STATE JUDICIAL SOVEREIGNTY

Josh Blackman*

In our “dual sovereignty” with a dual judiciary, it is the received wisdom that Congress has plenary power over the state courts through concurrent, mandatory, and exclusive jurisdiction. Congress, the argument goes, can allow, require, or forbid state courts from hearing federal causes of action. The Supreme Court, however, has sketched out an important but underappreciated limiting principle of this Congressional power, grounded in the separation of powers and state autonomy. I refer to this doctrine as state judicial sovereignty. Every effort by Congress to control the jurisdiction of the state courts must respect the power of states to vest their courts with subject matter jurisdiction to hear, or not to hear, causes of action. Concurrent, mandatory, and exclusive jurisdiction statutes can exist only within these bounds of state judicial sovereignty.

This Article articulates a framework to explain how the autonomy of the states to control their own courts interacts with Congress’ efforts to use or disregard the state courts for federal claims. Building on the analysis of concurrent, mandatory, and exclusive jurisdiction, I identify three attributes of state judicial sovereignty that are repeated throughout the Court’s precedents.

First, state judicial sovereignty refers to the constitutional obligations of state judges to hear federal causes of action, so long as the state vested them with adequate jurisdiction. Second, state jurisdictional sovereignty provides states with the autonomy to vest their courts with jurisdiction, but prohibits them from discriminating against federal claims by withdrawing pre-existing jurisdiction. Third, state judge sovereignty places a limit on the federal government’s power to control the state courts, based on the Supreme Court’s anti-commandeering and necessary-and-proper jurisprudence following NFIB v. Sebelius.

The bounds of federal authority over how state courts conduct their business have remained largely undefined for over 200 years. This Article aims to identify these boundaries and demonstrate the limits of Congress’ powers over state courts.

* Assistant Professor, Houston College of Law. The author would like to thank Samuel Bray, Aaron Bruhl, Jeff Rensberger, Charles W. “Rocky” Rhodes, Mark Tushnet, and the participants at the 7th Annual Junior Federal Courts Workshop, for their insightful comments and advice.
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I.  INTRODUCTION

In our “dual sovereignty” we have a dual judiciary. While the Constitution creates a single Supreme Court and gives Congress the power to constitute inferior tribunals, the courts of the several states predated our federal union. Through concurrent jurisdiction, these courts, subject to the complete control of the states, were deemed parallel forums to adjudicate federal claims. Yet, in specific areas, Congress designated the federal courts as the exclusive forums of certain federal claims, depriving the state courts of that jurisdiction. In other areas, the Supreme Court has determined that state courts, with or without the consent of the state, are required to entertain certain federal causes of action.

Each of these well-known features of our judicial system—concurrent, mandatory, and exclusive jurisdiction—represents efforts by one sovereign, the federal government, to command and control the jurisdiction of other sovereigns, the states. Though the power to mandate and exclude state court jurisdiction has been construed broadly, the Supreme Court has recognized certain limits on this authority based on a respect for the separation of powers, and the autonomy of each state to manage their courts. I refer to these constraints on federal power as state judicial sovereignty. State judicial sovereignty implicates the power of states to vest their courts with subject matter jurisdiction to hear, or not to hear, federal causes of action.

This Article articulates a framework to explain how the autonomy of the states to control their own courts interacts with Congress’ efforts to use or disregard the state courts for federal claims. Every effort by Congress to control the jurisdiction of the state courts must respect the power of states to vest their courts with subject matter jurisdiction to hear, or not to hear, causes of action. Concurrent, mandatory, and exclusive jurisdiction statutes can exist only within the bounds of state judicial sovereignty.

Part II explores the notion of concurrent jurisdiction, whereby state courts can entertain federal claims in tandem with the federal courts. From the beginning of our Republic, most jurists agreed that the state

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courts would entertain a concurrent jurisdiction over federal causes. The “state judges” clause of Article VI, providing that state “judges in every state shall be bound” by the “Supreme law of the land” provides a sound, but not complete, basis for this presumption of concurrency. Justice Joseph Story was the leading opponent of this view. He argued vigorously that state courts could not entertain any federal causes of action. Ultimately, Story’s view lost out. The rule of law has been, consistent from Hamilton in *The Federalist* to the present, that there is a very strong presumption that state courts maintain concurrent jurisdiction. This much is easy, as allowing state courts to entertain federal causes of action imposes no federalism costs on judicial sovereignty.

