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PROSECUTING FEDERAL CRIMES IN STATE COURTS

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DESPITE the ancient maxim that the courts of one sovereign will not "execute the penal laws of another,"[1] they sometimes do. For example, federal courts can hear state-law criminal prosecutions of federal officers for acts taken in the course of their duties that are brought initially in state court and are then removed to federal court.[2] In addition, some states now open their courthouse doors to officials from other states to pursue tax enforcement actions against delinquent taxpayers.[3] But states still do not (and perhaps cannot) entertain prosecutions of fugitives solely for crimes committed in another state because the Constitution assumes that the "state having jurisdiction" will seek extradition.[4] Another pos-

[1] The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825); see also Joseph Story, Commentaries on the Conflict of Laws 516–17 (Boston, Charles C. Little & James Brown 2d ed. 1841).
[2] See 28 U.S.C. § 1442 (2006).
[3] See Peter Hay et al., Conflict of Laws 173–74 & n.4 (5th ed. 2010).
[4] U.S. Const. art. IV, § 2, cl. 2.

sible category of cross-jurisdictional prosecutions involves state-court enforcement of federal criminal laws. Although this category might include state-court prosecutions for violations of federal law that have been criminalized under state law—as the State of Arizona lately attempted in the immigration setting[5]—the focus of this article is a potentially more controversial category: federal (or state) prosecutors pursuing a conviction for a federal crime, as such, in a state court.

Proposals for shuttling federal criminal prosecutions to the state courts have been around for a while. In the early twentieth century, Progressives such as Felix Frankfurter and Louis Brandeis urged such a proposal as a way to ease the federal courts' caseloads.[6] Since that time, the caseload problem has only worsened as Congress has federalized matters once handled primarily by the states' criminal justice systems, such as illegal gun possession, carjacking, domestic violence, and hate crimes.[7] Many such statutes are duplicative of state laws and provide for a kind of concurrent prosecutorial jurisdiction. Members of the Supreme Court have warned that the federal courts are in danger of becoming "police courts" as criminal matters swamp the federal docket and take priority over

[5] Ariz. Rev. Stat. Ann. § 11-1051 (2010) (Arizona law that (among other things) makes certain violations of federal immigration law crimes under state law). When states incorporate federal law and are not preempted from doing so, the state courts are ultimately enforcing state law, not federal law. See Pennsylvania v. Nelson, 350 U.S. 497, 500–01 (1956).

[6] See Felix Frankfurter & James M. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 293 (1928) (urging state-court jurisdiction over federal crimes); Felix Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 Cornell L.Q. 499, 516 (1928) (same); Felix Frankfurter, The Federal Courts, The New Republic, Apr. 24, 1929, at 273, 275 (same); see also Letter from Louis D. Brandeis to Charles Warren (June 23, 1922) *in* 5 Letters of Louis D. Brandeis 54 (Melvin I. Urofsky & David W. Levy eds., 1978) (suggesting Warren explore the history of lower federal courts and opining that their jurisdiction "should be abridged—particularly in criminal cases"); Charles Warren, Federal Criminal Laws and the State Courts, 38 Harv. L. Rev. 545, 569–72 (1925) (exploring history of lower federal courts and finding basis for shuttling federal criminal prosecutions to state courts).

[7] See Task Force on the Federalization of Criminal Law, Am. Bar Ass'n, The Federalization of Criminal Law 2 (1998) [hereinafter Task Force] (noting that over forty percent of all federal crimes enacted since 1865 have been created since 1970); Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 Stan. L. Rev. 869, 874 & n.16 (2009) (noting scholarly critiques of the expansion of federal criminal law).

civil litigation.[8] And a report of the American Bar Association has called for a stop to the further federalization of crime and for a phased reduction of the federal judicial role in criminal law enforcement.[9]

Perhaps recognizing a lack of political will in Congress to halt or roll back the federalization of crime, modern scholars have sought to dust off the Progressive era proposals to enlist state courts in the prosecution of federal crimes.[10] Paul Carrington, for example, has suggested that such a step would reduce federal expense by returning ostensibly local matters to local tribunals and local enforcement officials and allowing federal courts to devote themselves to matters that have a more legitimate claim on their scarce resources.[11] He has argued that "[t]here is almost no apparent down-side to the use of state courts" because doing so could result in a reduction of the federal courts' dockets by almost one-half, while state court dockets would be affected only marginally.[12] In addition, the most recent Long Term Plan of the U.S. Judicial Conference proposed a partial repeal of the current statutory provision for exclusive federal-court jurisdiction over federal crimes;[13] the Plan recommended "concurrent state and federal jurisdiction over certain federal

[8] William H. Rehnquist, Seen in a Glass Darkly: The Future of the Federal Courts, 1993 Wis. L. Rev. 1, 7; see also Sara Sun Beale, The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors, 51 Duke L.J. 1641, 1647–55 (2002) (noting the Court's resistance to increased federalization of crime). This particular complaint is nothing new. See Gil Seinfeld, The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction, 97 Cal. L. Rev. 95, 141–42 n.147 (2009) (citing Frankfurter & Landis, supra note 6, at 251).

[9] See Task Force, supra note 7, at 51–56.

[10] Examples include Paul D. Carrington, Federal Use of State Institutions in the Administration of Criminal Justice, 49 SMU L. Rev. 557, 557–61 (1996); Sara Sun Beale, Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction, 46 Hastings L.J. 979, 1011–13 & n.127 (1995); Thomas M. Mengler, The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime, 43 U. Kan. L. Rev. 503, 535–36 (1995); Jon O. Newman, Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System, 56 U. Chi. L. Rev. 761, 771–72 (1989). See also James E. Pfander, One Supreme Court 46–54, 81–85 (2009) (developing a potential constitutional rationale for state-court jurisdiction over matters such as federal crimes, under Article I's Inferior Tribunals Clause).

[11] See Carrington, supra note 10, at 561.

[12] Id.

[13] See 18 U.S.C. § 3231 (2006).

crimes," such as federal drug offenses and local violent crime.[14] The Plan suggests that "federal prosecutions [of such crimes] could take place in state court, either by the U.S. Attorney's Office (through cross-designation) or the state's attorney."[15] Whether such intersystem law enforcement is desirable is anything but clear.[16] The underexplored question that this Article addresses is whether such proposals are constitutional.[17]

As discussed in Part I, scholars who argue that state courts might enforce federal criminal laws base their argument on the conventional understanding that it was optional with Congress whether to create lower federal courts. That option derives from the text of Article III, which refers to such inferior courts as Congress "may" ordain and establish,[18] and it draws support from the text's origins in the Madisonian Compromise at the Constitutional Convention, which left the creation of lower federal courts to Congress. Given that Congress might have exercised its option not to create lower federal courts, or to create them but withhold certain jurisdiction, scholars assume that state courts would be competent to entertain all cases and controversies within the Supreme Court's appellate jurisdiction, including federal criminal prosecutions. Some go further and argue states would even be obliged to hear such cases. But with respect to the possibility of state-court prosecutions of federal crimes, the conventional wisdom may be more conventional than accurate.

We contend that the historical support for the possibility that state courts could entertain federal criminal prosecutions is sketchy

[14] Judicial Conference of the United States, Long Range Plan for the Federal Courts 27 (1995).

[15] Id.

[16] For policy analysis, see examples cited supra note 10. For a general assessment of the value of inter-jurisdictional law enforcement in the civil setting, see Robert A. Schapiro, Interjurisdictional Enforcement of Rights in a Post-*Erie* World, 46 Wm. & Mary L. Rev. 1399, 1434–35 (2005).

[17] Two prior works have noted the question and have provided some helpful discussion of it. See Anthony J. Bellia, Jr., Congressional Power and State Court Jurisdiction, 94 Geo. L.J. 949, 992–1000 (2006) (suggesting various constitutional doubts); Adam H. Kurland, First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction, 45 Emory L.J. 1, 61–82 (1996) (same). These works—unlike our own—deal with the question only as part of a larger set of issues addressed by their authors. And while we rely on their findings, we take issue with some of them as well.

[18] U.S. Const. art. III, § 1.

at best. Indeed, there was a widespread belief among those who framed, ratified, and implemented the Constitution that certain cases within the federal judicial power would be constitutionally off limits to the state courts, and federal crimes were a prime example. Moreover, there is little evidence that the Founding generation reasoned from Article III or the Compromise that, if lower courts went uncreated, state courts would be able to pick up all of the jurisdictional slack. Thus, even though lower federal courts may have been optional with Congress as a constitutional matter (although even this was doubted by some), many in the Founding-era supposed that federal courts might be necessary as a practical matter if, for example, there were to be prosecutions of federal crimes.

In addition, it is generally assumed that, during the early Republic, state courts did in fact enforce federal criminal laws and that early Congresses expressly provided for it.[19] As discussed in Part II, however, the evidence of such arrangements has been greatly overstated. At most—and only for a relatively brief period—state courts took jurisdiction in *civil* proceedings to recover monetary penalties or fines for violations of federal penal statutes. There is no similar record of genuinely criminal proceedings in the state courts for violations of federal law. Moreover, on the rare occasion when Congress actually permitted states to entertain federal criminal prosecutions, state courts concluded that they lacked jurisdiction. The state courts' refusal to allow federal criminal prosecutions (and eventually, even civil actions for fines and penalties) was consistent with the traditional proscription against cross-jurisdictional enforcement of penal laws; and it often relied upon the Marshall Court's statement that "[n]o part of the [federal] criminal jurisdiction" could be delegated to the state courts.[20] Although such sentiments have fallen into disrepute among modern scholars, there is no gainsaying that they bolstered state-court refusals to enforce federal penal laws.

In Part III we turn to subsequent developments that arguably supply stronger arguments for state-court jurisdiction over federal criminal prosecutions. One such development was the Court's conclusion, in the federal officer and civil rights removal settings, that

[19] See, e.g., Warren, supra note 6, at 570.
[20] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 337 (1816).

state criminal prosecutions implicating colorable federal questions could go forward in federal court. The Court thus decided that some cross-jurisdictional prosecutions in our federal system were not barred by the Constitution. Nevertheless, the constitutionality of federal court prosecutions of state crimes may not fully address the reverse possibility, particularly because Article III's text ("all cases arising under [federal law]") can be read as expressly including these state-law-based prosecutions implicating federal issues.

A still later development was the Court's conclusion in *Testa v. Katt* that state courts were constitutionally obligated to hear civil suits under federal statutes—even penal statutes—provided they had jurisdiction to hear analogous claims under their own law.[21] Although some scholars have attempted to make *Testa* the centerpiece for arguments in favor of state institutional commandeering more generally, it is open to question whether *Testa* would require imposition of the arguably novel jurisdictional duties that state-court prosecution of federal crimes would entail. That is because, even if one concludes that state-court competence to entertain federal criminal prosecutions is no longer constitutionally suspect, it is doubtful whether all state courts would have the jurisdictional capacity to hear such cases as a matter of their own law. And *Testa*, we argue, is primarily about ensuring that state courts exercise jurisdiction over federal claims that is otherwise theirs to exercise under state law.

Notwithstanding these questions surrounding state courts' competence to entertain federal criminal prosecutions, the location of prosecutorial authority would pose additional constitutional problems. As discussed in Part IV, if it is envisioned that state prosecutors would enforce federal criminal laws in state courts, commandeering questions respecting state executive officials could arise absent their cooperation. In addition, and even assuming their voluntary participation, the delegation of substantial prosecutorial power to persons outside the federal executive branch and not appointed in accordance with Article II could present a variety of constitutional difficulties. Finally, absent appropriate appointment and executive branch control, it is unclear that state officials, as

[21] 330 U.S. 386, 394 (1947).

such, would have standing to vindicate the sovereignty interests of the federal government that are embodied in its criminal laws.

Using federal officials (or properly appointed state officials) to prosecute federal crimes in the state courts could avoid some of these difficulties. But as discussed in Part V, state-court prosecutions of federal crimes, even by federal prosecutors, are problematic. For example, under the Fifth Amendment, federal criminal prosecutions for capital and "infamous" crimes must be commenced by indictment from a grand jury. Thus far, the Supreme Court has held that states are not bound by such a requirement, and it is unlikely that the Constitution would tolerate circumvention of the grand jury by the simple expedient of bringing a federal criminal prosecution in a state court. In addition, prosecutions for the same acts by different sovereigns will ordinarily not run afoul of double jeopardy. Nonetheless, the potential for such problems is high if a state might later retry on state-law grounds a crime that was unsuccessfully prosecuted in the same state's courts on federal grounds. Further muddying the waters is the question of who would hold the pardon power following a successful prosecution for a federal crime in state court—the President, the state's governor, or both. Finally, there would be a grab bag of questions about the applicability in state court of constitutionally inspired provisions regarding jury size, jury unanimity, and sentencing.

We recognize that not all of these concerns present insurmountable barriers. All of them, however, reflect an important aspect of the structure of our federal system. That system contemplates that the federal and state governments will act directly on their constituents and that each will vindicate its sovereignty and law enforcement interests through its own personnel and institutions.[22] In practice each has done so. Perhaps the practice has not been so monolithic as to exclude some sharing of functions and intergovernmental cooperation. But historically, no one seems to have con-

[22] See Wayne A. Logan, *Erie* and Federal Criminal Courts, 63 Vand. L. Rev. 1243, 1244–45 (2010) (noting that the general practice has been driven by "the principle that such laws embody sovereign normative preferences, susceptible of neither enforcement nor jurisprudential control by other governments") (citations omitted). See generally Bradford R. Clark, The Eleventh Amendment and the Nature of the Union, 123 Harv. L. Rev. 1817, 1838–58 (2010) (noting the Constitution's rejection of arrangements for direct coercion of states in favor of coercion of individuals).

templated or attempted anything on the order of state-court prosecution of federal crimes, despite the persistence of arguments in its favor in the modern era.

Although "dual federalism" has its critics, it turns out to be a particularly appropriate arrangement in the judicial enforcement of criminal laws. Even the possible workarounds that we discuss turn out to be sufficiently clumsy that they probably serve to reinforce the historical and structural objections to state-court enforcement of federal criminal laws. In any event, the doubtful constitutionality of so many aspects of any proposal for state-court prosecutions of federal crimes suggests that a better solution may lie elsewhere—namely, in stemming the tide of the federalization of criminal law at its source: Congress.

I. FOUNDING-ERA UNDERSTANDINGS

Some scholars have concluded that state-court jurisdiction to enforce federal criminal laws is consistent with Founding-era understandings.[23] Article III's text appears to make lower federal courts discretionary with Congress.[24] Although the early Court voiced doubt about this reading,[25] events at the Constitutional Convention are thought to reinforce it. As the story is usually told, Article III's text was a compromise between those who wanted the Constitution to mandate at least some lower federal courts and those who wanted no mention of them.[26] The Compromise and Article III's final language left it to Congress to decide whether to create lower federal courts and to determine which Article III cases and controversies they would hear. From this, scholars infer that if Congress had created no lower federal courts (or had created them but withheld certain jurisdiction), then the state courts would be able to

[23] See infra notes 27, 63–65, and accompanying text.

[24] U.S. Const. art. III, § 1 ("such inferior Courts as the Congress may from time to time ordain and establish").

[25] See infra notes 120–29 and accompanying text.

[26] For standard accounts, see 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, 763–64 (1984); Martin H. Redish & Curtis E. Woods, Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis, 124 U. Pa. L. Rev. 45, 52–56 (1975).

pick up the jurisdictional slack.[27] But as discussed briefly in this Section, the Founding-era was less sure about the competence of state courts to entertain all of the cases and controversies to which the federal judicial power extended. And many supposed that Congress might have to create federal courts for those matters that they perceived were outside the competence of the state courts, such as prosecutions for federal crimes. Our point is not so much that history supports a constitutional disability on state courts to hear federal criminal prosecutions (although it might); rather, it is that history provides only modest support for the claim that state courts were originally understood to be able to hear such cases.

A. Framing and Ratification of the Constitution

1. Revisiting the Madisonian Compromise

Early in the Constitutional Convention, two seemingly contradictory votes occurred over the language of what eventually became Article III. In the first, the Committee of the Whole unanimously voted to approve language establishing "one supreme tribunal, and of one or more inferior tribunals."[28] In the second, a badly divided Committee seemed to change course, voting narrowly in favor of a motion to scrap all reference to inferior federal courts in the proposed Article.[29] In an effort to salvage some reference to such courts, James Madison and James Wilson proposed language that "the national legislature be empowered to appoint inferior Tribunals."[30] As stated by Madison about his own proposal, "[T]here was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or

[27] See, e.g., Martin H. Redish & John E. Muench, Adjudication of Federal Causes of Action in State Court, 75 Mich. L. Rev. 311, 314 (1976) (calling this "reasonable to infer"); see also Printz v. United States, 521 U.S. 898, 907 (1997) (stating that an assumption that the "imposition of an obligation on state judges to enforce federal prescriptions" was "perhaps implicit" in the Constitution) (emphasis omitted); infra note 68.

[28] 1 The Records of the Federal Convention of 1787, at 104–05 (Madison's Notes) (Max Farrand ed., rev. ed. 1966) [hereinafter Farrand].

[29] Id. at 125 (Madison's Notes).

[30] Id. at 118 (Journal of the Convention); see also id. at 127 (Yates's Notes) (recording "shall have the authority" instead of "be empowered"); id. at 125 (Madison's Notes) (recording "institute" instead of "appoint").

not establish them."[31] The motion was successful. Madison's account of the events in those early days of the Convention thus appears to reinforce a plain reading of the final text of Article III as merely permitting rather than mandating the creation of inferior federal courts.

The significance of the events surrounding the Compromise may not, however, carry quite the knockdown quality that scholars attribute to it.[32] Madison's characterization notwithstanding, there was probably more at stake than a simple contest between those who wanted the Constitution to mandate the creation of some lower federal courts and those who argued against any reference to them. As scholars have noted, some at the Convention believed that state judges might actually serve in a dual capacity and act as "federal" courts, if and when "appointed" for that purpose by Congress.[33] In such an event, they would not be acting as state judges, but would effectively be acting as federal judges (at least for particular tasks), even while keeping their day jobs as state judges.

Although this sort of dual office-holding sounds a little odd today, it was standard operating procedure under the Articles of Confederation. Under the Articles, Congress could (and did) "appoint" state courts to hear piracies and high seas felonies.[34] Perhaps this was judicial business that the Articles supposed only a federal court could hear, because there would have been no need for deputizing state courts as federal courts if the state courts were capable of hearing such cases as a matter of their own jurisdiction. It is therefore possible that some participants who voted for the language of the Compromise—authorizing the national legislature to

[31] Id at 125 (Madison's Notes).

[32] See, e.g., Barry Friedman, A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction, 85 Nw. U. L. Rev. 1, 34, 37, 50, 55 (1990); see also Beale, supra note 10, at 1012 & n.127 ("Article III left the question whether to create lower federal courts entirely to the discretion of Congress."); Richard H. Fallon, Jr., The Ideologies of Federal Courts Law, 74 Va. L. Rev. 1141, 1151–54, 1158–60 (1988) (emphasizing centrality of Madisonian Compromise to theorizing about federal courts law).

[33] See, e.g., James E. Pfander, Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation, 101 Nw. U. L. Rev. 191, 209–10 (2007).

[34] See Saikrishna Bangalore Prakash, Field Office Federalism, 79 Va. L. Rev. 1957, 1966–67 (1993).

