

# TWINS SEPARATED AT BIRTH: A COMPARATIVE HISTORY OF THE CIVIL AND CRIMINAL ARISING UNDER JURISDICTION OF THE FEDERAL COURTS AND SOME PROPOSALS FOR CHANGE

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## INTRODUCTION

Article III of the Constitution empowers the federal courts to hear cases arising under the Constitution, laws, and treaties of the United States.<sup>1</sup> The courts hear both civil and criminal cases under this authority, and the grant extends equally to both.<sup>2</sup> Consequently, one might expect the civil and criminal arising under jurisdiction to be very similar. Instead, the two branches developed very differently. It is as though twins were separated at birth and grew up apart, each in its own unique way. We have become used to the differences over time. No one questions them.<sup>3</sup>

This article compares the development of the two branches of the arising under jurisdiction and suggests some changes to make the criminal branch more like the civil.<sup>4</sup> Prior scholarly treatment of the arising under jurisdiction focuses almost entirely on the civil branch, and on the fascinating line of Supreme Court decisions interpreting Congress's grant of the general original and

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1. U.S. CONST. art. III, § 2, cl. 1.

2. *Tennessee v. Davis*, 100 U.S. 257, 264 (1879). As the Court stated, Article III: embraces alike civil and criminal cases arising under the Constitution and laws. Both are equally within the domain of the judicial powers of the United States, and there is nothing in the grant to justify an assertion that whatever power may be exerted over a civil case may not be exerted as fully over a criminal one.

*Id.* (citation omitted).

3. Leslie L. Anderson, *The Line Between Federal and State Court Jurisdiction*, 63 MICH. L. REV. 1203, 1204 (1965) (“[J]urisdictional distinctions based upon subject matter justify themselves only because we are historically used to some of them.”).

4. Article III also extends the judicial power to other specific matters of federal interest, such as admiralty and maritime cases and cases to which the United States is a party. U.S. CONST. art. III, § 2, cl. 1. This article is limited to the general arising under jurisdiction.

removal civil arising under jurisdiction in 1875.<sup>5</sup> This article presents a comprehensive historical review of both the civil and criminal arising under jurisdiction from the Constitutional Convention to the present. By comparing the two parts of the jurisdiction as they developed throughout our history, the article presents new perspectives on both branches.

Parts I through IV of this article present the historical review. Part I examines the original understandings of the arising under jurisdiction that developed at the Constitutional Convention, during the ratification debates, and in the Judiciary Act of 1789. Most law students know that the Judiciary Act did not grant the lower federal courts original civil arising under jurisdiction, thus leaving civil cases arising under federal law to the state courts. It is less well known that Congress did grant the lower federal courts virtually all of the original criminal arising under jurisdiction. The record contains almost no evidence as to why Congress made this dramatic differentiation. Part I offers some possible explanations.

Part II explores the implementation of the arising under jurisdiction from 1789 to the Civil War. During this period, most developments occurred on the criminal side. Because of gaps in federal criminal statutes, the courts began to exercise jurisdiction over common law crimes. One such case, *United States v. Smith*, interpreted Article III's original criminal arising under jurisdiction very broadly in 1797.<sup>6</sup> Although most commentators begin discussion of the constitutional scope of the arising under jurisdiction with the civil case of *Osborn v. Bank*,<sup>7</sup> *Smith*

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5. See, e.g., Donald L. Doernberg, *There's No Reason For It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597 (1987); Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717 (1986); Linda R. Hirshman, *Whose Law Is It, Anyway? A Reconsideration of Federal Question Jurisdiction Over Cases of Mixed State and Federal Law*, 60 IND. L.J. 17 (1984-85); James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639 (1942); Ray Forrester, *The Nature of a "Federal Question"*, 16 TUL. L. REV. 362 (1942).

6. *United States v. Smith*, 27 F. Cas. 1147 (C.C.D. Mass. 1792) (No. 16,323). [The reported date of 1792 is incorrect. The correct date for the *Smith* case is 1797. See JULIUS GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 630 n.82 (1971). Subsequent cites to this case will use the reported date.] See *infra* notes 110-16 and accompanying text.

7. See, e.g., Chadbourn & Levin, *supra* note 5, at 646; Forrester, *supra* note 5, at 366-72; Hirshman, *supra* note 5, at 22-24; Doernberg, *supra* note 5, at 607-11.

anticipates *Osborn* by twenty-seven years.<sup>8</sup> In these and other early cases,<sup>9</sup> the Supreme Court set the broad outlines of the constitutional arising under jurisdiction, making clear that it extends to both civil and criminal cases in the original, removal, and appellate modes. Also, throughout this period Congress routinely enacted legislation calling for the enforcement of federal criminal laws in state courts.

Part III describes the major expansions and contractions in the arising under jurisdiction during Reconstruction, a chaotic period marked by radical reform and retrenchment. During this time, Congress greatly expanded the arising under jurisdiction to secure the rights of blacks in the South. The Supreme Court, however, refused to accept some of the new jurisdictional grants,<sup>10</sup> and, in time, Congress itself withdrew some of the grants. Additionally, jurisdiction changed even by mistake. The Commissioners charged with codifying the federal statutes inserted a new provision making the original criminal arising under jurisdiction exclusively federal. The marginal note accompanying this provision misreads the applicable precedent and wrongly asserts that it is unconstitutional for the state courts to hear federal criminal cases. While there is no specific indication that the legislators agreed, Congress nonetheless enacted the provision. Finally, the Act of March 3, 1875,<sup>11</sup> limited the general removal jurisdiction to civil cases,<sup>12</sup> thus breaking sharply with Congress's past practice of making removal jurisdiction coextensive in civil and criminal cases.

Part IV analyzes important developments from Reconstruction to the present. While the Supreme Court struggled mightily

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8. Common law crimes became very controversial, and the Supreme Court withdrew jurisdiction over them in 1812, thus greatly restricting the scope of the original criminal arising under jurisdiction. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). The Court held that Congress did not grant jurisdiction over common law crimes in the Judiciary Act of 1789. By declining to make a constitutional ruling, the Court left undisturbed the broad interpretation of the original criminal arising under jurisdiction in *United States v. Smith*. See *infra* notes 117-34 and accompanying text.

9. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

10. The Court did, however, reaffirm the broad scope of the constitutional arising under jurisdiction. See *Davis*, 100 U.S. at 257; *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247 (1867). See *infra* notes 317-26 and accompanying text.

11. Act of March 3, 1875, ch. 137, 18 Stat. 470. This Act is best known for granting original civil arising under jurisdiction to the lower federal courts. *Id.* § 1, 18 Stat. at 470.

12. *Id.* § 2, 18 Stat. at 470-71.

throughout this period to define and limit the civil arising under jurisdiction granted by the Act of 1875, the Court did not struggle at all on the criminal side. Part IV explores this mystery. In addition, it explains how the most recent case in the civil line, *Merrell Dow Pharmaceuticals v. Thompson*,<sup>13</sup> makes the standards for original and removal civil cases more like the standards for criminal cases. Since Reconstruction, the Court also affirmed that Congress can require the state courts to enforce federal law, both civil and criminal. Finally, on the civil side, the Court developed the doctrines of pendent and ancillary jurisdiction.

After this historical review, part V of the article makes some concrete proposals for change. At present, the general original civil arising under jurisdiction is concurrent with the state courts. The general original criminal jurisdiction, by contrast, is exclusively federal. Additionally, in civil cases the federal courts routinely exercise supplemental jurisdiction over state claims that are related to federal claims. Federal courts do not, however, exercise supplemental jurisdiction over state criminal charges. Consequently, in most civil cases, litigants may bring related federal and state claims together in either federal or state court. In most criminal cases, however, prosecutors cannot bring related federal and state criminal charges together in either system. I propose changing these rules to make the original criminal jurisdiction more like the civil. I propose that Congress make jurisdiction over some federal crimes concurrent with the state courts. Congress might start with drug offenses, which presently are overwhelming the federal courts.<sup>14</sup> The state courts could help solve the crisis by hearing a portion of these cases. I also propose that Congress, or the federal courts themselves, authorize the exercise of supplemental jurisdiction over state criminal charges. If this change had been in effect in 1992, the acquittal of the police officers that beat Rodney King and the subsequent riots in Los Angeles that left at least forty-four people dead<sup>15</sup>

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13. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986).

14. See *infra* note 437 and accompanying text.

15. Louis Sahagun & Vicki Torres, *Jittery L.A. Sees Rays of Hope*, L.A. TIMES, May 3, 1992, at A1.

and caused over one billion dollars in damage<sup>16</sup> might not have occurred. Prosecutors could have filed federal criminal charges and appended the state charges. A federal jury would have been drawn from a much larger geographical area than the state jury that was drawn from the nearly all-white Ventura County,<sup>17</sup> thus making conviction much more likely.<sup>18</sup>

The changes I propose would aid prosecutors, but they might also help defendants. Prosecutors would have enormous flexibility in cases in which defendants violate both federal and state law. They could file federal charges, state charges, or some combination of the two. They either could prosecute the charges jointly or make a reasoned decision that one or the other would prosecute. Defendants might use the new rules to avoid successive prosecution in federal and state court. At present, the Double Jeopardy Clause of the Fifth Amendment does not prohibit federal and state prosecutions for the same misconduct.<sup>19</sup> The Supreme Court treats the states and the United States as separate sovereigns that may enforce their laws independently.<sup>20</sup> However, the Court probably would prohibit second prosecutions if the same federal or state charges were tried in one system and then brought again in the other.

Part V also proposes two changes in current double jeopardy law to enhance protection for defendants and to give prosecutors

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16. Seth Mydans, *Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES, Apr. 30, 1992, at A1; David Margolick, *Switching Case to White Suburb May Have Decided Outcome*, N.Y. TIMES, May 1, 1992, at A20; Richard W. Stevenson, *Riots Inflamed a Festering South Central Economy*, N.Y. TIMES, May 6, 1992, at A23.

17. Two percent of the residents of Ventura County are black, and only six of the 264 people in the jury pool were black. Robert Reinhold, *After Police-Beating Verdict, Another Trial for the Jurors*, N.Y. TIMES, May 9, 1992, at L1, L11. No black jurors were chosen for the state prosecution. Richard A. Serrano & Carlos V. Lozano, *Jury Picked for King Trial; No Blacks Chosen*, L.A. TIMES, Mar. 3, 1992, at A1.

18. For a detailed account of the federal and state criminal proceedings against the Los Angeles police officers who beat Rodney King, see Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 510-33 (1994).

19. The federal retrial of the police officers in the Rodney King case sparked an outpouring of opinion, both pro and con, on this aspect of double jeopardy. See, e.g., *Now, Federal Review of the King Case*, N.Y. TIMES, Aug. 7, 1992, at A26 (favoring a second trial in federal court); William Safire, *Against the Grain*, N.Y. TIMES, Mar. 1, 1993, at A15 (opposing the retrial); Charles S. Ralston, *2d King Case Trial No Double Jeopardy*, N.Y. TIMES, Mar. 15, 1993, at A18 (agreeing with Supreme Court precedent allowing successive trials); *It's Not Double Jeopardy in L.A.*, N.Y. TIMES, Apr. 8, 1993, at A20; Jeffrey A. Meyer, *Double Jeopardy in the King Case*, N.Y. TIMES, Apr. 19, 1993, at A18.

20. See *infra* notes 439-40 and accompanying text.

a strong incentive to bring all charges together in one proceeding. First, it proposes abandonment of the dual sovereignty rule, which allows successive federal and state prosecutions for the same misconduct, in all cases where federal and state charges could be brought together. Second, it proposes adoption of the broad transactional standards used in civil cases to define an "offense" for double jeopardy purposes. If these two changes were made, the rules of civil claim preclusion could apply with full force and would require prosecutors to bring all charges together in one proceeding.

## I. THE ORIGINAL UNDERSTANDINGS

### A. *The Constitutional Convention*

The Constitutional Convention convened in Philadelphia in May of 1787.<sup>21</sup> Delegates prepared and presented several plans for the new government. All plans called for the creation of a judiciary separate from the legislature and the executive. In addition, the delegates generally agreed that the federal judiciary should hear criminal and civil cases involving the national interest.

On May 29, Edmund Randolph presented the so-called Virginia plan.<sup>22</sup> This scheme proposed the creation of a national judiciary consisting of "one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature."<sup>23</sup> The subject matter jurisdiction of the new federal courts was to extend to

all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue;

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21. The Convention convened on May 14 and began work on May 25. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 1-2 (Max Farrand ed. 1966) [hereinafter RECORDS]. AS published by Farrand, the RECORDS, contain numerous citations and emendations. This quotation, and subsequent quotations from RECORDS, do not indicate emendations and omissions contained therein.

22. *Id.* at 20-22.

23. *Id.* at 21.

impeachments of any National officers, and questions which may involve the national peace and harmony.<sup>24</sup>

Randolph's language suggests that the federal courts should hear both criminal and civil cases. "[P]iracies & felonies" are criminal, and "questions which may involve the national peace" probably was meant to encompass criminal prosecutions.<sup>25</sup>

The Convention discussed the Virginia plan over the next two weeks. Critics did not challenge the proposed subject matter jurisdiction at this point. Instead, they argued that the new Constitution should not require the creation of lower federal courts, thus beginning a debate that was not finally resolved until passage of the Judiciary Act of 1789.<sup>26</sup> When the Convention passed a motion eliminating the lower federal courts,<sup>27</sup> James Wilson and James Madison countered with the famous compromise proposal "that the National Legislature be empowered to institute inferior tribunals."<sup>28</sup> This motion passed,<sup>29</sup> but the opponents of lower federal courts continued to

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24. *Id.* at 22.

25. The beginnings of diversity jurisdiction can be seen in the language empowering federal courts to hear "cases in which foreigners or citizens of other States applying to such jurisdictions may be interested . . ." *Id.* Charles Pinckney of South Carolina also presented a plan on May 29. *Id.* at 16, 23. The details of the Pinckney plan are disputed. See 3 *id.* at 595-609. The plan went through several drafts, and the original proposal apparently was misplaced. *Id.* at 595. As reconstructed by Max Farrand, the original proposal gave Congress the power to institute "a federal judicial Court" with the power to "try Officers of the U.S. for all Crimes &c in their Offices . . ." *Id.* at 608. The plan also proposed that the federal court would hear appeals from state courts in cases involving treaties or the law of nations, federal regulation of trade or revenue, or where the United States was a party. *Id.* Thus, Pinckney appears to have agreed with Randolph that federal judicial power should extend to criminal and civil cases involving the national interest.

26. The Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

27. John Rutledge of South Carolina made the motion on June 5, arguing that the state courts should hear all cases in the first instance. 1 RECORDS, *supra* note 21, at 124. He contended that appeal to the Supreme Court would secure national rights and uniformity of judgments, without encroaching unduly on the state courts. *Id.* Rutledge's motion passed five states to four, with two state delegations divided. *Id.* at 125.

28. *Id.* at 125.

29. *Id.* On June 12 and 13, the Convention amended the jurisdictional provisions of the Virginia plan. The amendments struck the references to "all piracies and felonies on the high seas" and "all captures from an enemy," *id.* at 211, 220, and added the following language: "That the jurisdiction of the national Judiciary shall extend to cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony. . . ." *Id.* at 223-24, 232.

The record does not reveal why these changes were made. Professor Clinton suggests that delegates opposing a strong federal judiciary may have decided to whittle away at the

press their case.<sup>30</sup> When the Convention considered the judiciary provisions on July 18, several delegates spoke against the

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jurisdiction of the federal courts following the Madisonian Compromise, and that Madison and others counterattacked by proposing a general rather than a specific statement of federal court jurisdiction. Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 764 (1984).

30. On June 15, William Patterson presented the so-called New Jersey plan as a substitute for the Virginia plan. 1 RECORDS, *supra* note 21, at 241-45. The judiciary paragraph established "a supreme Tribunal [of] Judges" but omitted any mention of lower federal courts. *Id.* at 244. The New Jersey plan plainly contemplated that the Supreme Court would hear both civil and criminal cases involving matters of national and international concern:

[T]he Judiciary so established shall have authority to hear & determine in the first instance on all impeachments of federal officers, & by way of appeal in the dernier resort in all cases touching the rights of Ambassadors, in all cases of captures from an enemy, in all cases of piracies & felonies on the high seas, in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any of the Acts for regulation of trade, or the collection of the federal Revenue . . . .

*Id.* at 244. On June 19, the Convention voted to reject Patterson's proposal and to continue discussion of the Virginia plan. *Id.* at 322, 328.

Delegates considered two other plans that apparently were not formally presented to the Convention. On June 18, in a speech to the Convention, Alexander Hamilton outlined his plan. *Id.* at 291-93. (The full plan is set forth in 3 *id.* at 617-30.) Hamilton's plan probably was influential with the Committee of Detail that drafted the Constitution, *see infra* note 35 and accompanying text, because Hamilton's phrasing is closer to the language of Article III than is the language of the other plans. The Hamilton plan extended original jurisdiction to the Supreme Court:

in all causes in which the United States shall be a party, in all controversies between the United States, and a particular State, or between two or more States, . . . in all cases affecting foreign Ministers, Consuls and Agents; and an appellate jurisdiction both as to law and fact in all cases which shall concern the Citizens of foreign nations, in all questions between the Citizens of different States, and in all others in which the fundamental rights of this Constitution are involved, subject to such exceptions as are herein contained and to such regulations as the Legislature shall provide.

3 *id.* at 626. Hamilton appears to have accepted the Madisonian compromise because the judiciary article does refer to "[t]he Judges of all Courts which may be constituted by the Legislature," and states that "nothing herein contained shall be construed to prevent the Legislature from abolishing such Courts themselves." *Id.*

Another plan for a national judiciary was found in the papers of George Mason of Virginia. This plan called for the creation of a Supreme Court, but lower federal courts were to have only admiralty jurisdiction. *See 2 id.* at 432-33.

Madisonian compromise,<sup>31</sup> but after some debate, the Convention reaffirmed it.<sup>32</sup>

As to subject matter jurisdiction, the Convention unanimously adopted a resolution offered by Madison "that the jurisdiction shall extend to all cases arising under the Natl. laws: And to such other questions as may involve the Natl. peace & harmony."<sup>33</sup> It thus appears that James Madison was responsible for the phrase "arising under" that has so bedeviled generations of judges, law professors, and lawyers.<sup>34</sup> He may have thought the phrase conveniently summarized the cases involving issues of national law that had been mentioned in the various constitutional plans.

On July 23, the Convention unanimously agreed to appoint a five member Committee of Detail "for the purpose of reporting a Constitution conformably to the Proceedings aforesaid."<sup>35</sup> Committee drafts of the judiciary provisions and amendments made during the Convention provide significant information about the framers' intentions. A draft written by Edmund Randolph and edited by John Rutledge gave the federal courts jurisdiction of "all cases, arising under laws passed by the general Legislature."<sup>36</sup> Thus, the arising under jurisdiction at this point

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31. When the resolution "[t]hat the national Legislature be empowered to appoint inferior Tribunals" was raised, Pierce Butler argued that lower federal courts were unnecessary and that the state courts "might do the business." *Id.* at 38. *See also id.* at 45. Luther Martin feared that lower federal courts would "create jealousies & oppositions in the State tribunals, with the jurisdiction of which they will interfere." *Id.* at 45-46. Edmund Randolph responded that the state courts could "not be trusted with the administration of the National Laws," and Nathaniel Gorham argued that "[i]nferior tribunals are essential to render the authority of the Natl. Legislature effectual. . . ." *Id.* at 46.

32. The resolution "[t]hat the national Legislature be empowered to appoint inferior Tribunals" passed unanimously with nine states in favor and none opposed. *Id.* at 38-39.

33. *Id.* at 46; *see also id.* at 39. The Convention also deleted the provision for federal court jurisdiction of "impeachments of national Officers . . ." *Id.* at 39.

34. Unfortunately, there is no recorded debate on the Madison resolution.

35. *Id.* at 85. The members of the Committee were chosen the following day. They were Oliver Ellsworth, Nathaniel Gorham, Edmund Randolph, John Rutledge, and James Wilson. *Id.* at 97. Unfortunately, no minutes or journal accounts of the proceedings of the Committee have been found. Clinton, *supra* note 29, at 772.

36. 2 RECORDS, *supra* note 21, at 146. This draft gives "the supreme tribunal" jurisdiction of the cases specifically mentioned. *Id.* at 146-47. Other provisions make clear that the authors also intended the lower courts to hear such cases. The draft empowered Congress to establish inferior tribunals, *id.* at 146, and to give them "[t]he whole or a part of the jurisdiction aforesaid according to the discretion of the legislature . . . as original tribunals." *Id.* at 147.

did not include cases arising under the Constitution or treaties of the United States. The draft also extended jurisdiction to other cases, "as the national legislature may assign, as involving the national peace and harmony."<sup>37</sup>

A draft written by James Wilson, also edited by Rutledge, elaborates on the Randolph-Rutledge draft.<sup>38</sup> Significantly, criminal cases are specifically mentioned, but in a backhanded manner. Instead of affirmatively granting jurisdiction over cases involving violation of federal criminal laws, the draft reads: "& in the States, where they shall be committed; The Trial of all Criml Offences [sic]—except in Cases of Impeachment—shall be by Jury."<sup>39</sup> Nonetheless, the authors must have assumed that the federal courts would hear criminal cases. They would hardly have designated the venue and guaranteed jury trials for cases the federal courts could not hear. Perhaps Wilson and Rutledge believed that the power to hear cases "arising under Laws passed by the Legislature of the United States"<sup>40</sup> was sufficient to grant criminal jurisdiction because the Legislature might pass both criminal and civil statutes.<sup>41</sup> This reading of the Wilson-Rutledge draft is consistent with the earlier plans and the discussions of the Convention.<sup>42</sup>

37. *Id.* at 147. Such cases included suits for "the collection of the revenue" and several types of diversity jurisdiction. *Id.* Jurisdiction was extended over disputes "between citizens of different states," "between a State & a Citizen or Citizens of another State," "between different states," and "in which subjects or citizens of other countries are concerned." *Id.* Jurisdiction over admiralty cases also was granted. *Id.*

38. This document is set forth in *id.* at 163-75. The judiciary provisions appear in *id.* at 172-73. The arising under jurisdiction still extended only to cases "arising under Laws passed by the Legislature of the United States," *id.* at 172, but jurisdiction was added for "[c]lasses affecting Ambassadors other public Ministers & Consuls," *id.*, and the alienage jurisdiction was defined more specifically than in the Randolph-Rutledge draft.

39. *Id.* at 173. The final version of this language in Article III reads:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. CONST. art. 3, § 2, cl. 3.

40. 2 RECORDS, *supra* note 21, at 172.

41. The Wilson-Rutledge draft gave the legislature the power to "declare the Law and Punishment" of several kinds of crimes, including "Piracies and Felonies committed on the high Seas . . . counterfeiting . . . [and] Offences against the Law of Nations; . . ." 2 RECORDS, *supra* note 21, at 168.

42. Wilfred J. Ritz argues: "There is no clear expression in the records of the federal convention of any intent to establish a national judicial system exercising a criminal jurisdiction." WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789*:

On August 6, the Committee of Detail presented a draft Constitution that contained the judiciary provisions of the Wilson-Rutledge draft.<sup>43</sup> On August 27, the Convention made some very important amendments. The delegates agreed to extend the judicial power to equitable as well as legal cases<sup>44</sup> and to controversies "to which the U— S— shall be a party."<sup>45</sup> In addition, a quick series of amendments<sup>46</sup> greatly expanded the arising under jurisdiction to read as follows: "The Judicial Power shall extend to all cases both in law and equity arising under this Constitution and the laws of the United States, and treaties made or which shall be made under their authority; . . ."<sup>47</sup> This new language empowered the Supreme Court and lower federal courts to hear cases either arising under the Constitution itself, or under treaties, as well as cases arising under federal statutes.

It is intriguing to ponder why the phrase "laws passed by the Legislature" was amended to read simply "laws." Perhaps Mr. Rutledge, who proposed the amendment, thought the reference to the legislature was unnecessary. It is at least plausible, however, that he meant to extend jurisdiction to cases arising under federal common law.<sup>48</sup> It plainly would take some time after the new

EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 106 (Wythe Holt & L.H. LaRue eds., 1990). Ritz believes that the Convention probably meant to give Congress the power to legislate only a few specific crimes, with actual prosecution to occur in the state courts. *Id.* Ritz's view seems too restrictive for several reasons. The judiciary provisions of the various constitutional plans made specific references to criminal cases and to cases involving the "national peace and harmony" in defining the subject matter jurisdiction of the federal courts. In addition, the final version of Article III refers to criminal cases. Finally, the first Congress gave the lower federal courts jurisdiction over federal criminal cases and subsequently enacted a crime bill. *See infra* notes 85, 103-06 and accompanying text. Since many members of the first Congress attended the Constitutional Convention, it is unlikely they would have passed these measures if they thought the Constitution did not allow the the lower federal courts to hear criminal cases.

43. 2 RECORDS, *supra* note 21, at 177, 186-87.

44. *Id.* at 428.

45. *Id.* at 430. Both the Pinckney and Hamilton plans proposed federal jurisdiction in such cases. *See supra* notes 25, 30.

46. The phrase "The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States" was amended first to add the words "this Constitution and the" before the word 'laws.'" *Id.* at 430. Next, "the words 'passed by the Legislature' were struck out," and following "U.S.," the words "and treaties made or which shall be made under their authority" were inserted. *Id.* at 431. Finally, "The jurisdiction of the supreme Court" was replaced with "the Judicial power." *Id.* The record contains little discussion of the amendments.

47. *Id.* at 576.

48. The federal courts exercised jurisdiction over federal common law crimes in the early years of the Republic. *See infra* notes 107-16 and accompanying text.

government was in place for the legislature to pass a significant body of laws. Moreover, given the relative paucity of legislation and the ascendancy of the common law during these times, Rutledge may have thought limiting jurisdiction to cases arising under federal statutes would seriously restrict the power of the federal courts.

The Convention amended the judiciary provisions several more times, but the changes were stylistic rather than substantive.<sup>49</sup> The Convention approved the draft Constitution on September 17 and sent it to the states for debate and ratification.<sup>50</sup>

### B. The Ratification Process

The ratification process began shortly after the end of the Constitutional Convention. Anti-union sentiment was very strong, and the vote was very close in many state conventions.<sup>51</sup> Unlike the Constitutional Convention, which proceeded in closed session,<sup>52</sup> the state ratification process was open and highly

49. A committee was appointed on September 8 to undertake a final stylistic edit of the draft Constitution. *Id.* at 547, 553. The members were Alexander Hamilton, William Johnson, Rufus King, James Madison, and Gouverneur Morris. *Id.*

50. *Id.* at 648-49, 665-66.

51. The vote in Massachusetts was 187 in favor and 168 opposed. 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *Commentaries on the Constitution, Public and Private*, Vol. 1, 21 February to 7 November 1787, xli (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter COMMENTARIES ON THE CONSTITUTION, VOL. 1]. In New Hampshire the vote was 57 to 47 in favor, and in Virginia 89 to 79 in favor. *Id.* at xlii. Proponents of the new Constitution engaged in much political maneuvering and arm-twisting to gain state approvals. See John J. Fox, *Massachusetts and the Creation of the Federal Union, 1775-1791*, in THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE FEDERAL CONSTITUTION 121-27 (Patrick T. Conley & John P. Kaminski eds., 1988) (recounting the political struggle for ratification in Massachusetts); Jere Daniell, *Ideology and Hardball: Ratification of the Federal Constitution in New Hampshire*, in THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE FEDERAL CONSTITUTION 189-98 (Patrick T. Conley & John P. Kaminski eds., 1988) (describing the New Hampshire process).

The Constitutional Convention had suggested to the Continental Congress that the new government be established after nine states ratified the Constitution. 2 RECORDS, *supra* note 21, at 665-66. New Hampshire became the ninth state to do so on June 21, 1788, and Virginia followed on June 25. COMMENTARIES ON THE CONSTITUTION, VOL. 1, *supra*, at xlii. In recalcitrant states, the ratification process continued after the new government began operation. The final approval came in Rhode Island on May 29, 1790. *Id.*

52. 1 RECORDS, *supra* note 21, at 17.

political.<sup>53</sup> Delegates and private citizens wrote a steady stream of pamphlets and newspaper articles arguing for and against ratification.<sup>54</sup> As in the Constitutional Convention, a myriad of topics were discussed, and the judiciary received relatively little attention.<sup>55</sup> Nonetheless, much was said that reveals the original understandings of the arising under jurisdiction, and of concurrent and exclusive jurisdiction as well.

Delegates to state conventions criticised the arising under jurisdiction on several grounds. They complained that it was vague and ambiguous, and thus potentially very broad.<sup>56</sup> They

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53. Clinton, *supra* note 29, at 797-99.

54. The editors of COMMENTARIES ON THE CONSTITUTION, *supra* note 51, have painstakingly assembled four volumes of such materials.

55. John P. Frank, *Historical Bases of the Federal Judicial System*, 23 IND. L.J. 236, 236 (1948) ("Discussion in the country during the period of ratification usually found livelier topics than courts or judges."). Some commentators have characterized the debates on Article III as very controversial. See, e.g., Wythe Holt, "To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421, 1467 ("The judiciary provisions clearly provoked an outpouring of controversy and antagonism."); PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 20 (3rd ed. 1988) [hereinafter HART & WECHSLER] ("The judiciary article, which had aroused only relatively minor disagreement in the Convention, became a storm center of controversy in the ratification debates."). It is true that some speakers and writers attacked Article III with much emotion. Nonetheless, a review of the many volumes of original source materials reveals that relatively few pages focus on the judiciary. Moreover, the record shows that other Article III issues were more controversial than the arising under jurisdiction. Frank, *supra*, at 236. The diversity and alienage jurisdiction were very controversial. See Holt, *supra*, at 1466-78. In addition, Article III's omission of the right to a jury trial in civil cases may have provoked more pages of complaint than any other issue concerning the judiciary.

56. Several delegates voiced this criticism in the Virginia convention. See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliot ed., 1836) 565 (Grayson), 521, 523 (Mason), 572 (Gov. Randolph) [hereinafter DEBATES]. This complaint was also raised in the North Carolina convention, 4 *id.* at 136 (Mr. Spencer), and in pamphlets, letters, and newspapers. 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *Commentaries on the Constitution, Public and Private*, Vol. 2, 8 November to 17 December 1787, 268-69 (John P. Kaminski & Gaspare J. Saladino eds., 1983) (pamphlet by "A Federal Republican" complaining that the powers of the federal courts are "exceedingly comprehensive") [hereinafter COMMENTARIES ON THE CONSTITUTION, VOL. 2]; 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *Commentaries on the Constitution, Public and Private*, Vol. 3, 18 December 1787 to 31 January 1788, 264-65 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (letter dated January 5, 1788 from Samuel Osgood to Samuel Adams commenting that the arising under jurisdiction makes "[t]he Extent of the Judicial Power . . . as indefinite & unlimited as Words can make it.") [hereinafter COMMENTARIES ON THE CONSTITUTION, VOL. 3]; *id.* at 513 (Eleventh essay by "Brutus" published in the New York Journal, January 31, 1788, noting the broad scope of the arising under jurisdiction).

also feared that it would cause serious interference with the state courts.<sup>57</sup> Some delegates thought that federal and state judges would bicker jealously, causing tension and inefficiency.<sup>58</sup> Inevitably, some suggested that the way to avoid these problems was to jettison lower federal courts and leave cases arising under federal law to the state courts, with possible Supreme Court review.<sup>59</sup>

Proponents of the new Constitution answered the objections to the arising under jurisdiction by minimizing its scope and by stressing the need for a national judiciary.<sup>60</sup> They also stressed

Governor Randolph in Virginia appeared to recognize just how troublesome the phrase "arising under" might become. His comments foreshadow Chief Justice Marshall's discussion of the scope of the jurisdiction in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) where Randolph said:

[Federal jurisdiction] is ambiguous in some parts, and unnecessarily extensive in others. It extends to all cases in law and equity arising under the Constitution. What are these cases of law and equity? Do they not involve all rights, from an inchoate right to a complete right, arising from this Constitution?

3 DEBATES, *supra*, at 572. In *Osborn*, Chief Justice Marshall defined the arising under jurisdiction very broadly. He asserted that a case by or against the Bank of the United States for simple breach of contract would arise under federal law because the issue of whether the Bank had a right to sue, or to enter into the contract, depended on the federal statute creating the Bank and defining its powers. He conceded that these issues might not come up in the case, but he asserted that they still formed "original ingredient[s] in every cause." *Osborn*, 22 U.S. at 824. In Randolph's terms, the federal issues in the breach of contract case might be seen as inchoate; that is, partial or imperfect, begun but not completed, as opposed to complete, or fully presented. John Marshall attended the Virginia convention and may have been present the day that Randolph made these remarks. Marshall spoke to the Convention on Friday, June 20, 1788, and Randolph made the above-quoted comments on Saturday, June 21. See 3 DEBATES, *supra*, at 551-62. The *Osborn* case is discussed *infra* at notes 164-73 and accompanying text.

57. See, e.g., 3 DEBATES, *supra* note 56, at 527 (Mason), 325 (Henry), 563 (Grayson). This criticism was echoed in the press. See COMMENTARIES ON THE CONSTITUTION, VOL. 1, *supra* note 51, at 415-16 (first essay by "Brutus" in the *New York Journal*, October 18, 1787), 333 ("Centinel I," an essay published in *The Independent Gazetteer* in Philadelphia on October 5, 1787); COMMENTARIES ON THE CONSTITUTION, VOL. 3, *supra* note 56, at 513, 515 (Eleventh essay by Brutus); COMMENTARIES ON THE CONSTITUTION, VOL. 2, *supra* note 56, at 268-69 (essay by "A Federal Republican").

58. See, e.g., 3 DEBATES, *supra* note 56, at 569-70 (Grayson); 4 *id.* at 136-37 (Spencer).

59. See, e.g., 4 *id.* at 155 (Spencer).

60. John Marshall pointed out that the arising under jurisdiction would be limited to cases involving matters that Congress could legislate about. 3 DEBATES, *supra* note 56, at 553. Madison wrote in a letter to George Washington, "The great mass of suits in every State lie between Citizen & Citizen, and relate to matters not of federal cognizance." COMMENTARIES ON THE CONSTITUTION, VOL. 1, *supra* note 51, at 408. Thus, in Madison's view, "the far greater number of causes—ninety-nine out of a hundred—will remain with the state judiciaries." 3 DEBATES, *supra* note 56, at 538; see also 4 *id.* at 163 (Maclaine). Madison also cited the political axiom that "the judicial power should correspond with the

that jurisdiction would be concurrent with the state courts in most cases.<sup>61</sup>

The Federalist Number 82, written by Alexander Hamilton, contains the most thorough discussion of concurrent and exclusive jurisdiction during the ratification process.<sup>62</sup> Hamilton noted that exclusive federal jurisdiction over the cases in Article III, Section Two, might be inferred from the mandatory language of Section One.<sup>63</sup> However, he thought this interpretation would "amount to an alienation of State power by implication," and thus be unwise.<sup>64</sup> Hamilton believed that Congress could give the federal courts exclusive jurisdiction over cases arising under federal statutes.<sup>65</sup> He also believed, however, that unless Congress did so explicitly, the state courts "will of course take cognizance of the causes to which those acts may give birth."<sup>66</sup>

Concurrent jurisdiction could extend to criminal as well as civil cases. In Virginia, James Madison reminded the delegates that although Congress was authorized by the Confederation to establish courts for trying piracies and felonies committed on the high seas, it had instead given the state courts jurisdiction over

legislative" in defending the arising under jurisdiction. 3 *id.* at 532. In North Carolina, Davie pointed out that the arising under jurisdiction provided the central means for enforcing federal law. 4 *id.* at 158.