Part III turns to when concurrent jurisdiction is no longer permissive, but in fact mandatory. What is the basis of this congressional power? At the outset, I urge you to resist the temptation to answer preemption and the Supremacy Clause. This is only a partial solution. The Supremacy Clause itself vests no power, but merely provides that statutes that are validly enacted bind state judges. Rather, the exclusive jurisdiction statutes become the supreme law of the land when Congress acts pursuant to its necessary and proper power, coupled with either the “inferior tribunals” clause, or another specific grant in Article I, Section 8. This authority would, in theory at least, give Congress the power to require all state courts to entertain federal causes of action. But the Court has not held that Congress has such a sweeping and plenary power.

Rather, principles of state judicial sovereignty place a check on this authority. Specifically, Congress lacks the power to shrink or enlarge a state court’s jurisdiction. Congress can only work with, or invoke whatever jurisdiction a state legislature has already vested its state courts with. This is usually not a problem for state courts of general jurisdiction, which are presumed to have concurrent jurisdiction over all federal causes of action. Virtually all of the Court’s cases, however, stress that Congress can only require state judges to hear federal causes of action when their court already has “adequate” jurisdiction. This attribute of state jurisdictional sovereignty provides the state legislatures with a check on the ability of their state judges to interpret federal laws. Further, the Court has held in many cases that state courts can only hear federal causes of action with the state’s consent. While recent case law suggests that these precedents may be obviated, the Court has never squarely held that Congress can force a court, which otherwise lacks jurisdiction, to entertain a federal claim.

Part IV focuses on the final aspect of this sovereignty trilogy, exclusive jurisdiction. Rather than allowing the state courts to retain concurrent jurisdiction, or mandating concurrent jurisdiction, exclusive jurisdiction deprives state courts of jurisdiction, even if they previously had such jurisdiction. The basis for Congress’ power to designate causes of action has proved elusive to the Court. Justice Story, in keeping with his opposition to concurrent jurisdiction, argued that exclusive jurisdiction was re-
quired by Article III: “all cases,” but not the “controversies,” must be heard in a federal forum. Story’s view, however, was rejected. Virtually all other jurists, from Hamilton in The Federalist to Taney to Field to Harlan, agreed that Congress could elect to designate certain causes of action for exclusive jurisdiction. This view was reflected in the Judiciary Act of 1789, which provided for both concurrent and exclusive jurisdiction.

The modern conception of exclusive jurisdiction is understood to be based on some combination of Article III and Congress acting pursuant to its Article I powers. Again, the Supremacy Clause is not the complete answer. Instead, Congress acts to preempt state jurisdictional statutes pursuant to the inferior tribunals clause, or a specific grant in Article I, Section 8, coupled with the necessary-and-proper power. Because of the strong presumption of concurrency, and out of respect for the state jurisdictional sovereignty, when Congress seeks to divest the state courts of jurisdiction, it must do so clearly. In light of NFIB v. Sebelius, this deprivation of jurisdiction has been narrowed by the principles of federalism.

Building on the analysis of concurrent, mandatory, and exclusive jurisdiction, Part V identifies three attributes of state judicial sovereignty that are repeated throughout the Court’s precedents. First, state judge sovereignty refers to the constitutional obligations of state judges with respect to federal causes. While state judges are obligated to enforce the supreme law of the land, they can only do so when they sit in a court of competent jurisdiction. For courts of general jurisdiction this is not a problem, but in courts of limited jurisdiction, or where the state attempts to divest their courts of jurisdiction over certain federal causes of action—perhaps due to neutral budgetary reasons—the judges are unable to act, notwithstanding the command of the Supremacy Clause. Yet, once state legislatures do constitute courts of general jurisdiction, an implied consent can be understood for its judges to hear all federal causes of action. Withdrawing that jurisdiction in a discriminatory fashion, in light of that consent, raises constitutional problems.

Second, state jurisdictional sovereignty, explained the autonomy of the states to vest their state courts with jurisdiction, subject to the strictures of the federal constitution. Congress would have, in almost all cases, the power to preempt state jurisdictional statutes. Though, the Court’s recent precedents concerning our system of dual sovereignty place a direct limit on this power. Specifically, if Congress attempts to divest state courts of a jurisdiction long associated with the state police power—domestic law, for example—the Necessary and Proper Clause may not afford such a “great substantive and independent power.” These exclusive jurisdiction statutes would then be unconstitutional.

4. Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 517 (1898); Ableman v. Booth, 62 U.S. 506, 518 (1858); The Federalist No. 82 (Alexander Hamilton).
Third, state judge sovereignty places a limit on the federal government’s power to regulate the state court, based on the anti-commandeering principle, and necessary-and-proper jurisprudence following NFIB v. Sebelius. Congress lacks Article I powers to vest state courts with jurisdiction. It can only invoke the pre-existing jurisdiction of the state courts. In recognition of this principle, Congress cannot commandeer the state legislature by forcing them to vest their state courts with jurisdiction, or forcing state judges to hear cases where they otherwise lack jurisdiction. This choice is within the autonomy of the states. Yet, if a state court lacks any courts of general jurisdiction, Congress would be helpless to mandate that the state courts hear a cause of action. In that state, the citizen could always turn to a federal court to vindicate a federal right.

These three attributes of state judicial sovereignty help to explain, and put into context, Congress’ often ill-defined ability to control the state courts within constitutional bounds. The “bounds of federal authority over the way state courts conduct their business have remained undefined for over 200 years.”6 This Article aims to identify these boundaries and demonstrate the limits of Congress’ powers over state courts.

II. CONCURRENT JURISDICTION

The first, and most undisputed, aspect of state judicial sovereignty is the deeply rooted presumption in favor of concurrent jurisdiction between the federal courts and the state courts over federal causes of action. The Supreme Court explained in 1876, “[I]legal or equitable rights, acquired under either system of laws, may be enforced 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.”7 Further, the Court noted, “if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.”8 Nearly one century later, the Court maintained that “[w]e start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law.”9 Concurrent jurisdiction—intrinsic in our constitutional order—“has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule.”10 In 1981, the Court concluded: “It is black letter law, however, that the mere grant of jurisdiction to a federal court does not operate to oust a

6. State Court Procedures, supra note 2, at 949.  
8. Id.  
10. Id. at 507–08; see generally THE FEDERALIST NO. 82, supra note 4; FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 5–12 (1927); HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 8–11 (1973); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 400 (1826).
state court from concurrent jurisdiction over the cause of action.”11 More recently, the Court reaffirmed that it has “long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures.”12 When Congress creates a federal cause of action, it needs to do nothing in order for state courts of general jurisdiction to maintain concurrent jurisdiction. Likewise, state legislatures need not act in order for their state courts of general jurisdiction to maintain concurrent jurisdiction. (The steps Congress must take to render federal jurisdiction as exclusive is the subject of Part III). This Part explores the constitutional basis and history of concurrent jurisdiction.

A. The Constitution

The Constitution is silent as to why and how state courts maintain concurrent jurisdiction. The only clear reference to state courts in the Constitution is Article VI, which provides that the “judges in every state shall be bound thereby” by the supreme law of the land.13 As discussed at some length in Printz v. United States, while the state judges are bound by this law, state executive and legislative branch officials are not so bound.14 “Members of the several State Legislatures, and all executive and judicial Officers,” Justice Scalia wrote for the Court, are only “bound by Oath or Affirmation, to support this Constitution.”15 While the Supremacy Clause would be the most obvious textual basis for the presumption that state-court judges are bound by federal law, virtually all Supreme Court opinions have grounded this concurrent jurisdiction as implicit in our system of dual sovereigns, or through some combination of Article I and Article III.

B. The Federalist

The Federalist offers one of the most thorough analyses of the basis of concurrent jurisdiction. Justice Bradley, writing for the Court in Claflin v. Houseman, explained that Hamilton “fully examined” the issue of concurrent jurisdiction in Federalist 82, “with his usual analytical power and far-seeing genius; and hardly an argument or a suggestion has been made since which he did not anticipate.”16 This lavish praise is not much of an overstatement. Hamilton discusses the concerns about the “relation” of the “State courts” to the federal courts for “those causes which are to be submitted to federal jurisdiction.”17 Specifically, Publius

13. U.S. CONST. art. VI cl. 3.
17. THE FEDERALIST NO. 82, supra note 4.
addresses whether this jurisdiction is “exclusive, or are those courts to possess a concurrent jurisdiction.”

