdiction grants in Article III as default rules, designed for a world without lower federal courts.¹²

Two factors help to explain the contours of original jurisdiction in such a (counterfactual) world. First, original jurisdiction would address perceived concerns with the fairness and competence of the state courts. While some states (New York, Pennsylvania, Virginia) had opened their courts to suits against the state,¹³ Article III proceeds on the (entirely

10. For a summary of state-party matters on the Court's docket, see 5 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: SUITS AGAINST STATES* 7–126 (Maeva Marcus ed., 1994) (cataloging the cases brought on the Court's original docket in the 1790s).

11. The Madisonian compromise refers to the framers' decision to authorize, but not require, Congress to constitute federal courts inferior to the Supreme Court. See JAMES E. PFANDER, *PRINCIPLES OF FEDERAL JURISDICTION* (4th ed. 2021). On the interpretation of original jurisdiction as a default rule, see Pfander, *Original*, *supra* note 7, at 1551 (quoting Edmund Pendleton at the Virginia ratification debates).

12. See James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555 (1994) [hereinafter, Pfander, *Rethinking*].

13. See James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L.

understandable) assumption that state courts would not provide a reliable docket for the enforcement of claims against the states and their treasuries. Similarly, the Framers distrusted state court handling of matters affecting foreign ministers, worrying with some cause that states might not well attend to customary norms of ambassadorial immunity. By placing such matters in the only required federal court, Article III warded off potential state-court reluctance to recognize the ministerial immunities of foreign envoys.

Balancing concerns with state-court competence, which might have encouraged a broad grant of original jurisdiction, were worries about the geographic convenience of the Supreme Court. As Akhil has shown, the Court's original docket threatened distant and expensive litigation before juries drawn from the people living in the nation's capital.¹⁴ Article III accordingly limits original jurisdiction to matters involving those who were represented at the center: states and foreign ministers. Geography provides a compelling argument for restricting the Court's original jurisdiction to the scope specified in Article III, and helps to explain why the 1787 Philadelphia convention rejected a proposal for original jurisdiction over claims involving the United States as party.¹⁵

If geography explains why original jurisdiction was seen as limited to the matters specified, it does not explain the scope of the jurisdiction conferred as to those matters. Article III's grant of original jurisdiction certainly supports *Chisholm's* conclusion as to the suability of the states. But did state suability extend only to claims based on party alignment, or was it also available in individual suits against the states based on federal law? Article III extends the Court's original jurisdiction to "those [cases] in which a state shall be party"—language broad enough to encompass suits based on party alignment (controversies) and those brought to enforce rights conferred in the Constitution, laws, treaties and admiralty (cases).¹⁶ Edmund Randolph, the leader of the Virginia delegation to Philadelphia, the nation's first Attorney General,

Rev. 899, 939–42 (1997) (describing the Virginia, New York, and Pennsylvania statutes).

14. See Amar, *Section 13*, *supra* note 3, at 469–76.

15. See Pfander, *Original*, *supra* note 7, at 1549–60. Such a grant of original jurisdiction could have authorized, say, suits brought by the United States at the nation's center to collect taxes from citizens living very far away.

16. See Pfander, *Rethinking*, *supra* note 12, at 558, 562, 598–99.

and the counsel to the plaintiff in *Chisholm*, viewed original jurisdiction as encompassing suits to enforce federal law norms against the states as such. Randolph's report to Congress in 1792 proposed legislation to confer jurisdiction over federal-question claims against the states, a road not taken by the founding generation.¹⁷