61. See, e.g., 4 *id.* at 141 ("The opinion which I have always entertained is, that they will, in these cases, as well as in several others, have concurrent jurisdiction with the state courts, and not exclusive jurisdiction.") (Gov. Johnston); 3 *id.* at 553-54 (The state courts "have a concurrence of jurisdiction with the [lower] federal courts in those cases in which the latter have cognizance.") (Marshall); 4 *id.* at 163 ("There [are] a number of other instances, where, though jurisdiction is given to the federal courts, it is not taken away from the state courts.") (Maclaine).

It was generally believed that admiralty and maritime jurisdiction should be exclusively federal because of the need for uniformity of decisions in cases involving relations with foreign countries. See 3 *id.* at 532 (Madison); 571 (Randolph); 4 *id.* at 159 (Davie).

62. THE FEDERALIST, No. 82 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

63. *Id.* at 492. Hamilton made this inference from Section 1, stating: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress shall from time to time ordain and establish." *Id.* (emphasis added by Hamilton).

64. *Id.*

65. *Id.* at 493.

66. *Id.* The federal courts follow Hamilton's prescriptions to this day. See *infra* note 386 and accompanying text. As a necessary corollary, Hamilton argued that the Supreme Court must have appellate jurisdiction over state cases involving matters of national concern. Otherwise, "the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor." *Id.* at 494.

these cases.<sup>67</sup> He continued, "Now, sir, if there will be as much sympathy between Congress and the people as now, we may fairly conclude that the federal cognizance will be vested in the local tribunals."<sup>68</sup>

Ultimately, the proposed Constitution withstood the challenges in the state conventions. Many states proposed amendments to Article III to further limit federal court jurisdiction.<sup>69</sup> The proposed amendments, and the Madisonian compromise that left the structure and jurisdiction of the lower federal courts to the national legislature,<sup>70</sup> together ensured that the debate about the federal judiciary would continue with full force into the first session of the new Congress.

Nonetheless, by the time ratification was complete, some fundamental principles had been established concerning the federal judiciary and the extent of its power. The judicial power of the United States was limited to the cases set forth in Article III, and the arising under jurisdiction extended to both civil and criminal cases. Congress could create lower federal courts and give them jurisdiction over the cases in Article III, but Congress could also decline to create lower federal courts and leave almost all of the cases in Article III to the state courts in the first instance.<sup>71</sup> The jurisdiction of the lower federal courts generally was to be concurrent with the state courts unless Congress specifically made it exclusive.

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67. 3 DEBATES, *supra* note 56, at 536.

68. *Id.*

69. Some states proposed eliminating part of the diversity jurisdiction of the lower federal courts, *see, e.g.*, 3 *id.* at 660 (Virginia); 4 *id.* at 246 (North Carolina), or imposing a \$1500 amount in controversy requirement; *see, e.g.*, 1 *id.* at 323 (Massachusetts). Several states suggested limiting the jurisdiction of the lower federal courts to admiralty cases, *see, e.g.*, 4 *id.* at 246 (North Carolina); 3 *id.* at 660 (Virginia); 2 *id.* at 546 (Pennsylvania); 1 *id.* at 331 (New York). Some states wanted to limit the arising under jurisdiction of the Supreme Court to cases arising under federal treaties. *See, e.g.*, 4 *id.* at 246 (North Carolina); 3 *id.* at 660 (Virginia). Several Maryland delegates sought an express declaration that the state courts have concurrent jurisdiction in civil cases that could be heard in the lower federal courts. 2 *id.* at 550.

70. *See supra* notes 28-32 and accompanying text.

71. The clear exceptions were cases affecting ambassadors, other public ministers and consuls, and cases to which a State was a party. These cases were within the original jurisdiction of the Supreme Court. U.S. CONST. art. III, § 2, cl. 2.

### C. The Judiciary Act of 1789

The first Congress convened in the Spring of 1789.<sup>72</sup> As one of its first acts, the new Senate appointed a committee consisting of one senator from each state to draft a judiciary bill.<sup>73</sup> In due course, Congress passed "An Act to establish the Judicial Courts of the United States," known popularly as The Judiciary Act of 1789.<sup>74</sup> President Washington signed the Act into law on September 24, 1789.<sup>75</sup>

The Judiciary Act of 1789 sets forth a detailed blueprint for the structure, jurisdiction, and procedure of the federal courts.<sup>76</sup> Although the Act reveals *what* Congress did, the historical record contains little information about *why* Congress did it.<sup>77</sup> Nonetheless, by remembering the historical context and the debates during the Constitutional Convention and ratification, it is possible to make some inferences about Congress's motives. In some instances, however, those motives are a mystery, and will likely remain so.

Many of the Act's provisions reflect political compromise.<sup>78</sup> As in the earlier debates, some people favored creation of a fully

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72. Congress was supposed to convene on March 4, 1789, in New York City. RITZ, *supra* note 42, at 13. However, quorums were not present until April 1 in the House and April 6 in the Senate. 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791, HOUSE OF REPRESENTATIVES JOURNAL 7 (1977) [hereinafter HOUSE JOURNAL]; 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791, SENATE LEGISLATIVE JOURNAL 7 (1972) [hereinafter SENATE JOURNAL].

73. SENATE JOURNAL, *supra* note 72, at 11.

74. The Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

75. *Id.* at 93.

76. *Id.* at 73-93.

77. The Senate and House Journals are barebones documents that list actions taken in summary form. See, e.g., *supra* note 72. They contain no record of the debates. Senator William Maclay of Pennsylvania kept a diary during the three sessions of the first Congress. See Maclay, *The Diary of William Maclay and Other Notes on Senate Debates*, reprinted in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791 (Kenneth R. Bowling & Helen E. Veit eds., 1988). While the diary makes interesting reading, it is idiosyncratic and filled as much with observations about personalities as with summaries of the Senate debates. The other notes of the Senate debates are quite summary. The Senate Committee that drafted the judiciary bill kept no minutes.

78. Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation*, in ORIGINS OF THE FEDERAL JUDICIARY, ESSAYS ON THE JUDICIARY ACT OF 1789, 13-14 (Maeva Marcus ed., 1992); Holt, *supra* note 55, at 1479-80; RITZ, *supra* note 42, at 4-5, 22; Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 53-54, 67-68 (1923); Chadbourn & Levin, *supra* note 5, at 640-41.

elaborated system of federal courts invested with all of the subject matter jurisdiction permissible under Article III.<sup>79</sup> Congress compromised by creating lower federal courts and providing for an economical staffing of those courts and the Supreme Court,<sup>80</sup> while granting the federal courts only a portion of the arising under jurisdiction.<sup>81</sup>

The arising under jurisdiction may be exercised in three modes—original, removal, and appellate. A case arising under federal law may begin in a federal court, may be removed there from a state court, or may be heard by the Supreme Court on appeal from a state court. Congress gave the lower federal courts

79. Opponents continued to argue that the cases in Article III, both civil and criminal, could better be heard by the state courts in the first instance, with eventual Supreme Court review to ensure the uniformity of national law. Warren, *supra* note 78, at 62. For example, a letter from David Sewall, a Massachusetts judge, to Senator Caleb Strong, suggested that “[s]uits properly Cognizeable at Common Law” should be brought in the state courts, with review by the U.S. Supreme Court “in all causes of a federal kind to a certain amount.” Letter from David Sewall to Caleb Strong (Mar. 28, 1789) in Holt, *supra* note 55, at 1529-30. Interestingly, Sewall also suggested that cases involving violation of federal penal laws be brought in the state courts in the first instance:

And offences arising from Transgressions of Penal Statutes of Congress, might be cognizable in the S.J. of the State Courts, Which by the Supposition are to be Competently Supported by the Individual States and will always be attended with Grand and Petit Jurors of the best quality the State affords . . .

*Id.* at 1529.

80. Except for Massachusetts and Virginia (which had two districts) and Rhode Island and North Carolina (which had no district courts), a district court, made up of a single judge, would sit in each state. The Judiciary Act of 1789, §§ 2-3, 1 Stat. at 73-74. The country was divided into three circuits. Circuit panels would be staffed by two Supreme Court justices and the district judge of the state where the court was sitting. *Id.* § 4, 1 Stat. at 74-75. The Supreme Court was to consist of a Chief Justice and five associate justices. *Id.* § 1, 1 Stat. at 73.

81. The extent of Congress's power to control the jurisdiction of the lower federal courts has been debated throughout our history. The prevailing view has been that the power to create the lower courts includes the power to define and limit their subject matter jurisdiction. See *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-49 (1850). It is clear that the first Congress believed it had the power to give the lower federal courts much less jurisdiction than the Constitution allows. See *infra* notes 82-88 and accompanying text. For excellent recent treatments of this topic, compare Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985), and Clinton, *supra* note 29, with William R. Castro, *The First Congress's Understanding of its Authority over the Federal Courts' Jurisdiction*, 26 B.C. L. REV. 1101 (1985), and Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1981-82). See generally the sources cited in Clinton, *supra* note 29, at 742-44, n.3. See also, *Colloquy, Article III and the Judiciary Act of 1789*, in 138 U. PA. L. REV. 1499 (1990), featuring articles by Professors Akhil R. Amar, Daniel J. Meltzer, and Martin H. Redish that discuss Professor Amar's two-tier thesis.

a portion of the original arising under jurisdiction but none of the removal arising under jurisdiction.<sup>82</sup> In addition, it gave the Supreme Court only a portion of the appellate arising under jurisdiction.

Congress did not grant the lower federal courts original jurisdiction over civil cases arising under the Constitution, laws, or treaties of the United States. Litigants were to bring these cases in state court.<sup>83</sup> By contrast, Congress gave the lower federal courts virtually all of the original criminal arising under jurisdiction possible under Article III. Moreover, it made that jurisdiction exclusively federal, but with an important caveat. Congress gave the district courts exclusive jurisdiction of "all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts," where the punishment did not exceed a whipping of thirty stripes, a fine of one hundred dollars, or six months imprisonment.<sup>84</sup> It gave the circuit courts "exclusive cognizance of all crimes and offences cognizable under the authority of the United States" where greater punishments were possible, but with the following reservation: "except where this act otherwise provides, or the laws of the United States shall otherwise direct, . . ."<sup>85</sup> Thus, the first Congress specifically recognized its power to make federal crimes enforceable in state court.<sup>86</sup>

While Congress sharply differentiated between the civil and criminal original arising under jurisdiction of the lower federal courts, it made no such distinction in the Supreme Court's appellate arising under jurisdiction. Congress imposed significant limits on this jurisdiction, but applied them equally to civil and

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82. The 1789 Act granted removal jurisdiction in diversity cases. See *The Judiciary Act of 1789*, ch. 20, § 12, 1 Stat. at 79-80.

83. See *Zwickler v. Koota*, 389 U.S. 241, 245 (1967); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 430 (1866); HART & WECHSLER, *supra* note 55, at 960.

84. *The Judiciary Act of 1789*, ch.20, § 9, 1 Stat. at 76-77.

85. *Id.* § 11, 1 Stat. at 78-79.

86. Finally, the circuit courts were given concurrent jurisdiction with the district courts of crimes and offenses that could be heard in those courts. *Id.* at 78.

At least one contemporary commentator believes that the grant of original criminal arising under jurisdiction approaches constitutional limits. "[T]aking the whole together," he asserts, "a jurisdiction is given and distributed between these two tribunals which is co-extensive with that which the Constitution has bestowed on the judiciary branch of the government; . . ." PETER S. DUPONCEAU, *A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES* 49 (1824).

criminal cases.<sup>87</sup> Congress also limited the jurisdiction to review of the federal issue in an appeal.<sup>88</sup>

Although the Judiciary Act shows that Congress carefully balanced federal and state judicial power, the record contains almost no explanation of Congress's choices. Historical sources do not explain why Congress chose to treat the civil and criminal arising under jurisdiction so differently in the original mode while making no distinction between them in the appellate mode. Why didn't Congress allow both civil and criminal cases arising under federal law to be brought originally in federal court, or direct both to state court?<sup>89</sup> If they were going to split up the arising under jurisdiction, why not give the civil cases to the federal courts and the criminal cases to the state courts? And once having given the criminal arising under jurisdiction to the lower federal courts, why make it exclusively federal?

These questions cannot be answered with certainty. We do know that many proponents of a strong federal judiciary distrusted the state courts.<sup>90</sup> As Professor Wythe Holt has painstakingly demonstrated, during the revolutionary and post-revolutionary period, state courts often refused to enforce claims of creditors from other states or from England.<sup>91</sup> Congress

87. Section 25 of the Act gave the Supreme Court authority to review a final judgment of "the highest court of law or equity of a State in which a decision in the suit could be had" in three categories of cases: (1) where the validity of a federal statute or treaty was drawn into question, and the decision was against its validity; (2) where the validity of a state statute was drawn into question on the ground that it violated the Constitution, treaties, or laws of the United States, and the decision upheld the state statute; and (3) where the case involved the construction of federal law, and the decision was "against the title, right, [or] privilege . . . claimed by either party . . ." The Judiciary Act of 1789, ch. 20, § 25, 1 Stat. at 85-86. By clear implication, Congress withheld jurisdiction in the converse situations, namely when a state court upheld the validity of federal law, invalidated a state statute as violating federal law, or construed federal law in favor of the interpretation given by either party. In the third instance, if the state court decision construed federal law in favor of the interpretation given by one party, it would often be construing it against the interpretation given by the other, and thus the Supreme Court presumably could hear the case.

88. The restricting language read: "But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, [or] statutes . . ." *Id.* § 25, 1 Stat. at 86-87.

89. Opponents of the lower federal courts consistently argued that *all* cases arising under federal law, civil and criminal, should be brought in state courts. See *supra* notes 27, 31, 59, 79 and accompanying text. They did not argue that one or the other was *more* appropriately heard in state court.

90. See Marcus & Wexler, *supra* note 78, at 20-21.

91. See Holt, *supra* note 55, at 1425-58.

conferred the alienage and diversity jurisdiction primarily to provide a federal forum where these claims could be brought.<sup>92</sup> At a time when there was very little federal law for cases to arise under, the federalists may have given the state courts jurisdiction of civil arising under cases in exchange for federal diversity jurisdiction.<sup>93</sup> As to criminal cases, proponents of a strong national government may have felt that it was dangerous to leave enforcement of federal criminal law to hostile state courts. As Oliver Ellsworth, a chief architect of the Act, stated: “[I]f the State Courts, as such, could take cognizance of . . . offences [against the United States], it might not be safe for the General Government to put the trial and punishment of them entirely out of its own hands.”<sup>94</sup> This concern does not fully explain, however, why the criminal arising under jurisdiction should be exclusively federal. The exclusivity is even more puzzling when considered in light of the many statutes Congress passed in the 1790’s and early 1800’s giving the state courts concurrent jurisdiction over federal criminal cases.<sup>95</sup>

Finally, the Judiciary Act reflects another important understanding that directly affected the scope of the criminal arising under jurisdiction. Although the matter is not free from doubt, Congress apparently wanted the lower federal courts to hear cases charging common law crimes.<sup>96</sup> If the federal courts

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92. *Id.* at 1473-75. By imposing the \$500 amount in controversy requirement, Congress excluded the great mass of potential debt actions from federal court. *Id.* at 1487-88. This may have been necessary to appease legislators whose constituents wanted the protection of state courts and juries in debt collection actions.

93. See Chadbourn & Levin, *supra* note 5, at 641-42.

94. Letter from Oliver Ellsworth to Richard Law, August 4, 1789, *quoted in* Warren, *supra* note 78, at 66. See also Marcus & Wexler, *supra* note 78, at 20.

95. See *infra* notes 176-90 and accompanying text.

96. On May 13, 1789, the Senate appointed a committee to draft a bill “defining the crimes and offences that shall be cognizable under the authority of the United States, and their punishment.” SENATE JOURNAL, *supra* note 72, at 44. When this committee eventually reported a bill on July 28, it provided *punishments* for certain crimes, but did not define the crimes it listed. *Id.* at 98. In the meantime, the draft of the Judiciary Act submitted to the Senate on June 12, 1789, gave the district and circuit courts exclusive jurisdiction of “all crimes & offences cognizable under the Authority of the United States & defined by the laws of the same . . .” 5 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791, *Legislative Histories* 1176, 1178 (Charlene B. Bickford & Helen E. Veit, eds. 1986) (emphasis added). This wording arguably limited the criminal jurisdiction to crimes specifically defined by federal legislation. During the debates on the Act, sometime *before* the Crimes Bill was reported on July 28, the Senate deleted the phrase “& defined by the laws of the same,” in the Judiciary Act, perhaps anticipating that the Crimes Bill would not define federal crimes, or perhaps not be enacted at all during the

could hear such cases, their criminal jurisdiction would be greatly enlarged.<sup>97</sup>

The Judiciary Act of 1789 launched the new federal judiciary. Congress began implementing the arising under jurisdiction in the years that followed.

## II. IMPLEMENTATION OF THE ARISING UNDER JURISDICTION: 1789 TO THE CIVIL WAR

Congress moved slowly to implement the arising under jurisdiction in the early years of the Republic. Currents and countercurrents reflected the continuing disagreements about the proper balance of federal and state judicial power. Since Congress gave the lower federal courts almost all of the original criminal arising under jurisdiction but none of the civil, it is not surprising that most developments in the original jurisdiction occurred on the criminal side. Congress enacted a major crime bill in 1790.<sup>98</sup> Because of gaps in its coverage, the federal courts started exercising jurisdiction over common law crimes. In at least one early case of this type, a federal court interpreted the scope of the original criminal arising under jurisdiction very broadly.<sup>99</sup>

first session of Congress. *Id.* at 1176 n.34, 1178 n.46. (In fact, the Crimes bill was not enacted until April 30, 1790. *See infra* notes 103-06 and accompanying text.) From this it follows that Congress must have intended the lower federal courts to hear crimes defined by common law, at least until a crimes bill was passed, and possibly beyond that time. RITZ, *supra* note 42, at 18-19, 115; Warren, *supra* note 78, at 73; Holt, *supra* note 55, at 1505-06.

Julius Goebel, Jr., argues that deletion of the phrase "& defined by the laws of the same" should not be interpreted to authorize a criminal common law. GOEBEL, *supra* note 6, at 495-96. He suggests that the deletion merely removed a redundant phrase, since jurisdiction was sufficiently conferred by the language, "all crimes & offences that shall be cognizable under the Authority of the United States. . . ." *Id.* As Stephen Presser points out, however, the language that Congress left in can easily be interpreted to confer jurisdiction over common law crimes because the phrase "all crimes and offences" cognizable under federal authority may have included both statutory *and* common law crimes. STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* 85 (1991) [hereinafter *THE ORIGINAL MISUNDERSTANDING*]. Ultimately, it probably is inappropriate to draw conclusions about the propriety of common law crimes from the deletion of a single phrase. *Id.* at 85-86. Nonetheless, as subsequent history shows, federal judges assumed that they were to enforce a common law of crimes. *See infra* notes 107-09 and accompanying text.

97. *See infra* notes 110-16 and accompanying text.

98. Act of April 30, 1790, ch. 9, 1 Stat. 112.

99. *United States v. Smith*, 27 F. Cas. 1147 (C.C.D. Mass. 1797) (No. 16,323). *See infra* notes 110-16 and accompanying text.

Prosecution for common law crimes became very controversial, however, leading the Supreme Court to withdraw the jurisdiction in 1812.<sup>100</sup> Significantly, the Court did not decide whether jurisdiction over common law crimes violated Article III. Instead, it merely said that Congress had not granted this power in the Judiciary Act.

Subsequently, in a trio of cases, the Supreme Court interpreted the scope of the Article III arising under jurisdiction very broadly, and declared that it was coextensive in civil and criminal cases in the original, removal, and appellate modes.<sup>101</sup> These cases also confirmed Congress's power to make the jurisdiction exclusively federal. While these decisions were of enormous importance in defining the outer limits of Article III power, they were of less immediate practical significance because of the limitations on the arising under jurisdiction contained in the Judiciary Act.

Also, throughout this period, Congress routinely enacted legislation calling for the enforcement of federal criminal laws in the state courts. In time, some state courts began to resent this duty. Drawing on dicta in Supreme Court cases, they rejected the jurisdiction. The Supreme Court struck a compromise in *Prigg v. Pennsylvania*, holding that state judges could enforce federal criminal law if they wished and if state law allowed.<sup>102</sup> Finally, during this period Congress gave the lower federal courts both civil and criminal removal arising under jurisdiction in specific classes of cases.

#### A. *The First Crimes Bill and Jurisdiction over Common Law Crimes*

Congress began implementing the original criminal arising under jurisdiction<sup>103</sup> by passing a comprehensive crime bill.<sup>104</sup>

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100. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

101. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824).

102. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). *Prigg* is discussed *infra* at notes 203-30 and accompanying text.

103. Congress gave the lower federal courts the power to hear civil cases arising under federal law in only a few specific instances. The district courts were given limited powers in proceedings to revoke wrongfully obtained patents. Act of April 10, 1790, ch. 7, § 5, 1 Stat. 109, 111. Later, they were authorized to hear some infringement suits. Act of Feb. 21, 1793, ch. 11, § 6, 1 Stat. 318, 322. In addition, the 1792 pension law imposed some

The statute criminalized two broad categories of conduct: (1) actions that would improperly interfere with the functioning of federal institutions,<sup>105</sup> and (2) misconduct committed on federal property or the high seas.<sup>106</sup>

As Wilfred Ritz points out, many of the crimes in the Act were not defined but merely listed by name. Presumably, some

duties on the federal courts. Act of March 23, 1792, ch. 11, §§ 2, 3, 1 Stat. 243, 244. The federal courts were also given jurisdiction, concurrent with the state courts, over claims by Canadian refugees dispossessed for aiding the colonies during the Revolutionary War, Act of April 7, 1798, ch. 26, § 3, 1 Stat. 547, 548, and over claims by aliens seeking naturalization. Act of Jan. 29, 1795, ch. 20, § 1, 1 Stat. 414. In addition, a 1798 Act imposed a duty on both federal and state courts to issue writs of habeas corpus to secure release of federal soldiers arrested for nonpayment of debt or breach of contract. Act of May 28, 1798, ch. 47, § 14, 1 Stat. 558, 560. Otherwise, civil enforcement of federal legislation was to proceed in the state courts.

Original civil arising under jurisdiction was given to the federal courts for a short period in 1801-02 as a part of an effort by the Federalist Party to maintain its influence after a defeat at the polls. Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92. This Act was repealed by an Act of March 8, 1802, ch. 8, 2 Stat. 132. For a discussion of this controversial and highly political episode, see FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 21-28 (1928); Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 556-69 (1925); Wythe Holt, *The First Federal Question Case*, 3 LAW & HIST. REV. 169, 172-73 (1985); George L. Haskins & Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-1815*, in 2 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 121-81 (1981).

104. Act of April 30, 1790, ch. 9, 1 Stat. 112. Congress did create some relatively minor crimes during its earlier first session. A customs officer taking a bribe or making a false entry could be fined, and a master of a ship who swore to false statements could be fined and imprisoned. Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29, 46-47. Another statute punished perjury committed in the process of registering and clearing vessels. Act of Sept. 1, 1789, ch. 11, § 36, 1 Stat. 55, 65.

Congressional treatment of the April 30 crime bill is described in RITZ, *supra* note 42, at 120-25. See also 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791, *Legislative Histories 1741-43* (Charlene B. Bickford & Helen E. Veit, eds. 1986). The bill also is discussed in Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223, 225-27 (1986); DWIGHT F. HENDERSON, *CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801-1829* 7-8 (1875).

105. This category included such crimes as treason, Act of April 30, 1790, ch. 9, § 1, 1 Stat. at 112, forging or counterfeiting "any certificate, indent, or other public security of the United States," *id.* § 14, 1 Stat. at 115, stealing or falsifying any process or records of the federal courts, *id.* § 15, 1 Stat. at 115-16, perjury in any federal court proceedings or in a deposition taken pursuant to federal law, *id.* § 18, 1 Stat. at 116, bribing a federal judge, *id.* § 21, 1 Stat. at 117, and obstructing or opposing any federal officer. *Id.* § 22, 1 Stat. at 117.

106. This category included such wrongdoing as murder, *id.* § 3, 1 Stat. at 112, concealment of felonies, *id.* § 6, 1 Stat. at 113, manslaughter, *id.* § 7, 1 Stat. at 113, piracy or other felonies on the high seas, *id.* § 8, 1 Stat. at 113-14, maiming, *id.* § 13, 1 Stat. at 115, larceny, *id.* § 16, 1 Stat. at 116, and receiving stolen goods. *Id.* § 17, 1 Stat. at 116.

common law of crimes was to add definitions to the names.<sup>107</sup> In addition, federal judges soon began exercising jurisdiction over common law crimes that were not listed in the Act at all.<sup>108</sup> Legal historians continue to debate the legitimacy of federal common law crimes and their significance during this period.<sup>109</sup> It is clear, however, that by hearing cases charging common law crimes, the federal courts tapped a potentially vast reservoir of arising under jurisdiction.

*United States v. Smith* demonstrates the breadth of the criminal arising under jurisdiction.<sup>110</sup> The defendants in *Smith* were indicted for the common law crime of counterfeiting bills of the Bank of the United States.<sup>111</sup> One of the defendants objected that because no federal statute applied, the state courts had exclusive jurisdiction of the cases.<sup>112</sup> The court admitted

107. RITZ, *supra* note 42, at 124.

108. See, e.g., *United States v. Henfield*, 11 F. Cas. 1099, 1120-21 (C.C.D. Pa. 1793) (No. 6360); *United States v. Ravara*, 27 F. Cas. 714, 714-15 (C.C.D. Pa. 1794) (No. 16,122a); *United States v. Smith*, 27 F. Cas. 1147, 1147-48 (C.C.D. Mass. 1797) (No. 16,323). See also *United States v. Villato*, 28 F. Cas. 377, 378 (D. Pa. 1797) (No. 16,622); *United States v. Williams*, 29 F. Cas. 1330, 1331 (C.C.D. Conn. 1799) (No. 17,708). But see *United States v. Worrall*, 28 F. Cas. 774, 776-78 (C.C.D. Pa. 1798) (No. 16,766). *Worrall*, in which Justice Chase denied the existence of a federal common law of crimes, is discussed at length in Stephen B. Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 NW. U. L. REV. 26, 58-72 (1978), and Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1067-73 (1985).

109. E.g., compare 1 CHARLES WARREN, *THE SUPREME COURT IN U.S. HISTORY* 433-37 (1926) [hereinafter *THE SUPREME COURT IN U.S. HISTORY*] (arguing that most federal judges in the early years of the Republic recognized federal common law crimes), LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 273-79 (1985) (contending that the first generation of federal judges assumed the existence of a federal common law of crimes), and MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 9-11 (1977) (contending that opposition to a federal common law of crimes was "[u]nheard of before 1793 and, with one exception, uniformly rejected by American judges during the first two decades of the Republic"), with Robert C. Palmer, *The Federal Common Law of Crime*, 4 LAW & HIST. REV. 267, 272 (1986) (arguing that hearing federal common law crimes was an improper usurpation of power), and Preyer, *supra* note 104, at 225-31 (arguing that evidence is not conclusive as to whether there was a general consensus among federal judges in favor of common law crimes and that there probably was a difference of opinion). For an excellent overview of the issue that presents and assesses the full range of opinion, see *THE ORIGINAL MISUNDERSTANDING*, *supra* note 96, at 67-99.

110. *Smith*, 27 F. Cas. at 1147. The case was heard by Chief Justice Ellsworth and District Judge John Lowell. Preyer, *supra* note 104, at 229.

111. The Crimes Act of 1790 made it criminal to counterfeit "any certificate, indent, or other public security of the United States. . . ." Act of April 30, 1790, ch.9, § 14, 1 Stat. 112, 115. Since the bank bills did not fit this definition, the indictments were at common law. See GOEBEL, *supra* note 6, at 630.

112. *Smith*, 27 F. Cas. at 1147.

that the wrongdoing could have been punished in state court as a "common-law cheat," but noted that the Constitution gave the federal courts jurisdiction of all cases arising under the laws of the United States.<sup>113</sup> The criminal cases in *Smith* arose under federal law because the bank bills "were made in virtue thereof . . ." <sup>114</sup> Thus, a federal court could hear the cases, even though no federal statute criminalized the counterfeiting.

*Smith* appears to define the original criminal arising under jurisdiction particularly broadly because it empowers the federal courts to hear criminal cases when a federal issue is only peripherally involved. The wrongdoing in *Smith* was a kind of theft, or, as the court said, a state common law cheat. The fact that bills of a federal instrumentality were counterfeited probably would not be a central or contested issue in the cases. Thus, *Smith* seems to authorize federal jurisdiction over state criminal cases involving a single, tangential federal issue that might not even be raised in the proceeding.

On the other hand, *Smith* can be read to define the criminal arising under jurisdiction more narrowly if the defendants' crime had its genesis in federal rather than state law. The court said that the cases arose under federal law because the counterfeited bills "were made in virtue thereof," and even though there was no federal statute prohibiting it, "to counterfeit them was a contempt of and misdemeanor against the United States, and punishable by them as such . . ." <sup>115</sup> One can read this language to authorize federal jurisdiction over a state common law cheat prosecution because bills of the Bank of the United States were counterfeited. Alternatively, one can read the language to authorize jurisdiction over a federal common law crime that the court created in *Smith* itself or took from an existing body of federal common law crimes. If the latter reading is correct, federal law is much more centrally involved in the prosecution, and *Smith* authorizes a less expansive criminal arising under jurisdiction.<sup>116</sup>

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113. *Id.* at 1147-48.

114. *Id.* at 1148.

115. *Id.*

116. It also is significant that the court evaluated jurisdiction under Article III and did not mention Section 11 of the Judiciary Act of 1789 giving the circuit courts "exclusive cognizance of all crimes and offences cognizable under the authority of the United States . . ." Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 79. Perhaps the court believed that Congress intended to make the grant of jurisdiction in Section 11 coextensive with Article III.

In time, the jurisdiction envisioned by *Smith* was curtailed. Prosecution for common law crimes became very controversial.<sup>117</sup> Viewed from a modern perspective, this is hardly surprising. Who among us would be comfortable if a federal prosecutor or judge could seek to punish some actions or words that she thought offended the peace or dignity of the United States without notice to the defendant that such conduct might violate federal law?<sup>118</sup> Although indictments for the common law crimes of counterfeiting<sup>119</sup> or extortion<sup>120</sup> may not have raised eyebrows in the 1790s, people readily saw that common law prosecutions for seditious libel<sup>121</sup> were brought by those in power to silence the political opposition.<sup>122</sup> In 1807, a

117. See Jay, *supra* note 108, at 1011, 1039.

118. Ironically, we are not particularly bothered when a court creates a new civil cause of action and uses it to the disadvantage of an unsuspecting defendant. As the Supreme Court remarked in *Brinkerhoff-Faris Trust & Savings v. Hill*: "State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions." *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681 n.8 (1930).

119. See *Smith*, discussed *supra* notes 110-16 and accompanying text.

120. See, e.g., *United States v. Ravara*, 27 F. Cas. 714 (C.C.D. Pa. 1794) (No. 16,122).

121. See, e.g., *United States v. Greenleaf* (case dropped) (described in LEVY, *supra* note 109, at 276, and GOEBEL, *supra* note 6, at 629). See also *United States v. Cabell* (case aborted for political reasons) (described in LEVY, *supra* note 109, at 276-77).

122. See THE ORIGINAL MISUNDERSTANDING, *supra* note 96, at 67-68; Jay, *supra* note 108, at 1075-78. As Leonard W. Levy notes, if the executive could prosecute mere words as common law crimes, the First Amendment's free speech clause would offer "merely the shadow rather than the substance of protection by stipulating only a restriction upon Congress." LEVY, *supra* note 109, at 274.

People criticized federal common law crimes for impinging on state jurisdiction and for being unfair because people could be punished upon judicial whim for actions they did not know were criminal when undertaken. For example, in 1800, the Virginia General Assembly issued an "instruction" to the Senators from that state to oppose passing any law recognizing the existence of a federal common law of crimes. INSTRUCTION FROM THE GENERAL ASSEMBLY OF VIRGINIA TO THE SENATORS FROM THAT STATE IN CONGRESS, JANUARY 11TH, 1800, reprinted in DUPONCEAU, *supra* note 86, at 225-26. Such a body of law, they asserted, would open

a new tribunal for the trial of crimes never contemplated by the federal compact. It opens a new code of sanguinary criminal law, both obsolete and unknown, and either wholly rejected or essentially modified in almost all its parts by State institutions. It arrests, or supersedes, State jurisdictions, and innovates upon State laws. It subjects the citizens to punishment, according to the judiciary will, when he is left in ignorance of what this law enjoins as a duty, or prohibits as a crime.

*Id.* at 225. See also 1 Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 365-66 (1795) (stating that punishment for a common law crime "manifestly partakes of the odious nature of an ex post facto law, and subjects a man to an inconvenience which

series of indictments for common law crimes were issued in Connecticut federal court charging various federalists with libeling President Jefferson.<sup>123</sup> Almost all of the charges were eventually dismissed,<sup>124</sup> but one case, *United States v. Hudson & Goodwin*, reached the United States Supreme Court.<sup>125</sup> The Court seized this opportunity to withdraw jurisdiction over common law crimes from the lower federal courts. By taking this step, the Court greatly restricted the original criminal arising under jurisdiction.

The issue for decision, the Court began, was "whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases."<sup>126</sup> The Court's analysis is straightforward and summary. The power to create lower federal courts includes the power to define their subject matter jurisdiction; the lower courts thus can exercise only the jurisdiction that Congress gives them.<sup>127</sup> Jurisdiction over common law crimes has not been conferred by Congress.<sup>128</sup> Consequently, the lower federal courts cannot hear these cases.<sup>129</sup>

The Court made clear that it was *not* deciding whether jurisdiction over common law crimes could be given under Article III.<sup>130</sup> Instead, it was deciding only that such jurisdiction had not been conferred by the Judiciary Act of 1789:

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he could not possibly foresee, or calculate upon, at the time of doing the act").

123. THE SUPREME COURT IN U.S. HISTORY, *supra* note 109, at 435.

124. *Id.* at 436.

125. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). For discussions of the background of this case, see Jay, *supra* note 108, at 1012-19; 2 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION 770-82 (1953); LEONARD W. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 61-66 (1963); THE SUPREME COURT IN U.S. HISTORY, *supra* note 109, at 435-37; Preyer, *supra* note 104, at 242-47.

126. *Hudson & Goodwin*, 11 U.S. (7 Cranch) at 32. Before beginning its legal analysis, the Court acknowledged the political realities: "Although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion." *Id.* And that opinion was decidedly in the negative. See Jay, *supra* note 108, at 1017-18.

127. *Hudson & Goodwin*, 11 U.S. (7 Cranch) at 33.

128. *Id.*

129. *Id.* The Court specifically stated, "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *Id.* at 34. Today on the civil side, by contrast, the federal courts can hear cases asserting common law as well as statutory causes of action.

130. *Id.* at 33.

It is not necessary to inquire whether the general Government, in any and what extent, possesses the power of conferring on its Courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those Courts as a consequence of their creation.<sup>131</sup>

To decide the case on these grounds, the Court had to ignore the evidence that the first Congress intended the federal courts to hear common law crimes.<sup>132</sup> By declining to make a constitutional ruling, however, the Court left undisturbed the broad interpretation of Article III's criminal arising under jurisdiction in *United States v. Smith*,<sup>133</sup> and left open the possibility that Congress might grant jurisdiction over common law crimes if future events warranted.<sup>134</sup>

#### B. *Martin, Cohens, and Osborn*

While the Supreme Court declined to discuss the scope of the Article III arising under jurisdiction in *Hudson & Goodwin*, it seemed almost eager to expound on that subject in several subsequent cases. *Martin v. Hunter's Lessee*,<sup>135</sup> *Cohens v.*

131. *Id.* The Court went on to reject the argument that the lower federal courts had the power to hear common law criminal cases "as a consequence of their creation." *Id.* The Court simply did not think it necessary for the courts to exercise this power in order to preserve the existence and stability of the federal government. *Id.* at 33-34.

132. See *supra* note 96 and accompanying text.

133. *Smith*, 27 F. Cas. at 1148. See *supra* notes 110-16 and accompanying text.