Hamilton noted that “[t]he only thing in the proposed Constitution, which wears the appearance of confining the causes of federal cognizance to the federal courts”—that is, exclusive jurisdiction—“is contained in” Article III, Section I, which provides “THE JUDICIAL POWER of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress shall from time to time ordain and establish.”19 This provision can be read to “signify, that the supreme and subordinate courts of the Union should alone have the power of deciding those causes to which their authority is to extend.”20 But he rejected this conception, and instead understands Article III “simply to denote, that the organs of the national judiciary should be one Supreme Court, and as many subordinate courts as Congress should think proper to appoint.”21 Stated differently, “the United States should exercise the judicial power with which they are to be invested, through one supreme tribunal, and a certain number of inferior ones, to be instituted by them.”22

Hamilton stressed that the presumption for “concurrent jurisdiction of the State tribunals” would be most desirable for the norm, as it is “the most natural and the most defensible construction” of Article III, Section I.23 Perhaps more importantly, in a contrast with an exclusive jurisdiction standard, concurrent jurisdiction would not “amount to an alienation of State power by implication.”24 Here, Hamilton is keenly aware of the issues of federalism inherent in our dueling sovereignties. Depriving state courts of jurisdiction over federal causes of action would impact judicial sovereignty.25

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18. Id.
19. Id.
20. Id.
21. Id.
22. Id.
23. Id.
24. Id.
25. I found the term judicial sovereignty used in one other, unrelated context. E. Thomas Sullivan, Judicial Sovereignty: The Legacy of the Rehnquist Court Narrowing the Nation’s Power: The Supreme Court Sides with the States, 20 CONST. COMMENT. 171, 187 (2003) (book review) (“For now, judicial sovereignty is the legacy of the Rehnquist Court. After Narrowing the Nation’s Power, the burden should be on the Supreme Court to make a compelling case for its drive to rearticulate federalism as an overarching constitutional and political doctrine. To date, the Court certainly has not done so.”).
C. 19th Century Cases

The Court’s earliest and most definitive explanation of concurrent jurisdiction of the state courts was articulated by Justice Joseph Bradley in *Claflin v. Houseman.* This case considered whether the New York Supreme Court, a trial court of general jurisdiction, had subject matter jurisdiction for a claim under the federal Bankruptcy Act. (At the time, Bankruptcy cases were not designated for exclusive jurisdiction). Justice Bradley explained that the laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty.

The Court held that the state courts maintained concurrent jurisdiction. Bradley reasoned that “State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws, and treaties of the United States.” The basis of this rule was inherent in our system of dual sovereigns. “When we consider the structure and true relations of the Federal and State governments,” Justice Bradley explained, “there is really no just foundation for excluding the State courts from all such jurisdiction.” In broad language, the Court added, “Legal or equitable rights, acquired under either system of laws, may be enforced 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.”

Further, “if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.” It is important to stress that Congress does not need to take any affirmative steps to grant jurisdiction to the state courts. Nor do the states have to do anything more than vest their state courts with general jurisdiction; it is implicit in our dual sovereign system. (I pause to note that states must define by “their own constitution” whether their courts are “competent to take it.” If they don’t, the states lack the ability to hear federal causes of action.) This holding sug-

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26. Justice Bradley, a somewhat lesser known Justice, served on the Court from 1870 through 1892. He is probably best known for serving as a Republican appointed to the Electoral Commission that resolved the disputed election of 1876. Bradley authored the majority opinion in *The Civil Rights Cases, Hans v. Louisiana,* and dissented in the *Slaughter-House Cases.* The Civil Rights Cases, 109 U.S. 3 (1883); Hans v. Louisiana, 134 U.S. 1 (1890); Slaughter-House Cases, 83 U.S. 36, 111 (Bradley, J., dissenting).
27. 93 U.S. 130, 134 (1876).
28. Id. at 133.
29. Id. at 136.
30. Id.
31. Id.
32. Id.
33. Id. (emphasis added).
gests that any specific grants of jurisdiction to state courts are superfluous and unnecessary if concurrent jurisdiction is always maintained.

“The courts of the two jurisdictions are not foreign to each other,” Justice Bradley observed, “nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.” Even though a state court “derives its existence and functions from the State laws,” it “is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws.” This conclusion raises a thorny issue for state courts that are not of general jurisdiction, but derive limited jurisdiction from the state legislature.