B. NARROWING THE POTENTIAL SCOPE OF ORIGINAL JURISDICTION

Two developments helped narrow the Court's original jurisdiction to controversies based on party alignment. For starters, the Judiciary Act of 1789 established lower federal courts and in section 13 conferred original jurisdiction on the Court in controversies of a civil nature involving the states as parties.¹⁸ That grant brought to the Court a collection of suits, based on common law theories of property and assumpsit, that necessitated the formulation of general principles, rather than the application of federal law, and invited the Court to impose a form of retrospective hard-currency liability on the states, which would trigger the adoption of the Eleventh Amendment.¹⁹ In addition, *Marbury* announced a conception of original and appellate jurisdiction as mutually exclusive, to justify a refusal to issue an original writ of mandamus, thereby setting the stage for later Marshall Court decisions narrowing the scope of the original docket.²⁰

Akhil's work engages with the *Marbury* literature, enabling us to see Marshall's machinations in greater detail.²¹ Among other questions, the literature has criticized Marshall for treating original and appellate jurisdiction in Article III as mutually

17. See Pfander, *Rethinking*, *supra* note 12, at 636–40 (recounting Randolph's argument as counsel to *Chisholm* as to the necessity of original jurisdiction to enforce constitutional limits on the states and noting his support for original jurisdiction over federal law cases in his report to Congress in 1792).

18. See JA89, *supra* note 4, at §§ 1–13.

19. On the Eleventh Amendment's adoption, see James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998).

20. See *Marbury*, 5 U.S. at 173–75.

21. See Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 389 & n.60 (1982) (describing Marshall's interpretation of section 13 as "intellectually dishonest"); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 15–16; Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 366.

exclusive; for reaching and deciding a constitutional issue that he could have avoided through adroit statutory interpretation; for upholding the propriety of mandamus to ensure executive branch compliance with the rule of law, only to invalidate the statute that would have enabled the Court to play that role; and for contriving a conflict between statute and constitution that enabled the Court to proclaim the doctrine of judicial review.²² The opinion poses many questions, including how if at all Marshall proposed to reclaim the mandamus power for the use of the federal judiciary.²³

C. THE MOVE TO CONCURRENCY

Marbury's logic can seem hard to square with decisions that authorize the Court to hear matters on appeal that seemingly fall into the Court's exclusive grant of original jurisdiction. Yet, the Supreme Court has long taken the position that Congress can make its original jurisdiction exclusive or concurrent, empowering lower federal courts to exercise concurrent jurisdiction over matters that Article III presumptively assigns to the Court's original docket.²⁴ In effect, then, Congress can narrow the scope

22. For a summary of these criticisms, see Pfander, *Original*, *supra* note 7, at 1515–18.

23. How Marshall meant to reclaim the mandamus power has long puzzled *Marbury* scholars. See Karen Orren & Christopher Walker, *Cold Case File: Indictable Acts and Officer Accountability in Marbury v. Madison*, 107(02) AM. POL. SCI. REV. 241, 248 (2013) (identifying federal circuits, and the state court of Maryland, as possible venues for post-*Marbury* mandamus litigation). Within fifteen years, the Court had ruled out both the state courts and the lower federal courts. See *McIntire v. Wood*, 11 U.S. (7 Cranch) 504, 506 (1813) (circuit court may not exercise federal question jurisdiction to issue mandamus to a federal officer); *McClung v. Silliman*, 15 U.S. (2 Wheat.) 369, 369–70 (1817) (denying, without opinion, a motion in the Supreme Court to issue mandamus to a federal officer on appeal from a state court decision refusing to grant such a writ); *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 603 (1821) (refusing to permit circuit court to issue mandamus, even in a case properly before that court in the exercise of its diversity jurisdiction). Eventually, the Court found that the D.C. Circuit had power to issue mandamus to federal officers. See *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838).

Marshall may have foreseen this D.C. Circuit resolution. Two years before *Marbury*, in *United States v. Bank of Alexandria*, 24 F. Cas. 982 (C.C.D.C. 1801) (No. 14514), Charles Lee (*Marbury's* lawyer) sought mandamus to compel the bank to subscribe new shares of stock to applicants in accordance with applicable law. No one doubted that the D.C. Circuit had the mandamus power as to bodies corporate within the District; the case was decided on the basis that remedies at law were adequate. See *id.* at 984. Only a few months later, a peremptory mandamus issued from the same D.C. Circuit Court, directing an officer of the orphans' court in Alexandria to deliver the courts' records into the hands of the new register. See *United States v. Deneale*, 25 F. Cas. 817 (C.C.D.C. 1801) (No. 14946) (awarding peremptory mandamus). John Marshall's brother James was a judge on the circuit court, having been appointed to the bench as one of the midnight judges of 1801.