134. Although *Hudson & Goodwin* purported only to interpret the jurisdictional provisions of the Judiciary Act of 1789, as a practical matter it extinguished the federal common law of crimes. In a real sense federal common law crimes cease to exist if the federal courts are not empowered to hear them. (Although it is at least theoretically possible for state courts to hear federal common law crimes, it is unlikely they would wish to do so. Presumably, state courts can create their own criminal common law to proscribe conduct they find offensive.) Technically, however, *Hudson & Goodwin* appears to be only a decision about jurisdiction conferred—or not conferred—by Congress. It thus is very different from the decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). In *Erie* the Court explicitly extinguished the general civil common law that had grown up during the era of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), on the ground that the Constitution forbade its existence. *Erie*, 304 U.S. at 78.

135. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

Virginia,<sup>136</sup> and *Osborn v. Bank of the United States*<sup>137</sup> together defined the general contours of the jurisdiction.

In *Martin*, Hunter brought an ejectment action against Martin in a Virginia state court to recover land.<sup>138</sup> Martin claimed title under a royal grant made prior to the Revolution, and argued that his title was protected by the treaty with England.<sup>139</sup> Martin won in the lower court, but the Virginia Court of Appeals reversed.<sup>140</sup> Martin appealed to the United States Supreme Court and the Court ruled in his favor.<sup>141</sup> The Virginia Court of Appeals refused to obey the Court's mandate, claiming that the Supreme Court had no power to review its judgments and that Section Twenty-five of the Judiciary Act of 1789 was unconstitutional.<sup>142</sup> Martin then returned to the Supreme Court on a second writ of error to force execution of the mandate.<sup>143</sup>

Justice Story's wide-ranging opinion for the Court discussed Article III's arising under jurisdiction in its original, removal, and appellate modes.<sup>144</sup> Justice Story made clear that the jurisdiction under the three modes is coextensive, i.e., that any case arising under federal law may be brought in a lower federal court originally, removed there from a state court, or heard by the Supreme Court on appeal from a state court.<sup>145</sup> In addition, Justice Story suggested that the arising under jurisdiction extends equally to civil and criminal cases.<sup>146</sup> Finally, he asserted that Congress can make Article III jurisdiction exclusively federal.<sup>147</sup>

Justice Story posed the question, to which cases shall the arising under jurisdiction apply? He stated:

The answer is found in the constitution itself. The judicial power shall extend to all cases enumerated in the

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136. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

137. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

138. *Martin*, 14 U.S. (1 Wheat.) at 306.

139. *Id.* at 307.

140. *Id.* at 306-07.

141. *Id.* at 307, 362.

142. *Id.* at 305-06.

143. *Id.* at 313.

144. *Id.* at 327-352.

145. *Id.* at 333-352.

146. *Id.* at 335.

147. *Id.* at 334-37.

constitution. As the mode is not limited, it may extend to all such cases, in any form, in which judicial power may be exercised. It may, therefore, extend to them in the shape of original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other.<sup>148</sup>

Having said that the original and appellate arising under jurisdiction are coextensive, Justice Story then equated the appellate and removal jurisdiction, saying that the difference between the two is really only a matter of timing.<sup>149</sup> Removal is like appellate jurisdiction, Justice Story said, because both "presuppose[] an exercise of original jurisdiction to have attached elsewhere."<sup>150</sup> He continued:

If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as congress is not limited by the constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment. . . . And if the right of removal from state courts exist before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. . . . Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together.<sup>151</sup>

Plainly, then, if the original and appellate jurisdiction are coextensive, and if the appellate jurisdiction and removal jurisdiction are the same but for timing, the same arising under case may be brought to federal court in any of the three modes, depending on which is appropriate procedurally.

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148. *Id.* at 333. Justice Story reiterates this point later in the opinion, stating: The judicial power is delegated by the constitution in the most general terms, and may, therefore, be exercised by congress under every variety of form, of appellate or original jurisdiction. And as there is nothing in the constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

*Id.* at 338.

149. *Id.* at 349-50.

150. *Id.* at 349.

151. *Id.* at 349-350.

*Martin* was a civil case, but Justice Story suggested that the broad principles stated in the opinion also apply to criminal cases. He often used criminal cases as illustrations. In discussing the need for the appellate jurisdiction, for example, Justice Story stated:

Suppose an indictment for a crime in a state court, and the defendant should allege in his defence that the crime was created by an *ex post facto* act of the state, must not the state court, in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defence [sic]? . . .

It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognisance of cases arising under the constitution, the laws, and treaties of the United States. . . . It would seem to follow that the appellate power of the United States must, in such cases, extend to state tribunals . . .

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Similarly, in the discussion equating removal and appellate jurisdiction, Justice Story stated that “[t]he existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment.”<sup>153</sup> Justice Story also specifically said as to “cases arriving under the constitution, laws, and treaties of the United States[,] . . . [t]his class of cases would embrace civil as well as criminal jurisdiction . . . .”<sup>154</sup> Thus, Justice Story did not find any difference between civil and criminal arising under jurisdiction.

Finally, Justice Story asserted that Congress can make Article III jurisdiction exclusively federal:

[I]t is manifest that the judicial power of the United States is unavoidably, in some cases, exclusive of all state authority, and in all others, may be made so at the election of congress. . . . Congress, throughout the

152. *Id.* at 341-42.

153. *Id.* at 349.

154. *Id.* at 334-35.

judicial act, and particularly in the [ninth], [eleventh], and [thirteenth] sections, have legislated upon the supposition that in all the cases to which the judicial power of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts.<sup>155</sup>

In sum, *Martin* plainly is the seminal case in defining the general contours of the arising under jurisdiction.<sup>156</sup>

*Cohens v. Virginia* confirmed *Martin's* broad reading of Article III, as well as its suggestion that the arising under jurisdiction is

155. *Id.* at 336-37. After determining that Section Twenty-five of the Judiciary Act was constitutional, Justice Story concluded by explaining why the case at bar was within its terms. *Id.* at 351. *Martin's* title to the land was "perfect and complete" if it was protected by the federal treaty. *Id.* at 356. Since the decision of the court below must have determined that the treaty did not give *Martin* good title, "it was strictly a suit where was drawn in question the construction of a treaty, and the decision was against the title specifically set up or claimed by the defendant." *Id.* at 357. Thus, the case fell within the terms of Section Twenty-five.

156. *Martin* also contains many statements that have not stood the test of time. For example, Story suggests that Congress not only may, but must make the arising under jurisdiction exclusively federal:

Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself . . . [A]s to cases arriving under the constitution, laws and treaties of the United States . . . the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. . . .

No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals.

*Id.* at 330-31, 334-35, 337. These statements plainly are at odds with the original understandings in the Constitutional Convention and ratification debates. They also are in direct conflict with the assumptions underlying the Judiciary Act of 1789 and subsequent legislation imposing a duty on the state courts to enforce federal criminal laws. Interestingly, state courts seized upon the last sentence quoted above in resisting such legislation. See *infra* notes 198-202 and accompanying text.

One may wonder why a staunch proponent of federal power such as Justice Story would say that Congress cannot use the state courts to enforce federal law. The reason is that Justice Story wanted to increase the size and power of the federal judiciary. Elsewhere in *Martin*, he contends that Section One of Article III requires all of the judicial power allowed by Section Two to be vested somewhere in the federal judicial system. *Martin*, 14 U.S. (1 Wheat.) at 327-40. Given the constitutional limitations on the Supreme Court's original jurisdiction, if the state courts cannot hear cases arising under federal law, it follows that lower federal courts must be available to hear them. *Id.*; see MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 29-41 (2d ed. 1990). As noted above, the prevailing view has been that Congress need not vest all of the judicial power in the federal courts. See *supra* note 81.

coextensive in criminal and civil cases.<sup>157</sup> P.J. and M.J. Cohen were prosecuted in a Virginia state court for selling lottery tickets in violation of state law.<sup>158</sup> They defended by asserting that ticket sales were authorized by an act of Congress.<sup>159</sup> Following conviction they appealed directly to the United States Supreme Court since the state trial court was the highest state court having jurisdiction of the case.<sup>160</sup>

The Court upheld its jurisdiction.<sup>161</sup> Chief Justice Marshall wrote in characteristically broad terms. Although *Cohens* specifically involved the criminal appellate arising under jurisdiction, many of the Chief Justice's statements seem to apply to both civil and criminal jurisdiction exercised in any of the three modes. Chief Justice Marshall asserted that a case is considered to arise under federal law even if the defendant rather than the plaintiff raises the federal issue, so long as decision of the case depends on the construction of federal law:

If it be to maintain that a case arising under the constitution, or a law, must be one in which a party comes into Court to demand something conferred on him by the constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either.<sup>162</sup>

He continued in this vein:

[Article III] does not extend the judicial power to every violation of the constitution which may possibly take place, but to "a case in law or equity," in which a right, under such law, is asserted in a Court of justice. . . . But if, in any controversy depending [sic] in a Court, the cause should depend on the validity of such a law, that

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157. *Cohens*, 19 U.S. (6 Wheat.) at 264.

158. *Id.* at 265, 375.

159. *Id.* at 375.

160. *Id.* at 375-76.

161. *Id.* at 430.

162. *Id.* at 379.

would be a case arising under the constitution, to which the judicial power of the United States would extend.<sup>163</sup>

Chief Justice Marshall elaborated upon the constitutional limits of the original civil arising under jurisdiction in *Osborn v. Bank of the United States*.<sup>164</sup> In that case, the Bank of the United States brought suit in federal circuit court to enjoin state officials from enforcing an Ohio law taxing the Bank.<sup>165</sup> The Chief Justice first determined that the act creating the Bank gave the circuit court jurisdiction over suits involving it.<sup>166</sup> He then considered whether this jurisdiction exceeded Article III limits.<sup>167</sup> On the actual facts of the case, jurisdiction plainly was secure. The suit arose under federal law because the Bank was claiming that the Supremacy Clause of the Constitution<sup>168</sup> prohibited a state from taxing the Bank, a federal instrumentality.<sup>169</sup> However, Justice Marshall asserted in dicta that federal question jurisdiction would also exist in litigation involving the Bank where federal law was much less centrally involved. "Take the case of a contract," he said, "which is put as the strongest against the Bank."<sup>170</sup> Such a case would arise under federal law, he asserted, because the issue of the Bank's right to sue would necessarily present itself at the outset of the suit. Since the Bank's right to sue depended on federal law, the

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163. *Id.* at 405.

164. *Osborn*, 22 U.S. (9 Wheat.) at 738. *Osborn* has been much discussed in the literature. See, e.g., Doernberg, *supra* note 5, at 607-11; Chadbourn & Levin, *supra* note 5, at 646-49; Forrester, *supra* note 5, at 367-74; Hirshman, *supra* note 5, at 22-25. For a concise discussion of different interpretations of *Osborn*, see REDISH, *supra* note 156, at 84-90.

165. *Osborn*, 22 U.S. (9 Wheat.) at 739-40.

166. It seemed a close question whether Congress really intended to give such a broad jurisdictional grant. The statute said that the Bank shall be "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." *Osborn*, 22 U.S. (9 Wheat.) at 817. In the earlier case of *Bank of the United States v. Deveaux*, the Court interpreted similar language to give the Bank only a general capacity to bring or defend lawsuits, and not to create jurisdiction in the federal courts. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 85 (1809). Nonetheless, Chief Justice Marshall concluded that in this instance, Congress intended to confer such jurisdiction. *Osborn*, 22 U.S. (9 Wheat.) at 818.

167. *Osborn*, 22 U.S. (9 Wheat.) at 819-28.

168. U.S. CONST. art. VI, cl. 2.

169. *Osborn*, 22 U.S. (9 Wheat.) at 744-45.

170. *Id.* at 823.

case would arise under that law. Moreover, Chief Justice Marshall argued that subsequent cases involving the Bank based on state law would also arise under federal law, even if the Bank's right to sue was considered settled and thus was not actually raised in the later action.<sup>171</sup>

*Osborn* may be seen as doing for the original civil arising under jurisdiction what *United States v. Smith*<sup>172</sup> did for the original criminal arising under jurisdiction, and perhaps as going a step further. By holding that the hypothetical breach of contract case arises under federal law, the *Osborn* Court authorized jurisdiction in civil cases when federal issues are only peripherally involved in much the same way that *Smith* authorized jurisdiction in criminal cases when federal issues are tangential. In *Osborn's* hypothetical contract case, the federal issues of the Bank's capacity to make contracts or to sue remained in the background. Similarly, in *Smith* the fact that federal bank bills were the items counterfeited was not likely to be contested, and thus the federal issues would remain in the background. *Osborn* may be seen as going a step further than *Smith* because the cause of action in the breach of contract case clearly was state-created. In *Smith*, by contrast, it is not clear whether the crime charged actually had its source in state law or in federal common law.<sup>173</sup>

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171. *Id.* at 824. *Osborn* also contains several general statements suggesting that the scope of arising under jurisdiction is quite broad. For example, Chief Justice Marshall asserted, "This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it." *Id.* at 819 (emphasis added). Later in the opinion, the Chief Justice stated:

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.

*Id.* at 823.

172. *Smith*, 27 F. Cas. at 1147. See *supra* notes 110-16 and accompanying text.

173. The broad reading of Article III in *Osborn* was presaged by the brief experience with general civil arising under jurisdiction under the Judiciary Act of 1801. See *supra* note 103. Wythe Holt describes the case of *Hobby v. Day*, a libel action brought in federal court by a federal postmaster against the editors of two newspapers. See Holt, *supra* note 103 at 173-78. Holt identifies two possible theories supporting civil arising under jurisdiction. First, the plaintiff's status as a federal employee injects some federal issues into the case, at least potentially. *Id.* at 178-80. Second, in 1800 some people considered the common law a part of the laws of the United States. *Id.* Acceptance of this latter theory would have opened the federal courts to ordinary common law suits. Repeal of the 1801 Act ended this possibility.

Read expansively, *Martin, Cohens, and Osborn* (and *Smith*) together affirmed that Article III arising under jurisdiction extends to any case, civil or criminal, heard in the original, removal, or appellate mode, involving an issue of federal law, even if federal issue is only peripherally involved. These cases thus opened a vast reservoir of potential federal judicial power reminiscent of the worst fears of Grayson, Mason, and Randolph during the ratification debates.<sup>174</sup> Since Congress extended only a portion of the arising under jurisdiction to the federal courts, the justices' expansive ruminations did not precipitate a constitutional crisis. The chief practical consequence of the decisions was to secure Supreme Court review of state court judgments under Section Twenty-five of the Judiciary Act. Moreover, as previously discussed, *Smith's* broad interpretation of the original criminal arising under jurisdiction was soon followed by the withdrawal of jurisdiction over common law crimes in *United States v. Hudson & Goodwin*.<sup>175</sup>

### C. State Enforcement of Federal Criminal Law

Although the first Congress made the original criminal arising under jurisdiction exclusively federal,<sup>176</sup> later congresses routinely shared jurisdiction over statutory crimes with the state courts. Congress repeatedly enlisted the state courts to help enforce federal revenue laws. For example, in a statute imposing duties on distillers of "spirituous liquors," all fines, penalties, and forfeitures incurred under the act could be recovered in an action brought by the tax collector in the name of the United States.<sup>177</sup> When the cause of action arose more than fifty miles from the nearest federal district court, the law stated that "such suit and recovery may be had before any court of the state, holden within the said district, having jurisdiction in like cases."<sup>178</sup> Congress passed several other statutes imposing duties on various items and granting state court jurisdiction in virtually identical

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174. See *supra* notes 56-58 and accompanying text.

175. *Hudson & Goodwin*, 11 U.S. (7 Cranch) at 32. See *supra* notes 117-34 and accompanying text.

176. Act of Sept. 24, 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76-79.

177. Act of July 24, 1813, ch. 25, § 6, 3 Stat. 42, 44.

178. *Id.*

language.<sup>179</sup> Congress also passed a more comprehensive law authorizing the state courts to "take cognizance of all complaints, suits and prosecutions for taxes, duties, fines, penalties and forfeitures arising and payable" under any federal statutes for the collection of any direct tax or internal duty of the United States.<sup>180</sup> The statute made jurisdiction in such cases concurrent with the federal district courts, and authorized state courts to exercise jurisdiction even if the cause of action arose *less* than fifty miles from the nearest district court.<sup>181</sup>

Congress also called upon the state courts to enforce the law establishing the Post Office of the United States.<sup>182</sup> Section Twenty-eight of the Act read as follows:

[A]ll causes of action arising under this act may be sued, and all offenders against this act may be prosecuted, before the justices of the peace, magistrates, and other judicial courts of the several states, and of the several territories of the United States, they having competent jurisdiction by the laws of such states or territories, to the trial of claims and demands of as great value, and of prosecutions where the punishments are of as great extent; and such justices, magistrates, or judiciary, shall take cognizance thereof, and proceed to judgment and execution as in other cases.<sup>183</sup>

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179. *See, e.g.*, Act of July 24, 1813, ch. 26, § 10, 3 Stat. 44, 47 (imposing duties on sales at auction); Act of Aug. 2, 1813, ch. 39, § 5, 3 Stat. 72, 73 (taxing importers of foreign merchandise and retailers of wines and liquor); Act of Aug. 2, 1813, ch. 53, § 13, 3 Stat. 77, 80-81 (taxing certain commercial paper); Act of Dec. 21, 1814, ch. 15, § 21, 3 Stat. 152, 157-58 (imposing duties on spirits distilled in the United States); Act of Jan. 18, 1815, ch. 23, § 24, 3 Stat. 186, 191 (taxing household furniture and gold and silver watches).

180. Act of March 3, 1815, ch. 101, § 1, 3 Stat. 244.

181. *Id.* § 2, at 244-45. This law appeared to expand on an earlier law that used similar language in authorizing state court jurisdiction to enforce the revenue laws of the United States in certain parts of New York and Pennsylvania. *See* Act of March 8, 1806, ch. 14, § 1, 2 Stat. 354. Both the 1815 and the 1806 Acts also gave the state courts the same power as federal district courts to mitigate or remit any fines, penalties, or forfeitures imposed under the Acts. *See* Act of March 3, 1815, ch. 101, § 3, 3 Stat. 244, 245; Act of March 8, 1806, ch. 14, § 2, 2 Stat. 354, 355.

182. Act of March 2, 1799, ch. 43, § 28, 1 Stat. 733.

183. *Id.* § 28, 1 Stat. at 740-41. Later statutes regulating the post office continued this language. *See* Act of April 30, 1810, ch. 37, § 35, 2 Stat. 592, 603; Act of March 3, 1825, ch. 64, §§ 37-38, 4 Stat. 102, 113.

Other sections of the Act defined crimes such as embezzlement and robbery of the mails, and authorized fines, whipping, and imprisonment as punishment.<sup>184</sup>

Although some statutes merely authorized the state courts to hear federal criminal cases,<sup>185</sup> Congress often made such jurisdiction mandatory. For example, the 1799 Post Office Act gave the state courts jurisdiction of criminal cases arising under the Act and ordered that "such justices, magistrates, or judiciary, shall take cognizance thereof, and proceed to judgment and execution."<sup>186</sup> The 1798 Alien Enemies Act made it "the duty of the several courts of the United States, and of each state, having criminal jurisdiction" to hear cases against aliens.<sup>187</sup> And many revenue statutes authorized the tax collector to bring actions for

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184. Act of March 2, 1799, ch. 43, §§ 14, 15, 1 Stat. 733, 736-37. Congress also called upon the state courts to enforce federal criminal law in many other contexts. An Alien Enemy Act made it the duty of the federal and the state courts to apprehend alien enemies and to deport or imprison them. Act of July 6, 1798, ch. 66, § 2, 1 Stat. 577-78. The Fugitive Slave Act of 1793 required state and federal judges to hear claims of slaveowners and to send fugitive slaves back to their home states. Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302, 302-05. Congress also enlisted the state courts to enforce criminal sanctions in many Embargo Acts. *See, e.g.*, Act of Jan. 9, 1808, ch. 8, § 6, 2 Stat. 453, 454; Act of March 12, 1808, ch. 33, § 6, 2 Stat. 473, 475; Act of April 25, 1808, ch. 66, § 14, 2 Stat. 499, 502; Act of Jan. 9, 1809, ch. 5, § 12, 2 Stat. 506, 510; Act of March 1, 1809, ch. 24, § 18, 2 Stat. 528, 532-33; Act of June 28, 1809, ch. 9, § 4, 2 Stat. 550, 551; Act of May 1, 1810, ch. 39, § 3, 2 Stat. 605, 606; Act of April 14, 1812, ch. 56, § 3, 2 Stat. 707, 708; Act of Dec. 17, 1813, ch. 1, § 14, 3 Stat. 88, 92. The state courts also could hear cases for violation of laws regulating trade with the Indian tribes. *See, e.g.*, Act of April 18, 1796, ch. 13, § 7, 1 Stat. 452, 453; Act of March 30, 1802, ch. 13, § 15, 2 Stat. 139, 144.

185. *See, e.g.*, Act of June 5, 1794, ch. 49, § 9, 1 Stat. 378, 380 ("[I]t shall and may be lawful for the judicial courts of the several states" to hear all cases arising under the laws for collecting a revenue upon spirits distilled in the United States); Act of March 30, 1802, ch. 13, § 15, 2 Stat. 139, 144 (state and territorial courts "are hereby invested with full power and authority to hear and determine all crimes, offences and misdemeanors, against this act . . ."); Act of March 8, 1806, ch. 14, § 1, 2 Stat. 354 (state courts are "authorized to take cognizance of all complaints and prosecutions for fines, penalties and forfeitures, arising under the revenue laws of the United States" in certain parts of New York and Pennsylvania); Act of March 3, 1815, ch. 101, § 1, 3 Stat. 244 (same authorization but in all states).

186. Act of March 2, 1799, ch. 43, § 28, 1 Stat. 733, 740-41 (emphasis added). The 1810 Act regulating the post office also contained this mandatory language. *See* Act of April 30, 1810, ch. 37, § 35, 2 Stat. 592, 603.

187. Act of July 6, 1798, ch. 66, § 2, 1 Stat. 577-78. Similarly, the Fugitive Slave Act recited that "it shall be the duty" of state or federal judges to issue a certificate allowing removal of the slave to his or her home state. Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302-05.

finest, penalties, and forfeitures in state court.<sup>188</sup> These laws presumably obligated the state courts to hear the cases.

Finally, the statutes generally directed federal rather than state officials to prosecute the criminal actions in state court. For example, many revenue acts directed federal tax collectors to prosecute for recovery of fines, penalties, or forfeitures.<sup>189</sup> The Act of March 3, 1815, giving general authorization for state courts to hear suits and prosecutions to enforce federal revenue laws, authorized the district attorneys of the United States or their designated deputies to bring actions in state court:

[T]he district attorneys of the United States are hereby authorized and directed to appoint by warrant an attorney as their substitute or deputy in all cases where necessary to sue or prosecute for the United States, in any of the said state or county courts within the sphere of whose jurisdiction the said district attorneys do not themselves reside or practise; and the said substitute or deputy shall be sworn or affirmed to the faithful execution of his duty.<sup>190</sup>

Thus, the early congresses plainly saw no barrier to federal prosecutors appearing in state court to enforce federal criminal law.

This routine use of the state courts to enforce federal criminal law may seem surprising because jurisdiction over federal crimes today is exclusively federal and has been since 1874.<sup>191</sup> But in the early years of the Republic, state court enforcement of federal

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188. See, e.g., Act of June 5, 1794, ch. 45, § 10, 1 Stat. 373, 375 (fines, penalties, and forfeitures under this act imposing duties upon carriages "shall and may be sued for, and recovered, in any court of the United States, or before any magistrate, or state court, having competent jurisdiction."); Act of June 5, 1794, ch. 48, § 5, 1 Stat. 376, 378 (penalties under this act imposing tax on licenses for selling wines and foreign liquor may be recovered in state court when cause of action arises more than 50 miles from nearest district court); Act of July 6, 1797, ch. 11, § 20, 1 Stat. 527, 532 (all fines, penalties, and forfeitures incurred by virtue of this act taxing certain commercial paper "shall be sued for and recovered in the name of the United States . . . in any circuit or district court of the United States, or in any court . . . of the said states . . .").

189. See sources cited *supra* note 188.

190. Act of March 3, 1815, ch. 101, § 1, 3 Stat. 244.

191. Revised Statutes of the United States, § 711 (1815) (currently codified at 18 U.S.C. § 3231 (1988)). See discussion *infra* accompanying notes 289-301.

law seemed both natural and desirable.<sup>192</sup> Recall that many of the founders argued against creation of lower federal courts on the ground that state courts could adequately enforce federal law.<sup>193</sup> States-rights advocates supported legislation authorizing state courts to hear federal criminal cases.<sup>194</sup>

Given this background, it is surprising that state courts began to view their jurisdiction over federal criminal cases as an imposition on state prerogatives! In *Jackson v. Rose*, for example, the General Court of Virginia sustained a demurrer to an action filed by a federal tax collector seeking to recover a penalty under a United States revenue statute.<sup>195</sup> The Court held that it was unconstitutional for Congress to authorize state courts to hear federal criminal cases, relying on a principle from international law that one country will not enforce the penal laws of another:

[T]he Judiciary of one separate and distinct Sovereignty cannot of itself assume, nor can another separate and distinct Sovereignty either authorise, or coerce it to exercise the Judicial powers of such other separate and distinct Sovereignty. . . .

[T]here is no good reason why one Nation should authorise its Judiciary to carry the *Penal Laws* of another into execution, and it is believed that no Nation has ever done so . . . .<sup>196</sup>

Other state courts agreed.<sup>197</sup>

192. Warren, *supra* note 103, at 545.

193. See *supra* notes 26-27, 31, 59, 79 and accompanying text.

194. Warren, *supra* note 103, at 577.

195. *Jackson v. Rose*, 4 Va. (2 Va. Cas.) 124, 128 (1815). The case was originally filed in the Superior Court of Law for Harrison County, Virginia, and the jurisdictional issues raised by the demurrer were adjourned to the higher court. *Id.* at 124. The District Attorney of the United States argued on behalf of the plaintiff tax collector in the General Court. *Id.*

196. *Id.* at 35-36 (emphasis added). The same year, 1815, the Virginia Court of Appeals declared that it did not have to follow the mandate of the United States Supreme Court. See *Hunter v. Martin*, Devisee of Fairfax, 18 Va. (4 Munf.) 1 (1815). The Supreme Court, of course, disagreed. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

197. See, e.g., *United States v. Campbell* (Ohio), reported in 6 HALL'S AM. L.J. 113 (1814); *Maryland v. Rutter* (Almeida's Case), 12 Niles Reg. 114, 118, 232 (April 19, 1817); *United States v. Lathrop*, 17 Johns. (N.Y.) 4, 8-11 (1819); *Ely v. Peck*, 7 Conn. 239, 242-43 (1828); *Davison v. Champlin*, 7 Conn. 244, 248 (1828); *Haney v. Sharp*, 1 Dana (Ky.) 442 (1833); *Delafield v. Illinois*, 2 Hill (N.Y.) 159, 169 (1841) (*dicta*); *State v. Pike*, 15 New

Dicta from some federal cases lent support to this position. In *Martin v. Hunter's Lessee*, Justice Story opined that "No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals."<sup>198</sup> Building on this dictum<sup>199</sup> in *Houston v. Moore*, Justice Story added:

It is a general principle . . . that no nation is bound to enforce the penal laws of another within its own dominions. . . . It has been expressly held by this Court, that no part of the criminal jurisdiction of the United States can consistently with the constitution be delegated by Congress to State tribunals; and there is not the slightest inclination to retract that opinion. The judicial power of the Union clearly extends to all such cases. No concurrent power is retained by the States . . . .<sup>200</sup>

Several state courts seized upon this language in rejecting jurisdiction.<sup>201</sup> Thus, as Charles Warren succinctly states, "a form of legislation enacted by Congress, out of a desire to allay State jealousy and to reduce Federal power, became regarded by

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Hamp. 83, 84-85 (1844); *Ward v. Jenkins*, 10 Metc. (Mass.) 583, 587 (1846) (dicta). Not all judges agreed that a principle governing relations between truly independent sovereigns applied in this context. See, e.g., *Lathrop*, 17 Johns. at 21-22 (Platt, J. dissenting). As Judge Platt stated:

It is said to be a fundamental maxim, that the courts of one sovereign will not take cognizance of, or enforce the penal laws of another sovereign . . . . But when we consider the complex and peculiar structure and relations of our federal government and state governments, moving, indeed, in different spheres, but occupying the same territorial space, and operating upon, and for the benefit of the same people, the practice of independent nations affords no analogy sufficiently strong to guide us in the present case.

*Id.*

198. *Martin*, 14 U.S. (1 Wheat.) at 337.

199. The language clearly was dictum. *Martin* was an action in ejectment to recover a large tract of land in Virginia. The defendant claimed that his title was protected by the treaty with England. *Id.* at 306-07. Thus, the action did not involve state enforcement of federal criminal law.

200. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 69 (1820). See also *United States v. Bailey*, 34 U.S. (9 Pet.) 238, 259 (1835) (McLean, J., dissenting); *Fox v. Ohio*, 46 U.S. (5 How.) 410, 438 (1847) (McLean, J., dissenting).

201. See, e.g., *Lathrop*, 17 Johns. (N.Y.) at 8-9; *Davison*, 7 Conn. at 248; *Pike*, 15 N.H. at 84-85.

the States as an undue assumption of Federal power and an infringement on the sovereignty of the States.<sup>202</sup>

The Supreme Court again considered whether state courts could be required to enforce federal penal statutes in the notorious case of *Prigg v. Pennsylvania*.<sup>203</sup> In *Prigg*, the Court sought to ensure effective enforcement of the federal Fugitive Slave Act.<sup>204</sup> Political and social considerations affect jurisdiction and procedure as well as substantive law,<sup>205</sup> and *Prigg* is a clear case in point.

Edward Prigg, acting on behalf of a Maryland slaveowner, procured a warrant from a Pennsylvania magistrate directing a state constable to apprehend an escaped slave.<sup>206</sup> When the slave was brought before the magistrate, the officer refused to take any further action.<sup>207</sup> Prigg then engaged in self-help and returned the slave and her children to Maryland.<sup>208</sup> Pennsylvania indicted him for violating state law.<sup>209</sup> His conviction was affirmed by the state supreme court, but the United States Supreme Court reversed.<sup>210</sup>

In an opinion by Justice Story, the Court held that Article IV, Section Two, of the Constitution<sup>211</sup> established "a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain."<sup>212</sup> Consequently, the owner of a slave could legally seize an escaped slave anywhere in the country as long as he did not breach the peace.<sup>213</sup> The Fugitive Slave Act, which was

202. Warren, *supra* note 103, at 581.

203. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

204. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

205. Warren, *supra* note 103, at 546.

206. *Prigg*, 41 U.S. (16 Pet.) at 556-57.

207. *Id.* at 557.

208. *Id.* at 608-09.

209. *Id.*

210. *Id.* at 608-09, 626.

211. The applicable portion reads:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. CONST. art IV, § 2, cl. 3.

212. *Prigg*, 41 U.S. (16 Pet.) at 612.

213. *Id.* at 613.

enacted to implement the constitutional provision,<sup>214</sup> required both state and federal judges to cooperate in returning slaves to their owners.<sup>215</sup> The Act authorized a slaveowner or his agent to seize an escaped slave and bring the slave before either a local or federal judge.<sup>216</sup> Upon proof that the escaped slave "owe[d] service" to the slaveowner, it was "the duty of such judge or magistrate to give a certificate thereof to such claimant" which constituted permission to return the slave to the owner.<sup>217</sup>

The Court held the Act "clearly constitutional in all its leading provisions"<sup>218</sup> and overturned the Pennsylvania criminal statute as inconsistent with federal law.<sup>219</sup> The Court softened its holding somewhat, however, by inserting dicta that relieved the state courts of an obligation to enforce the Act. The Court said that the language requiring the return of escaped slaves

is found in the national Constitution, and not in that of any state. It does not point out any state functionaries, or any state action to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or entrusted to them by the Constitution. . . .

. . . .  
. . . . As to the authority so conferred upon state magistrates [by the Act], while a difference of opinion has existed, and may exist still on the point, in different states, whether state magistrates are bound to act under it; none is entertained by this Court that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation.<sup>220</sup>

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214. *Id.* at 615-16.

215. *Id.* at 617.

216. *Id.*

217. Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302, 304-05.

218. *Prigg*, 41 U.S. (16 Pet.) at 622.

219. *Id.* at 617, 625-26.

220. *Id.* at 615-16, 622.

By holding that state judges could enforce federal law if they wished and if state law allowed, Justice Story retreated from his statements in *Martin v. Hunter's Lessee* and *Houston v. Moore* explicitly denying this authority.<sup>221</sup> But this compromise suited the Court's purpose of ensuring enforcement of the Fugitive Slave Act. A decision requiring enforcement of the federal law by state courts would doubtless have been ignored or resisted in many states.<sup>222</sup> A decision denying state courts any authority to enforce the Fugitive Slave Act would have made the Act ineffective in jurisdictions where the state judges were willing to enforce it.

*Prigg* plainly lent important new support to the principle that Congress cannot require the state courts to enforce federal criminal laws. But *Prigg*, like the earlier federal and state decisions discussed above, simply announced a limitation on congressional power without any real explanation as to why the limitation exists or where it is expressed in the Constitution. Nor did any of the courts satisfactorily explain why the maxim of international law that no nation will enforce the penal laws of another should be applicable in our federal system.<sup>223</sup> And, of

221. See *supra* notes 198-200 and accompanying text.

222. Chief Justice Taney stated in a concurring opinion that both the Constitution and the Fugitive Slave Act impose an affirmative obligation upon state authorities to cooperate in apprehending escaped slaves and returning them to their owners. He expressed concern about language in the majority opinion that appeared to preempt all state laws on the subject—laws protecting slaveowners' rights as well as laws interfering with those rights. Charles Warren lists Taney as being in agreement with Justice Story that the "state officers mentioned in the [Fugitive Slave Act] are not bound to execute the duties imposed upon them by Congress, unless they choose to do so, or are required to do so by a law of the state." Warren, *supra* note 103, at 583 (quoting *Prigg*, 41 U.S. (16 Pet.) at 630 (Taney, C.J., concurring)). Warren, however, clearly misreads Taney's position by taking the quoted language out of context. Later in his opinion, Taney says:

But it is manifest from the face of the law, that an effectual remedy was intended to be given by the act of 1793. . . . [Congress] legislated with express reference to state support. . . . And the reliance obviously placed upon state authority for the purpose of executing this law, proves that the construction now given to the Constitution by the Court had not entered into their minds.

*Prigg*, 41 U.S. (16 Pet.) at 631 (Taney, C.J., concurring). Taney concludes:

I dissent therefore, upon these grounds, from that part of the opinion of the Court which denies the obligation and the right of the state authorities to protect the master, when he is endeavouring to seize a fugitive from his service, in pursuance of the right given to him by the Constitution of the United States . . . .

*Id.* at 633.

223. Charles Warren attributes this to "the desire of the Federal Courts to avoid friction with the States at a particularly nervous period." Warren, *supra* note 103, at 584.

course, both the federal and state decisions plainly conflicted with the understandings of Congress expressed in all of the federal legislation calling for the state enforcement of federal penal laws.<sup>224</sup>

The cases also are inconsistent in their treatment of criminal and civil arising under jurisdiction. Some of the state court decisions denying Congress the power to require or authorize state courts to enforce federal penal laws were careful to allow the state courts to continue to hear civil cases arising under federal law.<sup>225</sup> The United States Supreme Court also affirmed that state courts could hear such cases.<sup>226</sup> Why is concurrent jurisdiction over federal criminal cases a major intrusion into state sovereignty if concurrent jurisdiction over civil cases is a legitimate part of the federal system? State courts do not face greater practical problems or more complex choice of law issues in criminal arising under cases than they face on the civil side,<sup>227</sup> and the cases in the *Prigg* line make no such claim. The courts simply failed to address these issues.