"appoint" inferior tribunals—understood the language as reaffirming the appointment practice of the Confederation.[35] For such participants, the "discretion" in the legislature was the choice between creating freestanding federal courts or appointing state courts. Yet these participants might have viewed the appointment of state courts (or the creation of federal courts) as obligatory, at least for those matters that state courts as such might be incapable of hearing, just as under the Articles. The peculiar mechanism of appointing state courts as federal courts may not have survived the Constitution as finally ratified,[36] but the viability of such an arrangement at the time of the Compromise prohibits any easy conclusion as to what the language of the Compromise entailed.

For still others, the Compromise may have resolved the question of who would be responsible for establishing (or appointing) the lower federal courts. As noted above, the favorable vote to eliminate any reference to inferior federal courts—to which Madison's and Wilson's "compromise" was a response—came only after an earlier and unanimous vote in favor of language requiring the creation of some such courts by "the National Legislature." Intervening between those two votes was another vote, on a motion to change the branch that would have the power to appoint inferior courts. That earlier motion (also by Madison and Wilson) did so by deleting any reference to "the Legislature" and leaving "blank" who the appointing body would be.[37] It was only then that there was a shift in votes from the earlier unanimous approval of the appointment of federal courts by the National Legislature to the 5-4 vote to eliminate mention of inferior federal courts altogether. The se-

[35] See id. at 2015 n.286; see also Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 120; James E. Pfander, Article I Tribunals, Article III Courts, and the Judicial Power of the United States, 118 Harv. L. Rev. 643, 680–81 (2004).

[36] See infra notes 46–50 and accompanying text. James Pfander believes that something like it did survive. See Pfander, supra note 33, at 211–20. Pfander argues that Congress retained a power under Article I's Inferior Tribunals Clause to "constitute" state courts as federal "tribunals." Id. The merits of his thesis are beyond the scope of this Article, although we note that there is some question whether the appointment option survived the drafting process. See infra notes 50, 80, and accompanying text. If he is right, then there might be a good argument for state courts to hear federal criminal prosecutions, but they could do so only as federal tribunals, and not as state courts.

[37] Farrand, supra note 28, at 120 (Madison's Notes) (emphasis omitted).

quencing of these votes suggests that it may have been the elimination of the National Legislature as the appointing body that was a stumbling block for some—enough of a stumbling block for them to prefer no mention of such courts in the Constitution.[38] If so, their attention may not have focused particularly on the mandatory-versus-discretionary point emphasized by Madison.

The events surrounding the Compromise do not themselves, therefore, lead ineluctably to the conclusion that it was altogether optional for Congress to decide whether to create inferior federal courts. More importantly, nothing in the initial or later Convention debate over the language produced by the Compromise suggests that state courts, as such, would be able to hear any and all cases to which the federal judicial power might extend, such as federal crimes, if lower federal courts went uncreated. Of course, Article III's text ("may . . . ordain and establish") provides a more compelling argument against any constitutional obligation on Congress to create lower federal courts.[39] But as discussed in the following Section, one could believe that Article III did not require lower federal courts and yet also believe that, as a practical matter, Congress might have to create such courts for cases thought to be beyond the competence of the state courts.

To be sure, there were those at the Convention who opposed any constitutional provision for lower federal courts and argued that state courts would be able to hear all such cases.[40] William Paterson's New Jersey Plan, for example, made no provision for lower federal courts, but it expressly provided for state-court jurisdiction over "all punishments, fines, forfeitures & penalties" arising under all federal laws, subject to review in a federal "supreme Tribunal."[41] In addition, the Plan incorporated already existing powers of Congress in the Articles of Confederation, which would have included the power to appoint state courts as federal courts in

[38] See Richard H. Fallon, Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System 7–8 & n.47 (6th ed. 2009) [hereinafter Hart & Wechsler] ("[I]f the power did not lie with the legislature, the Convention might have considered it too dangerous to be vested elsewhere.").

[39] U.S. Const. art. III, § 1.

[40] See Collins, supra note 35, at 58–60 & nn.47–49.

[41] See Farrand, supra note 28, at 243–44 (Madison's Notes). For Paterson's own copy of the Plan, see 3 id. at 612 (Paterson's Notes).

cases of piracy and high seas felonies.[42] Interestingly, the Plan made no other express provision for state-court jurisdiction over the remainder of cases to which the federal judicial power would extend on appeal, perhaps suggesting doubt as to the capacity of state courts to hear federal crimes and other penal matters, absent the Plan's specific provision for it.

In addition, the New Jersey Plan provided not only that state courts and other state actors would be "bound" by federal law "in their decisions," but also intimated that they would be obligated to carry federal law into execution.[43] The mandatory nature of state-court jurisdiction was important from the perspective of the state judiciaries because, under the Plan, there would be no lower federal courts. Such commitments respecting state-court powers and even duties to entertain all matters to which the federal judicial power extended were also likely an implicit part of other constitutional proposals that made no provision for lower federal courts.[44] But it is not clear whether such commitments (other than state courts being bound by valid federal law in their decisions) survived the Constitution's final text, which rejected such proposals and allowed for the creation of lower federal courts. Indeed, proponents of those rejected proposals would complain the loudest during the debates over the Constitution's ratification that state courts—under Article III—would *not* be able to hear initially all of the cases and controversies to which the federal judicial power ex-

[42] See 1 id. at 243 (Madison's Notes); see also id. at 244 (cataloging cases within the appellate jurisdiction of the proposed federal "supreme Tribunal" and specifically referring to "piracies & felonies on the high seas").

[43] See id. at 242, 245 (Madison's Notes). The Plan stated that "all punishments, fines, forfeitures & penalties" under federal laws "shall be adjudged" in the state courts in the first instance. Id. at 243. It also stated that "if any State . . . shall oppose or prevent [the] carrying [of federal law] into execution," the federal Executive could arrange to "enforce and compel an obedience." Id. at 245. For a discussion of the eventual demise of this latter, coercive prong of the Plan, see Clark, supra note 22, at 1845–53.

[44] See, e.g., 2 Farrand, supra note 28, at 433 (presenting plan attributed to George Mason) (stating that state courts would exercise federal criminal jurisdiction "in such manner as the Congress shall by law direct"); see also Prakash, supra note 34, at 2018–19 (referring to the "implicit[] pledg[es]" and "tacit[] . . . assurances" of the availability of state courts if the Constitution did not allow for lower federal courts, and also concluding that such unspoken promises survived the Constitution's express allowance of such courts).

tended, unlike under the New Jersey Plan and similar arrangements.[45]

Another possibility in play at the time of the Compromise may have met a similar fate. As the proposed Constitution passed through various committees and debates, the Compromise's language of "empowering" legislative "appoint[ment]" of "inferior tribunals" was ultimately replaced with "such inferior courts as the Congress may . . . ordain and establish."[46] The final approval of the language "ordain and establish" may not have reflected an obligation to create inferior courts, as Supreme Court historian Julius Goebel once argued.[47] But Goebel may have been right that the ultimate change in wording—from "appoint" to "ordain and establish"—spelled the end of the possibility that state courts might be appointed as inferior federal courts as under the Articles of Confederation.[48] Instead, the language suggests that the creation of federal courts under Article III would entail the creation of free-standing courts, independent of the state courts.[49] Scholars, however, dispute whether this change in fact eliminated the possibility of appointing state courts as federal tribunals.[50]

[45] See infra text accompanying notes 53–55 and accompanying text.

[46] 2 Farrand, supra note 28, at 177, 186 (Madison's Notes) (substituting "such inferior Courts as shall, when necessary, from time to time, be constituted" by Congress); id. at 600 (Committee of Style) (substituting "such inferior courts as the Congress may from time to time ordain and establish").

[47] 1 Julius Goebel, Jr., History of the Supreme Court of the United States, Antecedents and Beginnings to 1801, at 246–47 (1971).

[48] See id. at 247.

[49] Cf. Steven G. Calabresi & Gary Lawson, The Unitary Executive, Jurisdiction Stripping, and the *Hamdan* Opinions: A Textualist Response to Justice Scalia, 107 Colum. L. Rev. 1002, 1028 (2007) ("[W]hen Article III refers to courts that Congress has 'ordain[ed] and establish[ed],' it refers most naturally to courts that Congress has itself *created* . . . .").

[50] Compare James S. Liebman & William F. Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 Colum. L. Rev. 696, 734–35 (1998) (concluding such appointment did not survive the Constitution's drafting), and Collins, supra note 35, at 124–29 (same), with Pfander, supra note 33, at 211–20 (concluding such appointment did survive because of a separate power under Article I's Tribunals Clause), Calabresi & Lawson, supra note 49, at 1028–29 (same), and Prakash, supra note 34, at 2007–13 (noting the possibility of such appointment under Article III, together with its attendant "incongruities").

2. Ratification

a. Reasoning from the Compromise

It is noteworthy that the Compromise and the competing positions that it supposedly bridged seem not to have been invoked during ratification as an argument in favor of Article III. Although the events at the Convention were "secret" in that they were not reported at the time, other important compromises made during the Convention became well-known and formed the basis of public arguments for and against the Constitution.[51] In debating Article III, however, opponents of the Constitution continued to argue in the state ratifying conventions that Article III ceded too much power to the federal government by even empowering Congress to create inferior courts.[52] At the same time, the Constitution's advocates do not appear to have suggested that the language of Article III represented a middle ground between the extremes of constitutionally mandated lower federal courts and no provision for lower federal courts at all.

More importantly, throughout the process of ratification, there was little suggestion that the events of the Compromise or the language of Article III implied anything about state-court powers (or duties) to hear Article III business should Congress fail to create lower federal courts. As in the Convention, some participants did urge that state courts might hear all federal judicial business in the first instance, but most of them did so as part of arguments in opposition to Article III and its provision respecting lower federal courts.[53] As noted above, the rhetoric of unqualified state-court jurisdictional competence had accompanied various rejected proposals that would have provided for no lower federal courts. But once

[51] For example, the "compromise" between large and small states, which provided for equal representation in one of the houses and popular representation in the other, was discussed as such. See The Federalist No. 37, at 237 (James Madison) (Jacob E. Cooke ed., 1961).

[52] See Clinton, supra note 26, at 819–20.

[53] See, e.g., Essays of Brutus XIV (1788), *reprinted in* 2 The Complete Anti-Federalist 431, 436–37 (Herbert J. Storing ed., 1981); Essays by Candidus I (1787), *reprinted in* 4 The Complete Anti-Federalist, supra, at 125, 129; Luther Martin, The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia (1788), *reprinted in* 2 The Complete Anti-Federalist, supra, at 19, 57.

the Convention settled on the Constitution's final language, the idea that there might be some enclaves of federal jurisdiction that were constitutionally off limits to the state courts seems to have become widely accepted, *particularly* by the Constitution's opponents.[54] Nevertheless, a few participants continued to suggest that state courts might still be appointed as federal courts under the Constitution, perhaps believing that the older arrangement under the Articles remained a viable option.[55]

b. Input from The Federalist

Some of the strongest evidence that state courts might have concurrent jurisdiction over "all" cases and controversies covered by Article III is thought to come from *Federalist No. 82.* There, Alexander Hamilton famously rejected an interpretation of Article III that would have wholly excluded state courts from concurrent jurisdiction over the subjects to which the federal judicial power extended.[56] He pointedly questioned, however, whether the state courts' concurrent jurisdiction necessarily extended to those cases over which they lacked "pre-existing" or "primitive" jurisdiction—

[54] Luther Martin's journey is illustrative. He opposed any reference to lower federal courts in the Constitution and indicated state courts could and would do it all. Yet he opposed the Constitution as drafted, in part because it dispossessed the state courts of the ability to hear a number of matters to which the federal judicial power extended. See Collins, supra note 35, at 61–62 & nn.51–53. William Paterson, who authored the New Jersey Plan, plainly recognized that under the Constitution, state courts would lack competence to hear any number of matters that they could have heard under his own plan. See id. at 127–28. On the other hand, two of the Constitution's most powerful supporters seemed to indicate that state courts might be able to hear all of the cases to which the federal judicial power extended, but such expressions were infrequent and not always free of ambiguity or later contradiction. See id. at 63–64 & n.56 (discussing views of Oliver Ellsworth, James Wilson, and Roger Sherman).

[55] See, e.g., 3 The Debates in the Several State Conventions 517, 546, 548 (Washington, Jonathan Elliot ed., 2d ed. 1836) (remarks of Edmund Pendleton) (referring to "appointment" of state courts); cf. id. at 536 (remarks of James Madison) (suggesting state courts might be "vested" with certain federal jurisdiction); The Federalist No. 45 (James Madison), supra note 51, at 313 (indicating judicial officers might be "cloathed with the correspondent authority of the Union"). For Madison's 1789 views regarding the impossibility of vesting state courts with federal jurisdiction that he considered them to lack, see infra notes 76–83 and accompanying text.

[56] See The Federalist No. 82 (Alexander Hamilton), supra note 51, at 554; see also William A. Fletcher, Congressional Power over the Jurisdiction of Federal Courts, 59 Duke L.J. 929, 938 (2010) (calling this rejected interpretation a "straw man").

jurisdiction that they would have held prior to the Constitution.[57] Hamilton nevertheless argued that unless prohibited by Congress, state courts would ordinarily be able to hear actions grounded on future federal statutes, as "in civil cases" state courts apply the laws "of Japan not less than of New-York."[58] In so doing, he said, "the national and state systems are to be regarded as ONE WHOLE," with state courts being the "natural auxiliaries" in the enforcement of federal law.[59]

By concluding that there would be state-court concurrent jurisdiction of "every case" under future federal statutes unless Congress said otherwise, Hamilton might have been suggesting that the civil suits under future federal statutes were indeed part of the states' pre-existing jurisdiction, even though they were based on non-pre-existing law.[60] Notably, Hamilton did not specifically bring up jurisdiction over federal crimes, or other cases more arguably outside of the state courts' "primitive" jurisdiction.[61] Furthermore, like other supporters of the Constitution, Hamilton neither relied on the Compromise to bolster his argument, nor reasoned from the possible absence of lower federal courts to the powers of state courts to entertain cases and controversies to which the federal ju-

[57] The Federalist No. 82 (Alexander Hamilton), supra note 51, at 554 ("[T]his doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the state courts have previous cognizance."). The idea that, under the Constitution, state courts would have concurrent jurisdiction over cases to which the federal judicial power extended, but not over which they previously lacked jurisdiction, was hardly novel. See Collins, supra note 35, at 62 n.53.

[58] The Federalist No. 82 (Alexander Hamilton), supra note 51, at 555.

[59] Id. at 555–56; see also The Federalist No. 27 (Alexander Hamilton), supra note 51, at 175 (stating that state courts would be "rendered auxiliary to the enforcement of [the national government's] laws").

[60] For a different reading of Hamilton, see Hart & Wechsler, supra note 38, at 404 n.6, 406 n.11 (understanding Hamilton's notion of pre-existing jurisdiction to turn on the source of the right enforced, not on the native capacities of state courts); see also Fletcher, supra note 56, at 938–39 (stating that cases arising under federal statutes were not within the state courts' pre-existing jurisdiction, but that Congress could provide either for their concurrent jurisdiction or exclusive federal jurisdiction).

[61] See James E. Pfander, Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases, 82 Cal. L. Rev. 555, 596 n.172 (1994) ("[Hamilton's] careful reference to civil cases suggests he was aware that criminal matters presented a different question.").

dicial power extended.[62] Overall, therefore, *Federalist No. 82* provides only equivocal support for the proposition that state courts might hear federal criminal prosecutions, and its "primitive" jurisdiction argument is some evidence against such a possibility.

c. Field Office Federalism?

Finally, some scholars point to other ratification evidence suggesting that state officials would not only be bound by federal law negatively—as a limit on their decisionmaking—but that they would be under an affirmative obligation to carry into execution congressional directives.[63] The distinction harks back to the apparent double obligation of the rejected New Jersey Plan, in which state judicial officials were "bound" by federal law "in their decisions" and also bound to exercise jurisdiction to carry federal law into execution.[64] But whatever else the historical evidence may suggest,[65] we believe that it cannot fairly be read as supporting an obligation on state courts to entertain federal criminal prosecutions under the Constitution as ratified. As one of us has argued elsewhere, these scholars move too quickly from acknowledgment of possible voluntary efforts on the part of the states to exercise jurisdiction that was otherwise theirs as a matter of state law, to conclusions about jurisdictional obligations.[66] Anti-Federalists understood that under the Constitution's Supremacy Clause, state courts would be under an obligation to subordinate their own law to valid federal law when deciding cases, and some were unhappy about that.[67] They do not, however, seem to have suggested that the Constitu-

[62] Perhaps it is insignificant, but Hamilton misquoted Article III, referring to "such inferior courts as congress *shall* ordain and establish." The Federalist No. 82 (Alexander Hamilton), supra note 51, at 557 (emphasis added).

[63] See, e.g., Evan H. Caminker, State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?, 95 Colum. L. Rev. 1001, 1042–50 (1995); H. Jefferson Powell, The Oldest Question of Constitutional Law, 79 Va. L. Rev. 633, 659, 662–64 (1993); Prakash, supra note 34, at 1974–88, 1995–2004.

[64] Farrand, supra note 28, at 245 (Madison's Notes); see also supra notes 43–44 and accompanying text.

[65] In this respect, we think the dissent in *Printz v. United States* rightly characterizes the tasks that early Congresses imposed on state judges as nonjudicial. See 521 U.S. 898, 949–52 (1997) (Stevens, J., dissenting).

[66] See Collins, supra note 35, at 140–44. Moreover, even the ratification-era references to cooperative arrangements with state courts do not go so far as to mention state-court prosecutions of federal crimes.

[67] See Prakash, supra note 34, at 2024–25.

tion would confer (or would enable Congress to confer) jurisdiction upon the state courts that they otherwise lacked, much less an obligation to exercise it.

* * *

In sum, scholars today read the Compromise and the constitutional text it helped produce as implicitly embodying an understanding that the state courts could hear any and all Article III business that Congress chose not to give to the federal courts in the first instance, including prosecutions of federal crimes. But the historical evidence fails to show that the Compromise held such significance for members of the Founding generation, or that they reasoned (as modern scholars do)[68] from the textual possibility of no lower federal courts to conclusions about state-court powers or duties respecting federal criminal cases (or, indeed, any other federal judicial business). This is perhaps unsurprising, however, given then-prevalent assumptions regarding limits on inter-jurisdictional enforcement of criminal laws.[69]

B. The Judiciary Act of 1789

Whatever the import of the Compromise, there was a strong sentiment in the First Congress that the federal government might have to create lower federal courts if it wanted to ensure a trial forum for federal criminal prosecutions. That point was well-articulated in the debates in the House of Representatives over a motion to delete the proposed establishment of lower federal courts in what would become the First Judiciary Act[70]—a replay of

[68] See, e.g., Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan, 86 Colum. L. Rev. 1515, 1585 (1986); Redish & Muench, supra note 27, at 314; see also Nicole A. Gordon & Douglas Gross, Justiciability of Federal Claims in State Court, 59 Notre Dame L. Rev. 1145, 1190 (1984) (arguing, based on the Compromise, that state courts have affirmative duties to hear federal claims, above and beyond a duty of nondiscrimination).

[69] See Bellia, supra note 17, at 966, 992–93 (noting general-law and law of nations default principles that were prevalent at the time of the Constitution's framing and ratification).