The Claflin court, citing Chief Justice Taney’s opinion in Ableman v. Booth, explained “the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other . . . .” But this citation is not directly on point. In Ableman, Taney concluded only that state courts could not overturn a federal court ruling. In rejecting the power of the Supreme Court of Wisconsin to nullify a federal judgment, Taney worried about “courts of justice of the several States,” which are subject to “local influences,” issuing “conflicting decisions.” This would result in the laws of the United States receiving “different interpretations in different States, and the Government of the United States would soon become one thing in one State and another thing in another.” Taney’s explanation was offered to show that it was “essential, therefore, to its very existence as a Government, that [the United States] should have the power of establishing courts of justice, altogether independent of State power, to carry into effect its own laws . . . .”

But this holding says nothing about the general presumption of concurrent jurisdiction. It merely suggests, in dicta, that state courts cannot reverse the judgments of federal courts. To the extent that state judges issue decisions that are not uniform, the Supreme Court sits in review. Justice Story makes this point clearly in Martin v. Hunter’s Lessee:

Judges of equal learning and integrity, in different states, might differently interpret a statute or a treaty of the United States, or even the constitution itself; if there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy in any two states.

34. Id. at 137.
35. Id.
36. Id. (citing Ableman v. Booth, 62 U.S. 506 (1858)) (emphasis added).
37. Ableman, 62 U.S. at 518.
38. Id. at 517–18.
39. Id. at 518.
40. Id.
The Supreme Court, sitting in appellate review of all state courts, ably serves the role as this “revising authority.”

As Hamilton explained in *Federalist 82*, “[t]he [state] courts . . . . will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions.” Bradley acknowledged this attribute of state courts, writing that there “is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied.”

So long as the state courts are vested with jurisdiction, either by their Constitution or legislature, concurrent jurisdiction cannot be denied.

Stated succinctly by Justice John Marshall Harlan I, the mere extension of the judicial power of the United States to suits brought by a state against citizens of other states did not of itself devest the state courts of jurisdiction to hear and determine such cases, and as congress has not invested the national courts with exclusive jurisdiction in cases of that kind, it follows that the courts of a state may, so far as the constitution and laws of the United States are concerned, take cognizance of a suit brought by the state in its own courts against citizens of other states.

Critically, courts must have jurisdiction over the matter. As Justice Thomas explained a century later in *Haywood v. Drown*, “the Constitution did not impose an obligation on the States to accept jurisdiction over such claims . . . . The Constitution instead left the States with the choice—but not the obligation—to entertain federal actions.”

In the end, the Supreme Court will sit in review of that issue.

### D. 20th Century Cases

The Court’s concurrent-jurisdiction precedents have remained largely consistent for over a century. In *Gulf Offshore v. Mobil Oil Corp.*, the Court continued its trend of reading exclusive grants very narrowly. In this case, the Outer Continental Shelf Lands Act granted district courts “original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf . . . .” Original does not exclusive make. The Court concluded that “[i]t is black letter law, however, that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action.” Relying on Hamilton’s explanation in *The Federalist No. 82*, the Court grounded this presumption of both

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42. *The Federalist No. 82*, supra note 4.
46. *Id.* at 478–79 (citing 43 U.S.C. § 1333(b) (2012)).
47. *Id.*
48. *Id.*
the States and National governments “exercis[ing] concurrent sovereignty,” with the “Constitution limit[ing] the powers of each.” Of course the Constitution “requires the States to recognize federal law as paramount.” But this conclusion begs the question of whether statutes depriving state courts of jurisdiction are constitutional, and thus supreme.

In other cases, the Court has much more strongly grounded this presumption of concurrency in principles of federalism. *Tafflin v. Levitt* considered whether there was concurrent jurisdiction for the Racketeer Influenced and Corrupt Organizations Act (“RICO”). The relevant statute provided that: “Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court . . . .” The plain text of the statute was silent concerning concurrent state court jurisdiction. Writing for a unanimous Court, Justice O’Connor found that this silence was not sufficient to divest the state courts of concurrent jurisdiction, even over a subject matter to which the states could not claim pre-existing jurisdiction. RICO’s “grant of federal jurisdiction is plainly permissive, not mandatory, for the statute does not state nor even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described ‘may’ be brought in the federal district courts, not that they must be.”

Relevant to our discussion, Justice O’Connor dug towards the root of concurrency. “We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law.” Concurrent jurisdiction—intrinsic in our constitutional order—“has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule.” Presumably this “phenomenon” and “deeply rooted presumptions” must be grounded in the Constitution itself, but the Court does not specify this.