24. See, e.g., *Bors v. Preston*, 111 U.S. 252 (1884); *United States v. Ravrra*, 2 U.S. (2

of the Court's original jurisdiction by assigning original matters to other tribunals for first instance adjudication, but it cannot expand the Court's original jurisdiction.

Marshall established this framework of concurrency in two great jurisdictional opinions from the 1820s, *Cohens v. Virginia* and *Osborn v. Bank of the United States*,²⁵ opinions that Akhil rightly champions as central to the Article III canon (pp. 581–82). *Cohens* holds that the Court's appellate jurisdiction under Section 25 extends to criminal proceedings in the state courts, where the defendant sets up a federal defense to the prosecution. *Osborn* holds that the federal trial court rightly enjoined Ohio state officials from collecting a confiscatory and unconstitutional state tax.²⁶ Both decisions drew upon the distinction between cases and controversies that continues to inform jurisdictional analysis today.

When taking up the interplay between the Court's original and appellate jurisdiction, however, Marshall made statements that students of Article III have found confusingly inconsistent. First consider *Cohens*, in which Virginia argued that the matter on appeal included the state as a party and thus (under the reasoning of *Marbury*) belonged exclusively to the Court's original jurisdiction.²⁷ Not so, said Marshall.²⁸ The same matter might be both a case and a controversy under Article III, and the fact that a state appears as a party, making it a possible controversy, does not preclude its also being a case. The assertion of a federal defense to the state prosecution made this a "case," after all, and it was a proper matter for the Supreme Court on appeal.

But how to square that conception of concurrency with what Marshall said three years later in *Osborn*, rejecting Ohio's argument that federal question cases were meant to originate in state courts?

In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in its appellate form. In every other case, the

Dall.) 297, 27 F. Cas 713 (C.C.D. Pa. 1793).

25. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

26. See *Cohens*, 19 U.S. at 430; *Osborn*, 22 U.S. at 821.

27. See *Cohens*, 19 U.S. at 368, 392.

28. See *id.* at 392–400.

power is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct. With the exception of these cases, in which original jurisdiction is given to this Court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior Courts is excluded by the Constitution.²⁹

Here, in offering an expansive view of lower federal court authority, Marshall seemingly returns to the idea of mutual exclusivity underlying *Marbury*, and shuts off appellate (and lower federal court) jurisdiction over all matters that belong to the Court's original docket.

Marshall describes the original docket here as comprising "cases," thus suggesting that he may have federal questions in mind. But *Cohens* already established that federal question cases with state parties were concurrent and could come to the Court either as original matters or on appeal (assuming they originated elsewhere). So, he must be saying in *Osborn* that some state-party controversies—those that depend entirely on party alignment—remain exclusively for the Court's original docket, and cannot be assigned to its appellate docket. That conclusion may have been informed to a degree by the Judiciary Act, which conferred exclusive jurisdiction on the Supreme Court in disputes between states and between states and foreign nations, but left an array of other state-party and foreign envoy matters to the lower courts.³⁰ Of course, if a lower court (state or federal) mistakenly heard a matter in the Court's exclusive original jurisdiction, the Court's appellate jurisdiction in federal question cases was available to correct the mistaken interpretation that led the lower court astray. That would be "case" jurisdiction, not "controversy" jurisdiction, one supposes. And it would reflect the exercise of the same kind of concurrency that Marshall supported in *Cohens*.