Perhaps the courts recognized that it would be wholly impractical to decree that federal courts have exclusive jurisdiction over civil cases arising under federal law. At this time, Congress had not given the lower federal courts original jurisdiction of civil arising under cases. If state courts could not hear these cases, then no court could hear them. On the criminal side, by contrast, Congress had given the lower federal courts almost all of the original criminal arising under jurisdiction in 1789.<sup>228</sup> Thus, the jurisdiction could be declared exclusively federal without making federal criminal law unenforceable.

Despite these puzzles and inconsistencies, the *Prigg* line of cases carried the day. The first codification of federal statutes, undertaken in the 1860's and early 1870's, added a new provision making jurisdiction of "all crimes and offenses cognizable under the authority of the United States . . . exclusive of the courts of

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224. See *supra* notes 176-90 and accompanying text.

225. See, e.g., *Lathrop*, 17 Johns. (N.Y.) at 5; *Davison*, 7 Conn. at 249-50.

226. See, e.g., *Teal v. Felton*, 53 U.S. (12 How.) 284, 292 (1851); *Postmaster General v. Early*, 25 U.S. (12 Wheat.) 136, 146 (1827).

227. See *infra* notes 441, 472-82 and accompanying text.

228. See *supra* notes 83-86 and accompanying text.

the several States.<sup>229</sup> The revisers explicitly relied upon the cases in the *Prigg* line in their explanatory notes.<sup>230</sup>

#### *D. Implementation of the Removal Arising Under Jurisdiction*

During the time that the state courts were decreeing that criminal cases arising under federal law were solely the province of the federal courts, Congress was authorizing removal of certain civil and criminal cases from state to federal court. This new removal jurisdiction significantly expanded the arising under jurisdiction of the lower federal courts.

Congress enacted the first arising under removal statute in 1815. Many New England states opposed the War of 1812 and resisted enforcement of federal embargo and non-intercourse statutes.<sup>231</sup> When federal customs officials searched ships and carriages and seized property, local citizens retaliated by bringing damage suits and initiating criminal prosecutions in state courts.<sup>232</sup> Congress responded by passing legislation specifically prohibiting any economic transactions with the enemy and authorizing federal officials, upon probable cause and after obtaining a warrant, to inspect premises and seize any goods held in violation of the Act.<sup>233</sup> Congress also provided for removal to federal circuit court of "any suit or prosecution . . . commenced in any state court, against any collector . . . or any other officer, civil

229. Revised Statutes of the United States, § 711 (1875).

230. 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE, Title XIII, ch. 12, at 116-17 (1872) [hereinafter COMMISSIONERS' REVISED STATUTES]. This codification is discussed *infra* at notes 289-301 and accompanying text.

231. Warren, *supra* note 103, at 584; HART & WECHSLER, *supra* note 55, at 1057-58; Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 806 (1965); *Willingham v. Morgan*, 395 U.S. 402, 405 (1969).

232. Warren, *supra* note 103, at 584.

233. Act of February 4, 1815, ch. 31, § 1-4, 3 Stat. 195, 195-197. Interestingly, and perhaps unrealistically, Congress tried to enlist the aid of the state courts in enforcing the Act. If a federal official had probable cause to believe that goods intended for the enemy were concealed in a dwelling house or building, the official was authorized to apply "to any judge or justice of the peace" for a warrant. *Id.* § 4, 3 Stat. at 196. The Act further provided "[t]hat the forfeitures and penalties mentioned in this act, shall be sued for, prosecuted, and recovered, or inflicted by action of debt, or by information or indictment, in any court competent to take cognisance thereof . . ." *Id.* § 7, 3 Stat. at 197-98.

or military . . . for any thing done by virtue of this act or under colour thereof . . . ."<sup>234</sup>

In 1833, Congress passed another removal statute,<sup>235</sup> this time in response to the nullification movement in South Carolina.<sup>236</sup> The Act authorized the President to use military force to ensure that federal import duties were collected.<sup>237</sup> In addition, it allowed removal of state civil or criminal cases filed against federal officials for "any act done under the revenue laws of the United States."<sup>238</sup>

The removal statutes are significant in several ways. They expanded the arising under jurisdiction of the lower federal courts

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234. *Id.* § 8, 3 Stat. at 198. The federal official was to file the removal petition in the state court, and after sufficient surety was given, it was "the duty of the state court to accept the surety, and proceed no further in the cause." *Id.* The Act directed that once papers were filed in federal court, "the cause shall there proceed in the same manner as if it had been brought there by original process." *Id.*

The Act also allowed removal after final judgment. At that point, either party could remove the case to a federal court by appeal. Moreover, either party could remove the case by writ of error within six months of judgment, and the circuit court would then try the case de novo. *Id.* at 199. The Act did not allow posttrial removal of a criminal case if the defendant was victorious in state court. *Id.*

One might ask why Congress allowed two trials in the same case. A partial explanation stems from the different jurisprudential norms of that time. As Wilfred Ritz points out, in the eighteenth century, successive trials, and even successive jury trials, were common. RITZ, *supra* note 42, at 27-28. In an era when judges sought to "find" the law rather than "make" it, successive trials increased the likelihood of finally achieving a correct and just result. *See generally id.* at 27-52.

Congress enacted a statute similar to the February 14 removal statute several weeks later. Act of March 3, 1815, ch. 94, 3 Stat. 231. Both laws were of limited duration. They were continued for four more years by the Act of March 3, 1817, ch. 109, § 6, 3 Stat. 396, 397. The 1817 Act also withdrew the right to post-judgment removal. *Id.* §§ 1-2, 3 Stat. at 396.

235. Act of March 2, 1833, ch. 57, 4 Stat. 632.

236. Warren, *supra* note 103, at 585; Amsterdam, *supra* note 231, at 806; FRANKFURTER & LANDIS, *supra* note 103, at 11, n.22.

237. Act of March 2, 1833, ch. 57, §§ 1, 5, 4 Stat. 632, 634.

238. *Id.* § 3, 4 Stat. at 632, 633. The removal procedures were somewhat different than those of the 1815 Act. The removal petition was to be filed in the federal circuit court rather than in the state court. *Id.* The Act required the defendant to file affidavits by himself and by an attorney attesting to the propriety of removal. *Id.* Once the case was docketed in federal court, the court clerk was to issue a writ of certiorari to the state court, requiring it to transmit the record to the federal court. The federal court then was to proceed as if the case had been originally filed there, and the state court was to stay any further proceedings. *Id.* If the state court proceeded further, any trial or judgment was "wholly null and void." *Id.*

substantially.<sup>239</sup> Although the Judiciary Act of 1789 authorized removal of diversity actions,<sup>240</sup> it did not allow removal of any federal question cases. The new removal statutes granted federal question removal jurisdiction for the first time. Moreover, the statutes extended removal equally to civil and criminal arising under cases. In addition, by directing that the removed case proceed in federal court as if commenced there originally,<sup>241</sup> the acts clearly contemplated that the private plaintiff or state prosecutor proceed in federal court. As discussed above, during this period Congress directed federal tax collectors and district attorneys to enforce federal statutes in state court.<sup>242</sup> Congress appeared equally comfortable requiring state prosecutors to litigate in federal court.

Finally, the removal statutes are flatly inconsistent with the maxim of international law that the courts of one state will not enforce the penal laws of another. It was this maxim that formed the basis of the statements in *Martin*, *Houston*, and the state cases in the *Prigg* line that state courts could not enforce federal criminal laws.<sup>243</sup> The constitutionality of the removal of state criminal cases under the 1833 Act was upheld by the Supreme Court in 1879 in *Tennessee v. Davis*.<sup>244</sup> As Charles Warren remarked, "if there is no inherent impossibility in a Federal Court's conducting a trial for violation of a State criminal law, there is equally no such impossibility in a State Court's trying a man for violation of a Federal criminal law."<sup>245</sup>

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239. The 1833 Act also expanded the original civil arising under jurisdiction of the federal courts in two ways. First, it provided that "the jurisdiction of the circuit courts of the United States shall extend to all cases, in law or equity, arising under the revenue laws of the United States, for which other provisions are not already made by law . . . ." *Id.* § 2, 4 Stat. 632. The Act also created a cause of action for damages on behalf of revenue officers injured in enforcing federal revenue laws. *Id.* § 2, 4 Stat. at 632-33. Second, the Act gave the federal courts greater power to issue writs of habeas corpus. A writ could be granted for a prisoner confined "for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof . . . ." *Id.* § 7, 4 Stat. 632, 634.

240. Act of Sept. 24, 1789, ch. 20, § 12, 1 Stat. 73, 79-80.

241. See *supra* note 234.

242. See *supra* notes 189-90 and accompanying text.

243. See *supra* notes 195-201 and accompanying text.

244. *Tennessee v. Davis*, 100 U.S. 257 (1879). See *infra* notes 320-26 and accompanying text.

245. Warren, *supra* note 103, at 546.

I do not mean to overstate the significance of the removal acts. They did not grant *general* arising under removal jurisdiction. Only state court cases brought against federal officials for actions taken in enforcing the Acts themselves or other revenue statutes could be removed to federal court. Thus, the Acts can be viewed as limited grants of arising under jurisdiction. In addition, the statutes did not approach the outer limits of Article III as defined in *United States v. Smith*<sup>246</sup> and *Osborn v. Bank of the United States*.<sup>247</sup> The federal issues generally would be central in cases removed under the acts, rather than peripheral or collateral. Typically, when a federal officer was being sued or prosecuted in state court, he would contend that he acted pursuant to federal law. Although the propriety of the officer's conduct would come up only as a defense, the issue would likely determine the outcome of the case. Despite these caveats, the removal statutes were an important step in the development of the arising under removal jurisdiction.

The national trauma of the Civil War and Reconstruction substantially altered the arising under jurisdiction, and it is to those developments that we now turn.

### III. EXPANSION OF THE ARISING UNDER JURISDICTION: THE RECONSTRUCTION ERA

The Civil War and Reconstruction transformed relations between the federal government and the States. The Nation won the War, and in the years following, the federal government moved to consolidate its power and to expand national authority.<sup>248</sup> The federal government actively encouraged growth in transportation, education, and commerce.<sup>249</sup> It also guaranteed federal rights against state authority by passing the

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246. *United States v. Smith*, 27 F. Cas. 1147 (C.C.D. Mass. 1797) (No. 16,323).

247. *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824).

248. FRANKFURTER & LANDIS, *supra* note 103, at 57-58, 65; Felix Frankfurter, *Distribution of Judicial Power between United States and State Courts*, 13 CORNELL L.Q. 499, 507-11 (1928); *Zwickler v. Koota*, 389 U.S. 241, 246-47 (1972).

249. FRANKFURTER & LANDIS, *supra* note 103, at 57-58; JAMES G. RANDALL & DAVID DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 535-42 (1961).

Thirteenth, Fourteenth, and Fifteenth Amendments, and by enacting wave upon wave of enforcement legislation.<sup>250</sup>

Congress turned to the federal courts to enforce the constitutional amendments and the new federal laws. To achieve its goals, Congress greatly expanded the civil and criminal arising under jurisdiction in its original, removal, and appellate modes. Congress generally made the original criminal jurisdiction exclusively federal and the original civil jurisdiction concurrent with the state courts. Removal statutes generally allowed equal removal of civil and criminal cases,<sup>251</sup> and the Supreme Court's appellate jurisdiction continued to extend equally to both civil and criminal cases.

The legislative history of Reconstruction shows that Congress was particularly concerned with the continuing violence and maladministration of justice in the South.<sup>252</sup> Congress sought systemic reform of southern criminal and civil justice systems to ensure an even-handed enforcement of federal rights.<sup>253</sup> Congress authorized far-reaching federal court intervention into the day-to-day workings of southern justice systems.<sup>254</sup> A substantial expansion of the civil and criminal arising under jurisdiction formed the essential underpinnings of this massive effort.

While Congress greatly expanded the arising under jurisdiction during Reconstruction, the Supreme Court worked methodically to curtail the congressional grants by restrictive interpretation. Although Congress gave more jurisdiction, the Court often refused to accept it. Depending on one's point of view, the Court's actions may be seen as seriously undermining legitimate congressional efforts to enforce important new rights, or as wisely restraining the arising under jurisdiction within reasonable and workable bounds. In interpreting Article III, on

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250. FRANKFURTER & LANDIS, *supra* note 103, at 65; *Patsy v. Board of Regents*, 457 U.S. 496, 502 (1982); *Zwickler*, 389 U.S. at 246-48; *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972). See generally, Donald H. Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 992-1020; William M. Wiecek, *The Reconstruction of Federal Judicial Power*, 13 AM. J. LEG. HIST. 333, 336-52 (1969); Amsterdam, *supra* note 231, at 828-30.

251. An important exception to this pattern occurred in 1875 when Congress enacted a general federal question removal provision, but limited it to civil cases. Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 471. See discussion *infra* accompanying notes 306, 310-11.

252. Zeigler, *supra* note 250, at 989.

253. *Id.*

254. *Id.* at 1020.

the other hand, the Court continued to construe the arising under jurisdiction very broadly. Finally, as Reconstruction continued, Congress itself acted to withdraw some of its grants of arising under jurisdiction.

Congress began its enforcement effort in 1863 with enactment of the Habeas Corpus and Removal Act.<sup>255</sup> The Act was directed at problems with the administration of justice in the South. Section Five of the Act authorized persons subjected to state criminal or civil proceedings for acts done "under color of any authority derived from . . . the President of the United States" to file in state court a petition for removal to federal court.<sup>256</sup> This provision combatted vexatious state criminal and civil actions against northern soliders charging them with false arrest, trespass, and other injuries.<sup>257</sup>

The 1866 Civil Rights Act also expanded both civil and criminal arising under jurisdiction.<sup>258</sup> The Act sought to ensure

255. Act of March 3, 1863, ch. 81, 12 Stat. 755 (entitled "An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases").

256. *Id.* § 5, 12 Stat. at 756.

257. See HAROLD M. HYMAN, A MORE PERFECT UNION 451-53 (1973); HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW 259 (1982); Amsterdam, *supra* note 231, at 808-09. The removal procedures tracked those in the 1815 Removal Act almost exactly, see *Mayor v. Cooper*, 73 U.S. 247, 254 (1867), thus allowing pretrial removal by the defendant, and posttrial removal by either party with a trial de novo in federal court. Act of March 3, 1863, ch. 81, § 5, 12 Stat. 755, 756-57. The 1863 Act also required the plaintiff or state prosecutor to pursue the action in federal court. *Id.* § 5, 12 Stat. at 757. No postjudgment removal was permitted in a criminal case if the defendant won. *Id.*

The 1863 Act was amended in 1866 to make removal easier and to circumvent impediments to removal that had been imposed by the state courts. Act of May 11, 1866, ch. 80, 14 Stat. 46. For a detailed review of this Act, see Zeigler, *supra* note 250, at 1002-04. In 1869 the 1863 Act was expanded to allow removal of any state action, civil or criminal, brought against a common carrier for loss or damage to any goods caused by rebel or United States troops. Act of Jan. 22, 1869, ch. 13, 15 Stat. 267.

Congress also amended the 1833 Removal Act several times during this period. By the Act of Mar. 7, 1864, ch. 20, § 9, 13 Stat. 14, 17, the provisions of the 1833 Act allowing removal of suits against federal officials for acts done pursuant to the revenue laws were extended to cover all internal duties. Interestingly, this Act also gave state courts concurrent jurisdiction with the lower federal courts in forfeiture proceedings brought by revenue officers to enforce the tax laws. *Id.* § 2, 13 Stat. at 14-15. Once again, then, Congress made federal criminal or quasi-criminal laws enforceable in state court. See discussion *supra* accompanying notes 176-88. Portions of the March 7 Act were repealed by the Act of June 30, 1864, ch. 173, § 50, 13 Stat. 241, but then reinstated in somewhat revised form by the Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171. See FRANKFURTER & LANDIS, *supra* note 103, at 61-62, n.22.

258. Act of April 9, 1866, ch. 31, 14 Stat. 27.

equal civil rights for the newly-freed slaves. Section One declared that citizens

of every race and color . . . shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, . . . and to full and equal benefit of all laws, and proceedings for the security of person and property, and shall be subject to like punishments, pains and penalties.<sup>259</sup>

Section Two provided criminal penalties against anyone acting under color of state law who denied another any right secured by the bill.<sup>260</sup> Section Three set forth three distinct jurisdictional grants: (1) the district courts were given, "exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act;" (2) the district courts were also given cognizance, "concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State . . . any of the rights secured to them by the first section of this act;" and (3) the district and circuit courts were given power to hear on removal any state suit, civil or criminal, commenced against any such person, or against any officials carrying out either this Act or other civil rights laws.<sup>261</sup> Section Three of the Act also incorporated by reference the liberal removal procedures of the 1863 Habeas Corpus and Removal Act.<sup>262</sup> The 1866 Civil Rights Act thus authorized the federal courts to hear significant new categories of civil and criminal cases arising under federal law.<sup>263</sup>

Despite the broad sweep of the jurisdictional language, the Supreme Court and Congress soon greatly reduced its scope. The second of the three jurisdictional grants contained in Section Three of the Act, the so-called "affecting jurisdiction," was the

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259. *Id.* (Section One is currently codified at 42 U.S.C. §§ 1981-1982 (1988)).

260. *Id.* § 2 (Section Two is currently codified at 18 U.S.C. § 242 (1988)).

261. *Id.* § 3.

262. *Id.*

263. The statute contemplated substantial intervention in the criminal and civil justice systems of the South to achieve its ends. Congress essentially told officials that "all causes, civil and criminal" would be taken away from them by the federal courts if parties were denied fundamental rights in state proceedings, and that they themselves could be subject to criminal penalties. See Zeigler, *supra* note 250, at 999-1001.

first to be restrictively interpreted by the Court, and was subsequently eliminated by Congress. A number of cases invoking the affecting jurisdiction were brought in Kentucky shortly after the 1866 Act was passed. Federal officials filed both civil and criminal cases in Kentucky federal court against state law enforcement officers and private citizens who committed violent acts against blacks. Such cases, they argued, were causes, civil and criminal, affecting persons who are denied or cannot enforce in state court any of the rights secured to them by Section One of the Act, and thus could be brought in federal court, even though state crimes or tort claims formed the basis of the suits.<sup>264</sup> A state statute prohibiting blacks from testifying against whites supported this jurisdictional theory.<sup>265</sup> Arguably, cases in which black witnesses would be denied the right to give evidence under Section One of the Act were causes affecting those witnesses.<sup>266</sup>

The Supreme Court reviewed a federal criminal case from Kentucky based on the affecting jurisdiction in 1872, and it rejected the prosecutor's jurisdictional theory.<sup>267</sup> The Court did not discuss whether the affecting jurisdiction as construed by the

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264. See Robert D. Goldstein, *Blyew: Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469, 482, 485-86 n.58 (1989) and sources cited therein.

265. The statute declared that "negroes and mulattoes shall [only] be competent witnesses . . . in all criminal proceedings where a negro or mulatto is a defendant" or in civil cases where they are the only parties. Act of Feb. 14, 1866, ch. 563, 1865 Ky. Act 38.

266. Thus construed, the affecting jurisdiction neared constitutional limits. It probably did not exceed them because issues of federal law were involved in the Kentucky federal actions, even though the crimes and causes of action were state-created. Blacks, whether as parties or witnesses, would be denied rights guaranteed by a federal statute unless the cases were heard in federal court. Although the federal statutory rights to testify and to be treated fairly would not be directly in issue in the federal proceeding, the federal statute provided the necessary foundation for enforcement of these rights. Analytically, the Kentucky cases seem quite similar to Chief Justice Marshall's breach of contract hypothetical in *Osborn*, 22 U.S. (9 Wheat.) 738 (1824), and to *Smith*, 27 F. Cas. 1147 (C.C.D. Mass. 1797) (No. 16,323). In *Osborn*, the federal statute creating the Bank of the United States and giving it the right to sue provided the necessary foundation for a breach of contract suit involving the Bank in much the same way that the 1866 Civil Rights Act formed the necessary foundation for black citizens to get a fair court hearing in cases against whites. Similarly, in *Smith* the fact that federal law authorized issuance of the bank bills that were counterfeited formed a necessary part of the background of the prosecution for theft in much the same way the 1866 Civil Rights Act formed a necessary part of the background of a proceeding in which black victims or witnesses could bring state criminal charges against whites. Thus, the broad construction of the affecting jurisdiction adopted in the Kentucky federal courts approaches but does not appear to exceed Article III limits.

267. *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1872).

prosecutor was within Article III limits. Instead, it held that Congress had intended to confer federal jurisdiction only over criminal and civil causes in which blacks were parties, and not over cases in which blacks might be called as witnesses or were the victims of a crime.<sup>268</sup>

Professor Robert D. Goldstein argues that the Court misconstrued congressional intent as expressed in the 1866 Civil Rights Act and deprived the federal government and minority citizens of an important remedy for combatting racial injustice.<sup>269</sup> But Congress did not overrule the Court; instead, it quietly acquiesced in the elimination of the affecting jurisdiction from the United States Code.<sup>270</sup>

The civil rights removal jurisdiction conferred by Section Three of the 1866 Act fared only slightly better than the affecting jurisdiction. Although the jurisdiction remained on the books,<sup>271</sup> an important legislative amendment and extremely narrow Supreme Court construction rendered the provision a virtual dead letter.<sup>272</sup> The 1866 Act incorporated the liberal removal

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268. The Court reasoned that persons called as witnesses in a case are "no more affected by it than is every other person, for anyone may be called as a witness." *Id.* at 591-92. If black witnesses were considered persons "affected," then federal jurisdiction would attach in any suit between whites "whenever it was alleged that a citizen of the African race was or might be an important witness." *Id.* at 592. Similarly, the Court held that a black crime victim was not a person "affected by the cause." *Id.* at 593.

269. See Goldstein, *supra* note 264, at 476-83, 507-13.

270. The affecting jurisdiction was dropped as a part of the first codification of the federal statutes. Congress began the codification process in 1866 by authorizing the President to appoint several Commissioners to rearrange and consolidate the laws. Act of June 27, 1866, ch. 140, 14 Stat. 74. The Commissioners finally completed their task in 1872. See COMMISSIONERS' REVISED STATUTES (Vol. I, II), *supra* note 230. Congress, however, was unhappy with their report because it made many substantive changes and contained numerous errors. The codification was not approved until it was revised by a new reporter, Thomas J. Durant, and reviewed by both a joint subcommittee of the Congress and the full Congress. See REVISED STATUTES OF THE UNITED STATES (1875) (published version of revision enacted June 22, 1874). For reviews of the codification process, see generally J. Myron Jacobstein & Roy M. Mersky, *Introduction*, in 1 COMMISSIONERS' REVISED STATUTES, *supra* note 230; Cass Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 396-409 (1982); Goldstein, *supra* note 264, at 513-22; Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608-12 (Opinion of the Court), 624-40 (Powell, J., concurring). Professor Goldstein contends that because of the complexity and confusion of the codification process, it is difficult to determine whether Congress affirmatively approved elimination of the affecting jurisdiction or simply did not notice it. See Goldstein, *supra* note 264, at 521.

271. The civil rights removal jurisdiction is currently codified at 28 U.S.C. § 1443 (1988).

272. REDISH, *supra* note 156, at 398.

provisions of the 1815 and 1863 removal acts that allowed removal both before and after judgment.<sup>273</sup> But postjudgment removal of civil rights cases was eliminated in the first codification of federal statutes of 1874,<sup>274</sup> despite the fact that Congress considered it an important means of enforcing the 1866 Act.<sup>275</sup> This amendment set the stage for the Supreme Court decisions in *Strauder v. West Virginia*<sup>276</sup> and *Virginia v. Rives*.<sup>277</sup> These cases held that pretrial removal was available only when a state statute affirmatively denied rights conferred by Section One of the 1866 Civil Rights Act, not when state justice officials denied civil rights by practice or custom.<sup>278</sup> Since few racially discriminatory state statutes remained in force after

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273. See *supra* note 234, 257.

274. See 1 COMMISSIONERS' REVISED STATUTES, *supra* note 230, Title XIII, ch. 7, § 111, at 71. This change appeared in the final version of the codification. See REVISED STATUTES OF THE UNITED STATES, § 641 (1875).

275. See *Baines v. City of Danville*, 357 F.2d 756, 761 (4th Cir. 1966), *aff'd per curiam*, 384 U.S. 890 (1966) and sources cited therein. The Commissioners did not explain this change. They may have been overly influenced by *The Justices v. Murray*, which held that the Seventh Amendment forbade a federal officer from removing a civil case to federal court when a state jury had decided against the officer. *The Justices v. Murray*, 76 U.S. (9 Wall.) 274 (1870). In *Murray*, one *Patrie* sued a federal marshal and his deputy for assault and battery in state court. The defendants asserted that they had taken *Patrie* into custody pursuant to a presidential order, but the jury decided for the plaintiff. The defendants then removed the case to federal court pursuant to section 5 of the 1863 Removal Act. *Id.* at 274-76. The Seventh Amendment states that "no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST., amend. 7. The Court reasoned that this provision applied to jury verdicts in state as well as lower federal courts, and held the removal improper. *Murray*, 76 U.S. (9 Wall.) at 278-82. See also *McKee v. Rains*, 77 U.S. (10 Wall.) 22 (1869). *Murray* plainly does not forbid postjudgment removal in criminal actions, equity cases, or common law cases tried by the court because the Seventh Amendment does not apply in those proceedings. See *Goldstein*, *supra* note 264, at 514 and sources cited therein. Consequently, the Commissioner's total elimination of postjudgment removal seems unjustified.

276. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

277. *Virginia v. Rives*, 100 U.S. 313 (1879).

278. *Id.* at 321-22. The Supreme Court subsequently reaffirmed *Strauder* and *Rives*. See *Neal v. Delaware*, 103 U.S. 370, 386-87 (1880); *Bush v. Kentucky*, 107 U.S. 110, 116 (1882); *Gibson v. Mississippi*, 162 U.S. 565, 582-83 (1896); *Smith v. Mississippi*, 162 U.S. 592, 600 (1896); *Murray v. Louisiana*, 163 U.S. 101, 105-06 (1896); *Williams v. Mississippi*, 170 U.S. 213, 219-20 (1898); *Kentucky v. Powers*, 201 U.S. 1, 30-32 (1906). The modern Supreme Court has continued this restrictive interpretation of civil rights removal. See *Georgia v. Rachel*, 384 U.S. 780 (1966), and *City of Greenwood v. Peacock*, 384 U.S. 808 (1966). For scholarly commentary critical of this line of cases, see generally, Amsterdam, *supra* note 231, at 843-50; REDISH, *supra* note 156, at 375-99; Martin H. Redish, *Revitalizing Civil Rights Removal Jurisdiction*, 64 MINN. L. REV. 523 (1980); and Note, *Federal Jurisdiction: The Civil Rights Removal Statute Revisited*, 1967 DUKE L.J. 136.

enactment of the Fourteenth Amendment, very few cases could be removed before trial.<sup>279</sup> With posttrial removal also unavailable, blacks were unable to come to federal court after judgment and demonstrate that discrimination had occurred in their case. Civil rights removal thus was effectively eliminated.

In 1867, Congress expanded the Supreme Court's civil and criminal appellate arising under jurisdiction.<sup>280</sup> Section Twenty-five of the Judiciary Act of 1789 limited jurisdiction to review of the federal issues in a case, thus denying the Court power to review any non-federal issues.<sup>281</sup> The 1867 Act eliminated the language imposing this restriction.<sup>282</sup> As Charles Alan Wright argues, "it seems entirely plausible that Congress intended by eliminating the proviso to open the whole case for review by the Supreme Court, if there is a federal question in the case sufficient to take the case to the Supreme Court."<sup>283</sup> Professor Wright is plainly correct that "[s]uch a course seems wholly consistent with the temper of the times."<sup>284</sup> Given Congress's pervasive distrust of the state courts, legislators probably did not want the presence of a questionable independent state ground for a decision to block federal rights. But the Supreme Court balked once again, holding in *Murdock v. Memphis* that the amendment worked no change.<sup>285</sup>

279. As Professor Edward A. Purcell notes, the Supreme Court "reduced civil rights removal to a trivial remedy." EDWARD A. PURCELL, *LITIGATION AND INEQUALITY* 144 (1992). After 1879, "the civil rights removal statute offered no remedy for blacks against extralegal local prejudice, no matter how virulent and oppressive or how effective that prejudice was in denying their legal rights." *Id.* By the end of the 1870s, of course, Reconstruction was effectively over. Professor Purcell suggests that the Justices may simply have been reflecting the major shift in the country's political attitudes. *Id.* at 145.

280. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

281. The Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 86-87. See *supra* note 88 and accompanying text.

282. Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 387.

283. CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 788-89 (1994).

284. *Id.* at 789.

285. *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875). Anthony Amsterdam has commented on the *Murdock* holding:

I have serious doubt (as did the Justices) whether the result in that case was purposed by Congress; and this very doubt whether Congress might not have meant to turn Supreme Court review into a sort of post hoc removal suggests the extreme disfavor in which the Thirty-Ninth Congress held the state courts.

Amsterdam, *supra* note 231, at 819 n.111.

*Murdock* declined to consider whether Congress could constitutionally extend jurisdiction to all issues raised in an appeal. *Murdock*, 87 U.S. at 633. One can make a very strong affirmative argument. The Supreme Court says that the arising under jurisdiction is coextensive in the original, removal, and appellate modes. See *supra* Part

As Reconstruction continued, Congress enacted additional legislation to protect the newly-freed slaves, Union Army officers,

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II.B. In *Martin v. Hunter's Lessee*, the Court said that the difference between removal and appellate jurisdiction was merely one of timing. *Martin*, 14 U.S. (1 Wheat.) at 349. When an action is removed to a lower federal court, the court adjudicates the entire case, not just the federal issue involved. If all issues can be adjudicated in a removed case, and removal and appellate jurisdiction are coextensive, then the Supreme Court should be able to hear all issues in cases on appeal.

Moreover, in discussing the arising under jurisdiction, the Court refers uniformly to "cases," rather than to "issues" or "claims." This suggests that once jurisdiction over a case attaches, the federal courts have authority to decide the entire case, and not just the federal issues therein. The Court made this inference explicit in *Osborn v. Bank of United States and Tennessee v. Davis*. In discussing the original jurisdiction, the *Osborn* Court asserted that once federal jurisdiction attached, "then all the other questions must be decided as incidental to this, which gives that jurisdiction." *Osborn*, 22 U.S. (9 Wheat.) at 257. The Court reasoned that because so few cases involve only federal issues, to hold otherwise would effectively cripple the original jurisdiction of the lower federal courts. *Id.* In discussing the removal jurisdiction, the *Davis* Court stated: "Nor is it any objection that questions are involved which are not at all of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient." *Davis*, 100 U.S. at 270.

The modern Supreme Court cases and the federal statute authorizing supplemental jurisdiction also support the argument that Congress can authorize the Supreme Court to hear all issues in cases appealed from state court. In *United Mine Workers v. Gibbs*, the Supreme Court held that Article III allows the federal courts to hear a state claim along with a federal claim when the two claims "derive from a common nucleus of operative fact," thus "permit[ting] the conclusion that the entire action before the court comprises but one constitutional 'case.'" *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). Congress codified *Gibbs*, and further extended supplemental jurisdiction to state claims involving additional parties so long as the claims form part "of the same case or controversy." 28 U.S.C. § 1367 (Supp. V 1993). The authority to exercise supplemental jurisdiction over state claims supports the argument here in two ways. First, if the lower federal courts have the power to hear state claims in a case arising under federal law, it is difficult to see why the Supreme Court should not have the same power in a case coming to it from a state court. In addition, Article III's grant of appellate jurisdiction to the Supreme Court in cases arising under federal law applies both to cases reaching it from the lower federal courts and from state courts. Since the Supreme Court has the power to adjudicate pendent state claims in a case that reaches it from a lower federal court, it is difficult to see why the Court could not adjudicate the state claims if the same case came up on appeal from a state court.

In sum, one can make a very strong argument that Congress could constitutionally extend jurisdiction to all issues in an appeal. One counterargument has some merit, however. The states' highest courts are supposed to have the final word on the meaning of state law. If the Supreme Court takes a case on appeal from a state's high court and reverses based on a different interpretation of state law, state authority plainly is compromised. Of course, the federal courts (including the Supreme Court) decide issues of state law when exercising supplemental jurisdiction and in diversity cases, and they sometimes decide wrongly. The state courts are not bound in later cases by these misreadings of state law. Presumably, the state courts also could ignore misinterpretations by the Supreme Court in cases heard on appeal from the state courts. Nonetheless, the federal-state conflict seems potentially more acute in an appeal, because the Supreme Court might tell a state's highest court that it is misinterpreting state law in the very case both courts are hearing.

and northern government officials supervising Reconstruction. These enforcement acts followed a similar pattern. They created new substantive rights, imposed criminal sanctions and provided private civil remedies for violation of the rights, and gave the federal courts original or removal jurisdiction or both over cases arising under the acts.<sup>286</sup> Congress did not appear to favor one branch of the arising under jurisdiction over the other; instead, it used both to achieve its purposes. In accord with prevailing practice after *Prigg v. Pennsylvania*,<sup>287</sup> Congress usually made

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286. For example, Congress passed a major civil rights bill in 1870 to enforce blacks' right to vote under the fifteenth amendment. Act of May 31, 1870, ch. 114, 16 Stat. 140. The Act required state election officials to register voters impartially and prohibited any person from obstructing registration or voting. *Id.* §§ 1-6, 16 Stat. at 140-41. Violators could be sued for up to \$500, plus costs and counsel fees, and could be charged with a misdemeanor. *Id.* §§ 1-5, 16 Stat. at 140-41. A section of the Act aimed specifically at Klan violence imposed stiffer criminal sanctions for conspiring and going in disguise with the intent to deny federal rights. *Id.* § 6, 16 Stat. at 141. Congress gave the federal courts jurisdiction over civil and criminal cases arising under the Act. *Id.* § 8, 16 Stat. at 142. Congress amended the Act in 1871 to give the federal courts an even greater enforcement role. Act of Feb. 28, 1871, ch. 99, 16 Stat. 433. Congress empowered the federal courts to appoint election supervisors who received broad powers to regulate election procedures, *id.* §§ 1-6, 16 Stat. at 433-35, and provided criminal sanctions for interference with supervisors or federal marshals. *Id.* § 10, 16 Stat. at 436-37. Offenders were to be tried in federal court. *Id.* § 9, 16 Stat. at 436. If federal officials or private persons were sued or prosecuted in state court for enforcing the provisions of the Act or exercising their rights under it, the cases could be removed to federal court. *Id.* § 16, 16 Stat. at 438-39.

In 1871, Congress also passed what is probably the best-known civil rights act in the nation's history. The statute, entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes," gave the federal courts jurisdiction to hear civil and criminal cases arising under its provisions. Act of April 20, 1871, ch. 22, 17 Stat. 13. The statute was primarily aimed at Klan violence. Zeigler, *supra* note 250, at 1011-13. It provided damage remedies and criminal sanctions against persons conspiring to deprive another person of constitutional rights, and gave the district and circuit courts jurisdiction over such actions. Act of April 20, 1871, ch. 22, § 2, 17 Stat. at 13-14. The Act also created the private right of action currently codified at 42 U.S.C. § 1983 (1988) for damages or equitable relief against persons acting under color of state law who deprived someone of rights secured by federal law, and gave "the several district or circuit courts of the United States" jurisdiction to hear such cases. *Id.* § 1, 17 Stat. at 13. The jurisdictional provision is currently codified at 28 U.S.C. § 1343 (1988).

Congress passed the Civil Rights Act of 1875 to ensure equal access to public accommodations. Act of Mar. 1, 1875, ch. 114, § 1, 18 Stat. 335. The Act created criminal sanctions for violation of its provisions, and also created a private right of action for damages on behalf of an aggrieved person. *Id.* § 2, 18 Stat. at 336. It gave the district and circuit courts jurisdiction to hear cases arising under the Act. *Id.* § 3, 18 Stat. at 336. The Supreme Court subsequently held sections one and two of the Act unconstitutional because they sought to regulate purely private conduct. See *The Civil Rights Cases*, 109 U.S. 3 (1883).