The power the state courts have to adjudicate federal claims is “inherent.” Under our “system of dual sovereignty,” the Court continued, “we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.” For state courts of general jurisdiction, which can usually hear all cases, the state legislatures need not act for those courts to hear federal matters. Arguably, maintaining state courts of jurisdiction, against the backdrop of concurrent jurisdiction, signifies

49. *Id.*
50. *Id.* at 478.
51. *Id.* 493 U.S. 455, 460 (1990) (citing 18 U.S.C. § 1964(c)).
52. *Id.* at 458–59.
53. *Id.* at 460–61 (emphasis added) (internal quotation marks omitted).
54. *Id.* at 459 (internal citation omitted).
55. *Id.* at 460–61 (emphasis added) (internal quotation marks omitted).
57. *Id.* (emphasis added).
consent that state judges can hear these cases. All that needs to happen is that a plaintiff “invoke” their jurisdiction “in conformity” with the general laws of the court.  


59. Id. at 944.

60. Collins, Article III Cases supra note 2, at 48.

No. 5] STATE JUDICIAL SOVEREIGNTY 2045

III. MANDATORY JURISDICTION

Through mandatory jurisdiction, Congress attempts to require, or force state courts to hear certain causes of action. This is different from concurrent jurisdiction where state courts entertain federal causes of action by choice. Mandatory jurisdiction cases come before the Court in two ways. First, a state judge declines to entertain a federal cause of action. Second, a state legislature or state constitution divests its state courts of jurisdiction over a certain federal cause of action.

Although this doctrine has followed two different arcs, three principles have remained constant. First, Congress does not have the power to vest state courts with subject matter jurisdiction. Stated differently, Congress cannot commandeer the state legislatures and force them to vest state courts with jurisdiction. Several state constitutions, rather than mere legislation, are responsible for allocating jurisdiction. This approach presents even broader commandeering problems, as it implicates the right of the people as sovereigns to amend their state’s organic law.

Second, state courts of general jurisdiction that can otherwise entertain concurrent jurisdiction are almost always obligated to exercise that jurisdiction. It is not a valid excuse to claim that enforcing federal law in the state court of general jurisdiction may result in confusion, inconsistent application of federal law, or any other substantive problem. The “state judges” clause of Article VI resolves those objections.

Third, state courts may decline to exercise subject matter jurisdiction if their state legislatures withdrew those causes of action from its jurisdiction. This principle was the clear rule of law for nearly two centuries, but it may not be any longer. In several opinions authored by Justice Stevens, this doctrine has branched off. In these cases, the Supreme Court precluded state legislatures from divesting their state courts of
general jurisdiction over federal causes of action. The Court has instituted something of an anti-discrimination principle, which rejects a state’s decision to treat federal causes of action separately as violative of the Supremacy Clause. This latter change, as highlighted by Justice Thomas in his dissenting opinion in *Haywood v. Drown*, represents a sharp turn from over two centuries of judicial sovereignty jurisprudence. All three fields of this law, however, are consistent in their recognition of state judicial sovereignty, which places limitations above and beyond Congress’ Article I and III powers to commandeer the state courts.

**A. The “Power” of the Supremacy Clause**

Several decisions have suggested, in one way or another, that state courts are required to hear federal causes of action due to the Supremacy Clause.⁶¹ This argument, never entirely fleshed out, is incomplete. Under Article VI, federal law is the supreme law of the land. That much is easy. The judges of these courts are bound by the supreme law under Article VI. No dispute there. Several Framers of the Constitution even contended that Congress need not constitute any inferior tribunals, and the state courts would serve double-duty as both state and federal institutions. But beyond this single reference in the Constitution, state courts remain subject to control of the states’ police power, vested only with the jurisdiction conferred by the state.

The interaction between the Supremacy Clause and state-court jurisdiction, however, is far more complicated. First, the Supremacy Clause is not an affirmative grant of power to Congress. Standing by itself, the provision cannot require state courts to hear certain causes of action. Congress must rely on the Necessary and Proper power, coupled with either the “inferior tribunals” clause or a specific grant of power in Article I, Section 8. Second, consideration must be given to the subject matter jurisdiction a state court already has. If a state court’s preexisting jurisdiction permits cognizance over a federal cause of action, Congress’ request that a state court hear it is not problematic. But Congress lacks an affirmative power, enumerated or implied, to vest state courts with subject matter jurisdiction. Third, state legislatures that never vested any of their courts with subject matter jurisdiction over a cause of action cannot be commandeered to so vest them. As a practical matter, all fifty states maintain state courts of general jurisdiction, so this problem is not particularly salient. The problem arises, however, if a state attempts to withdraw subject matter jurisdiction from its state courts. Under modern jurisprudence, such a decision may run afoul of the Supremacy Clause.