[70] Act of Sept. 24, 1789, ch. 20, §§ 2–3, 1 Stat. 73, 73. For analysis of the House debate, see Michael G. Collins, The Federal Courts, the First Congress, and the Non-Settlement of 1789, 91 Va. L. Rev. 1515, 1533–55 (2005). The motion was to strike the reference to the federal district courts, but the proposed circuit courts were likely the

the events at the Constitutional Convention. It is generally supposed that the shape of the Act was driven by political and policy arguments rather than constitutional ones.[71] Yet, as discussed in this Section, constitutional objections to the proposed elimination of lower federal courts from the Act were not a minor theme; rather, such objections seemed to dominate the debate. And those making such arguments prevailed in their effort to defeat the motion to eliminate these lower federal courts from the Act.

In addition to arguments based on expediency, nearly all of those who spoke in opposition to the motion to eliminate lower federal courts indicated that some of the jurisdiction under Article III was constitutionally off limits to the state courts. They argued that prosecutions for violations of federal criminal law, as well as certain aspects of admiralty jurisdiction, were prime examples of constitutionally driven federal jurisdictional exclusivity.[72] Echoing Hamilton's language suggesting that the state courts' concurrent jurisdiction was limited to those Article III cases and controversies that were within their "pre-existing" jurisdiction, House members stated that a federal crime would be something created "de novo" by the Constitution and thus no part of the states' pre-existing jurisdiction.[73] Rather, such cases could only be heard by courts exercising the federal judicial power, meaning that the motion was tantamount to outsourcing a power to those who were not authorized to exercise it. Representative Fisher Ames specifically rejected an argument from the Supremacy Clause that state courts could be expected to entertain such actions, noting that "[t]he law of the United States is a rule to them, but not an authority for them. It controls their decisions, but cannot enlarge their powers."[74] Some in the House, such as Ames, therefore concluded that the Constitu-

next target. See id. at 1523–24. Supporters of the motion, however, may have contemplated allowing federal admiralty courts of some kind. See id. at 1523.

[71] 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, 1485–87.

[72] 11 Documentary History of the First Federal Congress of the United States of America 1349–51 (Charlene Bangs Bickford et al. eds., 1994) [hereinafter DHFFC] (statement of Rep. Smith); see also id. at 1358–59 (statement of Rep. Ames).

[73] Id. at 1357–58 (emphasis omitted); see also id. at 1349–51 (statement of Rep. Smith).

[74] Id. at 1357–58 (statement of Rep. Ames).

tion itself mandated the creation of some lower federal courts to hear what the states could not.[75]

Others agreed, but drew a somewhat different conclusion. James Madison—father of the Compromise and then a member of the House—objected that constitutional problems would arise if there were no lower federal courts to entertain federal criminal prosecutions. He did not, however, suggest that the creation of lower federal courts was constitutionally compelled. Rather, he stated that absent such courts, violations of federal criminal laws could only be prosecuted in state courts and that this would present "insuperable objections."[76] A state court hearing such prosecutions could not do so as a state court, said Madison, because only a federal court could entertain such cases.[77] Rather, were state courts to hear such cases, they could only do so as federal courts—the very practice in existence under the Articles of Confederation. But under the Constitution, argued Madison, state judges hearing such cases would thereby be vested with Article III salary and tenure protection.[78] Other opponents of the motion to eliminate the lower federal courts had made a similar objection.[79] And, Madison added, such congressional appointment of state judges by designation would run afoul of Article II's Appointments Clause, which required presidential appointment with senatorial advice and consent: "It would be making appointments which are expressly vested in [the Executive], not indeed by nomination, but by description . . . ."[80]

Madison's argument seems strange only if constitutionally driven federal-court exclusivity of federal criminal prosecutions seems strange. But as just noted, the latter sentiment seems to have been widely shared in the first Congress, including by Madison. The only thing novel about Madison's contribution to the constitutional debate was the Appointments Clause wrinkle. But that particular

[75] See id. at 1358; see also id. at 1352 (statement of Rep. Smith), 1355 (statement of Rep. Benson), 1369–70 (statement of Rep. Sedgwick), 1386 (statement of Rep. Gerry).

[76] Id. at 1359.

[77] See id. at 1359–60. But cf. Fletcher, supra note 56, at 943 (characterizing Madison's argument as largely "practical," not constitutional).

[78] DHFFC, supra note 72, at 1359.

[79] See Collins, supra note 70, at 1550–52 & nn.136–37 (discussing views of Sens. Ellsworth, Paterson, and Strong, and Rep. Ames).

[80] DHFFC, supra note 72, at 1359 (emphasis omitted).

problem presupposed the incapacity of state courts, as such, to hear federal criminal cases—a matter on which the Federalist members of the House were generally agreed.[81] Madison apparently saw no contradiction in authoring the Compromise (in which lower federal courts may have been optional) and making *constitutional* arguments against the state courts' exercise of jurisdiction over federal criminal cases. This suggests that for him, neither the text of Article III nor the events leading to its creation entailed a notion of state-court competence to hear all Article III cases. Consequently, if Congress wanted to create a federal crime (which, one supposes, it was not constitutionally obligated to do), then it might, as a practical matter, also have to create a lower federal court.[82]

In sum, Madison's constitutional argument and the general tenor of the House debate are hard to square with any idea that state courts would be able to hear federal criminal prosecutions. In addition, the debates—particularly Madison's argument from the Appointments Clause—seem inconsistent with an understanding that state courts could be appointed as part of the federal judicial apparatus in a manner familiar to the Articles of Confederation. Failed efforts shortly after the First Judiciary Act to amend the Constitution to vest federal judicial power in the state courts also seem inconsistent with such an understanding.[83] And no subsequent Con-

[81] A vocal minority in favor of the motion disagreed with Madison and made modern-sounding arguments in favor of the state courts' native power to hear all of the cases within the Supreme Court's appellate jurisdiction. See id. at 1353 (statement of Rep. Jackson), 1371–72 (statement of Rep. Stone), 1382–83 (statement of Rep. Stone), 1389 (statement of Rep. Jackson); see also Collins, supra note 70, at 1563–67 (discussing these minority views).

[82] In the end, the Judiciary Act gave the district courts jurisdiction over various minor crimes "exclusively of the courts of the several States" but "concurrent" with the circuit courts, which also had "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States," with exceptions as might be elsewhere provided for. Act of Sept. 24, 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76–79. It is unclear whether the reference to exceptions was in favor of state courts or the district courts.

[83] In 1791, there was a failed effort to amend the Constitution to federalize state judges and eliminate lower federal courts. See Wythe Holt, "Federal Courts as the Asylum to Federal Interests": Randolph's Report, the Benson Amendment, and the "Original Understanding" of the Federal Judiciary, 36 Buff. L. Rev. 341, 357–61 (1987). In 1793, there was a failed effort to amend the Constitution to allow Congress to vest the federal judicial power in state courts. See Frankfurter & Landis, supra note 6, at 4 n.6.

gress appears to have recognized its supposed power to constitute state courts as federal tribunals.

II. STATE ENFORCEMENT OF FEDERAL PENAL LAWS IN THE EARLY REPUBLIC

A. Federal Penal Laws and the State Courts

In a historical study of the state courts and the first Congresses, Charles Warren concluded long ago that the federal government had enlisted state courts in the concurrent enforcement of certain federal criminal laws and that the state courts initially cooperated.[84] The examples that he found suggested to him that there would be no constitutional impediment to state courts hearing prosecutions for violations of federal criminal laws. He did so at a time when other Progressive critics of expanded federal jurisdiction were arguing that much of the federal criminal docket should be offloaded to the state courts.[85]

Warren's article proved influential. Although Warren concluded that these early congressional statutes and practices did not mandate state enforcement of federal laws, the modern Supreme Court relied on his article in holding that state courts were required to hear a party's claim for treble damages under a federal price control law.[86] In addition, the Court relied on Warren's findings to uphold the constitutionality of the District of Columbia courts' hearing a felony prosecution for a violation of federal law—even though those courts lacked Article III protections.[87] Even today, scholars continue to rely upon his work to support arguments for the enlistment of state judicial institutions in the enforcement of federal laws, including criminal laws.[88]

[84] See Warren, supra note 6, at 545.

[85] For Justice Brandeis's apparent encouragement of Warren in this effort, see Letter from Louis D. Brandeis to Charles Warren, supra note 6, at 54.

[86] See Testa v. Katt, 330 U.S. 386, 389–90 & nn.4–5 (1947).

[87] Palmore v. United States, 411 U.S. 389, 390, 402 (1973). *Palmore* is discussed infra Part III.

[88] See, e.g., Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205, 213 & n.26 (1985). For a skeptical assessment of the weight that may fairly be borne by Warren's history, see Note, Federal and Local Jurisdiction in the District of Columbia, 92 Yale L.J. 292, 310–11 & n.85 (1982).

The evidence that state courts entertained federal criminal prosecutions or that Congress authorized them to do so is not nearly as strong as those who have relied on Warren have assumed. The bulk of the congressional provisions to which he refers were suits for monetary fines, penalties, and forfeitures for violations of various federal laws.[89] These suits were brought by the United States or its officers, or in some cases, by private parties or informers. But the proceedings under most of these penal provisions were considered at the time to be civil suits, brought in state courts as an ordinary "action of debt"[90]—part of the everyday (and "pre-existing") civil jurisdiction of the state courts. Indeed, when such actions for penalties were brought in the federal courts, they were held to be civil actions,[91] not criminal, and thus subject to civil, not criminal, procedures.[92] In short, although the proceedings under these early federal statutes may have been viewed as criminal in

[89] See Warren, supra note 6, at 551–53.

[90] See, e.g., Davison v. Champlin, 7 Conn. 244, 244 (1828) (stating suit for penalty was civil "action of debt"); United States v. Lathrop, 17 Johns. 4, 4 (N.Y. Sup. Ct. 1819) (same); id. at 21 (Platt, J., dissenting) ("civil action[] founded on [a] penal statute[]"); United States v. Dodge, 14 Johns. 95, 95–96 (N.Y. Sup. Ct. 1817) (per curiam) (common law action "upon a bond" for nonpayment of customs duties); Jackson v. Rose, 4 Va. (2 Va. Cas.) 34, 34 (1815) ("action of debt"). Jurisdiction was rejected in each of these cases, except in *Dodge*.

[91] See, e.g., Parsons v. Hunter, 18 F. Cas. 1259, 1261 (C.C.D.N.H. 1836) (No. 10,778) ("An action of debt is the known, and usual remedy for penalties . . . ."); United States v. Mundell, 27 F. Cas. 23, 26 (C.C.D. Va. 1795) (No. 15,834) (finding action of debt for a penalty was civil).

[92] A standard formulation was that parties should proceed by "bill, plaint, or information," not by way of indictment or presentment. See, e.g., Act of Aug. 2, 1813, ch. 39, § 5, 3 Stat. 72, 73. The reference to "information" could suggest a criminal proceeding, but it need not. It was commonplace for the government to bring a civil proceeding of "information of debt" for nonpayment of duties under a statute. See United States v. Hathaway, 26 F. Cas. 224, 225 (C.C.D. Me. 1824) (No. 15,326); see also United States v. Lyman, 26 F. Cas. 1024, 1030 (C.C.D. Mass. 1818) (No. 15,647) ("[W]here the debt arises by statute, an action or information of debt is the appropriate remedy . . . ."); cf. The Sarah, 21 U.S. (8 Wheat.) 391, 396 n.a (1823) (reporter's note respecting revenue seizures on land: "These informations are not to be confounded with criminal informations at common law . . . . They are civil proceedings . . . ."). Some statutes referred to "complaints, suits and prosecutions" for fines, penalties and forfeitures, see, e.g., Act of Mar. 3, 1815, ch. 101, 3 Stat. 244, but it is unclear whether the reference is to anything but "prosecution" of the civil actions that parties could pursue for these remedies. See Adams v. Woods, 6 U.S. (2 Cranch) 336, 340–41 (1805) (holding the term "prosecution" can include a civil action of debt). But see Warren, supra note 6, at 572.

nature, they were civil in form.[93] Moreover, these federal penal statutes typically went out of their way to note that they were addressed to courts already "having competent jurisdiction by the laws of such state[]."[94]

The federal statutory references authorizing state courts to hear such cases were therefore not efforts to "confer" federal jurisdiction on them. Rather, in some statutes, the language of jurisdictional permission was needed "because the jurisdiction was exclusively vested in the national courts by the [1789] judiciary act; and consequently could not be otherwise executed by the state courts."[95] In other words, the statutory references regarding state-court authorization were sometimes designed to allow states to exercise their own, pre-existing jurisdiction over such cases. Such a reading is consistent with the jurisdictional understandings of the day that, even when state courts did hear cases that fell within the rubric of Article III, they were not exercising the federal judicial power or exercising jurisdiction that Congress had conferred on them. Instead, they were exercising their own judicial power.[96]

In other statutes, such references may have been designed to make clear that federal law had not preempted state laws and that states could punish the same acts that federal law proscribed, as a matter of state law.[97] For example, if states wanted to prosecute counterfeiting of U.S. money in their own courts as a matter of

[93] See Harold J. Krent, Executive Control over Criminal Law Enforcement: Some Lessons from History, 38 Am. U. L. Rev. 275, 296–302 (1989).

[94] Act of Mar. 2, 1799, ch. 43, § 28, 1 Stat. 733, 740; see also, e.g., Act of Apr. 18, 1796, ch. 13, § 7, 1 Stat. 452, 453 ("having jurisdiction in like cases"); Act of June 9, 1794, ch. 65, § 12, 1 Stat. 397, 400 (same); Act of June 5, 1794, ch. 45, § 10, 1 Stat. 373, 375 ("having competent jurisdiction").

[95] 3 Joseph Story, Commentaries on the Constitution of the United States 622–23 (Boston, Hilliard, Gray, and Co. 1833).

[96] See id. ("Congress may, indeed, permit the state courts to exercise a concurrent jurisdiction in many cases; but those courts then derive no authority from congress over the subject-matter, but are simply left to the exercise of such jurisdiction, as is conferred on them by the state constitution and laws."); see also Pfander, supra note 10, at 19–21 (noting traditional view that Congress could not confer jurisdiction on the state courts, but that instead "leaves" them to exercise concurrent jurisdiction under state law); infra note 210 and accompanying text.

[97] See Thomas Sergeant, Constitutional Law 131 (Philadelphia, Abraham Small 1822) (noting early forgery and counterfeiting statutes that reserved to states the power to punish the same acts under state law); see also Kurland, supra note 17, at 31 (noting distinction between federal jurisdictional exclusivity and preemption).

their own law, congressional language of state-court authorization would ensure that there would be no statutory impediment to their so doing.[98] And when state courts were presented with arguments that a crime being prosecuted in the state courts was really a federal crime that had to be prosecuted in the federal courts, they readily noted that the crime was also one under state law.[99]

As Warren acknowledges, state courts soon proved reluctant to entertain even these nominally civil suits under early congressional statutes.[100] Part of that reluctance was grounded in a sense that, although the suits were civil, they still had a penal cast to them. State courts invoked maxims from the law of nations in support of the proposition that no sovereign would enforce the penal laws of another and argued that Congress could not authorize them to exercise jurisdiction that was not theirs.[101] The Supremacy Clause posed no barrier to their jurisdictional refusal because the Clause only meant that federal laws "may give us a rule in many cases where we have jurisdiction, but they cannot give us jurisdiction."[102] After 1816, state courts also enlisted Justice Story's declaration for the Court in *Martin v. Hunter's Lessee* (discussed below) that "[n]o part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals."[103] As Chief Justice Taney later summarized, the enforcement of "penalties and forfeitures" in the early Republic had been entertained for a while by the state courts "readily, and without objection," and

[98] See, e.g., Fox v. Ohio, 46 U.S. (5 How.) 410, 434–35 (1847) (upholding state prosecution for passing counterfeit U.S. coin on the ground that the state might independently punish such activity); see also Moore v. Illinois, 55 U.S. (14 How.) 13, 21 (1852) (upholding state power to punish for harboring a runaway slave); United States v. Marigold, 50 U.S. (9 How.) 560, 569–70 (1850) (reaffirming *Fox*); Jett v. Commonwealth, 59 Va. (18 Gratt.) 933, 968 (1867) (upholding conviction for uttering of a forged note of a national bank, which was also a federal crime).

[99] See, e.g., Pennsylvania v. Schaffer, 4 U.S. (4 Dall.) xxvi, xxxi (1797) (rejecting defendant's argument that state crime being prosecuted was really a federal crime); see also supra note 97.

[100] See Warren, supra note 6, at 577–81. This may have marked a reversal on the part of state-power champions who, in 1789, argued against creating lower federal courts with broad jurisdiction and who would have preferred that state courts handle, in the first instance, cases to which the federal judicial power extended.

[101] See, e.g., Jackson v. Rose, 4 Va. (2 Va. Cas.) 34, 36–39 (1815).

[102] United States v. Campbell, Tappan's Ohio Rep. 61, 64 (Ct. of Common Pleas 1816); see also infra note 171.

[103] 14 U.S. (1 Wheat.) 304, 337 (1816).

that it was done "upon principles of comity," rather than as a "duty," until the power of the state courts to do so was brought into question.[104]

Nevertheless, Warren's study does point to one federal statute that appears to have allowed for felony prosecutions in state courts "having competent jurisdiction."[105] The Theft of the Mails Act of 1799 provided various punishments for its violation including whipping, substantial prison terms, and even the death penalty.[106] The statute is obviously some evidence that Congress supposed state courts could handle genuinely criminal prosecutions for genuinely federal crimes. But the statute appears to be singular,[107] and examples of attempted state-court enforcement are difficult to find. In one of the only reported state-court decisions under the Act, Virginia officials secured an indictment against the defendant for stealing packages from the U.S. mails and later obtained a conviction. The General Court of Virginia reversed the conviction, however, concluding unanimously that because the indictment was for a federal crime, the state courts lacked jurisdiction.[108] In another decision, the South Carolina Court of Errors dismissed an attempted prosecution under a later iteration of the Act, noting that it was "not a question of private right" over which the state courts might exercise concurrent jurisdiction under their own law.[109]

[104] Kentucky v. Dennison, 65 U.S. (24 How.) 66, 108 (1860); see also Stearns v. United States, 22 F. Cas. 1188, 1192 (C.C.D. Vt. 1835) (No. 13,341) (noting that state jurisdiction under these early statutes was voluntary).

[105] Warren, supra note 6, at 554 (citing Act of Mar. 2, 1799, ch. 43, § 28, 1 Stat. 733, 740–41). The Act could be read as mandating state-court jurisdiction when it says state courts "shall take cognizance" of cases under it. See Act of Mar. 2, 1799, ch. 43, § 28, 1 Stat. 733, 740–41.

[106] See Act of Mar. 2, 1799, ch. 43, § 15, 1 Stat. 733, 736–37.

[107] See Note, supra note 88, at 311 n.85.

[108] See Commonwealth v. Feely, 3 Va. Cas. 321, 321–23 (Gen. Ct. 1813).

[109] State v. M'Bride, 24 S.C.L. (Rice) 400, 404 (Ct. Err. 1839). *M'Bride* overruled an earlier contrary precedent from a lower court, State v. Wells, 20 S.C.L. (2 Hill) 687 (Ct. App. 1835). It is unclear whether *Wells* upheld a state prosecution of a federal criminal law or treated the violation of federal law as a common law crime under state law.