287. See *supra* notes 203-24 and accompanying text.

the original criminal jurisdiction exclusively federal and the original civil jurisdiction concurrent with the state courts.<sup>288</sup>

The *Commissioners' Revised Statutes*<sup>289</sup> codifying federal law added a general provision making the criminal arising under jurisdiction exclusively federal. The new section read: "The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States. 1. Of all crimes and offenses cognizable under the authority of the United States."<sup>290</sup> This

288. The 1870 Voting Rights Act conferred jurisdiction on the district courts, "exclusively of the courts of the several States, . . . of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, arising under this act . . ." Act of May 31, 1870, ch. 114, § 8, 16 Stat. 140, 142. This provision gave the federal courts exclusive jurisdiction over criminal cases arising under the Act and concurrent jurisdiction with the state courts over civil cases. The phrasing is awkward, however, and could be read to also grant exclusive jurisdiction over civil cases. Of course, if that was Congress's intent, it could simply have said: "The federal courts shall have exclusive jurisdiction over all cases, civil and criminal, arising under this act." The language Congress did use, or slight variations on it, had been used since the Judiciary Act of 1789 to confer jurisdiction on the federal courts. See, e.g., Act of Sept. 24, 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76-79; Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27. Then, as now, a grant of civil arising under jurisdiction generally was considered concurrent with the state courts unless Congress specifically said otherwise. See *THE FEDERALIST*, No. 82, *supra* note 62, at 492-93; *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 396-97 (1821); *Robb v. Connolly*, 111 U.S. 624, 635-37 (1884); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Thus, since the criminal arising under jurisdiction in the two Acts was specifically made exclusive of the state courts while the civil arising under jurisdiction was not, the civil jurisdiction was concurrent.

The 1875 Public Accommodations Act also made the criminal jurisdiction exclusively federal. Act of Mar. 1, 1875, ch. 114, § 3, 18 Stat. 335, 336.

289. See *supra* note 230.

290. 1 COMMISSIONERS' REVISED STATUTES, *supra* note 230, Title XIII, ch. 12, § 117, at 114. This provision fit awkwardly with other provisions governing the jurisdiction of the lower federal courts in criminal cases. The new section appeared in chapter 12, entitled "Provisions Common to More than one Court or Judge." Chapter Three defined the jurisdiction of the district courts, and contained the following provision: "The district courts shall have jurisdiction as follows: First. Of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital . . ." *Id.* § 563 at 94. This provision is inconsistent with the language from Chapter Twelve because it does not make the jurisdiction exclusively federal.

Chapter Seven, by contrast, made the criminal jurisdiction of the circuit courts exclusively federal: "The circuit courts shall have original jurisdiction as follows: . . . Twentieth. Exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the district courts of crimes and offense cognizable therein." *Id.* § 629 at 112. This provision is still inconsistent with the new language in Chapter Twelve, however, because it contains the reservation "except where it is or may be otherwise provided by law . . ." *Id.* A marginal note indicates that the language of

provision was accompanied by an extraordinary textual note in which the Commissioners asserted that the Constitution requires exclusive jurisdiction in criminal cases and that all statutes authorizing the state courts to enforce federal criminal law are void.<sup>291</sup> *Prigg v. Pennsylvania*, which stated in dictum that Congress may authorize, but not require, state courts to enforce federal criminal law,<sup>292</sup> was swept aside:

There is no conflict between the doctrine . . . laid down [in *Prigg*] and that asserted by the court in *Martin v. Hunter's Lessee*. Whatever power Congress may have had in the matter of fugitive slaves was substantive. It was claimed under a specific provision of the Constitution relating to that subject, and was not an incidental exercise of "the judicial power of the United States."<sup>293</sup>

The Commissioners confidently concluded:

It appears, then, that the jurisdiction of penalties and forfeitures, and the criminal jurisdiction offered to the State courts by several acts of Congress, have been declined by almost every State in which such suits have been attempted; and that the power of Congress to

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Subsection Twenty is drawn from Section Eleven of the Judiciary Act of 1789. *Id.* Section Eleven gave the circuit courts "exclusive cognizance of all crimes and offences cognizable under the authority of the United States, . . . except where this act otherwise provides, or the laws of the United States shall otherwise direct . . ." The Judiciary Act of 1789, ch. 20, § 11, 1 Stat 73, 79. The phrase in subsection 20, "except where it is or may be otherwise provided by law" appears to be merely a stylistic rewording of the similar language in the 1789 Act.

291. 1 COMMISSIONERS' REVISED STATUTES, *supra* note 230, Title XIII, ch. 12, at 116-17. "It is assumed in this statement of exclusive jurisdiction," said the Commissioners, "that all enactments authorizing the State courts to exercise jurisdiction of crimes and offenses and penalties under the laws of the United States are nugatory." *Id.* at 116. They cited *Jackson v. Rose*, 4 Va. (2 Va. Cas.) 124 (1815); *United States v. Lathrop*, 17 Johns. (N.Y.) 4 (1819); *Ely v. Peck*, 7 Conn. 244 (1818); and other state court cases from the early part of the century discussed at *supra* notes 195-97 and accompanying text for the proposition that "it was not within the power of Congress to extend to any court not established by the United States any part of 'the judicial power' of the United States." 1 COMMISSIONERS' REVISED STATUTES, *supra* note 230, at 116. They also quoted Justice Story's dictum in *Martin v. Hunter's Lessee* that "[n]o part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to state tribunals." *Id.* (quoting *Martin*, 14 U.S. (1 Wheat.) at 337).

292. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 615-16, 622 (1842).

293. 1 COMMISSIONERS' REVISED STATUTES, *supra* note 230, Title XIII, ch. 12, at 117.

extend such jurisdiction to any courts, except those established by the United States, has been denied not only by those courts, but by the Supreme Court of the United States. The grant of such jurisdiction is therefore nugatory.<sup>294</sup>

The Commissioners' assertions suffer from the same shortcomings as the assertions in the cases they cite.<sup>295</sup> The Commissioners simply announced a limitation on congressional power without any real explanation as to why it should be so. They neither explained why the rules should be different for criminal and civil cases nor addressed how federal courts can hear state criminal cases removed to federal court if state courts cannot hear federal criminal charges. Finally, the attempt to reconcile *Prigg's* statement that Congress can authorize state courts to enforce federal criminal sanctions with *Martin's* statement that Congress cannot seems strained at best. Congress has "substantive" power over many specific matters in the Constitution. For example, Article One, Section Eight, gives Congress the power to establish post offices, and the Fourteenth Amendment gives Congress the power to enforce due process and equal protection against state official action. If Congress imposes criminal sanctions for mail theft or deprivation of civil rights by state officials and gives both federal and state courts jurisdiction over these crimes, why is such legislation merely an "incidental exercise" of federal judicial power and not every bit as "substantive" as the Fugitive Slave Act? The criminal provisions of such legislation should be as enforceable in state court as the Fugitive Slave Act.

Despite these difficulties, Congress enacted the new general provision and made the criminal arising under jurisdiction exclusively federal.<sup>296</sup> Since the Commissioners' textual notes were not included in the revised report that was considered by a joint committee of Congress and the full Congress,<sup>297</sup> there is little reason to conclude that Congress agreed with their reasoning on the constitutional point. Moreover, Congress could have adopted the new provision without considering the constitutional issue because Congress clearly has the power to

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294. *Id.*

295. See discussion at *supra* part II.C.

296. See Revised Statutes of the United States, § 711 (1875).

297. See Goldstein, *supra* note 264, at 518.

make the criminal arising under jurisdiction exclusively federal even if it is not obliged to do so.<sup>298</sup> Given the tenor of the times, the new provision probably was not very controversial. Congress was consolidating its power and expanding national authority. Legislators had spent nearly a decade trying to make the southern states truly provide justice for all. To help accomplish this, Congress greatly expanded the arising under jurisdiction in both civil and criminal cases. The movement was all one way—from state court to federal court. In this climate, it seems unlikely that the new statutory provision, which was consistent with then-existing practice,<sup>299</sup> would receive much attention. In any event, the deed was done, and the criminal arising under jurisdiction was exclusively federal.<sup>300</sup> The provision has remained on the books ever since, and is currently codified at 18 U.S.C. § 3231, which reads: “The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.”<sup>301</sup>

The jurisdictional enactments of Reconstruction culminated in the Act of March 3, 1875.<sup>302</sup> This Act is best known for conferring general original civil arising under jurisdiction on the lower federal courts. By focusing on this part of the statute,

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298. See *supra* notes 65-66, 155 and accompanying text, and *infra* note 424.

299. See the discussion *supra* of the jurisdictional provisions of the enforcement acts accompanying notes 255-88.

300. One lower federal court recognized the significance of the new provision shortly after its enactment. In *Ex parte* Houghton, Judge Wheeler remarked:

This provision was not in the statutes of the United States anywhere before. It was framed *ex industria*, and placed there for some purpose. It was not merely the provision of the judiciary act relating to the jurisdiction of the circuit courts brought forward and placed here, as well as in the chapter relating to those courts, to express the same thing again in another connection; but it is a different thing. That provision made the jurisdiction of the circuit courts exclusive of all other courts, federal as well as state, except as otherwise provided. This applies to all the courts of the United States, and expressly excludes, and seems to be made expressly to exclude, the jurisdiction of the courts of the states.

*Ex parte* Houghton, 8 F. 897, 900 (D. Vt. 1881).

301. 18 U.S.C. § 3231 (1988).

302. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. The Act was entitled “An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes.” *Id.*

commentators have characterized the 1875 Act as very expansive.<sup>303</sup> The Act appears somewhat less expansive, however, when one examines all of its arising under provisions.

Specifically, the Act contains three grants of arising under jurisdiction. First, it gives the circuit courts general original civil arising under jurisdiction:

[T]he circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority . . . .<sup>304</sup>

Next, the Act continues the general original criminal arising under jurisdiction first granted in Sections Nine and Eleven of the Judiciary Act of 1789:

[The circuit courts] shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein.<sup>305</sup>

Finally, the Act granted general removal jurisdiction in civil cases arising under federal law:

[In] any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the

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303. See, e.g., FRANKFURTER & LANDIS, *supra* note 103, at 65 (The Act "gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789. These courts ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliance for vindicating every right given by the Constitution, the law, and treaties of the United States."); COLLINS, *supra* note 5, at 719 (examining "the great expansion of federal jurisdiction resulting from the passage of the Judiciary Act of 1875").

304. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

305. *Id.*

Constitution or laws of the United States, or treaties made, or which shall be made, under their authority[,] . . . either party may remove said suit into the circuit court of the United States for the proper district.<sup>306</sup>

These provisions are striking for several reasons. The grant of original civil arising under jurisdiction was undeniably broad, extending to any case arising under federal law so long as the amount in controversy exceeds five hundred dollars. The limited legislative history of this provision indicates that Congress meant to extend jurisdiction to Article III limits.<sup>307</sup>

The language Congress used in continuing the original criminal arising under jurisdiction suggests that Congress believed it had the power to make jurisdiction concurrent with the state courts. The language tracked the language of Section Eleven of the Judiciary Act of 1789 almost exactly.<sup>308</sup> Although the jurisdiction in both Acts was exclusively federal, both made an exception for instances where Congress directed otherwise. This reaffirmation of Section Eleven only one year after enactment of the Revised Statutes suggests that Congress gave little, if any, weight to the Commissioners' assertion that state courts could not hear federal criminal charges.<sup>309</sup>

306. *Id.* § 2, 18 Stat. at 470-71.

307. Congress tracked the constitutional language almost exactly. Senator Carpenter, a member of the Judiciary Committee, was primarily responsible for the final draft of the Act. 2 CONG. REC. 4984 (1874). He reminded his colleagues of Justice Story's argument that Congress was required to vest the lower federal courts with the full scope of federal judicial power. He then said, "This bill gives precisely the power which the Constitution confers—nothing more, nothing less." *Id.* at 4986-87. Most commentators have confirmed this understanding. See, e.g., Doernberg, *supra* note 5, at 603; Collins, *supra* note 5, at 723; Patti Alleva, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After Merrell Dow*, 52 OHIO ST. L.J. 1477, 1492-93 (1991); Forrester, *supra* note 5, at 374-77 ("No indication has been found either in the proceedings in Congress or in the available legal periodicals of the day that the statutory clause should have a different meaning and effect than the Constitutional clause. They were, and it would seem reasonably so, considered synonymous."). *But see* Chadbourn & Levin, *supra* note 5, at 642-45 (suggesting that most members of Congress probably were unaware of the potential scope of the arising under language in the Act).

308. Section Eleven of the 1789 Act gave the circuit courts "exclusive cognizance of all crimes and offences cognizable under the authority of the United States, . . . except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein." The Judiciary Act 1789, ch. 19, § 11, 1 Stat. 73, 78-79.

309. See *supra* notes 289-294 and accompanying text.

The grant of removal jurisdiction was expansive in some ways, but restrictive in others. As with the original civil arising under jurisdiction in Section One of the Act, Congress tracked the language of Article III and allowed removal of any civil case "arising under the Constitution or laws of the United States." This suggests that Congress meant to extend the civil removal jurisdiction out to constitutional limits.<sup>310</sup> On the other hand, by limiting the general removal arising under jurisdiction to civil cases, Congress broke sharply with its past practice of making civil and criminal removal jurisdiction coextensive. The removal provisions in the Acts of 1815, 1833, 1863, and 1866 all allowed removal of both civil *and* criminal cases brought against persons exercising their rights or authority under the acts or other federal laws.<sup>311</sup> By forbidding general federal question removal in criminal cases, Congress significantly restricted the removal jurisdiction. The legislative history does not indicate why Congress chose to break with tradition. Congress may have felt that existing criminal removal provisions were adequate to deal with the immediate problems in the South, and that a general grant of criminal removal jurisdiction was unnecessary.<sup>312</sup> Congress also may not have anticipated that federal issues would arise in routine state criminal cases. Today, of course, federal constitutional issues arise in vast numbers of state criminal actions, but in 1875 the Bill of Rights applied only to federal officials.<sup>313</sup> Thus, federal issues were much less likely to arise in state criminal cases than they are today. Congress may have felt that the Supreme Court's appellate jurisdiction would protect federal rights in the occasional state criminal case that involved an issue of federal law.

On the other hand, criminal removal jurisdiction would have helped corporations doing business interstate. Historians have

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310. Collins, *supra* note 5, at 726-27.

311. Act of Feb. 14, 1815, ch. 31, § 8, 3 Stat. 195, 198; Act of March 2, 1833, ch. 57, § 3, 4 Stat. 632, 633; Act of March 3, 1863, ch. 81, § 5, 12 Stat. 755, 756; Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27.

312. In addition, although the Revised Statutes eliminated post trial removal in civil rights cases, *see supra* note 274 and accompanying text, the Supreme Court did not restrict pretrial removal until 1879, when it decided *Virginia v. Rives*. *Virginia v. Rives*, 100 U.S. 313 (1879); *see supra* note 277 and accompanying text. Thus, Congress may have believed that existing removal provisions were sufficient to remedy unfairness in state criminal cases.

313. *See Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916), and cases cited therein.

argued that Congress granted civil removal jurisdiction in the 1875 Act primarily to protect corporations from unfriendly state regulation.<sup>314</sup> State regulatory legislation often imposed penal sanctions, and corporations could be expected to fight criminal prosecutions with federal defenses.<sup>315</sup> Since corporations presumably needed as much protection from criminal prosecutions as from civil suits, it is puzzling that the general removal jurisdiction was limited to civil cases.

Perhaps Congress simply believed that it was inappropriate to interfere with the state criminal process by allowing a general removal of state criminal cases to federal court in the absence of a compelling threat to federal interests. As Justice Brewer stated in *State of Iowa v. Chicago, B. & Q Railroad*:

While it may be within the power of congress to transfer to the federal court all actions to enforce the penal laws of the state in which questions of a federal nature may arise, yet a due regard for the dignity of the state, and a proper harmony between the state and federal governments, doubtless prompted congress to leave to the state courts the primary decision of all such actions, preferring that if a party thought any such rights were denied in the state courts he should seek relief through the appellate jurisdiction of the supreme court of the United States.<sup>316</sup>

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314. See, e.g., FRANKFURTER & LANDIS, *supra* note 103, at 64-65, 91-93; HYMAN, *supra* note 257, at 536-41; Wiecek, *supra* note 250, at 341-42; Collins, *supra* note 5, at 727-29.

315. In the years that followed, many states enacted laws regulating interstate commerce. With removal unavailable, corporations often invoked the federal courts' original jurisdiction seeking injunctions to restrain state officials from enforcing the criminal sanctions contained in such legislation. See generally Congressional Research Service, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 770-77 (1973); *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1024 (1965). One focal point of the struggle between the states and corporations concerned the attempt by state governments to fix maximum railroad rates. Donald H. Zeigler, *An Accommodation of the Younger Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266, 271 (1976). In a series of decisions beginning with *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418 (1890), and culminating in *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court held that the rate statutes in question deprived the railroads of property without due process of law, and enjoined the prospective enforcement of those laws. Zeigler, *supra*, at 271-72.

316. *State of Iowa v. Chicago B. & Q.R. Co.*, 37 F. 497, 502 (C.C.S.D. Iowa 1889) (sitting as a Circuit Court judge). In the years following the 1875 Act, the Supreme Court refused to use the original civil arising under jurisdiction to grant injunctions against pending state criminal proceedings. Instead, only threatened state prosecutions were

In summary, the 1875 Act reshuffled the civil and criminal arising under jurisdiction in the original and removal modes. In the 1789 Act, general original criminal arising under jurisdiction was granted but the civil counterpart was not. Neither criminal nor civil removal arising under jurisdiction was granted in 1789, but over the years both sorts of removal jurisdiction were given coextensively in specific federal statutes. In the 1875 Act, the original criminal and civil arising under jurisdiction were made more nearly equal. The circuit courts were empowered to hear civil cases arising under the Constitution and laws of the United States, as well as all crimes and offenses cognizable under the authority of the United States. But the civil and criminal removal jurisdiction, which had been granted equally over the years, was suddenly split in a manner reminiscent of the original jurisdiction in the 1789 Act. One branch of removal jurisdiction, the civil, was given generally. The other branch, the criminal, was not given generally but was limited to specific grants under particular federal statutes.

Although the Supreme Court often interpreted jurisdictional grants in Reconstruction statutes quite narrowly,<sup>317</sup> the Court continued to interpret Article III's arising under jurisdiction very broadly, reaffirming that it was coextensive in civil and criminal cases in the original, removal, and appellate modes. In *Mayor v. Cooper*, the Court upheld the constitutionality of the 1863 and 1866 removal statutes,<sup>318</sup> and stated:

The power here under consideration is given in general terms. No limitation is imposed. The broadest language is used. "All cases" so arising are embraced. None are excluded. . . .

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enjoined if they were based on state laws that violated federal rights. See Zeigler, *supra* note 315, at 281.

317. See *supra* notes 267-85 and accompanying text.

318. *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247 (1867). Cooper sued the mayor and aldermen of Nashville, Tennessee, in state court, alleging trespass and conversion. *Id.* at 248. The defendants sought to remove the case to federal circuit court under the 1863 and 1866 removal acts, saying they had acted under federal military authority. *Id.* at 248. The circuit court held that the removal acts were unconstitutional, and ordered the case remanded to state court. *Id.* at 249. An appeal was taken to the Supreme Court, and it reversed. *Id.* at 254.

[N]or is there any restriction as to the tribunals—State or Federal—in which they may arise. Wherever found, they are within the reach of this authority . . . .

. . . .  
Jurisdiction, original or appellate, alike comprehensive in either case, may be given. The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction within the sphere of the power, extending as well to the courts of the States as to those of the nation, is permitted. There is no distinction in this respect between civil and criminal causes. Both are within its scope.<sup>319</sup>

The Court returned to these themes in *Tennessee v. Davis* in upholding the constitutionality of the 1833 Removal Act.<sup>320</sup> James M. Davis was indicted for murder in a Tennessee state court.<sup>321</sup> He filed a removal petition in federal circuit court, alleging that he acted in self-defense while engaged in his duties as a federal revenue collector.<sup>322</sup>

The Court asserted that the power to remove such a case is necessary to vindicate federal authority, for otherwise, "the operations of the general government may at any time be arrested at the will of one of its members."<sup>323</sup> The Court cited *Cohens* for the propositions that the arising under jurisdiction extends equally to criminal and civil cases, and that a case arises under federal law when a federal issue is raised by the plaintiff or the defendant:

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319. *Id.* at 251-52. Not surprisingly, the Court cited *Martin*, *Cohens*, and *Osborn*. *Id.* at 253. The Court also explicitly stated that the removal jurisdiction conferred by the Reconstruction statutes had the same basis as the appellate jurisdiction. "The jurisdiction here in question involves the same principle, and rests upon the same foundation with that conferred by the twenty-fifth section of the Judiciary Act of 1789." *Id.* at 253. Since the constitutionality of the appellate jurisdiction had been uniformly sustained, the Court concluded that the removal statutes were constitutional as well. *Id.* at 254.

320. *Tennessee v. Davis*, 100 U.S. 257 (1879).

321. *Id.* at 258.

322. *Id.* at 258-59.

323. *Id.* at 263. Nor did the Court think eventual Supreme Court appellate review of state proceedings would be sufficient to protect federal interests because "the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested." *Id.*

[The arising under jurisdiction] embraces alike civil and criminal cases arising under the Constitution and laws. Both are equally within the domain of the judicial powers of the United States, and there is nothing in the grant to justify an assertion that whatever power may be exercised over a civil case may not be exerted as fully over a criminal one. . . . What constitutes a case thus arising was early defined in [*Cohens*]. It is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either.<sup>324</sup>

The Court also specifically rejected the argument that removal of a state criminal action raising a federal defense violates state sovereignty. This argument, the Court stated,

ignores entirely the dual character of our government. It assumes that the States are completely and in all respects sovereign. But when the national government was formed, some of the attributes of State sovereignty were partially, and others wholly, surrendered and vested in the United States. . . . Now the execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them, are confided to another sovereign, and to that extent the sovereignty of the State is restricted. The removal of cases arising under those laws, from State into Federal courts, is, therefore, no invasion of State domain.<sup>325</sup>

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324. *Id.* at 264. The Court also cited *Osborn* for the proposition that a case arises under federal law when a federal issue "forms an ingredient of the original cause . . . although other questions of fact or of law may be involved in it." *Id.*

325. *Id.* at 266-67. This reasoning also implicitly rejects for our federal system the maxim that one sovereign will not enforce the laws of another. See *supra* notes 196-200 and accompanying text.

Finally, the Court downplayed the practical problems that a federal court might face when adjudicating a state criminal prosecution:

[T]he mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case.<sup>326</sup>

#### IV. RECONSTRUCTION TO THE PRESENT

The modern framework for the exercise of the arising under jurisdiction was in place by the end of Reconstruction. While there have been important changes since then, such changes have been adjustments within an established structure rather than modifications of the structure itself. In the intervening years, of course, Congress enacted an enormous volume of legislation, both civil and criminal, and looked to the courts to enforce the new laws.<sup>327</sup> This expanded the arising under jurisdiction in the sense that there is much more federal law for cases to arise under. The general jurisdiction statutes have not changed

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326. *Id.* at 271-72. The Court continued on this point as follows:

The supposed anomaly of prosecuting offenders against the peace and dignity of a State, in tribunals of the general government, grows entirely out of the division of powers between that government and the government of a State; that is, a division of sovereignty over certain matters. When this is understood (and it is time it should be), it will not appear strange that, even in cases of criminal prosecutions for alleged offenses against a State, in which arises a defence under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding.

*Id.*

327. See Judge Henry J. Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1021-27 (1977) (in which Judge Friendly provides an overview of the major pieces of this legislation).

markedly,<sup>328</sup> however, and the constitutional contours of the arising under jurisdiction have not changed at all.<sup>329</sup>

Developments in three areas are important to our discussion. First, the Supreme Court interpreted the 1875 jurisdictional statute quite narrowly, confining the original and removal civil arising under jurisdiction to only a fraction of their possible scope. Second, the Court reaffirmed Congress's authority to require the state courts to enforce federal law, both civil and criminal.

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328. As to the appellate jurisdiction, Congress in stages extended discretionary review and restricted review as of right. Congress continues to treat civil and criminal cases equally. Section 25 of the Judiciary Act of 1789, as amended in 1867, *see supra* notes 280-85 and accompanying text, was re-enacted without significant change in Section 709 of the Revised Statutes of the United States (1875) and Section 237 of the Judicial Code (1911). The Judiciary Act of 1914 enlarged the jurisdiction by allowing discretionary review in cases that were the counterparts of the cases where Congress had authorized an appeal as of right. Thus, review by certiorari could be sought when the decision of the state court upheld the validity of federal law, overturned state law as being in conflict with federal law, or was in favor of the interpretation of federal law claimed by either party. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790. The Judiciary Act of 1916 made review discretionary whether the state court decision was in favor or against the interpretation claimed by either party. Act of Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726. The 1948 revision of the Judicial Code left these provisions basically unchanged. HART & WECHSLER, *supra* note 55, at 503. In 1988, Congress eliminated the remaining appeals as of right, thus making all review discretionary. Act of June 27, 1988, Pub. L. No. 100-352, § 3, 102 Stat. 662. The current grant of appellate arising under jurisdiction reads as follows:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a) (1988).

329. The Supreme Court recently reaffirmed the broad scope of the Article III arising under jurisdiction in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983). *Verlinden*, a Dutch corporation, and the Federal Republic of Nigeria entered an agreement for Nigeria to purchase cement. When Nigeria failed to comply with certain terms of the agreement, *Verlinden* brought suit in federal court in New York under 28 U.S.C. § 1330(a), which gives the district courts jurisdiction "of any non-jury civil action against a foreign state . . . as to any claim . . . with respect to which the foreign state is not entitled to immunity" under 28 U.S.C. §§ 1605-07. *Id.* at 483. Nigeria contended that § 1330(a) violated Article III, and moved to dismiss. The Supreme Court upheld jurisdiction, relying upon *Osborn*. That case, said the Court, "reflects a broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law." *Id.* at 492. The Court held that a federal issue would arise in suits brought under § 1330(a) because the court must consider whether the foreign state is immune from suit under federal law. *Id.* at 493-94.

Finally, on the civil side, the Court developed the doctrines of pendent and ancillary jurisdiction.

### A. Construction of the 1875 Jurisdictional Statute

The Supreme Court's restrictive reading of the 1875 Act is a story that has been told often and well,<sup>330</sup> so I will give only a brief summary. As noted above, the limited legislative history of the 1875 Act indicates that Congress meant to extend both the original and removal civil arising under jurisdiction to Article III limits.<sup>331</sup> The Supreme Court clearly read the Act this way in several removal cases.<sup>332</sup> In cases involving the original jurisdiction, however, the Court began moving toward the rule

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330. The best recent treatments of the subject are Doernberg, *supra* note 5, and Collins, *supra* note 5. For other excellent articles, see Forrester, *supra* note 5; Chadbourn & Levin, *supra* note 5; Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953); Ernest J. London, "Federal Question" Jurisdiction—A Snare and a Delusion, 57 MICH. L. REV. 835 (1959); William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" under Federal Law*, 115 U. PA. L. REV. 890 (1967); and Alan D. Hornstein, *Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis*, 56 IND. L.J. 563 (1981).

331. See *supra* notes 307, 310 and accompanying text.

332. The Court discussed the constitutional scope of the arising under jurisdiction and then applied those standards to removal under the 1875 Act. For example, in *Railroad Company v. Mississippi*, the state brought a mandamus action in state court to compel the railroad to remove a bridge it had built over a stream along the Mississippi-Louisiana border. *Railroad Co. v. Mississippi*, 102 U.S. 135 (1880). The railroad contended that a federal statute authorized construction of the bridge. The Court said that *Cohens, Osborn, Mayor v. Cooper*, and *Tennessee v. Davis* "firmly established" that a case arises under federal law when its decision depends on a federal right asserted by either plaintiff or defendant. *Id.* at 140-41. Speaking of the case before it, the Court asked rhetorically "[i]s it not, then, plainly a case which, in the sense of the Constitution, and of the statute of 1875, arises under the laws of the United States?" *Id.* at 140. See also *Ames v. Kansas ex rel. Johnston*, 111 U.S. 449, 462, 471 (1884) (equating the scope of the constitutional and statutory arising under provisions).

The Court gave its most expansive interpretation of the removal jurisdiction under the 1875 Act in the *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885). All of the cases looked remarkably like Chief Justice Marshall's breach of contract hypothetical in *Osborn*. See *supra* notes 169-73 and accompanying text. Each case asserted a state-created cause of action against the defendant railroad. The railroads sought to remove the cases to federal court based on their status as federal corporations. *Id.* at 3-10. The Court quoted extensively from *Osborn* in support of its conclusion that any case by or against a federally-chartered corporation arises under federal law. The Court once again equated the removal jurisdiction under the 1875 Act with Article III arising under jurisdiction, and held that the cases were properly removed. *Id.* at 11, 17.

that a case arises under federal law only if the federal issue appears on the face of the plaintiff's well-pleaded complaint.<sup>333</sup>

The Court adopted this rule in *Tennessee v. Union & Planters' Bank*,<sup>334</sup> and, for good measure, also applied it to cases invoking the civil removal arising under jurisdiction.<sup>335</sup> The Court may have taken these steps in response to the avalanche of cases that fell on the federal courts after 1875. Congress had been slow to help relieve the congestion, and the Court probably felt that it had to take some action on its own.<sup>336</sup>

As every student of the federal courts knows, *Tennessee v. Union and Planters' Bank* marked merely the beginning of the long struggle to define the scope of the statutory original and removal civil arising under jurisdiction. In *American Well Works*

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333. See *Metcalf v. Watertown*, 128 U.S. 586 (1888) (holding that a case does not arise under federal law when the federal issue first appears in plaintiff's reply to defendant's answer and the plaintiff did not raise the issue in the complaint); *Shreveport v. Cole*, 129 U.S. 36 (1889) (deciding that a case does not arise under federal law when plaintiff's complaint contains a federally-based response to an anticipated defense in the answer which, when filed, substantially undercuts the need to reach the federal issue).

334. *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894).

335. As to the original jurisdiction, the Court simply asserted that the 1875 Act required the federal issue to appear on the face of the plaintiff's complaint, citing the *Metcalf* case. *Id.* at 460; see *supra* note 333. The Court could not make such an assertion about removal jurisdiction, however, because of the substantial precedent holding that cases could be removed if the federal issue appeared in the defendant's answer. See *supra* note 332. Instead, the Court pointed to some amendments to the Act in 1887. The 1875 Act simply authorized removal of civil cases arising under federal law, Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, but the 1887 Act allowed removal of cases arising under federal law "of which the circuit courts of the United States are given original jurisdiction by [Section One of the 1887 Act]." Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553. Because a case could be brought in federal court originally only if the federal issue appeared on the face of the plaintiff's complaint, the Court concluded that this condition should apply to the removal jurisdiction as well. *Union & Planter's Bank*, 152 U.S. at 461-62.

Scholars have vigorously contested this interpretation of the 1887 Act. See, e.g., Doernberg, *supra* note 5, at 605-06 (arguing that "Congress' failure, in the 1887 Act, to change the language conferring original jurisdiction cannot reasonably be interpreted as altering the requirements for asserting it," and that consequently, the reference back to the original jurisdiction in the removal section should not be read as imposing any new restrictions on the removal jurisdiction); Collins, *supra* note 5, at 738-56 (arguing that diversity rather than federal question jurisdiction was the target of reform in the 1887 Act).

336. For a review of the slow course of reform legislation in Congress, see FRANKFURTER & LANDIS, *supra* note 103, at 69-102. Professor Purcell notes that the Court's restriction of the civil removal arising under jurisdiction stands in stark contrast to the Court's expansion of the diversity removal jurisdiction during the same period. PURCELL, *supra* note 279, at 268-72. Professor Purcell contends that the latter jurisdiction was expanded to strengthen the litigation position of corporations defending against tort claims. *Id.* at 271.

*v. Layne & Bowler*, Justice Holmes, writing for the Court, asserted that “[a] suit arises under the law that creates the cause of action,<sup>337</sup> only to see the Court take jurisdiction five years later over a suit asserting a state-created cause of action because federal law was centrally involved.<sup>338</sup> And, in *Skelly Oil v. Phillips Petroleum*,<sup>339</sup> the Court introduced a new level of complexity by holding that in a case brought under the federal declaratory judgment statute,<sup>340</sup> a court must recast the action as a coercive suit and then determine whether *that* case would arise under federal law.<sup>341</sup>

All of the cases in this line are civil cases. It is intriguing to ponder why a similar line of cases did not develop on the criminal side. The 1875 Act, after all, gave the lower federal courts jurisdiction over “all crimes and offenses cognizable under the authority of the United States . . . .”<sup>342</sup> This broad language might be read to encompass any criminal case involving an issue of federal law. Why have the federal courts not had to struggle in criminal cases as they have in civil cases to keep from being inundated by litigation in which federal law is only peripherally involved?

The answer, I think, lies in our history of exclusive jurisdiction, federal *and* state, in criminal cases. On the civil side, the courts have struggled most in cases where the plaintiff asserts a state-created cause of action, but the case also involves significant federal issues.<sup>343</sup> A state prosecutor could try to

337. *American Well Works v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

338. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). *But see Moore v. Chesapeake & Ohio Ry.*, 291 U.S. 205 (1934); *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986). For an interesting discussion of *Moore*, see PURCELL, *supra* note 279, at 375-76 n.147.

339. *Skelly Oil Co. v. Phillips Petroleum*, 339 U.S. 667 (1950).

340. 28 U.S.C. §§ 2201-2202 (1988).

341. The Court reaffirmed this standard. *See Franchise Tax Bd. of California v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). Professors Doernberg and Mushlin have argued that the Court misinterpreted the declaratory judgment statute and that *Skelly* and *Franchise Tax* are wrongly decided. Donald L. Doernberg & Michael Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. REV. 529 (1989).

342. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

343. One reason the courts struggle is because the well-pleaded complaint rule forces them to dismiss cases in which federal law will determine the outcome. It is hard to accept that such a case does not arise under federal law. *Consider Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989). In *Graham*, the tenth circuit misapplied the rule twice in

bring the criminal counterpart. A state prosecutor might try to file state criminal charges in federal court if significant federal issues were raised by the defendant or were otherwise present, contending that the action was "cognizable under the authority of the United States" and thus within the original criminal jurisdiction of the federal courts. I have not found any cases on point, however.<sup>344</sup> This is not surprising. The habit of exclusive original jurisdiction in criminal cases is so ingrained that it would not occur to a state prosecutor to try this gambit. Consequently, all of the criminal cases filed originally in federal court are brought by federal prosecutors and allege violations of federal criminal statutes. To use the parlance of the civil side, a federal statute "creates the cause of action." Thus, under the Holmes test or the face of the complaint test, federal criminal cases plainly arise under federal law.