This understanding of what Marshall had in mind fits tolerably well with the language in *Osborn*. When a matter, such as a state-party controversy, implicated the Court's original jurisdiction solely on the basis of the alignment of the parties and did not present any federal question, Marshall characterized the

29. See *Osborn*, 22 U.S. at 820–21.

30. See JA89, *supra* note 4, § 13 (conferring exclusive jurisdiction as to state-party matters, with important exceptions, and exclusive jurisdiction over suits brought against ambassadors and foreign ministers, but allowing suits by such parties and those involving consuls to originate in other courts).

matter as one that was original. But he did not bar lower courts from hearing those matters as an original matter. Rather, he simply ruled out the exercise of the “*judicial power of the United States* . . . in its appellate form.” That explains how the Court might exercise appellate jurisdiction over the federal question presented when a lower court wrongly entertains a state-party controversy within the Court’s own exclusive jurisdiction. What the Court cannot do (and has never done) is to assert appellate jurisdiction over a state court decision of a question of local or general law on the basis that the parties align in ways that satisfy Article III.³¹

Marshall indicated that different issues might arise from Article III’s grant of original jurisdiction over “cases” affecting ambassadors, other public ministers, and consuls. While the parties’ identity counts, use of the term “case” to describe the judicial power suggests that the framers had subject matter, rather than party alignment, jurisdiction in mind.³² Marshall noted the point in *Osborn*, explaining that as to suits brought against a foreign minister, the subject matter of the dispute “is in some degree, blended with the character of the party.”³³ Even where the suit proceeds against the minister’s employee, jurisdiction attaches by virtue of the fact that the ambassador’s immunity was implicated (“affected”) by suits against the employee as well.³⁴ Issues of immunity reveal that the jurisdictional grant necessarily implicated federal interests, as defined by the scope of immunity conferred by customary international law. Lower courts, both state and federal, could thus assert concurrent original jurisdiction over these matters, subject to appellate oversight. But if a vice consul were the subject of a debt action in state court and could not invoke any immunity from suit under applicable principles, the Court (on Marshall’s view) may have lacked appellate jurisdiction over the state judgment.³⁵

31. *Cf. Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874) (refusing to extend the Court’s supplemental appellate jurisdiction to encompass claims based entirely on state law).

32. *See Amar, Section 13, supra* note 3, at 478–88 (distinguishing between state-party controversies and ambassador cases in interpreting the original jurisdiction clause).

33. *See Osborn*, 22 U.S. at 854.

34. On the origins and content of ambassadorial immunity, see Robert J. Pushaw Jr., *Article III’s Case-Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 504 and n.280 (1994).

35. On the denial of jurisdiction, see *Mesa v. California*, 489 U.S. 121 (1989) (foreclosing removal by virtue of official party status except where the party raises a

The law seems to have settled there from an early day. In *United States v. Ravara*, the federal circuit court for Pennsylvania agreed to hear a criminal proceeding against a consul, rejecting the argument that the original jurisdiction of the Supreme Court in such matters was necessarily exclusive.³⁶ Much later, in *Bors v. Preston*, the Court confirmed the concurrent jurisdiction of lower federal courts over matters that might also originate before the Court.³⁷ Indeed, the Court seemingly approved the power of circuit courts to hear suits against consuls in diversity jurisdiction, viewing such litigation as permissible under Article III and under prevailing norms of ambassadorial immunity.³⁸ Such suits were also presumptively viable in state courts.

II. WHERE THE WORDS HAVE LED US

The cluster of Marshall Court opinions thus answers three questions about the relationship between the Court's original and appellate jurisdiction. First, Congress has authority to define the Court's original jurisdiction, making it either exclusive in the Supreme Court or concurrent with lower courts. Second, when Congress assigns a portion of the Court's original jurisdiction to a lower court, the Court can review that matter on appeal; the Court's appellate jurisdiction over cases arising under federal law encompasses appeals from lower courts to address federal questions that may have arisen in the course of such proceedings. But third, Congress cannot expand the Court's original jurisdiction; that much of *Marbury* remains alive.