B. Deciphering Houston v. Moore

In addition to Warren's study, the Supreme Court's antebellum decision in *Houston v. Moore*[110] is frequently invoked as an endorsement of state courts' ability to prosecute federal crimes.[111] The case involved a state-convened court-martial brought by Pennsylvania state regimental officers against Houston for failing to respond to a presidential call-up of the state militia in the War of 1812. After a judgment was entered against Houston for a fine, Moore—a state official—sought to levy on Houston's property to pay the assessed penalty. Houston then sued Moore civilly in state court for trespass. Moore's defense to the trespass action was that he was acting pursuant to the state tribunal's judgment, but Houston replied that the judgment was jurisdictionally defective and could therefore supply no justification for Moore's action. Houston argued that any prosecution for refusing the President's call-up of the militia was within the exclusive jurisdiction of the federal courts.[112] On direct review of the state-court civil proceedings, the U.S. Supreme Court ultimately upheld Moore's levy on Houston's property and the validity of the underlying state judgment on which it was based. But it is doubtful whether a majority concluded that a state could enforce federal criminal laws as such.

The reading of *Houston* as endorsing a state-court prosecution of a federal crime stems from the solitary opinion of Justice Bushrod Washington, who delivered the Court's judgment. He argued as a general matter that the federal and state governments could not criminalize the same wrongs.[113] He thus concluded that federal law had preempted the state's law, which purported to make Hous-

[110] 18 U.S. (5 Wheat.) 1 (1820).

[111] See, e.g., Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. Off. Legal Counsel 1, 22 (2007) (stating that *Houston* "upheld Pennsylvania's power to try a militiaman under federal criminal law"); Amar, supra note 88, at 213 & n.29 (drawing this conclusion); see also Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990) (citing *Houston* together with federal civil cases holding state courts have concurrent jurisdiction); James C. Rehnquist, Taking Comity Seriously: How to Neutralize the Abstention Doctrine, 46 Stan. L. Rev. 1049, 1061 n.62 (1994) (appearing to treat *Houston* as involving concurrent state-court jurisdiction to hear federal criminal prosecutions); Louise Weinberg, The Power of Congress over Courts in Nonfederal Cases, 1995 BYU L. Rev. 731, 746 n.48 (same).

[112] See *Houston*, 18 U.S. (5 Wheat.) at 4–6.

[113] See id. at 22–23.

ton's actions a state crime. Washington further concluded that the state-court proceeding must therefore have been one to enforce federal law and that that was unproblematic.[114] Although Washington was on the winning side of a 5-2 split upholding the action of the state courts, there is doubt whether other Justices agreed with his views about the ability of state courts to entertain prosecutions for violations of federal criminal law.

No other Justice expressly concurred in Washington's opinion. Washington himself remarked: "The other [nondissenting] judges are of opinion, that the judgment ought to be affirmed; but they do not concur in all respects in the reasons which influence my opinion."[115] Justice Johnson, who concurred in the judgment to uphold Houston's conviction, flatly disagreed with Washington's reasoning, invoking the principle that no government could enforce the criminal laws of another; instead, he concluded that the conviction should be upheld because Pennsylvania could enforce its own law against such conduct.[116] Johnson also reiterated Washington's point about the concurring Justices' lack of agreement.[117] In addition, the two dissenting Justices (who found the conviction invalid) concluded that federal law had preempted state law and that the state courts could not entertain a prosecution for a federal crime.[118]

Taking all of these opinions together, including the various disclaimers, it is difficult to read *Houston v. Moore* as clear precedent upholding the state courts' ability to entertain prosecutions of federal crimes. The majority to affirm the state conviction may have been achieved only with the aid of others who—like Justice Johnson—believed that state law had not been preempted and that the state courts had been enforcing their own criminal law, not federal law. If so, there may actually have been a majority for the opposite conclusion for which *Houston v. Moore* is today sometimes cited. Indeed, the view of legal scholars at the time was that the state-court decision in *Houston* must have been premised on the fact

[114] See id. at 24–32.
[115] Id. at 32.
[116] See id. at 33–35 (Johnson, J., concurring).
[117] Id. at 47 ("The course of reasoning by which the judges have reached [their] conclusion are various, coinciding in but one thing, viz., that there is no error in the judgment of the State Court of Pennsylvania.").
[118] Id. at 48–76 (Story, J., dissenting).

that state criminal laws had been violated—Washington's opinion notwithstanding.[119]

C. Intimations of Exclusivity from the Supreme Court

The idea that jurisdiction over federal criminal prosecutions was exclusive to the federal courts as a constitutional matter received a powerful boost from the same Court that decided *Houston*. In *Martin v. Hunter's Lessee*, the Court famously upheld the constitutionality of judicial review of state courts under Section 25 of the 1789 Judiciary Act.[120] Justice Story's opinion for the Court in *Martin* has since gained attention for its discussion of whether the cases and controversies to which the federal judicial power extend must be heard in a federal court, either originally or on appeal. Critics of traditional Federal Courts theory enlist parts of the opinion to support their notion that the federal judicial power must vest, either as to all or some Article III cases and controversies.[121] These critics adhere to traditional theory, however, in supposing that Congress did not have to create lower federal courts. Rather, if lower federal courts went uncreated, the federal appellate jurisdiction would have to be left open to review those cases to which these critics argue mandatory vesting applies and which would be heard initially in the state courts.[122]

But it was another part of Story's opinion that caught the attention of state courts at the time and held their attention for many years. Story asked, "In what cases (if any) is this judicial power exclusive, or exclusive at the election of congress?" He offered this response:

[119] See, e.g., 1 James Kent, Commentaries on American Law 372–74 (New York, O. Halsted 1826); Sergeant, supra note 97, at 270 & n.n.

[120] 14 U.S. (1 Wheat.) 304 (1816).

[121] The two pioneering articles are Clinton, supra note 26 (arguing for mandatory jurisdiction over all Article III cases and controversies) and Amar, supra note 88 (arguing for mandatory jurisdiction over Article III's "all cases" categories—admiralty, federal question, and ambassador cases).

[122] For these critics, lower federal courts are only conditionally required in the event Congress exercises its power to "except" cases from the Supreme Court's appellate jurisdiction over the state courts. See Amar, supra note 88, at 230; Clinton, supra note 26, at 793. A notion of constitutionally driven federal jurisdictional exclusivity is not inconsistent with theories of mandatory jurisdiction, as Story's opinion in *Martin* shows, but it is probably not dependent on such theories either.

> [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. No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases where, previous to the constitution, state tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction.[123]

In this statement, Story clearly suggests that jurisdictional exclusivity can arise from the Constitution and not just from congressional action. His remarks parallel Hamilton's reservations in *Federalist No. 82* in stating that state courts' concurrent jurisdiction was limited to their pre-existing authority.[124] Story went on in *Martin* to suggest that lower federal courts would have to be created. That is because, absent lower federal courts, "in some of the enumerated cases the judicial power could nowhere exist."[125] Such a difficulty would arise only if one supposed—as Story did—that some matters, such as federal criminal prosecutions, were off limits to state courts. Although he thought it was "a question of some difficulty," he nevertheless concluded: "It would seem, therefore, to follow, that congress are bound to create some inferior courts, in which to vest all that jurisdiction which, *under the constitution*, is exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance."[126] This was consistent with Story's dissent in *Houston v. Moore*, in which he rejected the idea that if Congress failed to provide jurisdiction over the enforcement

[123] 14 U.S. (1 Wheat.) at 333, 336–37; cf. Claflin v. Houseman, 93 U.S. 130, 136 (1876) (noting federal jurisdiction "may be made exclusive where not so by the Constitution itself").

[124] See Hart & Wechsler, supra note 38, at 390 n.1 (questioning, however, whether parallelism was conscious); see also *Houston*, 18 U.S. (5 Wheat.) at 68 (Story, J., dissenting) (stating of federal crimes: "They sprung from the Union, and had no previous existence").

[125] 14 U.S. (1 Wheat.) at 330.

[126] Id. at 330–31 (emphasis added and omitted).

of federal laws, there would be "a resulting trust . . . in the State tribunals to enforce them."[127]

Of course, this part of Story's opinion in *Martin* is generally rejected by traditionalists and their critics alike, because it seems at odds with the text of Article III and the events of the Compromise.[128] Despite its rejection by modern scholars, however, *Martin*'s language of constitutionally driven federal jurisdictional exclusivity would be reiterated by the Supreme Court throughout the nineteenth century and into the early twentieth.[129] And, as noted above, it formed the basis of many state-court arguments for refusing jurisdiction even over civil suits that provided for penal remedies.

D. Constitutional Structure and Cross-Jurisdictional Enforcement Actions

This early evidence respecting the exclusivity of federal criminal jurisdiction is consistent with traditional choice-of-law practice of American courts. In the interstate context, courts invoked (and continue to invoke) the maxim of public international law that one state will not enforce the penal laws of another.[130] In addition, in *Huntington v. Attrill*, the Court long ago acknowledged that state courts might refuse to enforce sister-state penal laws in the first instance and also refuse full faith and credit to sister-state penal

[127] 18 U.S. (5 Wheat.) at 68 (Story, J., dissenting); see also Kurland, supra note 17, at 31 (suggesting that if Congress failed to create lower federal courts, default would have been to state criminalization, not to state jurisdiction over federal crimes).

[128] See Amar, supra note 88, at 211–13; Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1163 (1992); Clinton, supra note 68, at 1585; David P. Currie, The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835, 49 U. Chi. L. Rev. 646, 702–04 (1982).

[129] See, e.g., Pickett v. United States, 216 U.S. 456, 459 (1910) (citing *Martin* and stating that with respect to federal crimes, "the court of the State could not be empowered to prosecute crimes against the laws of another sovereignty"); Robertson v. Baldwin, 165 U.S. 275, 278 (1897) (quoting *Martin*'s language of constitutional exclusivity); Railway Co. v. Whitton's Adm'r, 80 U.S. (13 Wall.) 270, 288 (1872) (citing approvingly *Martin*'s discussion of constitutional exclusivity); The Moses Taylor, 71 U.S. (4 Wall.) 411, 428–29 (1867) (same); see also Huntington v. Attrill, 146 U.S. 657, 672 (1892) (citing *Martin* for the proposition that state courts could not be compelled to hear civil suits for a penalty under federal statutes).

[130] See Hay, supra note 3, at 173 & n.4.

judgments.[131] The modern Court referred approvingly to *Huntington* when it concluded that a state could not award punitive damages in a civil suit for out-of-state conduct, even when the conduct might have been subject to such damages in the state in which the conduct occurred.[132] And it was this tradition against interjurisdictional enforcement of penal laws that formed the basis for the state courts' long-standing refusal to entertain civil actions for fines or penalties enacted by the federal government, as discussed above in Section II.A. With some exceptions, these views remained relatively well-entrenched until the middle of the last century, when the Court began to rethink the scope of the penal prohibition in civil actions arising under federal law.[133]

Nevertheless, it is possible that the federal system established by the Constitution had modified, or allowed for congressional modification of, this traditional rule. Given the less than fully sovereign status of the states in the new Union, it may be that the traditional prohibition against interjurisdictional prosecutions provided a governing default rule from which Congress could depart in the exercise of one of its enumerated powers. For example, as *Huntington* indicated, much of the law surrounding state (non)enforcement of sister-state penal actions appears to operate outside the command of the Full Faith and Credit Clause of the Constitution.[134] In other words, the Clause has not been thought to displace the operation (as between the states) of these antecedent choice-of-law practices that operated between different sovereigns. Indeed, the Extradition Clause expressly incorporates the old learning when it assumes that the "State having Jurisdiction" is the state in which the extraditable crime occurred.[135] But because the Full Faith and Credit Clause expressly gives Congress the power to declare the "effect"

[131] 146 U.S. at 685. *Huntington* was a suit to enforce a sister-state judgment argued to be penal in nature, but the Court assumed that the penal prohibition—properly construed—would apply both at the judgment enforcement stage and in the first instance. There has been erosion of this principle in the enforcement of sister-state tax judgments. See Milwaukee County v. M.E. White Co., 296 U.S. 268, 278–79 (1935) (requiring full faith and credit to a sister-state money judgment for taxes but leaving open the question whether states must hear such claims in the first instance).

[132] See State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 421–22 (2003).

[133] See infra notes 177–96 and accompanying text.

[134] *Huntington*, 146 U.S. at 685; see also U.S. Const. art. IV, § 1.

[135] U.S. Const. art. IV, § 2, cl. 2.

of sister-state laws and judgments, Congress arguably could eliminate the traditional barriers against enforcement of sister-state penal laws and judgments by statute—at least in the nominally civil setting, where state-court jurisdiction would be less problematic. Up to now, however, the Court has not read Congress's Full Faith and Credit Statute[136] to require state enforcement of sister-state penal laws, even in the civil setting.

On the vertical federalism level, Article III's language referring to "all cases" arising under federal law allows for federal-court jurisdiction over state-law criminal prosecutions in some settings.[137] As discussed below in Part III, federal officer removal statutes are the most obvious example of Congress having exercised its power to enforce Article III to this effect. Article III may also have contemplated state-law prosecutions in federal court in cases affecting ambassadors, consuls and ministers.[138] In these areas, the Constitution may have modified or allowed Congress to modify the traditional rule against inter-jurisdictional prosecutions.

Whether anything in the Constitution similarly modified the general-law principle against inter-jurisdictional enforcement of criminal law in the context of state-court prosecutions of federal crimes is less certain. As discussed above, the ancient rule was not as rigorously enforced in the early Republic as it might have been on the international plane, insofar as the first Congresses allowed state courts to entertain certain civil proceedings for fines, penalties, and forfeitures. In addition, a few of the earliest treatise writers seemed to support the possibility that state courts might be able to enforce federal penal laws "especially in fiscal proceedings, and lesser offences."[139] Others disagreed, however, and skepticism

[136] See 28 U.S.C. § 1738 (2006). To the extent that a state might make use of the broad provisions for the extraterritorial reach of its own criminal laws under Model Penal Code § 1.03, it can prosecute as a matter of its own law various matters that might also be a crime under sister-state law.

[137] U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under [federal law] . . . .").

[138] See John Harrison, The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III, 64 U. Chi. L. Rev. 203, 231–32 (1997).

[139] 1 St. George Tucker, Blackstone's Commentaries app. 182 (Philadelphia, William Young Birch & Abraham Small 1803) (footnote omitted); see also William Rawle, A View of the Constitution of the United States of America 264–65 (Philadelphia, Philip H. Nicklin 2d ed. 1829) (suggesting a broader power); Sergeant, supra note 97, at 269

quickly overtook even this limited breach of the traditional principle.[140] We next consider how post-Founding-era developments may have affected the question of whether state courts could hear (and might even be obliged to hear) federal criminal cases.

III. RECONSIDERING STATE-COURT POWERS AND DUTIES

A. Federal-Court Prosecutions of State Crimes

1. Federal Officer Removal

The constitutional status of the proscription against interjurisdictional prosecutions was undercut in at least one important area: federal officer removal. Building on a series of nineteenth-century statutes—the first as early as 1815[141]—federal officer removal statutes today allow for removal to federal court of prosecutions commenced against federal officers in state courts for "any act under color of" their office.[142]

The constitutionality of such removal statutes—designed ostensibly to protect federal officers from potentially unfriendly state courts and to guard against obstructions to the enforcement of federal law—was upheld in the post-Reconstruction-era decision of *Tennessee v. Davis*.[143] There, the State of Tennessee indicted a federal revenue officer for murder. The officer sought removal alleging that "he was assaulted and fired upon by a number of armed men" while seizing an illegal distillery and that he returned fire in self-defense, killing the victim.[144] On review, the Supreme Court indicated that the case "arose under" federal law for the purposes of Article III to the extent that it implicated a defense of authorization under federal law.[145]

& n.(i) (quoting Tucker, supra, but also suggesting a broader congressional power to vest state courts with criminal jurisdiction).

[140] See, e.g., Story, supra note 95, at 624 (reiterating that "no part" of federal criminal jurisdiction could be exercised by state courts); cf. Kent, supra note 119, at 377 (finding that federal criminal jurisdiction was exclusive by force of the Constitution but that jurisdiction over civil actions to enforce penal statutes was not).

[141] Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198. For the subsequent development of such removal statutes, see Hart & Wechsler, supra note 38, at 816–18.

[142] 28 U.S.C. § 1442(a)(1) (2006).

[143] 100 U.S. 257 (1880).

[144] Id. at 261.

[145] See Mesa v. California, 489 U.S. 121, 127–28 (1989) (construing *Davis*).

Scholars have argued that the tradition of congressional removal statutes and the *Davis* decision easily discredit any constitutional proscription against inter-jurisdictional prosecutions, including the reverse of *Davis*—state-court prosecutions for federal crimes.[146] But as discussed in this Subsection, it is not clear how much impact federal officer removal ought to have on the specific problem of state-court prosecutions for federal crimes.[147] Moreover, even if *Davis* and the tradition of federal officer removal are good authority for treating the traditional proscription against inter-jurisdictional prosecutions as something other than hard-wired in the Constitution, other constitutional problems remain, as we discuss in Parts IV and V.

Davis itself understood that approval of cross-jurisdictional prosecutions was a one-way street. In the same breath that it upheld federal jurisdiction over state criminal prosecutions, it seemed to echo *Martin v. Hunter's Lessee* in stating that "there can be no criminal prosecution initiated in any State court for that which is merely an offence against the general government."[148] The two dissenters in *Davis* were of the opinion that it should not even be a one-way street, based on their understanding of the federal system and the exclusivity of a government's enforcement of its own criminal laws.[149] They would have therefore constitutionalized the general-law prohibition on inter-jurisdictional prosecutions in both directions. *Davis*, then, was *unanimous* in its rejection of the possibility of state-court prosecutions of federal crimes.

More importantly, the language of Article III supports the particular result in *Davis*. The judicial power extends to "all cases" arising under federal law, and a standard reading of the "all cases" language is that it was designed to encompass criminal as well as civil cases.[150] Among the criminal cases that it could cover were state-law-based criminal proceedings raising questions of federal law. This reading provided the constitutional basis for Supreme

[146] See Beale, supra note 10, at 1011 & n.118; Mengler, supra note 10, at 536; Warren, supra note 6, at 597–98.

[147] See Kurland, supra note 17, at 69.

[148] 100 U.S. at 262.

[149] See id. at 272–302 (Clifford, J., dissenting).

[150] See Harrison, supra note 138, at 232–34; Daniel J. Meltzer, The History and Structure of Article III, 138 U. Pa. L. Rev. 1569, 1575 (1990); Pfander, supra note 61, at 606–07.

Court review of state-court criminal prosecutions early on, in *Cohens v. Virginia*,[151] in which the defendant claimed that his rights under federal law had been denied. Not long thereafter, Chief Justice Marshall went so far as to suggest that Congress should be capable of conferring original jurisdiction on lower federal courts that was coextensive with the Court's appellate jurisdiction under Article III.[152] Part of his reasoning was that state courts were "tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States."[153] The "all cases" language therefore means that the federal judicial power is broad enough to include state-law prosecutions raising federal defenses, although (absent removal) state courts could hear such cases in the first instance. But consistent with *Davis*, the same language tells us little about the ability of state courts to hear federal prosecutions.[154]

On the other hand, the conventional view today is that none of the judicial business within the Supreme Court's appellate jurisdiction is constitutionally off limits to the state courts in the first instance.[155] The modern view is in clear contrast with the surmise of

[151] 19 U.S. (6 Wheat.) 264 (1821).

[152] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 820–21 (1824).

[153] Id. at 821. On the other hand, jurisdiction in the removal cases (like the appellate jurisdiction in *Cohens*) was premised on original jurisdiction over the criminal prosecution in the state courts and therefore might not be full authority for initiating state-law-based prosecutions in federal court. See Ann Woolhandler & Michael G. Collins, State Standing, 81 Va. L. Rev. 387, 430–31 (1995).