The Court probably has not restricted the criminal removal jurisdiction because Congress has never granted general criminal removal arising under jurisdiction. Thus, a run-of-the-mill state criminal case is not a candidate for removal to federal court, even

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a very straightforward case. The facts were as follows. The Chickasaw Nation owns and operates a Motor Inn in Sulphur, Oklahoma. *Id.* at 839. Oklahoma brought an action in state court against the Chickasaw Nation for unpaid state taxes on the sale of cigarettes and bingo receipts from the Inn. *Id.* Because the case raised a federal question concerning tribal immunity to state taxes, the Indians removed the case to federal court. *Id.* Oklahoma moved to remand, arguing that the immunity issue came up only as a defense and did not appear on the face of its complaint. *Id.* The district court denied the motion, holding that the tribal immunity issue was "implicitly raised" by the complaint. *Id.* at 839. The tenth circuit affirmed, and the Supreme Court vacated and remanded for reconsideration in light of the well-pleaded complaint rule. *Id.* at 839-40. The circuit adhered to its previous decision, holding that while "nothing within the *literal* language of the pleading even suggests implication of a federal question, such a question is inherent within the complaint because of the parties subject to the action." *Id.* at 840. The Supreme Court reversed again based on the well-pleaded complaint rule. *Id.*

344. *Cf. Gwin v. Breedlove*, 43 U.S. (2 How.) 29 (1844). Breedlove recovered a money judgment in federal circuit court. The money was given to the federal marshal, Gwin. *Id.* at 29. Gwin did not pay all of the money to Breedlove, so Breedlove moved for judgment against Gwin under a Mississippi statute that made a sheriff liable for the money collected plus a 25 percent penalty. *Id.* at 30. The circuit court granted judgment for Breedlove, but the Supreme Court reversed the part of the judgment requiring Gwin to pay the penalty because the penalty was criminal in nature, and "the courts of the United States hav[e] no power to execute the penal laws of the individual states . . ." *Id.* at 37. *See also Gwin v. Barton*, 47 U.S. (6 How.) 7 (1848).

if the defendant raises an issue of federal law.<sup>345</sup> The civil rights and federal officer removal statutes are still on the books,<sup>346</sup> but civil rights removal was virtually eliminated by 1879,<sup>347</sup> and federal officer removal is invoked infrequently. Thus, the Supreme Court has not had to struggle on the criminal side as it has in civil cases to define the scope of the statutory arising under jurisdiction.<sup>348</sup>

Interestingly, the recent decision in *Merrell Dow Pharmaceuticals v. Thompson* may have made the statutory arising under standards for original and removal civil cases more like the statutory standards for original criminal cases.<sup>349</sup> *Merrell Dow* appears to re-adopt the *American Well Works* standard for civil actions.<sup>350</sup> *American Well Works* held that a

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345. The lower federal courts so held in several cases decided in the late 1800's. See, e.g., *Dey v. Chicago, M. & St. P. Ry.*, 45 F. 82 (C.C.N.D. Iowa 1891); *Texas v. Day Land & Cattle Co.*, 41 F. 228 (C.C.W.D. Tex. 1890); *Iowa v. Chicago, B. & Q. R. Co.*, 37 F. 497 (C.C.S.D. Iowa 1889). In all of these cases, the defendants were charged with violating a state criminal law. They asserted defenses based on federal law, and sought to remove the cases to federal court under the 1875, 1887, and 1888 jurisdiction acts. The federal courts denied removal on the ground that the general arising under removal jurisdiction applied only to civil cases.

346. See *supra* notes 233-38 (federal officer), 255-57, 263 (civil rights) and accompanying text.

347. See *supra* notes 271-79 and accompanying text.

348. The Court has not had to face the problems presented by *Skelly Oil and Franchise Tax* on the criminal side because there is no criminal equivalent of a declaratory judgment.

349. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986).

350. *Merrell Dow* rejected a case in which plaintiffs asserted several state common law causes of action, including negligence, and claimed that misbranding a drug in violation of a federal statute was evidence of that negligence. *Merrell Dow*, 478 U.S. at 805. Based on the parties' stipulation that a private right of action could not be implied from the federal statute, the Court assumed that Congress affirmatively did not intend to create a private remedy. The Court then concluded that it would flout, or at least undermine, congressional intent to exercise federal question jurisdiction to provide a private remedy by use of a state cause of action. *Id.* at 814.

Several commentators suggest that *Merrell Dow* works a de facto return to the *American Well Works* standard. See, e.g., *Alleva, supra* note 307, at 1524 (*Merrell Dow* "significantly recasts the federal question notion of substantiality in the restrictive *American Well vein*."); *Doernberg, supra* note 5, at 638 ("[N]o cause of action not created by Congress will be able to be heard in the federal courts pursuant to section 1331."); ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 240 (1989) (Under *Merrell Dow*, "federal question jurisdiction exists only if the federal law itself creates a cause of action, albeit one not relied on by the plaintiff."). A case cannot proceed unless the plaintiff asserts a cause of action that the court has power to hear. If a federal court lacks jurisdiction to enforce a federal right by means of a state cause of action, a case can proceed only if federal law creates the cause of action. If federal law does not, then the plaintiff is out of court.

case arises under the law that creates the cause of action.<sup>351</sup> Thus, if state law creates the cause of action, a civil case cannot be brought in federal court, even though significant issues of federal law will arise. If federal law creates the cause of action, then the case may be brought in federal court. These rules are similar to the standards on the criminal side. Cases for violation of state criminal laws are brought in state court, even though important issues of federal law may be present; cases for violation of federal criminal law are brought in federal court. Two important differences remain. First, jurisdiction of civil cases arising under federal law generally is concurrent with the state courts, while jurisdiction of criminal arising under cases is exclusively federal. Second, a federal (or state) court can hear a civil case asserting a federal common law cause of action,<sup>352</sup> while this is not possible on the criminal side. Given the current restrictive standards for implying private rights of action from federal statutes, however, there are relatively few new federal common law causes of action being created.<sup>353</sup> Therefore, as a practical matter, only those civil cases that assert a congressionally created cause of action and only those criminal cases that charge a defendant with a statutorily created federal crime arise under federal law for purposes of 28 U.S.C. § 1331 and 18 U.S.C. § 3231.

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Most lower federal court decisions after *Merrell Dow* have applied the *American Well Works* test. See, e.g., *Rogers v. Platt*, 814 F.2d 683, 688 (D.C. Cir. 1987); *Oliver v. Trunkline Gas. Co.*, 796 F.2d 86, 88-89 (5th Cir. 1986); *Utey v. Varian Assoc., Inc.*, 811 F.2d 1279, 1283-86 (9th Cir.), cert. denied, 484 U.S. 824 (1987); *Nashoba Comm. v. Town of Danvers*, 893 F.2d 435, 438-39 (1990). For an extensive discussion of these and similar cases, see Alleva, *supra* note 307, at 1532-38.

351. *American Well Works*, 241 U.S. at 260 (1916).

352. *Illinois v. Milwaukee*, 406 U.S. 91 (1972).

353. See *Karahalios v. National Fed'n of Fed. Employees*, 489 U.S. 527, 536 (1989); *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981); *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 15-16 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979). See generally, Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L. J. 665, 708-26 (1987); Robert H.A. Ashford, *Implied Causes of Action Under Federal Laws: Calling the Court Back to Borak*, 79 NW. U. L. REV. 227 (1984); George D. Brown, *Of Activism and Erie—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617 (1984).

*B. Congressional Power to Require State Courts  
to Enforce Federal Law*

Following Reconstruction, the Supreme Court made clear that Congress can require the state courts to hear both civil and criminal cases arising under federal law. In 1876, *Clafin v. Houseman* reaffirmed Congress's power.<sup>354</sup> Julius Houseman, as assignee in bankruptcy of Comstock and Young, sued Horace Clafin in New York state court under the Bankruptcy Act of 1867.<sup>355</sup> Houseman claimed that the bankrupts had willingly suffered a default judgment in a suit by Clafin just before they became insolvent, fraudulently intending to give Clafin a preference over other creditors.<sup>356</sup> The defendant demurred, arguing that the state court lacked subject matter jurisdiction.<sup>357</sup> The state court disagreed and subsequently entered judgment for the plaintiff.<sup>358</sup> The appellate courts affirmed, and the case reached the United States Supreme Court by writ of error.<sup>359</sup>

The Court first held that the Bankruptcy Act did not make the action exclusively federal.<sup>360</sup> Consequently, the state courts had concurrent jurisdiction.<sup>361</sup> The Court then discussed the correct rules of dual sovereignty:

The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. . . . [Federal and state law] together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as

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354. *Clafin v. Houseman*, 93 U.S. 130 (1876).

355. Act of March 2, 1867, ch. 176, § 35, 14 Stat. 517.

356. *Clafin*, 93 U.S. at 131.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.* at 135-36.

361. *Id.* at 136.

courts of the same country, having jurisdiction partly different and partly concurrent. The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the State and Federal governments. . . .<sup>362</sup>

The Court next affirmed that the state courts have a duty to hear federal claims when Congress does not make jurisdiction exclusively federal:

[R]ights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts, competent to decide rights of the like character and class . . . . If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. . . .

It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other . . . . But this is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied.<sup>363</sup>

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362. *Id.* at 136-37.

363. *Id.* Some commentators assert that *Clafin* merely stated Congress may authorize the state courts to exercise jurisdiction over federal claims, not that Congress can require this result. See PAUL M. BATOR ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 436 (2d ed. 1973) ("Note that . . . the Court . . . [was] concerned with whether the state courts may take jurisdiction, not with whether they must do so."); PETER W. LOW & JOHN CALVIN JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 235 (2d ed. 1989) ("[T]he issue of an obligation to hear federal cases was not before the Court and was not mentioned."). Nonetheless, I do not think the language quoted in the text sounds like "they can if they want to." At the very least, Nicole Gordon and Douglas Gross are correct when they say: "The Court did stress that state courts were just as bound to recognize federal law as state law, thereby implying a duty to exercise jurisdiction."

Although *Claflin* involved enforcement of a civil claim arising under federal law, the Court also indicated that state courts have a duty to enforce federal criminal law. As a part of its review of precedent, the Court referred explicitly to several statutes passed by early congresses giving the state courts jurisdiction over federal criminal cases,<sup>364</sup> and then stated:

These instances show the prevalent opinion which existed, that the State courts were competent to have jurisdiction in cases arising wholly under the laws of the United States; and whether they possessed it or not, in a particular case, was a matter of construction of the acts relating thereto. It is true that the States courts have, in certain instances, declined to exercise the jurisdiction conferred upon them; but this does not militate against the weight of the general argument. See *United States v. Lathrop*, 17 Johns 4. See especially, the able dissenting opinion of Mr. Justice Platt, *id.* 11.<sup>365</sup>

Although the Court is being diplomatic, it clearly implies that state courts wrongly refused to exercise the criminal arising under jurisdiction conferred upon them by Congress.<sup>366</sup>

Several cases brought under the Federal Employer's Liability Act ("FELA") dispelled any lingering doubts about Congress's authority to require state courts to enforce civil claims arising under federal law. In *Mondou v. New York, New Haven & Hartford Railroad*,<sup>367</sup> the Connecticut Supreme Court of Errors held that the plaintiff could not bring a FELA suit for personal injuries as of right in a Connecticut court. The court said that state policy differed from federal policy, and that it would confuse

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Nicole A. Gordon and Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1160 n.64 (1984).

364. *Claflin*, 93 U.S. at 140.

365. *Id.*

366. *Lathrop* was a New York case holding that Congress could not authorize the state courts to hear federal criminal cases. See *supra* note 197. Justice Platt's "able dissenting opinion" contended that the state court could hear these cases. *United States v. Lathrop*, 17 Johns. (N.Y.) 4, 11-23 (1819).

367. *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1 (1912). *Mondou* was one of several cases consolidated for decision under the title "The Second Employers' Liability cases." *Id.*

state courts to apply different standards to cases of the same general class.<sup>368</sup>

The United States Supreme Court rejected both arguments. As to the first, the Court stated:

The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.<sup>369</sup>

As to the second argument, the Court did not believe the state courts would be confused. Even if they were, this was not a good excuse: "The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication."<sup>370</sup> Accordingly, the Court held that FELA claims could be enforced as of right in state court.<sup>371</sup>

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368. *Id.* at 55-56.

369. *Id.* at 57.

370. *Id.* at 58.

371. *Id.* at 59. Later FELA cases affirmed *Mondou*, but with some exceptions and reservations. For example, in *Douglas v. New York, New Haven & Hartford Railroad*, the Court upheld the New York courts' dismissal of a FELA suit on grounds similar to *forum non conveniens*. *Douglas v. New York, N.H. & H. R.R.*, 279 U.S. 377 (1929). Speaking for the Court, Justice Holmes stated:

It may very well be that if the Supreme Court of New York were given no discretion [to dismiss], being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse.

*Id.* at 387-88. In *McKnett v. St. Louis & San Francisco Railway*, the Court compelled Alabama to hear a FELA claim in circumstances where it would hear the claim if it arose under the law of a sister state. *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934). The Court said:

While Congress has not attempted to compel states to provide courts for the enforcement of Federal Employers' Liability Act, the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law. The denial of jurisdiction by the Alabama court is based solely upon the source of law sought to be enforced. The plaintiff is cast out because he is suing to enforce a federal act. A state

Subsequently, *Testa v. Katt* explicitly held that the principles of *Clafin* and *Mondou* applied fully to cases arising under federal criminal law.<sup>372</sup> Justice Black's opinion for a unanimous court was extraordinary. It was sweeping, forceful, and laced with brief but frequent references to the history canvassed in this article. To the question "Can state courts be required to enforce properly enacted federal criminal laws?" Justice Black responded with a resounding "Yes!"

In that case, Testa sued Katt, an automobile dealer, in a Rhode Island State Court.<sup>373</sup> Testa claimed that Katt had overcharged for a car in violation of the federal Emergency Price Control Act.<sup>374</sup> The Act gave buyers of goods a private right of action for three times the overcharge plus costs and attorneys' fees, and stated that the case could be brought "in any court of competent jurisdiction."<sup>375</sup> The Act also gave federal and state courts concurrent jurisdiction.<sup>376</sup> Although Testa won a partial judgment in the lower courts, the Rhode Island Supreme Court ruled for Katt.<sup>377</sup> It reasoned that the section of the Act creating the private right of action was "a penal statute in the international sense" and thus the case could not be brought in the Rhode Island courts.<sup>378</sup>

Justice Black assumed for purposes of argument that the statute was penal.<sup>379</sup> Rhode Island had to enforce it nonetheless because of the Supremacy Clause:

[W]e cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign

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may not discriminate against rights arising under federal laws.

*Id.* at 233-34 (citation omitted). In *Herb v. Pitcairn*, the Court allowed an Illinois city court having only city-wide jurisdiction to dismiss a FELA claim that arose outside city limits. *Herb v. Pitcairn*, 324 U.S. 117 (1945). Finally, in *Missouri ex rel. Southern Ry. v. Mayfield*, the Court affirmed dismissal of a FELA suit on forum non conveniens grounds. *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950).

372. *Testa v. Katt*, 330 U.S. 386 (1947).

373. *Id.* at 388.

374. *Id.*

375. *Id.* at 387.

376. *Id.*

377. *Id.* at 388.

378. *Id.*

379. *Id.* at 389.

country. Such a broad assumption flies in the face of the fact that the States of the Union constitute a nation. It disregards the purpose and effect of Article VI of the Constitution . . . .<sup>380</sup>

Justice Black specifically relied upon some of the early federal statutes giving the state courts jurisdiction over federal crimes and actions for penalties and forfeitures.<sup>381</sup> He conceded that prior to the Civil War, both federal and state courts had sometimes questioned the power and duty of state courts to enforce federal penal statutes,<sup>382</sup> but he asserted that *Clafin* had set matters aright in 1876 "after the fundamental issues over the extent of federal supremacy had been resolved by the war . . . ."<sup>383</sup> According to Justice Black, *Clafin*

repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." [omitted] It asserted that the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide.<sup>384</sup>

Because the Rhode Island courts, being courts of general jurisdiction, have subject matter jurisdiction to hear these kinds of claims, Justice Black concluded that "[u]nder these circumstances the State courts are not free to refuse enforcement of petitioners' claim."<sup>385</sup>

380. *Id.*

381. *Id.* at 390.

382. *Id.* Justice Black cited, inter alia, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842); and *United States v. Lathrop*, 17 Johns. (N.Y.) 4 (1819).

383. *Id.* Unfortunately, Justice Black completely forgot about the Civil War sometime after writing this opinion. See *Younger v. Harris*, 401 U.S. 37 (1971).

384. *Id.* at 390-91.

385. *Id.* at 394.

The Supreme Court has not retreated from the standards of *Clafin*, *Mondou*, and *Testa* in the years since *Testa* was decided.<sup>386</sup> Indeed, it recently reaffirmed these standards in *Howlett v. Rose*, holding that the Florida state courts were required to hear a section 1983 action against a local school board.<sup>387</sup>

### C. Pendent and Ancillary Jurisdiction

The federal courts use pendent and ancillary jurisdiction (now sometimes referred to jointly as "supplemental" jurisdiction) to expand their subject matter jurisdiction. Under both doctrines, the federal courts hear claims that standing alone would not be within their competence. Interestingly, supplemental jurisdiction developed entirely on the civil side. The federal courts have never used it in a criminal case. Supplemental jurisdiction developed comparatively recently.<sup>388</sup> Two cases established the modern

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386. Often Congress does not specifically state whether jurisdiction over particular claims or crimes is exclusive or concurrent with the state courts. In such instances, the Court employs opposite presumptions in criminal and civil cases. The Court presumes that jurisdiction over new federal crimes is exclusively federal unless Congress specifically says otherwise. *Pettibone v. United States*, 148 U.S. 197, 209 (1893). The presumption is based on the general criminal arising under provision that gives the district courts original and exclusive jurisdiction over "all offenses against the laws of the United States." 18 U.S.C. § 3231 (1988). On the civil side, however, jurisdiction is presumed to be concurrent unless Congress specifically says otherwise, or unless concurrent jurisdiction would seriously compromise federal interests. As the Court said in *Gulf Offshore v. Mobil Oil*:

In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.

*Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (citation omitted). See also, *Taffin v. Levit*, 493 U.S. 455, 458 (1990); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962); *Clafin*, 93 U.S. at 136-37.

387. *Howlett v. Rose*, 496 U.S. 356 (1990).

388. Most of the major doctrinal developments occurred in this century. Interestingly, however, the seminal case is *Osborn v. Bank of the United States*. *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824). The defendants argued that the case did not arise under federal law because several issues of general, or state, law would also arise in it. *Id.* at 819. Chief Justice Marshall held that those issues may be decided as incidental to the federal questions. *Id.* at 822. *Osborn* does not, however, authorize federal courts to hear non-federal causes of action. Moreover, strictly construed, it authorizes decision only of state issues that must necessarily be determined in order to resolve the federal issues. John C. Minahan, Jr., *Pendent and Ancillary Jurisdiction of United States Federal District*

doctrine: *Moore v. New York Cotton Exchange*<sup>389</sup> and *United Mine Workers v. Gibbs*.<sup>390</sup>

*Moore* held that a court may exercise ancillary jurisdiction over a state claim if it is transactionally related to the federal claim.<sup>391</sup> The New York Cotton Exchange contracted with Western Union to distribute price quotations.<sup>392</sup> When the Odd-Lot Cotton Exchange applied for the service, Western Union refused because the New York Cotton Exchange had declined to give its consent, believing that the Odd-Lot Exchange was involved in an unlawful "bucket shop" operation.<sup>393</sup> *Moore*, the president of the Odd-Lot Exchange, sued in federal court, alleging that the refusal to give Odd-Lot ticker service violated the federal anti-trust laws.<sup>394</sup> The New York Exchange counterclaimed, alleging that Odd-Lot was stealing quotations and giving them to its members who were distributing them to bucket shops.<sup>395</sup>

The lower courts ruled against the plaintiff on the anti-trust claim, and in favor of the defendants on the counterclaim.<sup>396</sup> As to jurisdiction over the counterclaim, the Supreme Court held that since the counterclaim arose "out of the transaction which is the

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*Courts*, 10 CREIGHTON L. REV. 279, 289 (1976).

Later diversity cases authorized ancillary jurisdiction over separate claims by non-diverse parties, first when it seemed necessary, *see, e.g.*, *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1860); *Krippendorf v. Hyde*, 110 U.S. 276 (1884), and then when ancillary jurisdiction provided a convenient way to enforce an earlier judgment. *See, e.g.*, *Root v. Woolworth*, 150 U.S. 401 (1893); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) (plaintiff class in a federal class action included unnamed, non-diverse class members by exercise of ancillary jurisdiction, and the court thus could enjoin those members from relitigating in state court the questions decided in the federal suit).

For detailed reviews of the development of pendent and ancillary jurisdiction, *see* Minahan, *supra*, and Richard A. Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103, 114-28 (1983); Richard D. Freer, *A Principled Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34, 39-54.

389. *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926).

390. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

391. *Moore*, 270 U.S. at 607-10.

392. *Id.* at 601.

393. *Id.* at 601-02. A bucket shop uses price quotations from a legitimate commodities exchange to make a sham market. It sells futures contracts and settles them for cash, but with no possibility of delivery of the commodities in question. Conversation with Emily M. Zeigler, partner and chief commodities counsel of the law firm of Willkie Farr & Gallagher (July 9, 1993) (notes on file with author).

394. *Moore*, 270 U.S. at 602-03.

395. *Id.*

396. *Id.* at 603.

subject matter of suit," no independent ground of federal jurisdiction was necessary.<sup>397</sup> The Court gave a classic definition of transactionally-related claims that is used for supplemental jurisdiction and for the joinder provisions of the Federal Rules of Civil Procedure:

"Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which [Odd-Lot] bases its cause of action. It is an important part of the transaction constituting the subject-matter of the counterclaim. It is the one circumstance without which neither party would have found it necessary to seek relief. Essential facts alleged by [Odd-Lot] enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations, as, for example, that [Odd-Lot] is unlawfully getting the quotations, does not matter. . . .

So close is the connection between the case sought to be stated in the bill and that set up in the counterclaim, that it only needs the failure of the former to establish a foundation for the latter . . . .<sup>398</sup>

*United Mine Workers v. Gibbs* announced a test for the exercise of pendent jurisdiction that is consistent with the ancillary jurisdiction standards of *Moore* and its progeny. *Gibbs*

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397. *Id.* at 609.

398. *Id.* at 610. Following adoption of the Federal Rules of Civil Procedure in 1938, the courts extended *Moore's* rationale to permit ancillary jurisdiction over many of the transactionally related claims permitted under the Federal Rules. See, e.g., *Bossard v. McGwinn*, 27 F. Supp. 412 (W.D. Pa. 1939); *Dery v. Wyer*, 265 F.2d 804 (2d Cir. 1959) (both exercising ancillary jurisdiction over a third-party claim); *Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709, 715-17 (5th Cir. 1970) (approving ancillary jurisdiction over claim by a third-party defendant against the plaintiff); *Babcock & Wilcox Co. v. Parsons*, 430 F.2d 531 (8th Cir. 1970); *Lenz v. Wagner*, 240 F.2d 666 (5th Cir. 1957) (both approving ancillary jurisdiction over claim by person intervening as of right); *Scott v. Fancher*, 369 F.2d 842 (5th Cir. 1966) (ancillary jurisdiction exercised over a cross-claim). See generally, Minahan, *supra* note 388, at 297-302; Carole E. Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 397 (1976).

filed suit in federal court asserting that the United Mine Workers violated his rights under a federal labor statute and state tort law.<sup>399</sup> The Supreme Court held that the lower court correctly exercised pendent jurisdiction over the state claim.<sup>400</sup> The Court asserted that judicial *power* to hear a state claim exists under Article III whenever there is a claim arising under federal law "and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'"<sup>401</sup> The action comprises one case when the state and federal claims "derive from a common nucleus of operative fact" and "are such that [the plaintiff] would ordinarily be expected to try them all in one judicial proceeding . . . ."<sup>402</sup> If these conditions are satisfied, a court must then decide whether to exercise its power to hear the state claim. The Court identified several factors that should be assessed: (1) whether exercising jurisdiction over the state claim will foster judicial economy, convenience, and fairness to the litigants; (2) whether the federal claim is dismissed before trial; (3) whether the state claim predominates; (4) whether the state claim is closely tied to issues of federal policy; and (5) whether the jury will be confused by considering the two claims together.<sup>403</sup> A district court has broad discretion in making the decision since none of these factors is easily quantifiable.<sup>404</sup>

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399. *Gibbs*, 383 U.S. at 720.

400. *Id.* at 729.

401. *Id.* at 725.

402. *Id.*

403. *Id.* at 726-27.

404. *Id.* at 728. The Court held that Gibbs satisfied the test for pendent jurisdiction. *Id.* at 728-29. Because Gibbs's federal and state claims arose from the same incidents in the Tennessee coal fields, judicial power existed to hear the claims together. *Id.* at 728. In addition, the Court found no abuse of discretion by the lower court. *Id.* at 729. The Court felt the federal claim was substantial and not brought merely as a ploy to secure federal jurisdiction, even though it ultimately failed. *Id.* at 728. The allowable scope of the state claim involved federal pre-emption. *Id.* at 729. Although the Court did not say so directly, it implied that this favored the exercise of pendent jurisdiction because federal judges might be more solicitous of congressional intent to pre-empt state law than state judges, or at least more consistent in deciding preemption issues. *Id.* at 727-28. Finally, the district court lessened the possibility of jury confusion by using a special verdict form. *Id.* at 729.

Courts often used ancillary jurisdiction to hear state claims by or against new parties to a lawsuit.<sup>405</sup> Shortly after *Gibbs* was decided, many lower federal courts asserted so-called pendent party jurisdiction over state claims by or against new parties.<sup>406</sup> The Supreme Court, however, soon signaled that it had reservations about pendent party jurisdiction. In *Aldinger v. Howard*, the Court refused to allow a pendent state respondeat superior claim against a county in a Section 1983 action against officials of the county.<sup>407</sup> In *Finley v. United States*, the Court refused to hear pendent state claims against additional defendants in a suit against the United States under the Federal Tort Claims Act ("FTCA").<sup>408</sup> Jurisdiction over the FTCA claim was exclusively federal, so all the claims could be brought together only in federal court.<sup>409</sup> Although the Court recognized that its decision was inefficient and wasteful,<sup>410</sup> it nonetheless refused to hear the state claims.<sup>411</sup>

*Aldinger* and *Finley* threatened well-established forms of ancillary jurisdiction over claims adding parties, such as claims

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405. This happened, for example, in cases involving impleader and intervention. See *supra* note 398. See also 1 FEDERAL COURTS STUDY COMM., REPORT OF THE SUBCOMMITTEE ON THE ROLE OF THE FEDERAL COURTS AND THEIR RELATIONSHIP TO THE STATES 546 (1990) [hereinafter SUBCOMMITTEE REPORT].

406. See, e.g., *Almenares v. Wyman*, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972); *Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809 (8th Cir. 1969); *Stone v. Stone*, 405 F.2d 94 (4th Cir. 1968); *Connecticut Gen. Life Ins. Co. v. Crafton*, 405 F.2d 41 (5th Cir. 1968). Some courts, however, rejected pendent party jurisdiction. See, e.g., *Patrum v. City of Greensburg*, 419 F.2d 1300 (6th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970); *Hmyer v. Chai*, 407 F.2d 136 (9th Cir. 1969).

407. *Aldinger v. Howard*, 427 U.S. 1 (1976). The Court declined to make a broad pronouncement about pendent party jurisdiction, and instead disposed of the jurisdictional issue on relatively narrow grounds. *Id.* at 13. The Court explained that "it [was] quite unnecessary to formulate any general, all-encompassing jurisdictional rule." *Id.* However, it suggested that "[o]ther statutory grants and other alignments of parties and claims might call for a different result." *Id.* at 18. When *Aldinger* was decided, counties could not be sued under section 1983, and the Court concluded that permitting the same result indirectly by the use of pendent party jurisdiction would undermine congressional intent. *Id.* at 16-17.

408. *Finley v. United States*, 490 U.S. 545 (1989).

409. *Id.* at 555.

410. *Id.*

411. The Court stated that "with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly." *Id.* at 549. And while the FTCA's jurisdictional provisions did not specifically preclude the exercise of pendent party jurisdiction, the Court did not believe the provisions invited it either. *Id.* at 554.

against third-party defendants or by intervenors.<sup>412</sup> In *Finley*, Justice Scalia appeared to invite Congress to legislate in this area,<sup>413</sup> and Congress accepted the invitation in the Judicial Improvements Act of 1990.<sup>414</sup> Congress specifically authorized pendent party jurisdiction in federal question cases.<sup>415</sup> Thus, a plaintiff can join a related state claim against a new defendant, or a new plaintiff can join a state claim to a related federal claim asserted against the same (or an additional) defendant.<sup>416</sup> The lower federal courts have routinely exercised pendent party defendant and pendent party plaintiff jurisdiction since 1990.<sup>417</sup>

Supplemental jurisdiction avoids piecemeal litigation and helps resolve disputes fairly and efficiently. Although supplemental jurisdiction could reap similar benefits in criminal cases, it has never been used on the criminal side. An important first question is whether this would be constitutional. The case for an affirmative answer is very strong.

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412. Thomas M. Mengler et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 213-14 (1991); Wendy Collins Perdue, *Unstringing Pendent Jurisdiction*, 76 VA. L. REV. 539, 556-66 (1990). For other discussions of the implications of *Finley*, see Frank G. Avellone, *Revisiting the Past and Rethinking the Future of Incidental Jurisdiction*, 17 OHIO N.U. L. REV. 65 (1990); Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. REV. 247.

413. *Finley*, 490 U.S. at 556 ("Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress.")

414. Act of Dec. 1, 1990, Pub. L. No. 101-650, § 310 (a), 104 Stat. 5089, 5113 (codified at 28 U.S.C. § 1367 (1990)). Section 1367 occasioned much scholarly commentary. The Emory Law Journal published two symposia on supplemental jurisdiction. See 40 EMORY L.J. 943-1014 (1991); 41 EMORY L.J. 1-112 (1992). See also, John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735 (1991).

415. See 28 U.S.C. § 1367(a) (1990). Indeed, the primary purpose of section 1367 was to restore the law as it existed before *Finley* was decided. See SUBCOMMITTEE REPORT, *supra* note 405, at 559-61; Mengler et al., *supra* note 412, at 215; Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life after Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L. J. 445, 473 (1991).

416. Steven H. Steinglass, *Pendent Jurisdiction and Sec. 1983 Litigation*, in SIGNIFICANT DEVELOPMENTS IN FEDERAL CIVIL PRACTICE AND PROCEDURE 527, 531 (ALL-ABA 1991). Section 1367(b) attempts to codify existing law on pendent and ancillary jurisdiction in diversity cases, and thus imposes significant restrictions. *Id.* at 527.

417. See, e.g., *Roe v. Little Co. of Mary Hosp.*, 800 F. Supp. 620, 622-25 (N.D. Ill. 1992); *Leith v. Lufthansa German Airlines*, 793 F. Supp. 808, 812 (N.D. Ill. 1992); *Rosen v. Chang*, 758 F. Supp. 799, 802-03 (D. R.I. 1991) (all exercising pendent party defendant jurisdiction); *Broussard v. Graham*, 798 F. Supp. 370, 375 (M.D. La. 1992); *Godfrey v. Perkin-Elmer Corp.*, 794 F. Supp. 1179, 1183-85 (D. N.H. 1992); *McCray v. Holt*, 777 F. Supp. 945, 947-48 (S.D. Fla. 1991); *Arnold v. Kimberly Quality Care Nursing Serv.*, 762 F. Supp. 1182, 1184-87 (M.D. Pa. 1991) (all exercising pendent party plaintiff jurisdiction).

The supplemental jurisdiction cases on the civil side provide the basic support. The federal courts have power to exercise supplemental jurisdiction if the federal and state claims derive from a common nucleus of operative fact and thus constitute one constitutional case.<sup>418</sup> If a person commits acts that violate both federal and state criminal laws, the federal and state charges plainly satisfy the common nucleus test. If related federal and state civil claims make one constitutional case, it is difficult to see why the same is not true for related federal and state criminal charges. If the federal and state criminal charges constitute one case, then the federal courts should have the power to hear the state charges.

One might respond that the scope of an Article III case should be different in civil and criminal actions, and that while a civil case may contain both federal and state claims, a criminal case may not. However, this response is at odds with the many Supreme Court cases holding that the arising under jurisdiction extends equally to criminal and civil cases.<sup>419</sup> As the Supreme Court stated in *Tennessee v. Davis*:

[The arising under jurisdiction] embraces alike civil and criminal cases arising under the Constitution and laws. Both are equally within the domain of the judicial powers of the United States, and there is nothing in the grant to justify an assertion that whatever power may be exerted over a civil case may not be exerted as fully over a criminal one.<sup>420</sup>

Thus, if supplemental jurisdiction is constitutional in civil cases, it is constitutional in criminal cases.<sup>421</sup>

The criminal removal cases also support this conclusion. In *Tennessee v. Davis*, the Supreme Court held that a state criminal case arises under federal law and can be removed to federal court

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418. *Gibbs*, 383 U.S. at 725; *Finley* 490 U.S. at 549.

419. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 334-35, 341-42, 349 (1816); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 379, 391-92, 405, 423 (1821); *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 251-52 (1867); *Tennessee v. Davis*, 100 U.S. 257, 264 (1879).

420. *Davis*, 100 U.S. at 264 (citation omitted).

421. One might also argue that the exercise of supplemental jurisdiction in criminal cases would violate the maxim that one sovereign will not enforce the penal laws of another. But the maxim has only limited applicability in our federal system. See *supra* notes 223-224, 325, 379-85 and accompanying text.

if the defendant asserts a federal defense.<sup>422</sup> If a federal court can adjudicate a state criminal charge in these circumstances, it follows that a court can also adjudicate a state criminal charge appended to a factually related federal criminal charge.

One might argue that the two situations are distinguishable because the federal issue appears in a different position. With removal, the federal issue appears as a defense, while with supplemental jurisdiction, the federal charge appears in the original indictment. However, jurisdiction seems at least as secure in the latter case because the federal issue is even *more* centrally involved than in the former case. Using the well-pleaded complaint rule from the civil side, with supplemental jurisdiction the federal charge appears on the face of the prosecutor's well-pleaded indictment, while with removal the federal issue is first raised by the defendant.

Somewhat more persuasively, one might argue that federal and state issues are more inextricably linked in a removed case than in a supplemental jurisdiction case. In a removed case, the defendant's guilt or innocence often depends on the merits of the federal defense. Moreover, without removal, the states might threaten the federal government by forcing federal officials to defend protracted state criminal proceedings.<sup>423</sup> With supplemental jurisdiction, by contrast, the federal and state criminal charges are technically separate and can be fully adjudicated in separate federal and state proceedings. In addition, federal interests can be fully vindicated in the federal proceedings.

While these arguments have some force, they do not support the conclusion that supplemental jurisdiction is unconstitutional in criminal cases. They merely establish that the case for the constitutionality of criminal removal jurisdiction is particularly strong. *Gibbs*, and the cases making civil and criminal arising under jurisdiction coextensive, provide very strong support for the constitutionality of supplemental jurisdiction in criminal cases.

Despite the elegant simplicity of the constitutional arising under standards, the statutory framework is a complex patchwork that reflects political compromise and historical accident.

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422. *Davis*, 100 U.S. at 264.

423. Both factors seemed significant to the Supreme Court in upholding the constitutionality of the criminal removal statute in *Tennessee v. Davis*. See *Davis*, 100 U.S. at 262-63, and discussion *supra* at notes 320, 323 and accompanying text.

Congress has almost unbounded discretion in assigning arising under cases to the federal and state courts.<sup>424</sup> The current jurisdictional assignments are not anchored in constitutional cement, no matter how used to them we have become. The balance can be changed, as it has been in the past. Part V suggests some modifications.

#### V. PROPOSED CHANGES IN THE ARISING UNDER JURISDICTION

Congress and the courts have the power to make the civil and criminal arising under jurisdiction more similar. The rules of exclusive and concurrent jurisdiction for the two branches are very different. The general original civil jurisdiction has been concurrent with the state courts since 1875. In addition, the federal courts regularly exercise supplemental jurisdiction over state claims. Consequently, in most civil cases litigants can bring related federal and state claims together in either federal or state court. The general original criminal jurisdiction, by contrast, has been exclusively federal since 1874. In addition, the federal courts do not exercise supplemental jurisdiction over state criminal charges. Consequently, prosecutors cannot bring related federal and state criminal charges together in either system. Instead, each system hears only its own. I propose changing the

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424. One might argue that it is simply too late for Congress or the courts to make major changes in the jurisdiction rules. Long and persistent usage have modified the meaning of the Constitution, notwithstanding the intent of the framers or early interpretations of the scope of Article III. The general original civil arising under jurisdiction has been concurrent with the state courts since 1875; the criminal counterpart has been exclusive of the states since 1874. *See supra* notes 300-01, 304 and accompanying text. And the federal courts have *never* exercised supplemental jurisdiction in a criminal case.