These conclusions do not rule out the possibility that the scope of the Court's original jurisdiction was, as an original matter, broad enough to encompass suits against the states based on federal law (in addition to those based on party alignment). After all, on Marshall's view of concurrency, the possibility that such suits might proceed against the states in lower federal courts does not rule out original jurisdiction in the Supreme Court. But intervening developments have made such a possibility virtually impossible to see. Although by its terms, the Eleventh

federal defense).

36. See *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 27 F. Cas. 713 (C.C.D. Pa. 1793).

37. See *Bors v. Preston*, 111 U.S. 252 (1884).

38. See *id.* at 263 (vacating on the basis that the citizenship of the consul had not been adequately established in the record and thus implying that jurisdiction would be proper with more detailed allegations as to citizenship).

Amendment forecloses only suits against the states based on party alignment, the Court has read the provision to block federal law claims against the states as well.³⁹ Congress has never chosen to assign federal law claims against the states to the Court's original docket, leaving that feature of its original jurisdiction largely unexplored.⁴⁰

Marshall Court decisions subtly support such developments. The Court did not act in *Cohens* or *Osborn* to preserve and extend its original jurisdiction, but to protect its appellate jurisdiction and the power of Congress to assign federal question claims to lower federal courts. In doing so, *Osborn* portrays the Court's original jurisdiction as limited to state-party controversies defined in terms of party alignment. By narrowing the potentially exclusive scope of its original jurisdiction, the Court left its appellate jurisdiction more broadly intact as to matters of federal law, and warded off any implied limits on lower court power. That left the Court as the original referee of disputes between the states but assigned almost all federal questions to the Court's appellate jurisdiction.

CONCLUSION

Akhil explains constitutional development as a form of conversation that involves both public figures and the people themselves. Conversation on Akhil's telling has both constituted the nation and shaped what the Constitution of 1788 has come to mean. Akhil's discursive conception of constitutional development nicely accounts for our understanding of the Court's original jurisdiction. *Cohens* and *Osborn* both worked within the framework established by *Marbury* in seeking to make sense of the Court's original jurisdiction. Neither decision sought to recur to first principles or to uncover the original meaning of original jurisdiction. Rather, the Court set out to resolve the cases in a way that was true to its earlier decisions, to lines of future development, and to the larger structural commitments of the Constitution. In doing so, the Marshall Court may have buried the original meaning of Article III to achieve a federal judiciary

39. See *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

40. The Court once suggested that federal question claims against the states were proper matters for its original docket, but seemingly retracted the comment in subsequent litigation. See Pfander, *Rethinking*, *supra* note 12, at 574–76 (quoting *United States v. Texas*).

comprised of lower federal courts of first instance and a Supreme Court that performed its work primarily on appeal.

Coupled with the adoption of the Eleventh Amendment, and its handling by the modern Court, these developments obscure any possible federal-question conception of original jurisdiction in state-party cases. So, what role does originalism play in discursive constitutionalism? Akhil tells us that the text counts for a lot, but that other factors may legitimately inform the interpretive process.⁴¹ We can see those factors at work as the Court reshaped its original jurisdiction to meet the challenges of the moment. In molding constitutional law, Marshall was obliged to reckon with what the Court had done before as he charted a way forward. Originalism does not appear to have played a central role in, and perhaps would have disrupted, that ongoing process. Nor did originalist precepts govern the pre-revolutionary transatlantic debate over Great Britain's power to tax and regulate the colonies. In that setting, as in ours, a recurrence to first principles (had they been set down on parchment) may have stunted the constitutional dialog that Akhil has so powerfully described in *The Words that Made Us*.

41. Akhil Amar, *In Praise of Bobbitt*, 72 TEX. L. REV. 1703 (1994) (embracing Bobbitt's use of modalities of constitutional argument, including of course the central importance of the text).