[154] The "all cases" language also proved to be an important limit on cross-jurisdictional enforcement of state penal laws in the federal courts. Under Article III, § 2, diversity of citizenship actions and other "controversies" only included proceedings of a civil nature. In *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265 (1888), the Supreme Court dismissed on jurisdictional grounds a suit brought by the State of Wisconsin to enforce a penal money judgment that it had obtained in its courts against an out-of-state citizen. Although the suit otherwise seemed to fall within the Supreme Court's original jurisdiction over state versus out-of-state citizen "controversies," the Court held that because it was a suit to recover a penalty, it was not a "controvers[y] of a civil nature." Id. at 297; see Woolhandler & Collins, supra note 153, at 427–28 (viewing *Pelican Insurance* as illustrative of the non-litigability of state sovereignty interests outside of the state's own courts). At the lower court level, federal trial courts could sometimes hear removed civil enforcement actions brought by the state when they raised some question of federal law ("all cases"), but not when the only basis of jurisdiction was diversity of citizenship ("controversies"). See Woolhandler & Collins, supra note 153, at 429–30.

[155] See, e.g., Barry Friedman, Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts, 104 Colum. L. Rev. 1211, 1214 (2004).

Davis and of other nineteenth-century cases,[156] and it may be in tension with possibly contrary Founding-era understandings, as discussed in Parts I and II. But even if one starts from this now conventional premise, it would still not answer the question whether state courts—as a matter of their own law—would have jurisdiction to hear such matters as prosecutions for federal crimes. The latter point is important, because (as discussed below) the Supreme Court has never held that state courts are required to exercise jurisdiction that they never had under state law—as opposed to having to exercise jurisdiction they do have, or jurisdiction that they had antecedent to an impermissible withdrawal of it.

Finally, as a practical matter, removal under the federal officer statutes often spells dismissal on the merits. Because of Article III concerns, the Supreme Court has read the officer removal statutes as allowing for jurisdiction only when there is a colorable federal defense to the state-court proceeding.[157] Yet the federal defense that would allow for removal might also provide the basis for dismissal of the prosecution, based on the Supremacy Clause.[158] Of course, there might be factual issues in connection with the defense that could require a full-blown trial,[159] although it is unclear how often such trials actually occur.[160] It may be a minor point, but the tradition of federal officer removal may not be an especially strong tradition of actual inter-jurisdictional prosecutions. Rather, officer removal may operate more as a mechanism to allow federal courts

[156] See, e.g., Tarble's Case, 80 U.S. (13 Wall.) 397, 411–12 (1872) (concluding that state courts were constitutionally disabled from hearing habeas actions against federal officers); M'Clung v. Silliman, 19 U.S. (6 Wheat.) 598, 604 (1821) (concluding that state courts were constitutionally disabled from issuing mandamus to federal officers); see also supra note 129; cf. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 541–43 (1842) (denying state power to enforce federal fugitive slave laws as well as denying congressional power to enlist or compel such enforcement).

[157] Mesa v. California, 489 U.S. 121, 129 (1989).

[158] See Seth P. Waxman & Trevor W. Morrison, What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause, 112 Yale L.J. 2195, 2230–34 (2003).

[159] See, e.g., Wyoming v. Livingston, 443 F.3d 1211, 1225–26 (10th Cir. 2006) (noting possibility of trial when there is a genuine dispute of fact, but holding open possibility of later remand); Idaho v. Horiuchi, 253 F.3d 359, 377 (9th Cir. 2001) (rejecting Supremacy Clause immunity and remanding for trial in the district court), vacated as moot, 266 F.3d 979 (9th Cir. 2001).

[160] See Waxman & Morrison, supra note 158, at 2232.

to resolve officers' federal defenses in state criminal prosecutions, often peremptorily.

2. Civil Rights Removal

In addition, Reconstruction-era civil rights statutes provided for removal of certain civil suits and criminal prosecutions.[161] If a party could show that he would be denied or unable to enforce his federally protected "equal civil rights" in the state courts, he could remove the case to federal court. Congress may have intended the scope of these removal provisions to be quite broad.[162] But in fairly short order, courts construed them narrowly to require that a party show that the denial of equal rights would result from the operation of state positive law that conflicted with a specific federal law providing for equal rights.[163] Consequently, civil rights removal has not provided much of an avenue for federal-court trials of state criminal cases, as opposed to providing immunity from prosecution altogether—not unlike the pattern for federal officer removal.

For example, in *Georgia v. Rachel*, the Supreme Court upheld removal of a state-court prosecution for criminal trespass because a federal law, which provided equal access to public accommodations, expressly outlawed prosecutions for the acts that constituted a trespass under state law.[164] But a finding that civil rights removal was proper—because federal law had immunized the defendant's acts from state prosecution—also resulted in the dismissal of the prosecution after removal. Thus, the predicates for removal and dismissal are the same in cases such as *Rachel*—one of the few decisions in which a criminal defendant was able to satisfy the rigid requirements of civil rights removal.

But in other cases covered by these removal statutes, it remains theoretically possible for a state criminal trial to take place in federal court. In *Strauder v. West Virginia*, decided the same day as *Tennessee v. Davis*, the Court concluded that a state-court defen-

[161] See, e.g., Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27 (current version at 28 U.S.C. § 1443 (2006)).

[162] See 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, 882–908 (1965).

[163] See City of Greenwood v. Peacock, 384 U.S. 808, 827–28 (1966).

[164] 384 U.S. 780, 804–06 (1966).

dant should have been allowed to remove the criminal proceeding brought against him because a state law excluded black citizens from the state grand and petit juries.[165] Presumably, on removal, the state's law would have been inoperative in the assembly of a grand jury and petit jury in federal court.[166] But if there were a new indictment by a nondiscriminatorily chosen grand jury, there could also have been a trial in federal court for the violation of state law. State criminal proceedings presenting such stark conflicts with federal equal rights provisions, however, are likely to be rare.[167] As a result, civil rights removal provides an even weaker tradition of actual inter-jurisdictional prosecutions than does federal officer removal.

Like *Davis*, however, civil rights removal broke with the general-law maxim against inter-jurisdictional prosecutions, at least for prosecutions initiated in the courts of the sovereign bringing the prosecution.[168] It therefore provides some evidence that the principle is not embedded in Article III, at least as far as federal courts are concerned. In addition, and despite the understanding of *Davis* itself, these removal cases may be some evidence that state-court jurisdiction over federal crimes is not a constitutionally insurmountable barrier. On the other hand, the federal officer and civil rights removal cases were motivated by powerful constitutional concerns—for supremacy and equal protection, respectively—concerns that are missing in proposals for state courts to hear fed-

[165] 100 U.S. 303, 304, 312 (1880).

[166] See Theodore Eisenberg, State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988, 128 U. Pa. L. Rev. 499, 527–32 (1980).

[167] See Benno C. Schmidt, Jr., Juries, Jurisdiction, and Race Discrimination: The Lost Promise of *Strauder v. West Virginia*, 61 Tex. L. Rev. 1401, 1420 (1983).

[168] See supra note 153. The 1866 Civil Rights Act, the source for the modern civil rights removal statutes, had also provided for original jurisdiction in federal courts for state-law-based criminal prosecutions to be maintained by federal prosecutors. See Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27. But those provisions were narrowly construed early on. See Blyew v. United States, 80 U.S. (13 Wall.) 581, 590–95 (1872). And they were quickly expunged in 1874, because such original prosecutions would work a "complete revolution in the character and functions" of the federal courts. Robert D. Goldstein, *Blyew*: Variations on a Jurisdictional Theme, 41 Stan. L. Rev. 469, 514–15 & n.186 (1989) (quoting 1 Revision of the United States Statutes, tit. XIII, ch.7, § 100, at 63 (Washington, Gov't Printing Office 1872)). Moreover, it is not clear whether the 1866 Act meant to allow for original federal-court prosecution of a state crime, as such, or whether it meant to incorporate state law as the measure of a genuinely federal crime.

eral criminal prosecutions. Furthermore, even if the removal cases can be read as providing constitutional support for inter-jurisdictional prosecutions running in both directions, questions remain as to whether state courts would be able to hear such cases as a matter of their own jurisdiction and whether they could be compelled to hear them.

B. State-Court Jurisdictional Powers and Obligations

It seems clear that for much of this nation's history, the state and federal courts (including the Supreme Court) assumed that there might be constitutional impediments to state courts hearing federal criminal prosecutions. As discussed above, there were even doubts about the power of state courts to entertain ostensibly civil actions for a fine or penalty under federal law. Of course, absent a power in the state courts to entertain such proceedings, there was little argument that there might be an obligation to entertain them. Indeed, such a duty was routinely (if perhaps not universally) denied during the Republic's first century, from the Supreme Court on down.[169] These repeated sentiments likely reflected continuity with, and not—as some have argued[170]—change from, the Founding era. And to the extent that the Supremacy Clause might be thought to have something to say about the obligation of state courts to entertain federal claims, it was treated as providing a rule of decision in lawsuits that state courts otherwise were willing to hear and not a rule of jurisdiction.[171] In this Section, we address subsequent developments that may have altered these earlier understandings respecting state-court jurisdictional powers and duties and whether

[169] See Collins, supra note 35, at 135–65 (cataloging denials).

[170] See, e.g., Caminker, supra note 63, at 1046 (suggesting that the nineteenth-century Court deviated from original understandings).

[171] See supra note 73 and accompanying text (noting statement of Rep. Ames); see also Raoul Berger, Congress v. The Supreme Court 245 (1969) (stating that the Supremacy Clause "defines the governing 'supreme law,' and *if* a State court *has* jurisdiction, it commands that that law shall govern"); Amar, supra note 88, at 256 n.165 ("The supremacy clause . . . neither confers nor obliges state court jurisdiction; it simply requires that if and when state courts take jurisdiction over a case, they follow the supreme law of the land."); Bradford R. Clark, The Supremacy Clause as a Constraint on Federal Power, 71 Geo. Wash. L. Rev. 91, 103 (2003) ("The Supremacy Clause . . . establishes a rule of decision to be applied by courts—both state and federal—after jurisdiction attaches.").

they would permit (or require) state courts to hear federal criminal prosecutions.

1. The Requirement of Jurisdictional Nondiscrimination

Not until the Reconstruction-era decision in *Claflin v. Houseman* did the Supreme Court opine that there was no constitutional impediment to a state court hearing a private party's civil action for a penalty arising under federal law.[172] Federal law is a part of state law, said Justice Bradley, and federal rights might be vindicated "in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction."[173] Prior to that time, as discussed in Part II, state-court jurisdiction over civil actions for penalties had been greatly doubted, and *Claflin* acknowledged those doubts. Bradley invoked Hamilton's *Federalist No. 82* in support of the Court's ruling on the presumptive concurrent powers of state courts over federal claims.

Some have read the opinion as supporting not just a power, but also a duty in state courts to entertain federal claims.[174] *Claflin*, of course, did no more than hold that state courts had concurrent jurisdiction over civil claims brought by trustees in bankruptcy, none of which were actions for penalties. Nor was any question of the obligation of the state courts to hear such claims before the Supreme Court. Although one might try to tease a message of state-court jurisdictional duties out of *Claflin*'s nationalist rhetoric, the Court repeatedly qualified its observations about state-court power to hear federal claims as limited to claims over which the state courts would otherwise have jurisdiction as a matter of state law.[175]

[172] 93 U.S. 130, 137 (1876) ("If an act of Congress gives a penalty to a party aggrieved, . . . 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.") (dicta).

[173] Id. at 136.

[174] See, e.g., Testa v. Katt, 330 U.S. 386, 391 (1947); Tonya M. Gray, Note, Separate but Not Sovereign: Reconciling Federal Commandeering of State Courts, 52 Vand. L. Rev. 143, 153 (1999).

[175] See 93 U.S. at 137 ("to which their jurisdiction is competent, and not denied"); id. ("competent to decide rights of the like character and class"); id. at 141 ("jurisdiction . . . authorized by the laws of the State"); see also Ellen A. Peters, Capacity and Respect: A Perspective on the Historic Role of State Courts in the Federal System, 73 N.Y.U. L. Rev. 1065, 1078 (1998) (noting *Claflin*'s linkage of concurrent jurisdiction

And *Claflin*'s author had elsewhere made clear that state-court powers did not extend to prosecutions for federal crimes.[176]

Early understandings were further drawn in question seventy-five years later in *Testa v. Katt*.[177] There, the Court concluded that the Constitution obligated the state courts in Rhode Island to hear a claim for treble damages under a World War II federal price control statute, at least when the state courts heard "similar" cases (or the "same type of claim") under their existing jurisdiction.[178] The Court invoked the Supremacy Clause for support, even though Congress had not expressly commanded state courts to entertain such cases.[179] And it compelled the exercise of jurisdiction even though, as a choice-of-law matter, the Rhode Island courts would not entertain sister-state or foreign claims with a similar penal aspect to them.

Testa plainly broke with tradition insofar as it rejected the Court's post-*Claflin* suggestion that "a State cannot be compelled to take jurisdiction of a suit to recover a like penalty for a violation of a law of the United States."[180] Nevertheless, *Testa* had been preceded by New Deal-era decisions under the Federal Employer's Liability Act, in which the Court (perhaps also breaking from tra-

with "the continued viability of state court rules of jurisdiction and procedure"). For other contemporaneous sentiment, see *United States v. Jones*, 109 U.S. 513, 520 (1883) (noting that jurisdictional obligations could not be imposed "against the consent of the States").

[176] While riding circuit, Justice Bradley awarded relief on federal habeas corpus to a party convicted in state court of what Bradley determined could only be a federal crime, reciting the old maxim: "It would be a manifest incongruity for one sovereignty to punish a person for an offense committed against the laws of another sovereignty." Ex parte Bridges, 4 F. Cas. 98, 105 (C.C.N.D. Ga. 1875) (No. 1,862). In *Bridges*, the court concluded that the state courts had "no jurisdiction" to punish perjury before a federal commissioner who was acting in a judicial capacity. Id.

[177] See 330 U.S. 386, 389 (1947).

[178] Id. at 388, 394. The jurisdictional statute provided that suit "may be brought in any court of competent jurisdiction." Id. at 387 n.1.

[179] This is the conventional reading of *Testa*. Nevertheless, some appear to read the statute's language, see supra note 178, as an implicit jurisdictional command from Congress to state courts. See Bellia, supra note 17, at 950–51; Martin H. Redish & Steven G. Sklaver, Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism, 32 Ind. L. Rev. 71, 76 (1998).

[180] Huntington v. Attrill, 146 U.S. 657, 672 (1892).

dition)[181] concluded that state courts could not "discriminate" against federal claims when their "ordinary jurisdiction" would have reached such cases.[182] Some have concluded, based on *Testa* and related decisions, that state courts would therefore be able and obligated to entertain federal criminal prosecutions, at least when they entertain analogous prosecutions under state law.[183] But it is doubtful whether *Testa* can bear such a reading.[184]

Testa's observations about state-court duties ultimately turn on understandings of state-court powers. The Court's observations about "same" or "similar" cases seem designed to ensure that the state courts' own jurisdiction was up to the task of hearing the federal claim for a civil penalty that was involved in that case. As noted above, when state courts hear cases to which the federal judicial power extends, the traditional view has been that they are not exercising the federal judicial power, but rather state judicial power.[185] *Testa* reasoned that Rhode Island courts had heard double damages suits under other federal statutes and treble damages actions under state law.[186] Thus, rather than suggesting that the Constitution itself might impose a jurisdictional obligation on state courts that was unlike the jurisdiction they already exercised under state law, *Testa* largely leaves state courts as it finds them, jurisdictionally speaking. In other words, *Testa* does not purport to impose novel jurisdictional obligations on the states, but only tries to make sure they exercise jurisdiction that is otherwise theirs to exercise in a nondiscriminatory manner.[187] Closely tied to the question of ju-

[181] See Haywood v. Drown, 129 S. Ct. 2108, 2128 (2009) (Thomas, J., dissenting) (arguing that the Court's jurisdictional nondiscrimination requirement was a break from past practice).

[182] McKnett v. St. Louis & S.F. Ry. Co., 292 U.S. 230, 233–34 (1934); see also Mondou v. N.Y., New Haven & Hartford R.R. Co., 223 U.S. 1, 56–59 (1912).

[183] See, e.g., Beale, supra note 10, at 983, 1012; Caminker, supra note 63, at 1038; Vicki C. Jackson, Federalism and the Uses and Limits of Law: *Printz* and Principle?, 111 Harv. L. Rev. 2180, 2248 (1998); Redish & Muench, supra note 27, at 350–59.

[184] For other efforts to read *Testa* more narrowly than its sweeping language would suggest, see Bellia, supra note 17, at 993–99; Ellen D. Katz, State Judges, State Officers, and Federal Commands After *Seminole Tribe* and *Printz*, 1998 Wis. L. Rev. 1465, 1506–09; Kurland, supra note 17, at 70–71; Note, Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism, 60 Harv. L. Rev. 966, 971 (1947).

[185] See supra note 96 and accompanying text.

[186] 330 U.S. at 394.

[187] See Katz, supra note 184, at 1507.

risdictional obligation, therefore, is the question whether state courts have jurisdictional competence in the first place, as a matter of state law—that is, "jurisdiction adequate and appropriate under established local law."[188]

To be sure, *Testa* rejected the Rhode Island Supreme Court's suggestion that state courts lacked power to hear the federal penalty action by concluding that their general jurisdiction under state law seemed up to the task. Perhaps *Testa* was wrong not to accept the state court's assessment of its own jurisdictional limitations, but the Rhode Island court's gloss on its jurisdiction was arguably one that it had not evenhandedly enforced.[189] In addition, this bit of second-guessing of state law by the Supreme Court may be appropriate to ensure that a state court not jurisdictionally discriminate against federal claims just because they are federal or because of some unspoken hostility to the underlying federal norm. On this view, failure to hear a "like case" under federal law is a proxy for identifying jurisdictional cheating. Thus, to the extent that *Testa* relies on the Supremacy Clause,[190] the Clause's force may be limited to ensuring that states exercise evenhandedly jurisdiction that is otherwise theirs. This reading of *Testa* comports with historical understandings that the Supremacy Clause would supply an obligatory rule of decision for state courts to apply valid federal law in cases that they entertained, but did not itself compel a state to create a court or supply it with jurisdiction. And while federal law may be "supreme in-state law,"[191] the Constitution "commandeers" state courts only in their decisionmaking and in the nondiscriminatory exercise of jurisdiction that is otherwise theirs to exercise. Subsequent decisions by and large reinforce this jurisdictional competence reading of *Testa*.[192]

[188] 330 U.S. at 394.

[189] See id. (noting state courts heard double damages claims under minimum wage provisions of federal labor laws).

[190] Some rest *Testa*'s principle elsewhere than the Supremacy Clause. See, e.g., Daniel J. Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1162 (1986) (suggesting federal common law as the source).

[191] Caminker, supra note 63, at 1023.