While this sort of argument might have some force in construing other parts of the Constitution, courts are not likely to accept it in construing Article III. Throughout our history, the basic framework of federal jurisdiction has remained the same. The Madisonian Compromise, *see supra* notes 28-32 and accompanying text, underlies that framework. The Supreme Court has been comfortable construing Article III very broadly because the federal courts can exercise only the portion of Article III power that is conferred on them by Congress. This arrangement has allowed Congress flexibility in altering jurisdictional rules to meet current needs. As the Supreme Court said in 1966, "We may assume that Congress has constitutional power to provide that all federal issues be tried in the federal courts, that all be tried in the courts of the states, or that jurisdiction of such issues be shared." *City of Greenwood v. Peacock*, 384 U.S. 808, 833 (1966). Thus, just because some of the jurisdictional rules have not been changed for a long time, or because some parts of the jurisdiction have never been used, does not mean that Congress cannot change the rules or confer unused parts of the jurisdiction.

exclusivity rules on the criminal side to make the original criminal arising under jurisdiction more like the civil. Specifically, I propose that Congress make jurisdiction over some federal crimes concurrent with the state courts<sup>425</sup> and that Congress, or the federal courts themselves, authorize supplemental jurisdiction over state criminal charges.

These changes would make the American criminal justice system more efficient and more just. The present exclusivity rules cause inefficiency and exacerbate federal-state tensions. Duplicative, piecemeal litigation obviously is inefficient. Federal and state prosecutors lack real incentive to cooperate because each must eventually try their own charges alone. In addition, the exclusivity rules are at least partly responsible for the increasing federalization of American criminal law. Because federal and state charges cannot be combined, Congress has felt compelled to incorporate state crimes into federal statutes so that federal prosecutors can fully prosecute the wrongdoing arising from a criminal transaction. While changing the exclusivity rules is hardly a panacea for all of these problems, it would help ameliorate them. If all the charges from a criminal incident could be brought together in either state or federal court, duplicative and piecemeal litigation would be reduced. This change would encourage cooperation between federal and state prosecutors, and Congress would feel less pressure to create so many new federal crimes.

Finally, I suggest two additional changes to enhance the protection for defendants and to give prosecutors an extra incentive to bring all charges together in one federal or state proceeding. First, abandon the dual sovereignty rule, which currently allows successive federal and state prosecutions for the same misconduct, in cases where all charges could be brought together in either state or federal court. Second, adopt the "same transaction or occurrence" standard from the civil side to define a criminal "offense" for double jeopardy purposes. If these changes were made, prosecutors would be required to bring all

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425. As this article was going to press, a committee of the Judicial Conference recommended that Congress authorize concurrent jurisdiction over some federal crimes. See COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 22-23 (Draft 1994) [hereinafter LONG RANGE PLANNING REPORT].

charges that they wished to bring against a defendant together in one proceeding.

### A. *The Case for Change*

Historically, the states administered the criminal law.<sup>426</sup> Congress enacted criminal statutes only to protect clear federal interests.<sup>427</sup> In the late 1800's, however, Congress began criminalizing wrongdoing that did not directly injure the federal government.<sup>428</sup> Congress enacted these laws under the commerce, taxing, and postal powers, and the Necessary and Proper Clause.<sup>429</sup> Congress continued the practice in the early

426. William Van Alstyne, *Dual Sovereignty, Federalism and National Criminal Law: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court*, 26 AM. CRIM. L. REV. 1737, 1742 (1989); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 284 (1980). The states still have this responsibility. See *Arizona v. Maypenny*, 451 U.S. 232, 243 (1981) (It "goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government.") (quoting *Patterson v. New York*, 432 U.S. 197, 201 (1977)). Justice Stewart once suggested that "[t]he definition and prosecution of local, intrastate crime are reserved to the States under the Ninth and Tenth Amendments." *Perez v. United States*, 402 U.S. 146, 158 (1971) (Stewart, J., dissenting).

427. Louis B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROBS. 64, 64-65 (1948). The first federal criminal statute, enacted in 1790, criminalized actions that improperly interfered with federal functions and misconduct committed on federal property or on the high seas. Act of April 30, 1790, ch. 9, 1 Stat. 112. See *supra* notes 103-05 and accompanying text. An 1804 Act created additional punishments for piracy on the high seas and for violating federal revenue laws. Act of March 26, 1804, ch. 40, 2 Stat. 290. The 1825 Crime Bill addressed several matters of federal concern, including crimes on the high seas or in coastal areas within federal maritime jurisdiction, crimes by federal officials, and forgery of United States coins or commercial paper. Act of March 3, 1825, ch. 65, 4 Stat. 115.

428. Schwartz, *supra* note 427, at 65. The Post Office Act of 1872 is commonly cited as one of the first such statutes. See, e.g., *id.*; NORMAN ABRAMS & SARA S. BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 43-44 (2d ed. 1993); James L. Buckley, *Introduction to Van Alstyne, supra* note 426, at 1738. The Post Office Act criminalized the use of the mails to commit fraud, disseminate obscene materials, and conduct lotteries. See Act of June 8, 1872, ch. 335, §§ 145-149, 302, 17 Stat. 283, 301, 302, 323.

429. ABRAMS & BEALE, *supra* note 428, at 16; WAYNE R. LAFAYE & AUSTIN W. SCOTT, *CRIMINAL LAW* 123 (1986). As Justice Field explained in *United States v. Fox*:

There is no doubt of the competency of Congress to provide, by suitable penalties, for the enforcement of all legislation necessary or proper to the execution of powers with which it is intrusted . . . . Any act committed with a view to evading the legislation of Congress passed in the execution of any of its powers . . . may properly be made an offence against the United States. But an act committed within a State . . . cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An

years of this century,<sup>430</sup> and it has accelerated the pace in recent years.<sup>431</sup> Proponents justify the expansion of federal criminal law on the grounds that state and local officials need federal help,<sup>432</sup> and that federal officials can more conveniently investigate and prosecute large-scale criminal activity that

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act not having any such relation is one in respect to which the State can alone legislate.

United States v. Fox, 95 U.S. 670, 672 (1877). For a review of the cases establishing and defining Congress's power to enact criminal laws, see ABRAMS & BEALE, *supra* note 428, at 16-43.

430. See, e.g., Act of June 25, 1910, ch. 395, 36 Stat. 825 (current version at 18 U.S.C. §§ 2421-2424 (1988)) (prohibiting the interstate transportation of women for immoral purposes); Act of January 17, 1914, ch. 9, 38 Stat. 275 (criminalizing the importation of opium); Act of Oct. 29, 1919, ch. 89, 41 Stat. 324 (current version at 18 U.S.C. §§ 2311-2313 (1988)) (prohibiting the interstate transportation of stolen motor vehicles). In the 1930's, Congress added many new criminal statutes. See, e.g., Act of June 18, 1934, ch. 569, 48 Stat. 979 (current version at 18 U.S.C. § 1951 (1988)) (protecting trade against racketeering); Act of May 18, 1934, ch. 304, 48 Stat. 783 (current version at 18 U.S.C. §§ 2113 et seq. (1988 & Supp. V 1994)) (criminalizing bank robbery); Act of May 18, 1934, ch. 302, 48 Stat. 782 (current version at 18 U.S.C. § 1073 (1988)) (making it unlawful to travel interstate to avoid prosecution). As early as 1925, Charles Warren complained of "[t]he present congested condition of the dockets of the federal courts and the small prospect of any relief to the heavily burdened federal judiciary, so long as Congress continues, every year, to expand the scope of the body of federal crimes." Warren, *supra* note 78, at 545.

431. Daniel A. Braun, *Praying to False Sovereigns: The Rule of Successive Prosecutions in an Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 5 (1992). See, e.g., Act of Sept. 14, 1959, Pub. L. No. 86-257, 73 Stat. 519, 535-36 (current version at 29 U.S.C. § 501 (1988)) (making embezzlement of labor union funds a crime); Act of September 13, 1961, Pub. L. No. 87-228, 75 Stat. 498 (current version at 18 U.S.C. § 1952 (1988)) (criminalizing travel in interstate commerce with intent to carry on unlawful activity or commit a crime of violence in furtherance of such activity); Act of Mar. 20, 1962, Pub. L. No. 87-420, 76 Stat. 35, 41-42 (current version at 18 U.S.C. § 664 (1988)) (prohibiting embezzlement from employee benefit plans); Act of June 19, 1968, Pub. L. No. 90-351, 82 Stat. 197, 226-35 (current version at 18 U.S.C. §§ 921-928 (1988 & Supp. V. 1994)) (regulating the interstate transportation of illegal firearms); Act of April 11, 1968, Pub. L. No. 90-284, 82 Stat. 73, 75-77 (current version at 18 U.S.C. §§ 2101-2102 (1988)) (making it a crime to travel across a state line for the purpose of inciting a riot); Act of Oct. 15, 1970, Pub. L. No. 91-452, 84 Stat. 922, 941-48 (current version at 18 U.S.C. §§ 1961 et seq. (1988 & Supp. V 1994)) (criminalizing racketeering and corrupt practices); Act of October 15, 1970, Pub. L. No. 91-452, 84 Stat. 922, 937-38 (current version at 18 U.S.C. § 1955 (1988)) (criminalizing gambling); Act of Nov. 2, 1978, Pub. L. No. 95-575, 92 Stat. 2463 (current version at 18 U.S.C. §§ 2341-2346 (1988)) (criminalizing interstate traffic in contraband cigarettes).

432. John L. McClellan, *Codification, Reform, and Revision: The Challenge of a Modern Federal Criminal Code*, 1971 DUKE L.J. 663, 680-82; Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538, 1550 (1967).

spreads interstate.<sup>433</sup> The result, however, is that the federal government regularly criminalizes conduct that was traditionally prosecuted at the state and local levels.<sup>434</sup> Because federal criminal law rarely preempts state law,<sup>435</sup> America has two overlapping systems of criminal justice.<sup>436</sup>

The jurisdictional exclusivity rules exacerbate the inefficiencies, inequities, and federal-state tensions inherent in this system. The exclusivity rules make it more difficult for federal and state courts to balance their workloads or to assist each other in disposing of cases. In recent years, for example, the federal courts have been inundated with drug prosecutions.<sup>437</sup> Because jurisdiction over federal drug charges is exclusively federal, none of these charges can be diverted to state court to help relieve the pressure.<sup>438</sup>

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433. ABRAMS & BEALE, *supra* note 428, at 44; LONG RANGE PLANNING REPORT, *supra* note 426, at 21 (“[S]ignificant interstate activity by actors engaged in a massive enterprise, such as a multistate drug operation or a multistate fraud scheme, should normally call for the resources and reach of the federal government.”).

434. WILLIAM W. SCHWARZER & RUSSELL R. WHEELER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE 1-3 (1994); ABRAMS & BEALE, *supra* note 428, at 44-45; Buckley, *supra* note 428 at 1738; Braun, *supra* note 431, at 5.

435. ABRAMS & BEALE, *supra* note 428, at 778-81. *But see* Pennsylvania v. Nelson, 350 U.S. 497 (1956). The general rule is that the federal and state governments may criminalize the same wrongdoing as violating their separate sovereignties. Louis B. Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics, and Prospects*, 41 LAW & CONTEMP. PROBS. 1, 17 (1977).

436. Schwartz, *supra* note 435, at 17, 18; Frase, *supra* note 426, at 284; Buckley, *supra* note 428, at 1738.

437. Between 1980 and 1990, the number of new federal criminal filings rose from 28,932 to 48,904, an increase of well over 50%. ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 10 (1990). Drug cases rose from 3,245 to 12,810 during the same period, an increase of several hundred percent. *Id.*; *see also*, SUBCOMMITTEE REPORT, *supra* note 405, at 34-45. In addition, federal criminal cases, including drug cases, have become even more complex, thus using even more resources. The Committee on Long Range Planning reports that the number of multi-defendant cases has grown by 70% since 1980, and the number of multi-defendant drug cases has grown 30% in the last four years. LONG RANGE PLANNING REPORT, *supra* note 425, at 8. Criminal jury trials last longer as well. *Id.*

438. In 1990, the Federal Courts Study Committee strongly urged federal prosecutors to bring fewer drug cases and to refer more cases to state and local authorities for prosecution under state law. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, PART 1, at 35-37 (1990), *reprinted in* ABRAMS & BEALE, *supra* note 428, at 291-93. But there is no indication that they have heeded the call. *See* Stanley Marcus, *Erosion of Public Confidence in Criminal Justice System Is Source of Increased Federalization of Crime*, STATE-FEDERAL JUDICIAL OBSERVER 2 (Dec. 1993) (criticizing the growing volume of federal drug prosecutions since 1990). Apparently, as many as 50 or 60 senior federal judges refuse to hear drug cases. Joseph B. Treaster, *2 Judges Decline Drug Cases, Protesting*

The exclusivity rules, along with current double jeopardy law, also encourage multiple prosecutions. The Double Jeopardy Clause of the Fifth Amendment does not prohibit federal and state prosecutions for the same misconduct.<sup>439</sup> Successive prosecutions commonly occur.<sup>440</sup> This duplication of effort and expense obviously is wasteful. And a second prosecution certainly

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*Sentencing Rules*, N.Y. TIMES, Apr. 17, 1993, at 1, col. 1. Some district judges dismiss federal drug charges in favor of state prosecutions, but appeals courts have reversed, relying on the maxim that the prosecutor has complete discretion in deciding whether to prosecute. *See, e.g.*, *United States v. Ucciferri*, 960 F.2d 953 (11th Cir. 1992); *United States v. Mann*, 517 F.2d 259 (5th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976).

439. *Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 187 (1959). Suggested changes in the double jeopardy rules are discussed in part V.B *infra*.

440. *See, e.g.*, *Bartkus*, 359 U.S. 121 (1959) (defendant was tried and acquitted of bank robbery in federal court and then tried and convicted of the same robbery in state court); *Abbate*, 359 U.S. 187 (1959) (defendants were convicted in state court of conspiring to destroy property and then convicted in federal court for the same acts); *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977) (defendants were tried and acquitted in state court on charges of bribery and conspiracy to avoid payment of the Pennsylvania cigarette tax and subsequently convicted in federal court of criminal charges based on the same activity); *Turley v. Wyrick*, 554 F.2d 840 (8th Cir. 1977) (*per curiam*) (defendant was tried and acquitted of bank robbery in federal court and then convicted in state court for the same robbery); *United States v. Cordova*, 537 F.2d 1073, 1075 (9th Cir. 1976) (*per curiam*), *cert. denied*, 429 U.S. 960 (1976); *United States v. James*, 532 F.2d 1161, 1164-65 (7th Cir. 1976); *United States v. Jackson*, 470 F.2d 684, 689 (5th Cir. 1972), *cert. denied* 412 U.S. 951 (1973); *Ferina v. United States*, 340 F.2d 837, 839 (8th Cir.), *cert. denied*, 381 U.S. 902 (1965); *People v. Adamchesky*, 184 Misc. 769, 55 N.Y.S.2d 90 (1945) (defendant convicted in federal court of illegal transportation of stolen cigarettes in interstate commerce and subsequently convicted of grand larceny in state court); *People v. Candelaria*, 315 P.2d 386 (Cal. 1957) (defendant convicted first for bank robbery under federal law and then for burglary in state court incident).

Many states have constitutional or statutory provisions prohibiting prosecution when another jurisdiction has already prosecuted a person for the same crime. For a listing of these provisions, see Brown, *supra* note 431, at 5 n.15; Michael A. Dawson, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 294 n.94 (1992); James E. King, Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 477, 494 n.94 (1979). Commentators report, however, that these provisions are either little used or interpreted so restrictively that they do not effectively bar a second prosecution. *See* Dawson, *supra*, at 294, and Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306, 342-44 (1963). Shortly after the decisions in *Abbate* and *Bartkus*, the Attorney General adopted a policy known as the Petite Policy that directs federal prosecutors not to initiate a federal prosecution after a person has been prosecuted in state court for substantially the same act of acts unless there is a compelling federal interest in proceeding. ABRAMS & BEALE, *supra* note 428, at 756-57. Again, however, observers have concluded that the policy is haphazardly and inconsistently administered, and that many prosecutions are undertaken in apparent disregard of the policy. *See* Joseph S. Allerhand, Note, *The Petite Policy: An Example of Enlightened Prosecutorial Discretion*, 66 GEO. L. J. 1137, 1138, 1143-45 (1978); ABRAMS & BEALE, *supra* note 428, at 757-76; King, *supra*, at 491-93.

feels like double jeopardy to a defendant who is subjected to two trials and two possible punishments for the same wrongdoing.<sup>441</sup>

The jurisdictional exclusivity rules also make it more difficult for federal and state law enforcement officials to coordinate their crime-fighting efforts. While federal and state investigators sometimes collaborate,<sup>442</sup> federal and state prosecutors often do not.<sup>443</sup> Federal and state prosecutors have little incentive to build a case together because they cannot prosecute it together. Eventually, either the state or federal prosecutor (or both) must go forward alone in her own court pressing only her own charges. Moreover, in notorious cases federal and state prosecutors sometimes end up competing for the media attention and the credit.<sup>444</sup> Thus, the exclusivity rules encourage competitive rather than cooperative federalism.

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441. See *Barthus*, 359 U.S. at 155 (Black, J., dissenting). As Justice Black stated: The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one.

*Id.*; see also *Green v. United States*, 355 U.S. 184, 187 (1957) (successive prosecutions subject a defendant "to embarrassment, expense, and ordeal and [compel] him to live in a continuing state of anxiety and insecurity. . .").

442. ABRAMS & BEALE, *supra* note 428, at 724; Dawson, *supra* note 440, at 296-99; Braun, *supra* note 431, at 7-8.

443. Frase, *supra* note 426, at 256-89; ABRAMS & BEALE, *supra* note 428, at 103-04; King, *supra* note 440, at 497. *United States v. Burt* provides a classic example of lack of coordination between state and federal authorities. *United States v. Burt*, 619 F.2d 831 (9th Cir. 1980). In *Burt*, state officials discovered a large-scale drug operation, and they filed state charges in two state courts. *Id.* at 833. Subsequently, the narcotics agent in charge of the state investigation met with federal drug agents and prosecutors to discuss possible federal prosecution. *Id.* State officials decided to defer based on assurances by federal prosecutors that they could move more quickly and devote more resources to the case than could state prosecutors, and that federal penalties were greater. *Id.* at 833-34. Unfortunately, however, no one conferred with the state prosecutor who was pursuing the second of the state cases. *Id.* at 834. Subsequently, the court in that case granted a motion to suppress some evidence. *Id.* In addition, since the defendants also were not told about the decision to defer to federal prosecution, they filed suppression motions in the first case. *Id.* The prosecutor in that proceeding then moved to have the complaint dismissed because the "prosecution was unable to proceed." *Id.* When the defendants were subsequently indicted on even more serious federal charges, they filed a motion to dismiss that made a colorable claim of vindictive prosecution. *Id.* This motion set off a flurry of appeals to the Ninth Circuit on the eve of trial. *Id.* at 834-35.

444. ABRAMS & BEALE, *supra* note 428, at 724. In more routine cases, by contrast, sometimes neither the federal nor the state prosecutor wants to proceed, or each leaves a case for the other and it falls through the cracks. *Id.* at 710-11; Frase, *supra* note 426, at 272-75, 279.

The jurisdictional exclusivity rules also give prosecutors opportunities for abuse. Prosecutors can harass a defendant with successive state and federal prosecutions, or treat the first case as a dry run.<sup>445</sup> Prosecutors can also pick the jurisdiction which provides the greater legal advantage in offense definition, evidence admissibility, or severity of penalties.<sup>446</sup> Finally, the exclusivity rules are at least partially responsible for Congress's growing practice of incorporating state crimes into federal statutes.<sup>447</sup> This practice is extremely controversial. Critics charge that it invades the province of the states,<sup>448</sup> involves the federal government in crimes of scant federal concern,<sup>449</sup> and overburdens the federal courts.<sup>450</sup> The United States does not

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445. *Ashe v. Swenson*, 397 U.S. 436, 447 (1970); *Van Alstyne*, *supra* note 426, at 1747; *King*, *supra* note 440, at 480; *Levenson*, *supra* note 18, at 530-32 (explaining how federal prosecutors learned from the state trial of the police officers charged with beating Rodney King). *Cf. Edwards v. Oklahoma*, 815 P.2d 670, 673 (Ct. Crim. App. 1991) ("We are deeply concerned with the number of cases which come before us in which the appellant has been charged with the wrong crime. . . . [T]his Court will not grant . . . the State *carte blanche* to make repeated attempts to convict an individual for an alleged offense . . .").

446. *ABRAMS & BEALE*, *supra* note 428, at 725-27.

447. The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68 (1988 & Supp. V 1994), provides a good example of this practice. The Act defines racketeering activity as, *inter alia*, "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year . . ." *Id.* § 1961. The Act makes it unlawful for a person associated with an enterprise, whose activities affect interstate commerce, to participate in the conduct of the enterprise's affairs through a pattern of racketeering activity. Thus, if a person commits murder, kidnapping, or one of the other acts defined as racketeering activity, and in the process affects interstate commerce, he can be punished under the statute. *Id.* § 1962(c).

448. *Buckley*, *supra* note 428, at 1738; *ABRAMS & BEALE*, *supra* note 428, at 44; *Schwartz*, *supra* note 427, at 70; *Marcus*, *supra* note 438, at 2.

449. *NORMAN ABRAMS, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 117 (1986); *United States v. Cortner*, 834 F. Supp. 242, 244 (M.D. Tenn. 1993) *rev'd sub nom* 30 F.3d 135 (1994) (lamenting that the federalization of state criminal law is distorting "[t]he historically unique and discrete jurisdiction of the Federal Courts"). Professor Frase, in his study of federal prosecutorial discretion, found that federal prosecutors did not concentrate primarily on cases involving a direct injury to federal interests, but instead gave as much or more attention to cases prosecutable at the state or local level. Frase, *supra* note 426, at 285.

450. *Maryanne Trump Barry, Don't Make a Federal Case of It*, N.Y. TIMES, Mar. 11, 1994, at A31; Justice Sandra D. O'Connor, *Address at the U.S. Ninth Circuit Conference*, in STATE-FEDERAL JUDICIAL OBSERVER, Dec. 1993, at 2.

have a comprehensive national criminal code.<sup>451</sup> Instead, federal criminal law has grown piecemeal over the years, as Congress responds to political pressure to address a particular crime problem.<sup>452</sup> As a result, federal criminal statutes often are frustratingly incomplete, and criminalize only a portion of the wrongdoing involved in a criminal incident.<sup>453</sup> Congress in turn has broadened federal criminal statutes to include state law crimes, such as murder or extortion, so that federal prosecutors may undertake more complete prosecutions.<sup>454</sup>

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451. Schwartz, *supra* note 435, at 15; *Reform of the Federal Criminal Laws, Hearings Before the Subcomm. on Crim. Law and Proc. of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. pt. 1, 11 (1971) (memorandum from Malcolm Hawk) [hereinafter 1971 Hearings]; Note, *Piggyback Jurisdiction in the Proposed Federal Criminal Code*, 81 YALE L.J. 1209, 1210 (1972) ("Unlike the states, the federal government does not have plenary criminal jurisdiction. Rather, it is limited to regulating criminal behavior that is in some way related to one of the constitutionally delegated federal powers.")

452. 1971 Hearings, *supra* note 451, at 16 (Statement of Attorney General John N. Mitchell); *Id.* at 102 (Testimony of Richard H. Poff); Robert Drinan et al., *The Federal Criminal Code: The Houses are Divided*, 18 AM. CRIM. L. REV. 509, 509 (1981). As one federal judge recently complained, "[t]he Congress has had a recent penchant for passing a federal criminal statute on any well-publicized criminal activity." *Cortner*, 834 F. Supp. at 244.

453. Edmund G. Brown & Louis B. Schwartz, *New Federal Criminal Code is Submitted*, 56 A.B.A. J. 844, 847 (1970) (complaining that a person could be prosecuted federally for impersonating a federal official but not for a kidnapping perpetrated by that means, and that a person could be prosecuted federally for retaliating against a federal juror but that only the state could prosecute if the juror was murdered); Drinan et al., *supra* note 452, at 514 ("Current law provides for the exercise of jurisdiction over the robbery of a local gas station where the robbery affects interstate or foreign commerce. Under current law, however, there would be no federal jurisdiction over a murder that occurred during the robbery."); 1971 Hearings, *supra* note 451, at 11 (Memorandum from Malcolm Hawk); John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174, 188 (1965) (noting that federal law is "not nearly as well supplied as local law with lesser included offenses of varying degrees of seriousness, to which a guilty plea might be negotiated").

454. Attempts to incorporate state crimes into federal law reached their zenith in the Proposed Federal Criminal Code submitted to Congress in 1971. The text of the Code is set forth in NATIONAL COMM'N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT (1971) [hereinafter FINAL REPORT]. The Code made a laudable attempt to give standard definitions to the many crimes against the person and against property scattered throughout existing law. *See id.* at 326-93. Section 201 (b) of the Code provided for so-called "piggyback" jurisdiction, whereby these offenses could be piggybacked onto other Code offenses. Thus, for example, if a federal prisoner was attempting to escape and killed a person in the course of that attempt, § 201 (b) would allow prosecution for the murder as well as the escape. Piggyback jurisdiction was harshly criticized as interfering with states' rights. *See, e.g., Resolution by National Association of Attorneys General*, FINAL REPORT at 6-7; George W. Liebmann, *Chartering a National Police Force*, 56 A.B.A. J. 1070, 1071, 1073-74 (1970); Drinan et al., *supra* note 452, at 515-16, and was not approved by Congress. *Id.* at 515.

The changes I suggest in the jurisdictional exclusivity rules would help make the American criminal justice system more efficient and would lessen federal-state tensions. The courts could better balance their work loads and help each other dispose of cases if all charges arising from one incident could be brought together in either federal or state court. For example, if jurisdiction over federal drug charges was concurrent with the state courts, federal prosecutors could file a portion of the drug cases there, thus helping to solve the federal court caseload crisis.<sup>455</sup> State criminal justice systems could absorb the new cases relatively easily, because those systems are vastly larger than the federal system.<sup>456</sup> Similarly, if the federal judges in a particular district had relatively few cases and state judges were overburdened, the federal judges might help by exercising supplemental jurisdiction over state charges in cases requiring a lengthy trial. In addition, duplicative proceedings could be almost entirely eliminated if all charges arising from an incident could be brought together. This obviously would be more efficient, and it would save defendants trauma and expense.

If federal and state prosecutors could build and prosecute important cases together, they would have more opportunity and incentive to cooperate and they would be less likely to work at cross-purposes. Assume, for example, that a defendant smuggled illegal drugs into a state in violation of both federal and state drug laws. Federal and state prosecutors would have enormous flexibility. Prosecutors could file federal charges, state charges,

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Piggyback jurisdiction is conceptually very different than supplemental jurisdiction. Under the piggyback proposal, state crimes were literally federalized; they were incorporated into and became a part of federal law. With supplemental jurisdiction, by contrast, state crimes remain state crimes. Their meaning and content are defined and controlled by the states.

455. Federal prosecutors might not cooperate, preferring to remain in more comfortable and familiar surroundings. See Schwartz, *supra* note 427, at 86 (suggesting that federal prosecutors would not want to prosecute federal offenses in state court). If this happened, the federal courts might abstain in some cases, thus forcing federal prosecutors into state court. Under the current exclusivity rules, federal charges cannot be brought in state court if a federal court refuses to hear them. This may partly explain why federal appeals courts have prohibited dismissal of federal criminal cases in favor of prosecution on state charges. See *supra* note 438. The federal courts might consider changing this policy if federal charges would not be lost but could be brought in state court, either alone or together with state charges.

456. New federal drug cases numbered 12,810 in 1990, see *supra* note 437, while reports from 35 states indicate that over one million felony cases were filed that year. ABRAMS AND BEALE, *supra* note 428, at 12-13.

or some combination of the two, in either state or federal court. They could prosecute the charges jointly, or make a reasoned decision that one or the other would prosecute.<sup>457</sup>

Prosecutors might, of course, decide not to use the new jurisdictional rules, and one or the other might pursue only their own charges in their own court.<sup>458</sup> In many instances, however, some combination of charges would be appropriate because federal or state law might provide a better fit. Since state criminal law is more complete than federal law, prosecutors might use state law contemporaneously to charge all related crimes and lesser included offenses.<sup>459</sup>

Federal prosecutors could appear in state court without any additional authorization by Congress,<sup>460</sup> although the states might have to give permission for the federal prosecutor also to prosecute the related state charges.<sup>461</sup> Congress probably would have to authorize state officials to prosecute federal crimes in state court.<sup>462</sup>

Using supplemental jurisdiction, federal prosecutors could prosecute state charges in federal court that were related to an underlying federal offense, or federal and state prosecutors could

457. Prosecutors would also have to satisfy federal or state joinder rules. But these rules are quite liberal, and generally allow joinder of all crimes arising from a criminal transaction. *See, e.g.*, FED. R. CRIM. P. 8(a) (allowing joinder of offenses if they are "of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan").

458. Under my proposals, however, double jeopardy (or claim preclusion) would prohibit prosecution for any additional charges in either federal or state court arising out of the same criminal incident. *See infra* note 483 and accompanying text. This result is not unfair. Presently, most cases that might be prosecuted in both systems are in fact prosecuted in only one. In addition, prosecutors could avoid claim preclusion by cooperating and filing all charges together in one proceeding.

459. *See supra* notes 451-54, and accompanying text.

460. 28 U.S.C. § 517 (1988) permits the Attorney General to send any officer of the Department of Justice to "attend to the interests of the United States in a suit pending . . . in a court of a State . . ." In addition, recall that early Congresses routinely authorized federal prosecutors to appear in state court to enforce federal criminal laws. *See supra* notes 189-90 and accompanying text.

461. Federal law currently authorizes a federal prosecutor to receive a special temporary appointment as a state prosecutor to pursue a case in state court. 5 U.S.C. §§ 3371-3373 (1988 & Supp. V 1994).

462. 28 U.S.C. § 516 (1988) provides that "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States . . . is interested . . . is reserved to officers of the Department of Justice . . ." (emphasis added). Presumably, Congress can authorize state officials to prosecute federal criminal charges in state court either alone or together with a federal prosecutor.

both pursue the state charges in federal court.<sup>463</sup> Prosecutors would probably use supplemental jurisdiction in one of three ways. The first is simple pendent claim jurisdiction as in *United Mine Workers v. Gibbs*.<sup>464</sup> A federal prosecutor might bring a federal criminal charge against a defendant and append a related state charge. The second is pendent party defendant jurisdiction as in *Aldinger v. Howard*<sup>465</sup> and *Finley v. United States*.<sup>466</sup> A federal prosecutor might bring a federal criminal charge against one defendant and add a related state criminal charge against an additional defendant. The third is the analogue to civil pendent party plaintiff jurisdiction.<sup>467</sup> A state prosecutor might join a federal criminal case and assert a related state criminal charge, either against the original defendant or a new defendant.

Courts should consider the same factors that they consider in civil cases when deciding whether to exercise supplemental jurisdiction.<sup>468</sup> If supplemental jurisdiction will foster judicial economy, convenience, and fairness, courts should exercise it. If the opposite is true, they shouldn't. Courts also should consider the relative seriousness of the federal and state charges. If a prosecutor brought a minor federal charge and appended a related state murder charge, the court should probably decline to exercise jurisdiction over the state charge. If, on the other hand, the federal and state charges are both serious, or the federal charges predominate, a court probably should hear the state charges. Although supplemental jurisdiction plainly provides opportunities for better federal-state cooperation, it also might cause federal-state friction if federal prosecutors proceed without the knowledge and/or permission of state prosecutors. One can imagine the reaction of a state prosecutor who initiates a case in state court

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463. When state criminal cases are removed to federal court, state prosecutors prosecute. See, e.g., *City of Norfolk v. McFarland*, 143 F. Supp. 587, 590 (E.D. Va. 1956); *Carter v. Tennessee*, 18 F.2d 850, 855 (6th Cir. 1927). In addition, Congress has already provided that in some instances state prosecutors may receive a special temporary designation as a federal prosecutor to help bring a case in federal court. See 5 U.S.C. §§ 3371-3372, 3374 (1988 & Supp. V 1994).

464. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). See *supra* notes 399-404 and accompanying text.

465. *Aldinger v. Howard*, 427 U.S. 1 (1976). See *supra* note 407 and accompanying text.

466. *Finley v. United States*, 490 U.S. 545 (1989). See *supra* notes 408-11 and accompanying text.

467. See *supra* notes 415-417 and accompanying text.

468. See *supra* note 403 and accompanying text.

only to find that a federal prosecutor is already pursuing the charges in a federal forum. Of course, federal prosecutors could easily avoid this problem by consulting with their state counterparts before filing state charges in federal court. The federal court could ensure that consultation takes place by declining to exercise supplemental jurisdiction unless the state prosecutor either appears and assists in the case, or affirmatively indicates that he does not object to federal prosecution of the state charges.

Finally, changing the jurisdictional exclusivity rules might slow the growing federalization of state criminal law. If federal courts exercised supplemental jurisdiction over state crimes relating to a core federal violation, incorporating state crimes into federal statutes would simply be unnecessary. Congress could criminalize only the wrongdoing that directly affects federal interests, and state law would provide any additional charges necessary for complete prosecution.

It might be argued that supplemental jurisdiction would interfere with state sovereignty even more than present practices. Now, only selected state law crimes are incorporated into federal statutes. Under my proposal, *any* related state charges could be heard in federal court, thus opening up entire state criminal codes for federal enforcement and working a *de facto*, if not *de jure*, federalization of state criminal law.

I have several responses. The present system literally federalizes state law. Federal law then governs the definition and content of those crimes, and federal prosecutors can enforce the statute without any consultation with state authorities. With supplemental jurisdiction, by contrast, no new federal law would be created.<sup>469</sup> The federal government would merely enforce state law, rather than creating duplicate federal crimes and thereafter ignoring state law. In addition, state law presumably would govern the definition and content of state crimes, and federal prosecutors would be obliged to consult with state prosecutors. Moreover, since supplemental jurisdiction is a doctrine of discretion, a federal court could dismiss state charges if appropriate. Finally, the federal courts routinely exercise supplemental jurisdiction over state claims in civil cases, and

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469. Indeed, much of the state law presently incorporated into federal statutes could be removed as unnecessary.

Congress recently affirmed and expanded the practice.<sup>470</sup> If supplemental jurisdiction does not improperly invade state interests in civil cases, it is difficult to see why it would do so in criminal cases.<sup>471</sup>

I have made a strong case for relaxing the jurisdictional exclusivity rules and allowing related federal and state criminal charges to be brought together in either federal or state court. It seems prudent, however, to examine the traditional criteria for determining whether subject matter jurisdiction should be exclusive to see if they support exclusive jurisdiction in criminal cases. The criteria are (1) whether there is a need for uniformity in the interpretation and application of the law, (2) whether the issues are difficult and complex so that expertise is needed among a small and cohesive group of judges, and (3) whether it is likely that judges from other courts will be hostile to the objectives of

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470. See 28 U.S.C. § 1367 (Supp. V 1994); see *supra* notes 414-16 and accompanying text.

471. On the civil side, the Supreme Court has refused to directly federalize state claims, but the federal courts have enforced the same claims using supplemental jurisdiction. In several recent cases, the Court held that 42 U.S.C. § 1983 and the Due Process Clause of the Fourteenth Amendment do not encompass claims against state officials that can be brought as tort claims in state court. The Court reasoned that direct incorporation of state law would disturb the federal-state balance. It is clear, however, that the federal courts would hear these claims if they were appended to properly cognizable federal claims. For example, in *Paul v. Davis*, the police chief of Louisville, Kentucky distributed Davis's picture on a flyer, calling him an "active shoplifter," even though he had not been convicted of that crime. *Paul v. Davis*, 424 U.S. 693, 695-96 (1976). The Supreme Court held that the police chief deprived Davis of due process. Without a more concrete injury, such as loss of his job, the complaint simply stated a defamation claim that must be brought in state court. To hold otherwise, the Court stated, would lead to a vast federalization of state tort law. *Id.* at 697-701. If, however, Davis had suffered an injury cognizable under the Due Process Clause, like loss of his job, he could have appended the state defamation claim and the Court would have heard it. *Id.* at 701. Thus, although the defamation claim cannot be read directly into federal law, it can be heard under supplemental jurisdiction.

*Hudson v. Palmer*, 468 U.S. 517 (1984), provides another example. An inmate alleged that a prison guard entered his cell and gratuitously destroyed property. *Id.* at 519-20. He sued for deprivation of the property without due process. *Id.* at 520. The Court denied the claim because the state could not provide any meaningful pre-deprivation process before an employee committed a random, unauthorized act. *Id.* at 533. The Court concluded that the inmate alleged only a tort claim actionable in state court. *Id.* at 534-35. If we assume, however, that a prison adopted a policy of randomly destroying inmates' property, inmates could challenge that policy under the Fourteenth Amendment. The federal courts would entertain any related state tort claims against the prison or against individual guards for damages. Thus, the same tort—intentional destruction of property—cannot be heard directly but can be heard indirectly using supplemental jurisdiction. In sum, exercising supplemental jurisdiction over state tort claims does not improperly usurp state authority, while directly federalizing such claims does.

the law.<sup>472</sup> Upon examination, these criteria do not support the exclusive jurisdiction of the federal and state courts in criminal cases.

Uniformity in the interpretation and application of the criminal law is *per se* a good thing.<sup>473</sup> As more judges from different courts make rulings, the law inevitably becomes less uniform. It is impossible, however, to achieve complete uniformity. Even when jurisdiction is exclusive to one court, the judges of that court often disagree with each other. The real issue is whether concurrent jurisdiction will be so disruptive that its costs outweigh the benefits. If concurrent jurisdiction will create such extreme variations in the interpretation and application of the law that people will not know what their rights and duties are or how to order their affairs, then jurisdiction should be exclusive.

Concurrent jurisdiction over criminal cases will not create this level of uncertainty. There is, as already noted, overlap between the two systems. Both federal and state judges know the basic concepts and doctrines of criminal law and procedure.<sup>474</sup> The criminal law is not new, and a substantial body of precedent has developed over time. This, coupled with the easy access to legal research materials, makes it unlikely that federal and state judges will adopt widely divergent interpretations of each other's law. Federal judges will be guided by state court interpretation of state law, as they are in diversity cases.<sup>475</sup> State judges will be guided by federal interpretation of federal law, as they are in other cases where they must apply federal law.<sup>476</sup> In addition, judges of one system do not have to follow decisions from the other system that wrongly interpret the first system's law.<sup>477</sup> Professor Redish suggests asking whether a body of law is either detailed and specific or more general and vague, since uniformity is more difficult to achieve in the latter than in the former

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472. *Tafflin v. Levitt*, 493 U.S. 455, 464 (1990); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483-84 (1981). See also HART & WECHSLER, *supra* note 55, at 480.

473. See *Ableman v. Booth*, 62 U.S. (21 How.) 506, 517-18 (1859).

474. *Anderson*, *supra* note 3, at 1203 (noting "the increasing overlap of subject matter being litigated in federal and state courts and the growing uniformity of standards to be applied in the decision-making process under recent Supreme Court decisions").

475. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967).

476. See, e.g., *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359, 361 (1952) (holding that federal law governs the issue of the validity of releases in a Federal Employers' Liability Act case brought in state court).

477. *Tafflin*, 493 U.S. at 465.

instance.<sup>478</sup> As law goes, criminal law is relatively clear and specific. It is almost entirely statutory,<sup>479</sup> and because of the harsh sanctions involved, it is written with precision so that people may know exactly what conduct is prohibited. Thus, modifying the jurisdictional exclusivity rules will not pose a significant threat to uniformity in the interpretation and application of criminal law.

Many of these same points are relevant in considering whether exclusive jurisdiction is necessary to promote judicial expertise. Both federal and state judges are expert in criminal law and procedure, and they are competent to adjudicate federal and state criminal charges.<sup>480</sup> Criminal law is not like patent law, admiralty, or bankruptcy, which are technical and discrete. As Judge Leslie L. Anderson states, "[p]roblems in the handling of criminal cases are in many ways quite identical in both [the federal and state] court systems . . . ."<sup>481</sup> Moreover, as of January 1, 1992, thirty-four states and Puerto Rico had adopted the Federal Rules of Evidence,<sup>482</sup> thus making federal and state litigation even more similar. Consequently, exclusive jurisdiction in criminal cases does not promote any unique expertise.

The third criterion is whether judges from one court system will be hostile to the objectives of the laws promulgated by another jurisdiction. Federal judges will not be hostile to state criminal law; nor will state judges be hostile to federal criminal law. Judges do not like criminals or piecemeal litigation. They are likely to embrace changes that make it easier to fight crime and to dispose of all charges in one case. In sum, the criteria for determining whether subject matter jurisdiction should be exclusive do not support exclusive jurisdiction in criminal cases.

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478. Martin H. Redish and John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 331 (1976).

479. There are no federal common law crimes. See *supra* notes 125-131 and accompanying text.

480. The Supreme Court recently held that state courts are fully competent to adjudicate issues of federal criminal law that arise in civil RICO actions brought in state court, "particularly since many RICO cases involve asserted violations of state law, such as state fraud claims, over which state courts presumably have greater expertise." *Tafflin*, 493 U.S. at 465.

481. Anderson, *supra* note 3, at 1204.

482. JACK B. WEINSTEIN ET AL., EVIDENCE: RULES, STATUTE AND CASE SUPPLEMENT iii (1992).

### B. Proposed Changes in the Double Jeopardy Rules

There is much to be gained by changing the exclusivity rules. But if Congress made the changes I suggest, it is by no means clear that federal and state prosecutors would rush to embrace the new system. Federal prosecutors probably would prefer to remain in the familiar and more comfortable confines of the federal courthouse rather than entering the rough and tumble precincts of state criminal justice systems. Federal prosecutors might add related state charges in some cases, but overworked local prosecutors probably would not want to appear in federal court to help press the charges. Thus, merely changing the jurisdictional exclusivity rules might have little practical impact unless prosecutors were given some additional incentive to bring all charges together in one federal or state proceeding.

To provide this incentive, I suggest two changes in the current double jeopardy rules. First, abandon the dual sovereignty rule, which currently allows successive prosecutions, in cases where all charges, state and federal, could be brought together in either state or federal court. Second, adopt the broad transactional standards used in civil cases to determine the scope of an "offense" for double jeopardy purposes. If these changes were made, claim preclusion rules from the civil side could apply with full force to successive federal and state criminal prosecutions. In short, if both federal and state charges could be brought from the same criminal transaction, and prosecutors fail to bring any of those charges in the first proceeding, they would be precluded from filing them in a second proceeding in either system.<sup>483</sup>

The Fifth Amendment prohibition against twice being put in jeopardy for the same offence<sup>484</sup> is the criminal counterpart of civil claim preclusion.<sup>485</sup> A former conviction operates much like

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483. Exceptions should be made in appropriate circumstances. See *infra* notes 507-509, 524 and accompanying text.

484. The exact wording is "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ." U.S. CONST. amend. V. *Benton v. Maryland*, 395 U.S. 784 (1969), held this guarantee applicable against the states through the Fourteenth Amendment.

485. Claim preclusion forbids a second suit asserting the same cause of action, and binds the parties "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Sea-Land Serv. v. Gaudet*, 414 U.S. 573, 578-79 (1974)

merger, a former acquittal much like bar.<sup>486</sup> Currently, there is very little inter-system preclusion in criminal cases; neither double jeopardy nor collateral estoppel prohibit successive prosecutions by federal and state authorities for the same misconduct.<sup>487</sup> The Supreme Court treats the states and the United States as separate sovereigns that may enforce their laws independently.<sup>488</sup> The dual sovereignty theory is flawed.<sup>489</sup> Under our theory of government, sovereignty rests in the people,

(quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876)).

Issue preclusion, or collateral estoppel, applies in criminal as well as in civil proceedings. *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970), held that issue preclusion is "embodied in the Fifth Amendment guarantee against double jeopardy." As a practical matter, however, issue preclusion plays a very limited role in criminal cases. See *infra* note 510.

486. Daniel K. Mayers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions* 74 HARV. L. REV. 1, 3 n.10 (1960). Claim preclusion requires a final judgment on the merits. *Cromwell*, 94 U.S. at 352-53. By contrast, jeopardy usually attaches when the jury is sworn, *Crist v. Bretz*, 437 U.S. 28 (1978); *Downum v. United States*, 372 U.S. 734 (1963), although courts make many exceptions. For example, jeopardy does not attach when the defendant agrees to a mistrial, *United States v. Dinitz*, 424 U.S. 600 (1976), when the jury cannot agree on a verdict, *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824), or when a conviction is reversed on appeal on grounds other than insufficiency of the evidence. *United States v. Ball*, 163 U.S. 662 (1895).

487. See *supra* note 439 and accompanying text.

488. *United States v. Lanza* sets forth the classic statement of the dual sovereignty theory:

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

*United States v. Lanza*, 260 U.S. 377, 382 (1922). The Supreme Court reaffirmed this rule in 1959. See *Bartkus v. Illinois*, 359 U.S. 121 (1959) (allowing a state proceeding after a federal acquittal for the same misconduct); *Abbate v. United States*, 359 U.S. 187 (1959) (allowing a federal proceeding after a state conviction for the same wrongdoing). For an historical review of the cases in this line, see *Bartkus*, 359 U.S. at 128-36; Harrison, *supra* note 440, at 336-42.

Courts often deny defendants any inter-system issue preclusion on the ground that state and federal prosecutors cannot be bound by factual findings in a proceeding where they were not a party. See, e.g., *State v. Mechtel*, 499 N.W.2d 662, 666-67 (Wis. 1993); *People v. Nezaj*, 528 N.Y.S.2d 491, 494-95 (N.Y. Sup. Ct. 1988); *Turley v. Wyrick*, 554 F.2d 840, 842 (8th Cir. 1977); *United States v. Smith*, 446 F.2d 200, 202 (4th Cir. 1971); *United States v. Hutul*, 416 F.2d 607, 626 (7th Cir. 1969).

489. The dual sovereignty theory has been criticized heavily in the literature. See Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609, 618-19 n.32, and sources cited therein.

not in an artificial governmental entity.<sup>490</sup> As a practical matter, federal and state prosecutors represent the same people.<sup>491</sup> I grant that a federal prosecutor represents all of the people of the United States while a state prosecutor represents only a subgroup. Nonetheless, either a federal or a state prosecution benefits essentially the same people.<sup>492</sup> For example, the people of California are the primary beneficiaries of either a federal or state prosecution for smuggling drugs into California. Thus, successive federal and state prosecutions are *not* brought on behalf of different parties; in fact, only the lawyers are different. A party cannot avoid *res judicata* simply by changing counsel; the people should not be able to avoid double jeopardy by changing their representative.

The jurisdictional exclusivity rules may underlie—or at least reinforce—the dual sovereignty theory. The state and federal courts generally exercise exclusive original jurisdiction over their own criminal charges. Although the charges may overlap, they cannot be brought together. Consequently, without the dual sovereignty theory, double jeopardy would often completely preclude one set of charges or the other. On the civil side, courts do not preclude a second suit on a claim that could not have been brought in an earlier action because the court lacked subject

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490. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 472 (1793) ("Sovereignty is the right to govern; a nation or State-sovereign is the person or persons in whom that resides. . . . [H]ere it rests with the people . . ."); *THE FEDERALIST*, *supra* note 62, No. 39, at 241 (James Madison) ("[A] republic . . . derives all its powers directly or indirectly from the great body of the people . . ."); Alexis De Tocqueville, *DEMOCRACY IN AMERICA* 55 (Phillips Bradley ed., 1945) ("[w]henver the political laws of the United States are to be discussed, it is with the doctrine of the sovereignty of the people that we must begin").

491. *Moore v. Illinois*, 55 U.S. (14 How.) 13, 22 (1852) (McLean, J., dissenting) ("It is true, the criminal laws of the Federal and State Governments emanate from different sovereignties; but they operate upon the same people, and should have the same end in view."); *Dawson*, *supra* note 440, at 301 ("[A] collection of citizens empaneled in a state courthouse is [not] different in kind from a collection of citizens empaneled across the street in a federal courthouse.").

492. See *Harrison*, *supra* note 440, at 327 ("[T]he states and federal government do not protect separate societies. The federal government protects the same society as does the state. . . . Thus, when an act is committed which violates the laws of two sovereigns, no offense is committed against the 'peace and dignity of both'; rather the offense has been committed against *one* society."). See also, *King*, *supra* note 440, at 485-86; Note, 80 *HARV. L. REV.*, *supra* note 432, at 1542-43 (1967).

matter jurisdiction.<sup>493</sup> The reason is that it is unfair to punish a party for failing to do something she cannot do. Although never articulated by the Supreme Court, this same reasoning helps explain why the Court clings to the dual sovereignty theory. But, of course, if the exclusivity rules are changed to allow all charges to be brought together in one proceeding, this reason for the dual sovereignty theory disappears.

Even if we consider federal and state prosecutors to be different parties, developing principles of nonparty preclusion in civil cases also support inter-system double jeopardy.<sup>494</sup> Traditionally, only parties to an action, or those in strict privity with them, could be bound.<sup>495</sup> Courts reasoned that it is a denial of due process to bind a person who has not had a day in court.<sup>496</sup> Nonetheless, courts have begun to loosen these rules<sup>497</sup> and bind nonparties when the relationship between the party and the nonparty is sufficiently close to make preclusion fair.<sup>498</sup> Courts are most willing to bind nonparties when two

493. JOHN J. COUND ET AL., CIVIL PROCEDURE 1298 (6th ed. 1993) ("[V]irtually every state follows the 'prior jurisdictional competency' rule, which prohibits preclusion of a claim beyond the rendering court's jurisdiction."); *Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373 (1985); *Seagoing Uniform Corp. v. Texaco*, 705 F. Supp. 918, 921, 923 (S.D.N.Y. 1989); *Brennan v. EMDE Med. Res., Inc.*, 652 F. Supp. 255, 264-65 (D. Nev. 1986); RESTATEMENT (SECOND) OF JUDGMENTS, § 26(1)(c) (1982).

494. For discussion of nonparty preclusion, see generally Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992); Lawrence C. George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 STAN. L. REV. 655 (1980); Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485 (1974); John K. Morris, Comment, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered*, 56 CAL. L. REV. 1098 (1968).

495. *Cromwell*, 94 U.S. at 352; *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 319 (1927). Privity was narrowly construed as a "[m]utual or successive relationship to the same rights of property." BLACK'S LAW DICTIONARY 1361 (4th ed. 1951). See also *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 179 (1973). Nonparties could also be bound by adjudication between others if they agreed to be bound, see RESTATEMENT (SECOND) OF JUDGMENTS § 40 (1982), or if they controlled the litigation. *Id.* § 39. Courts presumably would bind a federal or state prosecutor who formally, or perhaps informally, agreed to abide by the results of a prosecution in the other system. Similarly, if a federal or state prosecutor "second-chaired" prosecution of her own charges in the other system without formally appearing, courts presumably would preclude relitigation of those charges.

496. *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971); *Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940); *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1233 (2d Cir. 1977).

497. *Amalgamated Sugar Co. v. NL Indus.*, 825 F.2d 634, 640 (2d Cir. 1987); *Bankers Trust Co. v. Old Republic Ins. Co.*, 697 F. Supp. 1483, 1485 (N.D. Ill. 1988).

498. *Amalgamated Sugar*, 825 F.2d at 640; *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84, 95 (5th Cir. 1977); *Phillips v. Kidder, Peabody & Co.*, 750 F. Supp. 603, 607 (S.D.N.Y. 1990).

conditions are met: (1) the nonparty had notice of the suit and an opportunity to participate, and (2) one of the parties adequately represented the nonparty's interests.<sup>499</sup>

Both of these conditions could (or should) be satisfied when a wrongdoer violates both federal and state criminal laws. Federal and state prosecutors easily can devise means to inform each other of these cases,<sup>500</sup> particularly if they limit notification to important cases that both might actually want to prosecute. Current law already allows federal and state prosecutors to appear in each other's courts,<sup>501</sup> and any necessary additional authorization could easily be provided. Federal and state prosecutors would have to be familiar with both federal and state

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499. See, e.g., *First Ala. Bank of Montgomery v. Parsons Steel, Inc.*, 747 F.2d 1367, 1379 (11th Cir. 1984), *rev'd on other grounds*, 474 U.S. 518 (1986) (trustee precluded because he had an opportunity to intervene in first action and declined to do so and his interests were identical with those of the plaintiffs in that case); *Amalgamated Sugar*, 825 F.2d at 637, 640-41 (shareholder held properly precluded when he had an opportunity to participate in earlier litigation and declined to intervene and he had no interest to assert that had not been previously asserted by the board of directors); *Garcia v. Wilson*, 820 P.2d 964, 967 (Wash. Ct. App. 1991) (passenger's personal injury action held properly precluded by driver's property damage suit when passenger had notice of the first action, testified in it, and admitted that she had no new evidence or witnesses to present in a second proceeding). In *Garcia*, the Court also believed the passenger was maneuvering by failing to intervene in the property damage action, hoping to obtain an estoppel if the driver won and a second chance before a new jury if the defendant lost. *Id.*

In 1991, Congress enacted legislation prohibiting a challenge to consent decrees in a federal employment discrimination suit by individuals who had notice of the suit and an opportunity to intervene and whose interests were adequately represented by a party. 42 U.S.C. § 2000e-2(n) (Supp. V 1994). This statute overruled *Martin v. Wilks*, 490 U.S. 755 (1989). *Martin* refused to preclude white firefighters in Birmingham, Alabama from challenging a consent decree in a prior suit between the City and black firefighters setting goals for the hiring and promotion of blacks, notwithstanding that the whites had notice, an opportunity to intervene, and their interests were adequately represented by the defendants in the first suit. *Id.* The 1991 Act precludes only challenges to consent decrees. 42 U.S.C. § 2000e-2(n). Courts have not precluded subsequent damage actions by individual victims of discrimination, despite the fact that the individuals might have intervened in the action producing the consent decree, because the individuals' interests were not sufficiently similar to the interests of the parties in the prior action. See, e.g., *Riddle v. Cerro Wire & Cable Group, Inc.* 902 F.2d 918, 922-23 (11th Cir. 1990); *Loveridge v. Fred Meyer, Inc.*, 864 P.2d 417, 421-22 (Wash. Ct. App. 1993).

Federal Rule of Civil Procedure 23(c)(2) and (a)(4) allow unnamed members of a (b)(3) plaintiff class to be bound if they are given notice and an opportunity to opt out or appear if their interests are adequately represented by the named parties.

500. Note, 80 HARV. L. REV., *supra* note 432, at 1551, 1556.

501. See *supra* notes 460-63 and accompanying text.

criminal law so they could identify appropriate cases for combined charges. This requirement would not be overly burdensome.<sup>502</sup>

In deciding whether a nonparty was adequately represented by a party, courts look to seek whether the nonparty shared the same or similar litigation goals as the party, and whether the party vigorously litigated the suit.<sup>503</sup> In cases in which a wrongdoer violates both state and federal law, the interests of federal and state prosecutors are virtually identical—they want to convict and punish the person.<sup>504</sup> In addition, in these days of tight jobs and merit selection, both federal and state prosecutors hire some of the most talented law school graduates. Despite large case loads, both have sufficient resources to litigate important cases vigorously.

In some instances, federal and state authorities might work at cross-purposes or undermine each other. A corrupt federal prosecutor might allow a defendant to plead guilty to a minor charge, thus precluding more serious charges in state court. A local prosecutor or jury in a conservative area might protect a defendant who took politically popular but illegal action by, again, allowing a plea to a minor charge, or by acquitting altogether.<sup>505</sup> The Supreme Court has specifically relied on the possibility of such misconduct in affirming the dual sovereignty rule, arguing that a contrary rule would allow the nation and the states to frustrate each other's interests.<sup>506</sup>

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502. See *supra* notes 457-59 and accompanying text. The Supreme Court has held that it is reasonable to expect federal officials working for the Small Business Administration and the Farmers Home Administration to know and apply state law in tailoring loan agreements. See *United States v. Kimbell Foods*, 440 U.S. 715, 729 (1979).

503. Bone, *supra* note 494 at 203; *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir. 1975); *First Ala. Bank of Montgomery*, 747 F.2d at 1379; *Garcia*, 820 P.2d 966-67.

504. Note, 80 HARV. L. REV., *supra* note 432, at 1550, 1553. Although a small portion of federal criminal law protects uniquely federal interests, see *supra* notes 427-36 and accompanying text, Congress passes most federal criminal legislation to achieve the same goals than as states, and to supplement local enforcement efforts and fight large-scale criminal activity that spreads interstate. See *supra* notes 432-33 and accompanying text.

505. See Herman, *supra* note 489, at 630-31.

506. See *Bartkus*, 359 U.S. at 137 ("Were the federal prosecution of a comparatively minor offense to prevent state prosecution of [a] grave . . . infraction of state law, the result would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines."); *Abbate v. United States*, 359 U.S. 187, 195 (1959) ("[I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered."). See also *United States v. Lanza*, 260 U.S. 377, 382 (1922).

The possibility of abuse does not justify the dual sovereignty rule. As Justice Black noted in *Barthkus v. Illinois*, such abuse will be very rare.<sup>507</sup> It makes little sense to allow successive prosecutions in all cases because abuse may occur in a few. It makes more sense to adopt a rule prohibiting successive prosecutions when one prosecutor adequately represents the interests of the other, and to allow exceptions for the rare case when he does not.<sup>508</sup> This is the rule on the civil side, where a prior judgment binds parties, and in appropriate cases, nonparties, unless fraud or other extraordinary circumstances make preclusion unfair.<sup>509</sup> In sum, the dual sovereignty theory is conceptually flawed and outmoded. It should be abandoned.

Although double jeopardy rarely prevents successive prosecutions in different systems, it does prevent a second prosecution of the same offense within the same system. Courts limit its effect, however, by defining an "offense" narrowly.<sup>510</sup> The federal courts and most state courts use the so-called "same evidence" test to decide whether a successive prosecution is for the

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507. *Barthkus*, 359 U.S. at 157 (Black, J., dissenting).

508. In framing its position against the dual sovereignty theory, the American Civil Liberties Union considered making a sham prosecution exception to a general rule prohibiting successive federal and state prosecution for the same misconduct. Herman, *supra* note 489, at 630-31. The ACLU rejected the exception for two reasons. First, some feared that the exception was so vague that it might swallow the rule. *Id.* Second, there are alternative means of disciplining prosecutors who conduct sham prosecutions. *Id.*

509. See *Sea-Land Serv.*, 414 U.S. at 579. The Restatement (Second) of Judgments allows exceptions to both claim and issue preclusion for extraordinary circumstances, including fraud. See RESTATEMENT (SECOND) OF JUDGMENTS, § 28(5)(a) (1980) (allowing an exception "because of the potential adverse impact of the determination on the public interest"); *id.* §26, cmt. j (no preclusion in cases of "fraud, concealment, or misrepresentation"). Unnamed members of a plaintiff class are not bound by the judgment in a class action when their interests have not been adequately represented. See *Hansberry*, 311 U.S. 32; *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973).

510. Collateral estoppel rarely precludes a successive prosecution for the same misconduct. A person seeking an estoppel on an issue must establish that the issue was actually litigated and necessary to the result in the prior proceeding. *Cromwell*, 94 U.S. at 354; See also *Rios v. Davis*, 373 S.W.2d 386 (Tex. Civ. App. 1963); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). Courts will not give an estoppel if the record of the first proceeding is ambiguous. *Russell v. Place*, 94 U.S. 606 (1876); RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. e (1980). Most crimes have several elements and a defendant may interpose more than one defense. A simple "Not Guilty" verdict is opaque, and does not reveal which issues in the case were decided in the defendant's favor. A defendant cannot obtain an estoppel on an issue unless the record shows that the jury must have based its decision on that issue. *Mayers & Yarbrough*, *supra* note 486, at 33-34; *Walter V. Schaefer*, *Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe*, 58 CAL. L. REV. 391, 394 (1970); *United States v. Smith*, 446 F.2d 200, 202-03 (1971); *Commonwealth v. Campana*, 304 A.2d 432, 437-38 (Pa. 1973).

same offense.<sup>511</sup> *Blockburger v. United States* gives the classic statement of the test: “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a[n additional] fact which the other does not.”<sup>512</sup>

As the Supreme Court notes in *Brown v. Ohio*, the test emphasizes the elements of the two offenses.<sup>513</sup> As long as each requires proof of a fact that the other does not, successive prosecutions are allowed, even though the proof overlaps substantially and the two charges are a part of the same criminal episode.<sup>514</sup> For example, if a person robs someone at knife-point, taking her money and stabbing her, he could be tried first for assault and battery with a deadly weapon with intent to kill, and later for robbery with a dangerous weapon. The same evidence test allows the second prosecution because intent to kill is not an element of robbery, and taking property from the victim is not an element of assault with intent to kill.<sup>515</sup>

The same evidence test plainly does little to prevent successive prosecutions for the same wrongdoing.<sup>516</sup> Justice Brennan opined that it “virtually annuls the constitutional guarantee.”<sup>517</sup> The test also has spawned tortured decisions by

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511. *United States v. Dixon*, 113 S.Ct. 2849, 2860 (1993) (reaffirming the same evidence test); *Johnson v. State*, 66 P.2d 1137, 1140 (Okla. Crim. App. 1980) (“Extensive research . . . indicates that the ‘same evidence test’ is utilized by a majority of state and federal courts.”); *Cousins v. State*, 354 A.2d 825, 829, 831 (Md. 1976); *Ashe*, 397 U.S. at 451 (Brennan, J. concurring); *State v. Ahuna*, 474 P.2d 704, 706 (Haw. 1970) (all affirming that the same evidence test is the majority rule).

512. *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (citing *Gavieres v. United States*, 220 U.S. 338, 342 (1911)). The test has been used in this country since the late 1800s. See *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871).

513. *Brown v. Ohio*, 432 U.S. 161 (1977).

514. *Id.* at 166.

515. See *Johnson*, 611 P.2d at 1142. The same evidence test also allows multiple prosecutions if a single criminal episode involves several victims, or can be divided into chronologically discrete crimes. *Ashe*, 397 U.S. at 451 (Brennan, J. concurring).

516. *Campana*, 304 A.2d at 437 (The same evidence test “has been almost unanimously regarded as totally ineffective to implement the important double jeopardy guarantee of preventing successive prosecutions.”).

517. *Ashe*, 397 U.S. at 451 (Brennan, J. concurring). Justice Brennan continued: “Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening.” *Id.* at 452. See also, *People v. White*, 212 N.W.2d 222, 227-28 (Mich. 1973).

the federal and state courts struggling to avoid its harsher effects.<sup>518</sup>

To enhance double jeopardy protection, some states have adopted the "same transaction" test to define the scope of an offense.<sup>519</sup> This test is borrowed from civil cases that use it to define the scope of a claim for *res judicata*, joinder, and supplemental jurisdiction purposes.<sup>520</sup> Under the *Restatement (Second) of Judgments*, a valid final judgment extinguishes a claim, including "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action

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518. In *Grady v. Corbin*, the Supreme Court held that even if successive prosecutions were not barred by the *Blockburger* test, "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady v. Corbin*, 495 U.S. 508, 510 (1990). Shortly thereafter, however, the Court recognized a major exception to the new rule, holding that prosecution for conspiracy is not precluded by a prior prosecution for the underlying substantive offense. *United States v. Felix*, 112 S.Ct. 1377, 1384-85 (1992). In 1993 the Court overruled *Grady*, calling it "wrong in principle" and "unstable in application." *Dixon*, 113 S.Ct. at 2860, 2863.

The states have struggled as well. For example, Oklahoma and Hawaii do not follow either the same evidence test or the same transaction test exclusively, preferring instead to base decisions on the facts of individual cases. See *Johnson*, 611 P.2d at 1142; *Ahuna*, 474 P.2d at 706-07. Other states apply some amalgam of the two tests. For example, in *State v. Richardson*, the defendant attempted to rob a liquor store by brandishing a butcher knife and placing it against the stomach of the clerk on duty. *State v. Richardson*, 460 S.W.2d 537, 537-38 (Mo. 1970) (*en banc*). He pled guilty to attempted robbery, but was later convicted of assault with intent to maim for the same incident. Even though the same evidence test did not preclude the second prosecution because intent to maim is different than intent to rob, the Missouri Supreme Court reversed the second conviction. *Id.* at 539-40.

519. See, e.g., *White*, 212 N.W.2d at 228; *State v. Corning*, 184 N.W.2d 603, 605-06 (Minn. 1971); *State v. Gallup*, 816 P.2d 669, 671 (Or. Ct. App. 1991); *Campana*, 304 A.2d at 441; *Walton v. State*, 448 S.W.2d 690, 696 (Tenn. Crim. App. 1969). The United States Supreme Court has specifically declined to adopt this standard. See *Garrett v. United States*, 471 U.S. 773, 790 (1985). Both the Model Penal Code and the ABA Project on Minimum Standards for Criminal Justice recommend adoption of the same transaction test for double jeopardy purposes. See *Model Penal Code* § 1.07(2) (Proposed Official Draft 1962); *Standards Relating to Joinder and Severance*, A.B.A. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE § 1.3 (Approved Draft 1968).

520. *Ashe*, 397 U.S. at 453-56 (Brennan, J. concurring); *White*, 212 N.W.2d at 228; *Campana*, 304 A.2d at 439-441.

arose.<sup>521</sup> The *Restatement* explains the scope of this rule as follows:

The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.<sup>522</sup>

Arguments of fairness and efficiency strongly support extending this standard to criminal cases. As Justice Brennan argued in *Ashe v. Swenson*:

Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening. And given our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution, the potentialities for abuse inherent in the "same evidence" test are simply intolerable.

. . . .  
[The] "same transaction" test of "same offense" not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of single transaction or

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521. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982). Section 24 also states that defining a transaction or series of connected transactions should be done pragmatically, "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations . . ." *Id.* § 24(2).

522. *Id.* § 24 cmt. a.

occurrence best promotes justice, economy, and convenience.<sup>523</sup>

In addition, if the law affords parties in civil suits the protection of the same transaction test, it follows *a fortiori* that criminal defendants should receive at least the same protection.<sup>524</sup>

If the dual sovereignty theory were abandoned and the same transaction test were used to define an offense, the modern rules of civil claim preclusion would apply when defendants violated both state and federal criminal law. On the civil side, courts routinely grant claim preclusion if the plaintiff in a state action fails to bring a federal claim that is transactionally-related to the state claim and within the state court's jurisdiction.<sup>525</sup> Similarly, if a plaintiff files a federal action and fails to join a related state claim by use of supplemental jurisdiction, the plaintiff is precluded from bringing the state claim in a later proceeding.<sup>526</sup> Adopting these standards in criminal cases would

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523. *Ashe*, 397 U.S. at 452-54 (Brennan, J., concurring). See also, *White*, 212 N.W.2d at 228; *Campana*, 304 A.2d at 440-41.

524. *Ashe*, 397 U.S. at 456-57 (Brennan, J., concurring); *White*, 212 N.W.2d at 228; *People v. Noth*, 189 N.W.2d 779, 789 (Mich. Ct. App. 1971) (Levin, J., dissenting); *State v. Cooper*, 13 N.J.L. 361, 365-76 (1833).

Courts applying the same transaction test in criminal cases make common sense exceptions. Thus, successive prosecutions are allowed if a single court does not have jurisdiction over all of the crimes, or if the prosecutor could not know of all offenses at the time of the first trial, or if some extraordinary prejudice will occur. See, e.g., *Campana*, 304 A.2d at 440 n.37.

525. See e.g., *Migra v. Board of Educ.*, 465 U.S. 75 (1984) (plaintiff's failure to file § 1983 claim in state action for wrongful firing precluded later federal suit); *Pasterczyk v. Fair*, 819 F.2d 12, 14 (1st Cir. 1987) (federal action for damages for wrongly computing plaintiff's prison term precluded by earlier state action that sought declaratory and injunctive relief); *Swanson v. Best Buy Co.*, 731 F. Supp. 914, 918 (S.D. Iowa 1990) (federal suit against employer for discrimination and wrongful discharge precluded by prior state action for failure to pay employee in accordance with employment agreement); *Gray v. Coomer*, 706 F. Supp. 539, 541 (W.D. Ky. 1988) (plaintiff's federal RICO action precluded because plaintiff filed state fraud action and did not include a RICO claim arising from the same misconduct); *JBK, Inc. v. Kansas City, Mo.*, 641 F. Supp. 893, 899 (W.D. Mo. 1986) (challenge to constitutionality of ordinance regulating massage parlors precluded by failure to raise the claim in an earlier state proceeding).

526. See, e.g., *First Ala. Bank of Montgomery*, 747 F.2d 1372-73 (plaintiffs' failure to assert common law fraud claim in federal court using pendent jurisdiction precluded later assertion of that claim in state court); *Woods Explor. & Prod. Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1315 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972) (state action precluded by failure to assert state claim in earlier federal case by using pendent jurisdiction); *Jeanes v. Henderson*, 688 S.W.2d 100, 102-04 (Tex. 1985) (plaintiff's failure to assert declaratory judgment claim in federal action precluded later assertion of that theory of recovery in state court); *Rennie v. Freeway Transp.*, 656 P.2d 919 (Or. 1982);

require prosecutors to cooperate and to combine all charges that they wish to bring in one state or federal criminal prosecution.

Federal and state prosecutors could no longer ignore each other, for the actions of one would bind the other. A state prosecutor would have to consider possible federal charges, and a federal prosecutor would have to consider possible state charges. Prosecutors would be forced to talk to each other and to consider their options.<sup>527</sup> There is no unfairness here. Prosecutors would not be sandbagged or otherwise disadvantaged as long as they were aware of each other's laws and they talked to each other.

### CONCLUSION

This article has compared the development of the civil and criminal arising under jurisdiction and has suggested changes to make the criminal branch more like the civil. It has also shown that the changes are both workable and just. These modifications would significantly alter the criminal arising under jurisdiction. But jurisdictional rules, like other rules of law, must change with the times. As Justice Frankfurter once stated:

Not inherent reasons, then, but practical justifications explain the past judiciary acts and must vindicate existing jurisdiction. The force and dangers of parochial attachments, the effectiveness and limitations of a centralized judiciary administering law over a continent, the dependability of state courts, the convenience of suitors, shifting economic and political sentiments—such influences, with varying incidence, have shaped the accommodations of authority distributed between the national judiciary and the state courts. The present jurisdiction cannot rely on tradition. Always have the

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Eagle Prop. v. Scharbauer, 758 S.W.2d 911 (Tex. Ct. App. 1988) (both granted claim preclusion because federal court had pendent jurisdiction over state claims in prior actions, and there was no indication it would have declined to exercise it).

Courts make exceptions in appropriate cases. *See, e.g.*, Doe v. Maher, 515 A.2d 134, 139 (Conn. 1986) (state action challenging on state constitutional grounds restrictions on funding for abortions not precluded by prior federal action because the federal judge specifically reserved the state constitutional issues); Capital Tel. Co. v. N.Y. Tel. Co., 540 N.Y.S.2d 895, 898 (N.Y. App. Div. 1989) (plaintiff's state antitrust claims not precluded by earlier federal antitrust case because federal court would not have exercised pendent jurisdiction over the state claim).

527. *See supra* notes 455-457 and accompanying text.

accommodations been temporary. The only enduring tradition represented by the voluminous body of congressional enactments governing the federal judiciary is the tradition of questioning and compromise, of contemporary adequacy and timely fitness.<sup>528</sup>

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528. Frankfurter, *supra* note 248, at 514-15.