[192] See, e.g., Howlett v. Rose, 496 U.S. 356, 372 (1990) ("The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented."); FERC v. Mississippi, 456 U.S. 742, 760 (1982) (characterizing *Testa* as limited to "analogous" claims); see also Alden

The Court's recent decision in *Haywood v. Drown*[193] is not to the contrary, although it is an advance upon *Testa*. By statute, New York had removed from its courts of general jurisdiction all civil actions (state and federal) brought by prison inmates against corrections officers for acts taken in the course of their duties. Instead, such claims were to be brought against the state itself, in the state's court of claims. Despite the evenhanded jurisdictional withdrawal, *Haywood* held that the statute was unconstitutional when applied to a federal civil rights claim brought in a state court of general jurisdiction by a prisoner—apparently based on the Court's assessment of the statute's hostility to the underlying federal right.[194] *Haywood* therefore suggests that jurisdictional nondiscrimination may not always be a "valid excuse" not to hear a federal claim.[195] But the effect of the Court's ruling was to void the state statute and thereby to reinstate the state courts' clear pre-existing jurisdiction over such claims. In that respect, *Haywood* did not purport to impose an obligation on a state to exercise jurisdiction that the state claimed it had never exercised.[196]

2. Jurisdictional Nondiscrimination and Criminal Prosecutions

Can the analogous-claims argument be translated to criminal prosecutions? Proceeding at a high level of generality, *Testa* might oblige a state court of general jurisdiction to hear virtually any federal civil action, there almost always being a state-law analogy to which one could point. Only a narrowly construed valid excuse—such as a neutral rule of *forum non conveniens*—could stand in the

v. Maine, 527 U.S. 706, 752 (1999) (stating that *Testa* does not require state courts to hear claims against the state that would be barred in federal court by sovereign immunity, even if it hears analogous claims under state law). Laura Fitzgerald has argued that *Alden* considerably narrowed the reach of *Testa*'s nondiscrimination argument, and did so in a general way. See Laura S. Fitzgerald, Suspecting the States: Supreme Court Review of State-Court State-Law Judgments, 101 Mich. L. Rev. 80, 166–68 (2002).

[193] 129 S. Ct. 2108 (2009).

[194] Id. at 2117.

[195] Cf. Katz, supra note 184, at 1507 (making a similar point about *Testa*).

[196] See Richard H. Seamon, The Sovereign Immunity of States in Their Own Courts, 37 Brandeis L.J. 319, 339 (1998) (stating that state-court obligations under *Testa* and its progeny are premised on "the state law that remained intact when the discriminatory state law was disregarded" rather than "expand[ing] the state courts' jurisdiction").

way.[197] Plus, *Testa* makes clear that a state's policy or its content disagreement with federal law may be ignored in determining whether there is a sufficient analogy. One might therefore argue that with respect to the criminal docket, there will almost always be some sufficiently analogous state-law crime to require state courts to entertain a prosecution of any given federal crime. And this might be particularly easy in an era in which many federal crimes are largely duplicative of state-law crimes.

We doubt, however, whether matters should be approached at such a high level of generality. In *Haywood*, the Court continued to state that the "like claims" limitation of *Testa* has force to it, even in courts of general civil jurisdiction.[198] As discussed below in this Section, criminal actions seeking to vindicate the sovereignty interests of the state and federal governments are going to be more "unlike" each other in important respects than any two civil actions implicating private rights under state and federal law, no matter how similar the substance of the crime.[199] In addition, as discussed in Parts IV and V, the fundamental dissimilarity of federal and state criminal actions is also borne out by the constitutional difficulties surrounding prosecutorial authority and procedural rules in the two systems.

First, it is probably not the case that state courts hearing criminal cases are acting as courts of general jurisdiction in the way that state courts hearing civil cases might be. Consistent with historic practice, and despite *Testa*'s dismissive attitude regarding the general-law prohibition on inter-jurisdictional enforcement of penal laws, state-court criminal jurisdiction is (and typically has been) limited to crimes arising under that state's laws. In other words, the states' own criminal jurisdiction has likely been shaped by and premised on the traditional understanding against cross-jurisdictional enforcement of criminal laws. It may be that not all states would perceive that they lack jurisdiction to entertain crimi-

[197] See, e.g., Beale, supra note 10, at 1012; Redish & Muench, supra note 27, at 350–52.

[198] 129 S. Ct. at 2117 & n.6.

[199] See Kurland, supra note 17, at 71 (noting "fundamentally different" concerns of the U.S. in its enforcement of criminal statutes and private enforcement of its penal statutes in *Testa*). The distinction may also explain why claim preclusion readily applies as between ordinary federal and state civil actions, whereas in the criminal setting it ordinarily does not, at least across jurisdictional lines.

nal prosecutions to vindicate sovereignty interests other than their own; but some, and perhaps many, would. State courts hearing criminal cases are, to that extent, acting as specialized courts with limited subject matter jurisdiction—the sort of limitation that even the *Testa* line of cases professes to honor.[200] Thus, although one might attempt to analogize state crimes to federal crimes after *Testa*, the point of such an inquiry—to see if the state courts are refusing, for some impermissible reason, to exercise jurisdiction they otherwise have—might not be implicated.

Second, criminal prosecutions, in contrast to most civil actions, have long been considered "local," and local actions could only be prosecuted in the jurisdiction that had authority over the subject matter in question.[201] By contrast, cross-jurisdictional litigation of civil actions has long been possible because most private civil actions for damages were "transitory," even when the remedy included a penal element.[202] Such private rights could thus migrate into any court of general subject matter jurisdiction in which the plaintiff could obtain good personal jurisdiction over the defendant.[203] Of course, one might argue that the civil suits for fines, penalties, and forfeitures under early federal statutes were "local" insofar as they were penal. Yet Congress assumed that state courts could enforce them, suggesting that—across the state-federal jurisdictional divide—the rule respecting local actions was (for a time)

[200] See, e.g., Herb v. Pitcairn, 324 U.S. 117, 137 (1945) (finding no obligation on state court of limited territorial jurisdiction to hear FELA claim that arose outside the court's jurisdiction); see also Redish & Muench, supra note 27, at 350 (endorsing a "limited jurisdiction" exception).

[201] See Story, supra note 1, at 516–17 (noting "[t]he common law considers crimes as altogether local" and that "[t]he same doctrine has been frequently recognised in America").

[202] For example, some wrongful death statutes may have had a penal dimension, yet actions enforcing them were transitory. See Brainerd Currie, The Constitution and the "Transitory" Cause of Action, 73 Harv. L. Rev. 36, 48 n.51 (1959) (noting the penal remedy argument).

[203] The local action rule had its primary impact in litigation concerning land, and a judgment entered on such a claim would not have to be recognized because of its perceived jurisdictional defect. See, e.g., Clarke v. Clarke, 178 U.S. 186, 190, 195 (1900). But it was also a justification for jurisdictional exclusivity over criminal actions. Sturgenegger v. Taylor, 5 S.C.L. (3 Brev.) 7, 7 (1811) ("[C]rimes, and the rights of real property, are local."); see also Herb v. Pitcairn, 324 U.S. 117, 121 (1945).

less strictly observed.[204] To the extent that such a rule might have been an argument against jurisdiction in a case like *Testa*, the Court's decision was inconsistent with it. But as Anthony Bellia has suggested, a "penal" action for treble damages recoverable wholly by the plaintiff (as in *Testa*) might not have traditionally been considered "local," as opposed to suits in which the government reaped the lion's share of the award.[205] Thus, *Testa* itself may not have fully disposed of the local action limitation to which most states continue to adhere. The point, moreover, is not that the old limitation on cross-jurisdictional enforcement of local actions would somehow prohibit a state court from entertaining a federal criminal prosecution. Rather, it is that the states' adherence to such a limitation is some indication that they have never had jurisdiction over crimes other than their own, and that they are not engaged in jurisdictional cheating—*Testa*'s concern—when they refuse to exercise such jurisdiction.

Third, a limited reading of *Testa*, in which state courts are obliged only to exercise jurisdiction that is otherwise theirs to exercise as a matter of state law, also makes sense in light of the modern Court's "anti-commandeering" decisions.[206] Admittedly, the Court has gone out of its way to distinguish state court judicial action from state legislative and executive action (to which the Court says its anti-commandeering rules apply more rigorously).[207] But if *Testa* means that the Constitution obliges state courts to hear disputes that did *not* fairly fall within their pre-existing jurisdiction, then state legislatures might find themselves under an affirmative obligation to enact legislation to allow their courts to host federal criminal prosecutions. That may be why the rejected New Jersey

[204] On the other hand, James Pfander may be right in suggesting that these penal actions were actually "transitory" and not "local." See Pfander, supra note 61, at 596 n.173.

[205] See Bellia, supra note 17, at 994–96. Of course, one could also argue that the rule is not violated by a federal criminal prosecution in a state court in the state and district in which the crime was committed, in satisfaction of the vicinage requirements of the Constitution. For a discussion of those requirements, see infra note 278.

[206] See Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 188 (1992).

[207] See, e.g., *Printz*, 521 U.S. at 916, 925. Some reject the distinction and argue that all state officials should be subject to commandeering. See Caminker, supra note 63, at 1028–29. Others reject the distinction but urge fuller application of the anti-commandeering principles to state courts. See Katz, supra note 184, at 1504.

Plan felt the need to provide expressly for state jurisdiction over federal criminal cases and why, in the interstate tax-collection setting today, most states have felt the need to enact legislation to expand their own courts' jurisdiction to accommodate civil enforcement actions by sister-state officials.[208] In short, more than judicial commandeering would be required if the "like cases" jurisdictional limitation of *Testa* were abandoned in civil cases or if *Testa*'s mandate were routinely applied to the criminal setting.

3. Congress and Testa

If the constitutional principle articulated by *Testa* cannot fairly be read as mandating state courts to hear federal criminal prosecutions, could state courts be required to do so if Congress insisted?[209] By confining the extent of state-court commandeering to the nondiscriminatory exercise of their existing jurisdiction (in the absence of a congressional directive), *Testa* reinforces that the relevant source of state-court jurisdictional power to hear federal matters is state law. In other words, consistent with historical practice, state courts exercise state judicial power when they entertain jurisdiction over matters to which the federal judicial power also happens to extend.[210]

If this is a correct reading of *Testa*, then it is open to question whether Congress itself could expand the state courts' jurisdiction beyond what they are given by their own legislatures and constitutions. The Court has long declared that Congress cannot enlarge the jurisdiction of the state courts or confer jurisdiction that they lack as a matter of state law.[211] As Caleb Nelson has observed, "[I]f nondiscriminatory state law fails to give any state court jurisdiction to adjudicate a particular class of federal claims, Congress cannot

[208] See supra notes 3, 41–45, and accompanying text.

[209] The source of authority would be Congress's necessary and proper power to carry Article III into execution. See U.S. Const. art. I, § 8, cl. 18, or perhaps its power to carry into effect the underlying criminal law, see United States v. Comstock, 130 S. Ct. 1949, 1956 (2010).

[210] See Caleb Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559, 1636 & n.332 (2002) (discussing this concept); see also Story, supra note 95, at 623.

[211] See Nelson, supra note 210, at 1636 & n.332; see also Brown v. Gerdes, 321 U.S. 178, 188–89 (1944) (Frankfurter, J., concurring); Redish & Muench, supra note 27, at 341 & n.123.

necessarily require (or even authorize) the state courts to hear those claims."[212] If so, and if the discussion above is correct in concluding that jurisdiction over federal criminal prosecutions is insufficiently "like" the criminal jurisdiction states have long exercised, then a congressionally imposed jurisdictional obligation would first require the state legislature to provide the jurisdiction that state courts would otherwise lack. Whether the state courts ever had jurisdiction over criminal prosecutions other than those based on a violation of their own state law is doubtful, to say the least. Coming at it from another perspective, one might question whether the damage to traditional principles of federalism would be "proper" even if Congress might possibly find it "necessary" to the enforcement of Article III.[213]

Thus, although *Testa* did not involve an express congressional command to exercise jurisdiction, its jurisdiction-reinforcing principle might also be an outer limit on congressional efforts to commandeer state courts in the enforcement of federal criminal laws.[214] States would, of course, remain free to confer jurisdiction on their courts to hear federal criminal prosecutions—assuming, as current theory holds, there is no federal constitutional impediment to their so doing. It is even conceivable that some state courts might construe their existing statutes as conferring such jurisdiction. In those circumstances, state courts might be obligated to entertain federal criminal prosecutions on a nondiscriminatory basis. But absent such action by a state legislature or its courts, we remain skeptical whether state courts could (or could be required to) hear such cases.[215]

[212] Nelson, supra note 210, at 1636 n.332. If state law gave state courts such jurisdiction, Congress could authorize state courts to hear such claims, but then the authorization would be doing no work (other than, perhaps, to negate statutory federal court jurisdictional exclusivity).

[213] See generally Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267 (1993).

[214] If those scholars who say that *Testa* itself involved a congressional command are right, see supra note 179, then *Testa*'s jurisdiction-reinforcing principle would be a limit on congressional power for that reason alone.

[215] If those scholars who say Article I's Tribunals Clause allows Congress to "constitute" state courts as federal "tribunals" are right, then Congress's power to commandeer state courts might not be subject to the limit for which we argue. See Calabresi & Lawson, supra note 49, at 1036 & n.149. As indicated elsewhere, however, we doubt

4. Federal Crimes and Non-Article III Judges

Finally, and for similar reasons, the Court's decision in *Palmore v. United States* probably should not be read as supporting either state-court jurisdiction over federal crimes or Congress's power to compel it.[216] *Palmore* upheld a felony conviction in a congressionally created Article I court in the District of Columbia for violation of a federal criminal law. In support of its holding, the Court invoked Charles Warren's historical scholarship and concluded that "the enforcement of federal criminal law [has not] been deemed the exclusive province of federal Art. III courts" because early Congresses "left the enforcement of selected federal criminal laws to state courts."[217]

The Court's conclusion, however, is misleading. As discussed in Part II, felony prosecutions were not a part of that history—with one largely stillborn exception regarding theft of the mails. More importantly, there simply was no dispute in *Palmore* over whether the D.C. court had jurisdiction of prosecutions for federally created crimes as a matter of its own law, because Congress had created the court and conferred the jurisdiction itself. Admittedly, the suggestion that federal crimes might be routinely prosecuted before non-Article III judges is troubling, particularly if applied outside the setting of the District and federal territories. But the decision provides little support for the argument that state courts might have to exercise jurisdiction that is not theirs as a matter of local law. Much less does it support the proposition that Congress can compel state courts to entertain federal prosecutions, insofar as Congress has plenary legislative authority over the District (and territories) in a way that it does not over the states.[218]

whether this vestige of the Articles of Confederation made it through the Constitution's drafting process or the First Congress. See supra notes 46–50, 80–81, and accompanying text.

[216] 411 U.S. 389, 410 (1973). But see Beale, supra note 10, at 1011 (reading *Palmore* as supporting state-court jurisdiction over federal crimes).

[217] 411 U.S. at 402.

[218] For additional skepticism regarding *Palmore*'s breadth, see Kurland, supra note 17, at 73–74; Note, supra note 88, at 306–07 (noting that although the crime in *Palmore* was federally created, both the law and the court were ostensibly local to the District of Columbia). The problems associated with non-Article III state judges overseeing federal criminal prosecutions are obviously not implicated in civil litigation in which state judges might be required to determine whether a federal crime has

IV. FEDERAL CRIMINAL PROSECUTIONS: SEPARATION OF POWERS AND FEDERALISM

Even apart from the question whether state courts have the capacity to entertain prosecutions for federal crimes, serious difficulties remain respecting who may bring such prosecutions. In this Part, we briefly consider several constitutional problems that might accompany a state or local prosecutor's attempt to pursue a federal criminal conviction in state court, even if Congress were to allow for it. (We deal later with the possibility of prosecutions in state courts by federal officials.) They include (1) Article II problems respecting the exercise of federal criminal prosecutorial authority by persons not appointed as federal officers, as well as the delegation of prosecutorial power outside the executive branch; (2) anti-commandeering problems were Congress to mandate state officials' prosecution of federal crimes; and (3) problems of state standing to sue for violations of federal criminal laws. Although we note possible ways of avoiding these problems, it is not clear how successful those solutions would be. As elsewhere, our purpose is less to resolve those questions definitively than to show that they are sufficiently numerous and large that the possibility of state prosecutions for federal crimes rests on doubtful foundations.

A. Delegation

1. The Appointments Clause

It is likely that only "Officers of the United States" can regularly enforce federal criminal laws through the mechanism of a formal prosecution of a defendant. And there may even be problems with ad hoc or nonrecurring efforts at such enforcement. If so, either federal prosecutors must maintain these prosecutions in the state courts, or there must be a proper appointment of state prosecutors as federal officers consistent with Article II's Appointments Clause.[219] To be sure, the Clause might not ordinarily apply to state officers who otherwise assist in the enforcement of federal law, be-

been committed as a predicate to finding liability under a federal statute. See Tafflin v. Levitt, 493 U.S. 455, 467 (1990) (upholding state-court concurrent jurisdiction over civil claims under federal anti-racketeering laws).

[219] U.S. Const. art. II, § 2, cl. 2.

cause they would ordinarily be exercising the law enforcement authority of their own state, as state officials. But prosecuting a federal crime, as such, likely involves the exercise of powers not otherwise theirs under state law and would require affirmative federal authorization.

The Supreme Court has defined "officers" as persons who exercise "significant authority" under federal law.[220] And in *Buckley v. Valeo*, the Court seemed to indicate that only Officers of the United States could represent the United States in court—a position since taken by the Office of Legal Counsel.[221] As a matter of Article II, a mere federal employee, much less an unappointed nonfederal official, probably could not exercise the broad "duties and discretion"[222] associated with prosecutorial decisionmaking.

On the other hand, frontline prosecutors would probably not be "principal" as opposed to "inferior" officers, because they would likely be subject to the "direct[ion] and supervis[ion]" of a superior other than the President, such as the Attorney General.[223] Not being principal officers, they would not require presidential appointment with senatorial advice and consent. But as inferior officers exercising delegated sovereign authority, Congress would have to authorize their appointment through the President, or a department head, or perhaps the courts. Absent such an appointment, the

[220] Buckley v. Valeo, 424 U.S. 1, 125–26 (1976) (per curiam).

[221] See Representation of the United States Sentencing Commission in Litigation, 12 Op. Off. Legal Counsel 18, 26 (1988) (citing *Buckley*, 424 U.S. at 140).

[222] Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 881 (1991). An old Attorney General Opinion once determined that (then-styled) "assistant United States district attorney[s]" were "officers" and not "mere employees." 31 Op. Att'y Gen. 201, 201 (1918).

[223] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3146–47, 3162 (2010) ("We [have] held . . . that [w]hether one is an 'inferior' officer depends on whether he has a superior, and that 'inferior officers' are officers whose work is directed and supervised at some level by other officers appointed by the President . . . ." (quoting Edmond v. United States, 520 U.S. 651, 662–63 (1997) (alteration in original) (internal quotation marks omitted))); see also Morrison v. Olson, 487 U.S. 654, 672 (1988) (noting that the independent counsel was an inferior, not a principal officer); United States Attorneys—Appointment Power of the Attorney General, 2 Op. Off. Legal Counsel 58, 58–59 (1978). A number of courts have stated that U.S. Attorneys are "inferior officers." See, e.g., United States v. Hilario, 218 F.3d 19, 25 (1st Cir. 2000); United States v. Gantt, 194 F.3d 987, 999 (9th Cir. 1999). But see Ross E. Wiener, Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys, 86 Minn. L. Rev. 363, 444 (2001) (arguing that U.S. Attorneys are "principal" officers).

state prosecutor would not be in a materially different position from a private party when it comes to the enforcement of federal criminal law.[224]

Historically, private parties have not been able to pursue federal criminal prosecutions, although they may once have had some role in starting the process, including directly appealing to grand juries.[225] On the other hand, the Supreme Court has endorsed the possibility of private prosecutions in some settings. For example, it has recognized the authority of a federal court to appoint a private attorney to prosecute a claim of criminal contempt for violation of a federal court's order.[226] But such a possibility would involve a one-time proceeding by a disinterested party, who was appointed by the court whose process was being vindicated. The temporary nature of an appointment may be a substantial factor in determining non-officer status.[227] In addition, criminal contempt may be *sui generis* to the extent that it is thought to involve one of the genuinely inherent powers of the courts.[228] Moreover, the ability of a private party to pursue a contempt proceeding when the government has chosen not to remains an open question.[229]

The Court has also upheld the private enforcement of federal penal laws in the *qui tam* setting. In such settings, private parties seek to vindicate the interests of the federal government in suits for

[224] See Op. Off. Legal Counsel, supra note 221, at 26 ("[W]e have taken the position that, as a general matter, a government agency cannot constitutionally delegate to a private party responsibility for the conduct of litigation in the name of the United States or one of its agencies.").

[225] See Krent, supra note 93, at 293–96 (noting "private citizens could, in effect, lobby the grand jury," but also noting that prosecutors might refuse to act on a grand jury presentment and that private citizens "did not control the prosecutions once begun").

[226] See Young v. United States ex rel. Vuitton, 481 U.S. 787, 800–01 (1987) (overturning criminal contempt conviction when prosecuted by counsel for party who had been a beneficiary of the court's order, but recognizing court's authority to appoint a disinterested private attorney).

[227] See United States ex rel. Stone v. Rockwell Int'l Corp., 282 F.3d 787, 805 (10th Cir. 2002) (noting "occasional or temporary" rather than "continuing and permanent" nature of role of *qui tam* relators); Op. Office Legal Counsel, supra note 111, at 25.

[228] See Amy Coney Barrett, Procedural Common Law, 94 Va. L. Rev. 813, 846–47 (2008) (noting unusual, inherent nature of the power).

[229] See Robertson v. United States ex rel. Watson, 130 S. Ct. 2184, 2188 (2010) (Roberts, C.J., dissenting from dismissal of certiorari) ("Our entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another.").

damages for false claims made against the United States. Although the Court has upheld the Article III standing of *qui tam* relators based on their being partial assignees of the damages claim of the United States, it expressly noted that it was not addressing potential Article II questions under the Appointments Clause or the Take Care Clause.[230] Even if those Article II problems can be surmounted in the *qui tam* setting,[231] they are obviously magnified in the setting of a criminal prosecution. The powers exercised by prosecutors seeking convictions for federal crimes would be far more significant and potentially more ongoing than when a private person seeks monetary relief on their own behalf as well as for the United States. In addition, the damages-assignment theory of *qui tam* does not readily translate to the more purely criminal setting in which the sovereignty (not just pecuniary) interests of the United States are at the forefront.[232] These considerations therefore tend to reinforce the argument that only a properly appointed federal "officer" could pursue criminal prosecutions on behalf of the United States.[233]

2. The Take Care Clause

Of course, even if this argument about officer status is correct, the Appointments Clause hurdle is not insurmountable. All that is needed is a proper appointment of the state prosecutor by a proper federal official. But even so, there might still be problems with the

[230] Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 778 n.8 (2000).

[231] For contrasting perspectives on the significance of *qui tam* for standing doctrine, compare Cass R. Sunstein, What's Standing After *Lujan*? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 173–77 (1992) (arguing for its broad significance), with Ann Woolhandler & Caleb Nelson, Does History Defeat Standing Doctrine?, 102 Mich. L. Rev. 689, 725–32 (2004) (arguing for its limited significance).

[232] Cf. Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 186–89 (2000) (upholding private parties' standing to sue for civil penalties payable to the government when they also sought to redress their own injuries).

[233] During Prohibition, Congress authorized state officials to pursue equity actions in state court to obtain injunctions, in the name of the United States, for violations of the Volstead Act. See Krent, supra note 93, at 308 n.164, 309. But the civil nature of those suits may be sufficient to distinguish them from criminal prosecutions for Article II purposes. More importantly, the Prohibition amendment specifically conferred concurrent enforcement authority on the states. See U.S. Const. amend. XVIII, § 2.

delegation of prosecutorial power under the Take Care Clause.[234] The federal executive branch may well have a monopoly on prosecution of federal crimes, whether or not federal courts have a jurisdictional monopoly over them.[235] The Supreme Court made clear in *Morrison v. Olson* that even if a prosecutor is a properly appointed federal officer, there may still be constitutional problems if there are insufficient executive controls over the officer.[236] In *Morrison,* the Court upheld a statute allowing the ad hoc appointment by a special Article III court of an independent counsel to investigate violations of federal criminal law by high-ranking federal government officials. Over a sharp dissent by Justice Scalia, the Court found that there was sufficient executive branch control over the prosecution given that the independent counsel could be removed by the Attorney General for good cause.[237]

Adam Kurland has argued that the Court's holding in *Morrison* forecloses state prosecutors from pursuing federal criminal convictions: "allowing a state prosecutor to prosecute for violations of federal law would violate even the [*Morrison*] majority's 'flexible' approach to resolving separation of powers issues" since "[u]nder these circumstances, the President retains *no* control over the decision to prosecute."[238] That assessment is likely correct if the state prosecutor has not been appointed as a federal officer subject to executive removal, but it may not be true otherwise.

Morrison was concerned with problems regarding separation of powers within the federal government. The Court approved the independent counsel on the ground that the institutional design did not increase the power of either the legislative or judicial branch

[234] U.S. Const. art. II, § 3, cl. 4.

[235] See Edward A. Hartnett, The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking in All the Wrong Places, 97 Mich. L. Rev. 2239, 2256–62 (1999) (focusing on Article II dimension of public standing); Tara Leigh Grove, Standing as an Article II Nondelegation Doctrine, 11 U. Pa. J. Const. L. 781, 790 (2009) (casting standing limits as an Article II nondelegation question).

[236] 487 U.S. 654, 685–93 (1988); see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151 (2010) (finding dual for-cause limitations on President's removal power over members of regulatory board violated separation of powers).

[237] See 487 U.S. at 692 (noting good cause determination was subject to judicial review).

[238] Kurland, supra note 17, at 81.

vis-à-vis the Executive.[239] The notion of state prosecutors pursuing federal criminal convictions raises a distinct but analogous problem. Working from *Morrison*'s reasoning, and assuming a proper appointment and removability, it is not impossible to imagine a structure for this sort of delegation grounded in cooperative federalism that would preserve the federal Executive's power to "take care."[240]

For example, Congress could provide for state prosecutors to be appointed by the Attorney General (as a department head) consistent with Article II. Congress could also provide that state prosecutors could lose their federal status for good cause or no cause. Current statutes already allow the Attorney General to "appoint attorneys to assist United States Attorneys when the public interest so requires," subject to the Attorney General's power of removal.[241] In addition, state prosecutors have often served as "special" assistant U.S. Attorneys to prosecute cases in *federal* court.[242] Of course, on this approach, the state prosecutors would cease to be wholly state officials to the extent they are prosecuting federal criminal cases. But assuming some such appointment were possible, and assuming states were willing to tolerate such dual office-holding by their officials, *Morrison* might not forbid state prosecutors from prosecuting federal crimes under appropriate supervision of other executive branch actors.

Such joint appointments have the potential to blur the lines of authority, however, and thereby decrease accountability—a problem with constitutional overtones.[243] This problem might remain even if Congress were to address the Appointments and Take Care issues. At the same time, there is an argument that this sort of cooperation might reduce rather than enhance problems of account-

[239] See 487 U.S. at 693–96.

[240] For a wide-ranging discussion of cooperative federalism efforts in the enforcement of federal regulatory law, see Philip J. Weiser, Towards a Constitutional Architecture for Cooperative Federalism, 79 N.C. L. Rev. 663 (2001).

[241] 28 U.S.C. § 543 (2006); see also id. § 519 (stating that such "special attorneys" shall be directed and supervised by the Attorney General).

[242] See, e.g., United States v. Smith, 324 F.3d 922, 925 n.1 (7th Cir. 2003) (noting that "it is not uncommon for states to lend their prosecutors to the federal government for appointment as [Special Assistant U.S. Attorneys]").

[243] Cf. New York v. United States, 505 U.S. 144, 168–69 (1992) (noting a reduction in accountability when the federal government compels state governments to act).

ability. Rachel Barkow has argued that the current structure of the Department of Justice renders its prosecutors largely unaccountable to other branches of government and ultimately to voters.[244] By contrast, the heads of state and local prosecutors' offices are generally elected and accountable. Nevertheless, arguments about appointment, removal, and the Take Care Clause assume that the accountability that matters is that of the President—not that of the individual prosecutor, or even the system as a whole. If so, the joint enforcement scheme probably does little to improve the relevant accountability.[245]

B. Commandeering State Prosecutors

Thus far, our discussion of appointing state prosecutors to prosecute federal crimes has contemplated their voluntary cooperation. Some states, however, might balk at the dual office-holding of their officers. And presumably no one is obliged to accept an offer of federal employment. Absent acceptance of an appropriate appointment within the executive branch, however, anti-commandeering principles discussed in Part III[246] would cast doubt on Congress's ability to conscript state prosecutors to enforce federal criminal laws. Such doubt would exist whether or not state *courts* could (or could be compelled to) entertain federal criminal prosecutions.

If attempted, coercion of state prosecutors would constitute a clear effort to commandeer state executive branch officials in the enforcement of federal law.[247] Of course, one might argue that

[244] See Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989, 1011–34 (2006). Although having state officials prosecute federal crimes might itself be a safeguard against federal prosecutorial overreaching, the degree of safeguard might vary inversely with the degree of coercion of state officials that any such proposal might contemplate.

[245] In addition, such a joint enforcement scheme might allow for even greater prosecutorial discretion by giving officials an extra venue choice to prosecute federal crimes in a way that could be expected to work systematically to the disadvantage of federal criminal defendants. Of course, this is already true to the extent that state and federal prosecutors coordinate prosecutorial strategy when there is the potential for concurrent or sequential prosecution under state and federal law.

[246] See supra notes 206–08 and accompanying text.

[247] The degree of coercion would likely be even greater than that in the Brady Act, struck down in *Printz v. United States*, requiring local law enforcement officials to use their best efforts to register handgun sales. See 521 U.S. 898, 902–04, 935 (1997).

given the discretion involved in prosecutorial decisionmaking, any congressional mandate—as a practical matter—might amount to little more than an authorization. But that would hardly transform a state prosecutor's duty to prosecute federal crimes into a fully voluntary one if Congress purported to impose a duty (and the duty would be unquestionable if state prosecutors were federally appointed).[248]

C. Standing to Prosecute Federal Crimes

Finally, there may even be some question whether state prosecutors as such (that is, without an appointment) would have standing in state court to pursue violations of federal criminal laws. The question closely parallels but does not entirely overlap with the Appointments and Take Care issues just discussed. Of course, standing requirements under state law might or might not mimic those of federal law. But to the extent that they do, or might be required to in the federal law enforcement setting, problems under federal standing doctrine could constitute problems in state courts as well.

When private plaintiffs bring civil actions in federal court, standing doctrine requires that they have suffered a concrete "injury in fact" at the hands of a defendant who caused the injury, and they are prohibited from litigating generalized grievances.[249] No similar injury in fact is required when the government undertakes a criminal prosecution, however, and prosecutors may pursue generalized grievances on behalf of the public.[250] Moreover, it is a sufficient

[248] A scheme that mandates state participation—and thus emphasizes the power disparity between the state and federal governments—may result in only grudging participation, in contrast to more cooperative arrangements. See Roderick M. Hills, Jr., The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't, 96 Mich. L. Rev. 813, 815 (1998); see also Jonathan Remy Nash, The Uneasy Case for Transjurisdictional Adjudication, 94 Va. L. Rev. 1869, 1912 (2008) (discussing this problem in the civil litigation setting).

[249] See, e.g., Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102–04 (1998); see also Jonathan Remy Nash, Standing and the Precautionary Principle, 108 Colum. L. Rev. 494, 504–05 (2008).

[250] See, e.g., Richard H. Fallon, Jr., The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights, 92 Va. L. Rev. 633, 667 (2006) ("In suits by the government, courts characteristically make no inquiry into injury."); Trevor W. Morrison, Private Attorneys General and the First Amendment, 103 Mich. L. Rev. 589, 627 (2005) ("Federal courts regularly adjudicate government enforce-

"harm" to the public that the defendant has violated the criminal laws of the sovereign. Nevertheless, the prosecuting party must be the legitimate representative of the relevant sovereign or public whose interests have been harmed by the violation of its criminal law.[251] And it is likely that state prosecutors, as such, can legitimately pursue only the interests of the state and its public, as opposed to those of the federal government.[252]

Certainly harms to sovereigns can overlap, and the acts of a criminal wrongdoer may injure state citizens and the state's sovereignty interests, as well as those of the federal government. That possibility is built into a federal system that still allows state and federal governments to prosecute separately the same criminal acts without running afoul of double jeopardy.[253] But when the state prosecutes a defendant for those acts, it is ordinarily enforcing its own criminal laws, which have defined the particular wrong as a matter of state law. Even when a state has standing to sue in federal court for violations of noncriminal federal law,[254] the rationale for such standing is the injury that the state's own citizens and perhaps the sovereign itself may have suffered.[255] Thus, absent ap-

ment actions that would lack 'injury in fact' if brought by private plaintiffs."); cf. Hartnett, supra note 235, at 2246–51 (noting how the federal government can get around the problem of establishing "injury in fact" in criminal cases).

[251] Early cases seemed to require that states articulate a sovereignty interest separate from that of the federal government as a precondition to "concurrent" enforcement under state law. See supra note 98; see also Kurland, supra note 17, at 89.

[252] *Maine v. Taylor*, 477 U.S. 131 (1986), is not to the contrary. There, the State of Maine sought to defend the constitutionality of one of its statutes whose violation was the predicate for a federal environmental crime being prosecuted by the U.S. The Supreme Court permitted Maine to intervene to pursue an appeal after the First Circuit held Maine's statute unconstitutional and the U.S. chose not to appeal. The Court upheld Maine's standing to appeal and ultimately reversed the appeals court's dismissal of the criminal proceeding, and reinstated the defendant's guilty plea. See id. at 136–37. While suggestive of state standing regarding some aspects of federal criminal prosecutions, the decision hardly suggests that a state could prosecute such a case in the first instance. In fact, the Court doubted whether, as a separate sovereign, Maine would have standing to sue for a violation of federal criminal laws. See id. at 137 ("[P]rivate parties, and perhaps even separate sovereigns, have no legally cognizable interest in the prosecutorial decisions of the Federal Government . . . .").

[253] See Bartkus v. Illinois, 359 U.S. 121, 132–36 (1959).

[254] See generally Woolhandler & Collins, supra note 153 (exploring the history of state standing in civil actions in federal courts).

[255] See, e.g., Massachusetts v. EPA, 549 U.S. 497, 518–23 (2007). Moreover, *Massachusetts* was a suit challenging the rejection of a petition demanding that an agency

pointment as federal officers, state and local officers (and the governments they represent) may lack standing to redress harms to the sovereignty interests of the United States.[256]

Finally, one might try to premise state standing to prosecute a federal criminal offense on Congress's express recognition of state standing to represent the interests of the United States, were it to do so. Whether Congress has authorized a federal claim is a traditional part of standing analysis in the civil setting, and some scholars believe that Congress's authority in this regard is nearly conclusive, even if not constitutionally unlimited.[257] But even here there is substantial academic authority for the proposition that federal standing requirements would carry over into the state courts when federal law is being enforced.[258] If so, any limitations on Congress's ability to confer public-law standing in the federal courts would be applicable in state courts as well. Moreover, if federal standing law applies, then a state prosecutor (without a proper appointment) may still be in no better position than a private party seeking to enforce federal criminal law, despite congressional authorization.

* * *

Each of the above arguments relating to the authority to prosecute suggests that a state or local prosecutor, without appointment as a federal officer, may not be able to undertake the enforcement of federal criminal law in the state courts. That would, of course, be entirely in keeping with historical practice. Moreover, the possible

regulate—not a suit in which a state asserted standing as a complaining party to vindicate the interests of the United States.

[256] See Woolhandler & Nelson, supra note 231, at 703–04 (discussing Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852)). Professors Woolhandler and Nelson conclude that the *Wheeling Bridge* Court permitted a state to bring suit to enjoin a public nuisance obstructing a navigable river "not because the state was a proper plaintiff to bring suit on behalf of the people of the United States," but because the state alleged "'special damage' to its own property." Id. at 703 (quoting *Wheeling Bridge*, 54 U.S. (13 How.) at 518).

[257] See, e.g., Cass R. Sunstein, Standing Injuries, 1993 Sup. Ct. Rev. 37, 40 (arguing that the law in question should provide the relevant measure as to whether there has been a legal injury for standing purposes).

[258] See William A. Fletcher, The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions, 78 Cal. L. Rev. 263, 265 (1990); Paul J. Katz, Comment, Standing in Good Stead: State Courts, Federal Standing Doctrine, and the Reverse-*Erie* Analysis, 99 Nw. U. L. Rev. 1315, 1318–19 (2005). The Court has not, however, squarely answered the question.

ways out are awkward: either transforming state officers into dual office holders or inserting federal prosecutorial personnel into the forefront of state-court prosecutions of federal law. Even if one of those two avenues is pursued, and the prosecution is maintained by an officer properly appointed and properly accountable, a laundry list of procedural hurdles may still stand in the way. We briefly sketch a few of the more prominent ones in the final Part of this Article.

V. STATE PROCEDURES AND FEDERAL CRIMES

A. The Grand Jury Requirement

Complicating matters is the question of how, if at all, federal grand jury rights would be carried forward into state prosecutions for federal crimes. The Fifth Amendment provides that the federal government shall commence its proceedings by grand jury in any "capital or otherwise infamous crime."[259] The Court has held, however, that this particular guarantee is not applicable to the states through the Fourteenth Amendment, although some doubt may now surround the question.[260] The great majority of states do not employ grand juries in all felony cases, and many states lack grand juries altogether.[261] And if the Constitution does not require states to employ grand juries, it is unlikely that Congress could compel states that lacked them to create them. We consider the problem first by focusing on the possibility that federal prosecutors might be the ones doing the prosecuting, and second by focusing on state prosecutors.

[259] U.S. Const. amend. V. The suits for fines, penalties, and forfeitures heard by state courts in the early Republic would not have implicated a "capital" or "infamous" crime. See Kurland, supra note 17, at 64–65.

[260] See Beck v. Washington, 369 U.S. 541, 545 (1962); Hurtado v. California, 110 U.S. 516, 538 (1884). In *McDonald* v. *Chicago*, 130 S. Ct. 3020, 3046 & n.30 (2010) (Alito, J., plurality), a plurality noted that *Hurtado* was decided well prior to the Court's practice of "selective incorporation" of various provisions of the Bill of Rights through the Fourteenth Amendment's Due Process Clause, suggesting that the issue of incorporation of the Grand Jury provision may be an open one. But cf. id. at 3093–94 (Stevens, J., dissenting) (noting that the Court has not adopted and should not adopt a "total incorporation" approach to the Bill of Rights, specifically invoking *Hurtado*).

[261] See David B. Rottman & Shauna M. Strickland, Dep't of Justice, State Court Organization 2004, at 213–17 & tbl.38 (2006).

1. Federal Prosecutors

One of the purposes of the grand jury requirement is to protect against overreaching by the executive branch.[262] To the extent that prosecution in state courts for federal crimes is to be undertaken by federal prosecutors, the purposes of the grand jury requirement seem to be fully implicated. To allow a federal prosecutor to make an end run around the grand jury requirement because the prosecution will take place in a state with less strict (or no) grand jury requirements cuts out a potentially important screening function. Moreover, the simple fact that the criminal trial will take place in state court before a state judge and petit jury does not make up for the loss of the grand jury's additional check on federal prosecutors.

If the Constitution requires a federal prosecutor first to get a grand jury to sign off on a particular prosecution brought in state court, it would require federal court involvement (in states lacking grand juries), unless one further assumes that the state judges will be able to oversee the progress of a federal grand jury and, if needed, the prosecutor. Any possible orders to a federal prosecutor by a state court, however, would raise the whole panoply of difficulties traditionally associated with state-court orders to federal officials that are injunctive in nature—a power that many doubt.[263]

Of course, it might be possible to imagine a scheme in which Congress could empower the state courts (in states that lack grand juries) to do the superintending of the federal grand jury proceedings and have the power to issue orders to federal prosecutors. The long-standing doubts regarding state-court orders to federal officials may amount to no more than a constitutional common law default rule of official immunity that could be overcome by clear language from Congress. Congress might also allow states to issue process in excess of the state court's jurisdictional borders and to call grand jurors from the length and breadth of the relevant federal district. Having a state judge in control of the process may look awkward, but perhaps no more awkward than arrangements by which federal prosecutors are superintended by non-Article III

[262] See Niki Kuckes, The Useful, Dangerous Fiction of Grand Jury Independence, 41 Am. Crim. L. Rev. 1, 34–35 (2004).

[263] See Richard S. Arnold, The Power of State Courts to Enjoin Federal Officers, 73 Yale L.J. 1385 (1964) (discussing the problems).

judges in certain of the territories and in the local courts of the District of Columbia.[264] But it seems hard not to conclude that the Constitution may demand that if a federal prosecutor does the prosecuting, the grand jury requirement be complied with.

2. State Prosecutors

On the other hand, if state prosecutors can pursue prosecutions of federal crimes in state courts—which we doubt, absent a proper appointment and executive branch control—perhaps there is an argument that the grand jury requirement can be dispensed with. Under this argument, the state prosecutor would be bound by whatever strictures he otherwise would be bound by when bringing a prosecution under state law. The problem of federal prosecutorial overreaching that the grand jury right is designed to check would be less implicated if the prosecutor was someone otherwise independent of the federal executive branch, as he clearly would be if the participation of the state prosecutor were voluntary. Of course, the state prosecutor's independence and lack of appointment may in turn suggest other structural problems, as noted above.

The Fifth Amendment's text, however, does not suggest that the grand jury can be dispensed with so long as the federal government uses a nonfederal official to do its work. What is more, the Constitution's grand jury provisions may serve another purpose beyond policing the federal executive branch: they may also exist to prevent overreaching by the federal legislative branch.[265] Just as petit juries have had—as a practical matter—a long-standing ability to nullify substantive law by rendering acquittals in criminal cases, federal grand juries also arguably serve a screening function in refusing to indict based on federal laws they may not wish to see en-

[264] See supra notes 216–18 and accompanying text (discussing *Palmore v. United States*, 411 U.S. 389 (1973)). See generally Stanley K. Laughlin, Jr., The Law of United States Territories and Affiliated Jurisdictions (1995) (discussing various juridical arrangements of the territories).

[265] See Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 84 (1998).

forced generally or against a particular party.[266] This legislative-check function of the grand jury will therefore be implicated even if the official prosecuting a federal crime is a state and not a federal officer. Consequently, federal grand jury rights could well be implicated no matter who does the prosecuting of federal crimes.

B. The Pardon Power

Another issue raising federalism and structural concerns has to do with the power to pardon a criminal conviction. The President would ordinarily have the power to pardon those convicted of violating federal law, but the state's governor would ordinarily have the power to pardon those convicted in the state's courts. The power to pardon either before or after conviction has been a time-honored and unrestrained prerogative of the executive of the relevant sovereign.[267] As Anthony Bellia has explained, it was a central tenet of the law of nations and interstate relations in the late eighteenth and early nineteenth centuries that the sovereign's power to punish and to pardon were inextricably intertwined, to the point of being indivisible.[268]

Perhaps surprisingly, this particular issue was addressed, albeit inconclusively, over 180 years ago by the Supreme Court in *Houston v. Moore*, discussed in Part II. In his dissent, Justice Story seemed to think that if state courts could entertain their own state-law-based prosecutions for violations of the federal law in question—although he maintained they could not—then the state's governor alone would be able to exercise the pardon power in the event of a conviction. This possibility troubled Story because he feared that it would in some measure interfere with the President's ability to pardon for failure to heed a Presidential call-up of the mi-

[266] See generally Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 869–75 (1994) (discussing petit jury and grand jury nullification).

[267] Bellia, supra note 17, at 984–88, 998–99. The pardon power itself would not have been implicated in the suits for fines, penalties and forfeitures heard by state courts in the early Republic. See Sergeant, supra note 97, at 130–31.

[268] Bellia, supra note 17, at 984–85 & n.156 (quoting The King v. Parsons, (1692) 89 Eng. Rep. 575 (K.B.)).

litia.[269] Justice Washington, who authored the main opinion, stated that he was "by no means satisfied" that the state's governor would be able to issue a pardon in such a case, despite the usual linkage of the power to prosecute and the power to pardon.[270] But Washington—perhaps alone—was operating on the doubtful assumption that the state was actually prosecuting a federal crime, not a state crime.

Maybe the simple answer should be that the power to pardon and the related power to parole ought to follow the sovereign whose law is being vindicated. Indeed, despite their differences regarding whose law was being enforced in *Houston*, Justices Washington and Story seem to share this assumption. Dividing the power to punish and the power to pardon is problematic, and has the potential to encroach on important prerogatives of either the President or the governor.[271]

C. Double Jeopardy

Double jeopardy presents another hurdle. Currently, the federal government and state governments may independently prosecute a defendant for the same act.[272] As noted above, if the defendant has committed what amounts to both a state crime and a federal crime, a long-standing vestige of dual sovereignty permits both systems to prosecute and punish without running afoul of the Double Jeopardy Clause. This practice has its critics.[273] Moreover, the current potential for prosecutorial manipulation of jurisdiction to secure the harsher (typically federal) sanction[274]—or simply to arrange a

[269] Houston v. Moore, 18 U.S. (5 Wheat.) 1, 72–73 (1820) (Story, J., dissenting). Story believed that the prosecution was one under state law, but had been preempted by federal law. Id. at 70–72, 75–76.

[270] Id. at 31.

[271] See Commonwealth v. Green, 17 Mass. 515, 542 (1822) (discussed in Bellia, supra note 17, at 964 & n.63).

[272] See, e.g., United States v. Lanza, 260 U.S. 377, 382–84 (1922). This assumes, of course, that Congress has not preempted the states from punishing the same conduct as a matter of state law. See id. at 385.

[273] See, e.g., Akhil Reed Amar & Jonathan L. Marcus, Double Jeopardy Law After Rodney King, 95 Colum. L. Rev. 1, 4–28 (1995).

[274] See Rachel E. Barkow, Federalism and Criminal Law: What the Feds Can Learn from the States, 109 Mich. L. Rev. 519, 573–78 (2011) (noting that decisions by federal prosecutors to go forward are greatly driven by harsher sentences typically available under federal law for particular criminal acts).

do-over—is a reason that some have argued against the creation of federal crimes that overlap with pre-existing state crimes.[275]

Even assuming the constitutionality of the current regime that allows separate prosecutions by separate sovereigns, a problem would arise if state courts were able to entertain a prosecution for a federal crime. If state officials (perhaps in a federal capacity) prosecute unsuccessfully under federal law, may those officials turn around and prosecute the same defendant in the same court for the same crime under *state* law? When the judicial institutions of different governments play host to two prosecutions of the same defendant for the same acts under their own laws, the separate sovereignty reasoning may be persuasive. When the federal government borrows state institutions and state officials to prosecute a federal crime, however, "cooperative federalism" starts to undermine the separate-sovereignty rationale that ordinarily allows for both state and federal prosecutions for the same acts.[276] Although it is unclear, it may be that a subsequent state-court prosecution for the state crime for the same act should be foreclosed, or, if events happen in reverse, that the prior state-law prosecution in state court should foreclose a prosecution for the federal crime in state court.

D. Other Lurking Procedural Tangles

Finally, prosecutions of federal crimes in state courts would also raise troublesome questions about the application of federal procedures in the state courts—a familiar problem in the civil setting that sometimes falls under the heading of "Reverse-*Erie*."[277] In

[275] See, e.g., Kathleen F. Brickey, Criminal Mischief: The Federalization of American Criminal Law, 46 Hastings L.J. 1135, 1162–72 (1995).

[276] For example, double jeopardy problems would also arise if federal prosecutors, after an unsuccessful first prosecution for a federal crime in state court by a state prosecutor, attempted to pursue a prosecution in federal court for the same federal crime. See Bartkus v. Illinois, 359 U.S. 121, 130 (1959) (reading *Houston v. Moore* as supporting a double jeopardy bar "in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question").

[277] See, e.g., Kevin M. Clermont, Reverse-*Erie*, 82 Notre Dame L. Rev. 1 (2006). As Wayne Logan has noted, the decoupling of procedure and substance in criminal cases can be more problematic than in civil cases, to the extent that the sovereign creating the crime may have a greater interest in controlling and conditioning deprivations of liberty though its own processing rules. See Logan, supra note 22, at 1243, 1278–79 & 1244 n.7.

some respects, however, this may be less of a problem than it is in the civil arena because so much of state criminal procedure has been constitutionalized in the last fifty years. As a result, many procedural requirements are already common to the federal and state courts alike, but significant gaps remain.

Consider the applicability of constitutional requirements governing the petit jury.[278] A federal criminal jury generally consists of twelve jurors,[279] although the Court has indicated that the Sixth Amendment does not itself require twelve.[280] Additionally, a federal criminal verdict must be unanimous,[281] apparently as a matter of the Constitution.[282] But the constitutional requirements for state

[278] The right to trial by jury in criminal cases is provided for in Article III and in the Sixth Amendment. Both also have vicinage requirements—requiring that a crime be tried in the state in which it was committed, U.S. Const. art. III, § 2, as well as before a jury drawn from the state and the "district" in which the crime was committed. Id. amend. VI. If applicable to the states trying a federal crime, the latter provision could produce a more geographically diverse jury than might otherwise be the case. For reasons discussed in this Section, the vicinage requirement may well apply to states trying federal crimes, even though the Court has not yet held it applicable to the states when trying state crimes.

[279] See Fed. R. Crim. P. 23(b)(1) (requiring twelve). A jury of fewer than twelve jurors cannot return a verdict without court approval and the parties' stipulation. Fed. R. Crim. P. 23(b)(2); see also Fed. R. Crim. P. 23(b)(3) (authorizing the court to "permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror" after deliberations have begun).

[280] Williams v. Florida, 399 U.S. 78, 86–103 (1970). Although *Williams* was a state-law prosecution in state court, the Supreme Court purported to construe the reach of the Sixth Amendment as such, and upheld the use of a six-person jury. Id. at 86.

[281] See Fed. R. Crim. P. 31(a).

[282] In *Apodaca v. Oregon*, 406 U.S. 404 (1972), there was no majority opinion, but—in an unusual alignment of the Justices that turned on Justice Powell's opinion—a majority agreed that the Constitution does not require states to employ jury unanimity, while another majority agreed that the Sixth Amendment does require unanimous criminal verdicts in federal court. See Johnson v. Louisiana, 406 U.S. 356, 366, 369–71 (1972) (Powell, J., concurring in *Johnson* and *Apodaca*) (concluding that while the Sixth Amendment does require unanimous jury verdicts in federal court, its incorporation by the Fourteenth Amendment does not transport that particular requirement to the states); cf. McDonald v. Chicago, 130 S. Ct. 3020, 3035–36 n.14 (2010) (plurality opinion) (indicating that differential rule in state and federal courts was "the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation"). The Court has also approved the use of a six-person criminal jury, see *Williams*, 399 U.S. at 86–103, but only if it is unanimous. See Burch v. Louisiana, 441 U.S. 130, 134–39 (1979). The Court has also held that a state criminal jury consisting of only five jurors is constitutionally insufficient. See Ballew v. Georgia, 435 U.S. 223, 239 (1978) (plurality opinion); id. at 245–46 (Powell, J., concurring in judgment).

criminal juries are not quite the same. Although the Court has held that the right to trial by jury in nonpetty criminal prosecutions applies in state courts, the Constitution does not require unanimous verdicts in state courts.[283] But if the Constitution requires jury unanimity in trials of federal crimes in federal court, then arguably the Constitution would require unanimity in trials of federal crimes in state courts. In this respect, the petit-jury-unanimity requirement might operate like the grand jury requirement (and for similar reasons): inapplicable to the states when trying state crimes, but applicable when trying federal crimes.[284]

Moreover, even though the Constitution may not mandate twelve person juries, the mere fact that federal practice has long subscribed to such a requirement may mean that state courts must adopt it when hearing federal crimes. In the civil context, the Court has held that although states are not subject to the jury-trial requirements of the Seventh Amendment,[285] state courts are required to conform to certain federal jury practices when hearing a federal claim if they are "part and parcel" of the federal right being enforced.[286] Somewhat similar reasoning might therefore require states hearing prosecutions of federal crimes to conform to both federal size and unanimity requirements.[287] Of course, insisting on a unanimous jury of twelve might be easier for states to accommodate than insisting on a grand jury requirement. All states already have petit juries, and many adhere to size and unanimity require-

[283] See Duncan v. Louisiana, 391 U.S. 145, 159–62 (1968); *Johnson*, 406 U.S. at 366, 369–71, 380 (Powell, J., concurring).

[284] See supra text accompanying notes 259–66; cf. Solar v. United States, 86 A.2d 538, 540 (D.C. Mun. Ct. App. 1952) (concluding that federal practices controlled the non-Article III courts of the District of Columbia that once heard federal criminal prosecutions).

[285] See Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 215–17 (1916). The plurality in *McDonald* may have cast some doubt on *Bombolis*. See 130 S. Ct. at 3046 & n.30.

[286] Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 363 (1952) (quoting Bailey v. Cent. Vt. Ry. Co., 319 U.S. 350, 354 (1952)) (internal quotation marks omitted).

[287] The analogy may be imperfect because the civil jury trial requirement applicable in state court under *Dice* is one that would be constitutionally required in federal court, unlike the criminal twelve-person jury requirement. See Williams v. Florida, 399 U.S. 78, 86–103 (1970).

ments like those in the federal courts.[288] Even so, it is not easy to know what adjustments to state jury practice the Constitution might require were state courts to entertain federal criminal prosecutions. Nor would the uncertainties likely stop with conviction, given other questions related to punishment and sentencing.[289]

* * *

Although the procedural difficulties discussed in this Section may have a laundry list quality to them, they are testament to the fundamental difficulty of inter-jurisdictional prosecutions in our federal system, particularly state-court prosecutions for federal crimes. Justice Story offered a similar list of questions when he

[288] See Robert H. Miller, Comment, Six of One Is Not a Dozen of Another: A Reexamination of *Williams v. Florida* and the Size of State Criminal Juries, 146 U. Pa. L. Rev. 621, 646–49 (1998) (indicating that twelve-person juries are the default in most states in felony cases, but with substantial variation); Ethan J. Leib, Supermajoritarianism and the American Criminal Jury, 33 Hastings Const. L.Q. 141, 142 (2006) (noting that all but two states require unanimity in felony cases).

[289] Most of these concerns are subconstitutional in nature. For example, although federal penalties would ordinarily follow conviction for a federal crime, there might be some question whether, in a state that had abolished the death penalty for state crimes, a state court could (or might be obliged to) impose a death penalty upon conviction of a federal crime. In addition, the Crime Victims' Rights Act of 2004, Pub. L. 108-405, 18 Stat. 2260, dictates important roles for victims and victims' relatives in the sentencing context and elsewhere; and the Act seems to apply to all federal offenses. See 18 U.S.C. § 3771(e) (2006); see also Mandatory Victims Restitution Act of 1996, §§ 204–06, 18 U.S.C. §§ 3663–64 (2006), amended by 18 U.S.C. § 3663(b)(4)–(6) (Supp. II 2008). Questions as to the proper custodian and proper target of habeas corpus could also arise. Cf. Carter v. Tennessee, 18 F.2d 850, 855–56 (6th Cir. 1927) (sentencing federal officer to state imprisonment on federal court conviction of state crime following removal).

Sentencing could prove particularly problematic. States may be under the same obligation (such as it is) to which federal courts are subject under the Federal Sentencing Guidelines. See 18 U.S.C. § 3553(b)(1) (2006). The Act providing for their promulgation states that, with a couple of exceptions, it is applicable to offenses "described in any Federal statute." 18 U.S.C. § 3551(a) (2006). And the federal courts' nonapplication of the Guidelines to nonfederal crimes in federal courts supports the notion that the Act would follow the sovereign that created the crime rather than the forum in which the conviction is obtained. See, e.g., United States v. Cutchin, 956 F.2d 1216, 1219 (D.C. Cir. 1992) (holding Guidelines apply on their face only to federal crimes). Although the Court has concluded, for constitutional reasons, that the Guidelines are only advisory rather than mandatory, see United States v. Booker, 543 U.S. 220, 245–46 (2005), states would still likely have to conform their decision making to take them into account to the same extent that federal courts do, with appellate review for noncompliance.

contemplated the prospect of state-court prosecutions for federal crimes in *Houston v. Moore*.[290] Although he did not fully answer those questions, he did sum up:

> In a government formed like ours, where there is a division of sovereignty, and, of course, where there is a danger of collision from the near approach of powers to a conflict with each other, it would seem a peculiarly safe and salutary rule, that each government should be left to enforce its own penal laws in its own tribunals.[291]

CONCLUSION

Proposals to have state courts entertain prosecutions for federal crimes have been around for almost a century and show no signs of disappearing. Whatever their utility, this Article has argued that such proposals are sufficiently beset with constitutional difficulties that they should be rejected. Their supposed justification from Founding-era developments is weak, whether one looks to the framing, ratification, or implementation of Article III. Furthermore, there was no tradition of federal criminal prosecutions in the state courts, despite scholarly and judicial suggestions to the contrary. At the same time, a strong if not dominant belief existed that such prosecutions were off limits to the state courts, perhaps by force of the Constitution, but certainly as a matter of the state courts' own jurisdiction.

The Supreme Court's eventual blessing of congressional statutes allowing removal of certain state-law prosecutions to federal courts did little to undermine those early understandings. Rather, it was not until the New Deal that the Court began to undermine long-settled understandings: first when it articulated a general duty of jurisdictional nondiscrimination on the part of the state courts when hearing civil actions under federal law and then when it required state courts to entertain federal civil actions for penalties. But even those decisions, fairly read, have little to say about

[290] See Houston v. Moore, 18 U.S. (5 Wheat.) 1, 75 (1820) (Story, J., dissenting) (asking whether a state could prosecute and punish for treason against the U.S., and whether it would foreclose later prosecution in federal court or give rise to double jeopardy problems).

[291] Id. at 69.

whether state courts may exercise jurisdiction that is not otherwise theirs to exercise as a matter of state law, particularly in the criminal prosecution setting.

Finally, even supposing that no constitutional disability attaches to state courts entertaining such cases as a matter of their own jurisdictional choice, other problems relating to the exercise of federal prosecutorial power outside of the executive branch and the mismatch of constitutional procedural obligations on state and federal courts reinforce the constitutional doubtfulness of proposals to have state courts host federal criminal prosecution. One therefore need not buy into Justice Story's disputed views of the constitutional exclusivity of federal criminal jurisdiction to conclude, as he did, that it is a "particularly safe and salutary rule" that the federal government should be left to enforce its own criminal laws in its own courts.