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⁶¹. See, e.g., *In re Certified Questions from U.S. Crt. App. for Sixth Cir.*, 696 N.W.2d 687, 694 (Mich. 2005) (Markman, J., dissenting) (“Nothing in the Michigan Constitution expressly grants jurisdiction to the courts of Michigan to entertain federal claims; it has long been understood that state courts may be required under some circumstances to resolve such claims, and to adjudicate federal rights.”).
The Supremacy Clause has no “power” by itself. Congress, acting pursuant to its enumerated and implied powers, can enact laws arising under the Constitution that are the supreme law of the land. These laws, in turn, displace conflicting state laws pursuant to the Supremacy Clause. But it is incorrect to say that by dint of the Supremacy Clause, state jurisdictional statutes—that do not conflict with any federal law—are unconstitutional.

Several Supreme Court decisions seem to suggest that the Supremacy Clause, standing alone, gives Congress such a power to grant the federal courts exclusive jurisdiction. In *Yellow Freight System, Inc. v. Donnelly*, Justice Stevens stated that “[t]o give federal courts exclusive jurisdiction over a federal cause of action, Congress must, in an exercise of its powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction.” In *Tafflin v. Levitt*, Justice O’Connor explained that “under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.” In his concurring opinion in *Tafflin*, Justice Scalia, joined by Justice Kennedy, wrote, “it therefore takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction—an exercise of what one of our earliest cases referred to as ‘the power of congress to withdraw’ federal claims from state-court jurisdiction.”

All of these analyses are incomplete. As is often the case, Supremacy Clause analyses can be circular. There is no question that under the Supremacy Clause, state judges are bound by the supreme law of the land. This principle, however, does not answer whether a judge must entertain state causes of action. Ironically, the Justice who most effectively rebutted the view articulated by Justice Scalia in *Tafflin v. Levitt* was Justice Scalia six years later in *Printz v. United States*.

In *Printz*, the Court invalidated provisions of the Brady Handgun Violence Prevention Act, which required local law enforcement officers to conduct background checks on prospective gun purchasers. Justice Scalia’s majority opinion rejected the dissent’s argument that the Supremacy Clause saves the statute. Rather, he wrote, the Supremacy Clause “makes ‘Law of the Land’ only ‘Laws of the United States which shall be made in Pursuance [of the Constitution].’” As a result, Scalia

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62. 494 U.S. 820, 823 (1990) (emphasis added); *Tafflin*, 493 U.S. at 470 (Scalia, J. & Kennedy, J., concurring) (“It therefore takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction—an exercise of what one of our earliest cases referred to as ‘the power of congress to withdraw’ federal claims from state-court jurisdiction.”) (emphasis added).
64. *Id.* at 470 (emphasis added) (quoting Houston v. Moore, 18 U.S. 1, 26 (1820)).
65. THE FEDERALIST NO. 27, at 174 (Alexander Hamilton) (“It merits particular attention in this place, that the laws of the Confederacy, as to the ENUMERATED and LEGITIMATE objects of its jurisdiction, will become the SUPREME LAW of the land; to the observance of which all officers legislative, executive, and judicial, in each State, will be bound by the sanctity of an oath.”).
67. *Id.*
concluded, “the Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution.”

In other words, to become the supreme law of the land, a statute still must be enacted pursuant to an independent and enumerated grant of authority in Article I. A federal statute mandating that state courts entertain a specific cause of action, is only the supreme law of the land so long as Congress has the power to require state courts to do so in the first place. If Congress lacks the power to infringe on judicial sovereignty in this matter, the law is “not in accord with the Constitution,” and cannot be considered the supreme law of the land. The Supremacy Clause does not independently grant any powers, let alone the authority, to require state legislatures to vest their state courts with jurisdiction to entertain federal causes of action.

In a related context, Justice Thomas explained in his dissent in *Haywood v. Drown* that “[a]lthough the Supremacy Clause does not, on its own force, pre-empt state jurisdictional statutes of any kind, it may still pre-empt state law once Congress has acted.” Justice Thomas continued, “the Supremacy Clause does not address whether a state court must entertain a federal cause of action; it provides only a rule of decision that the state court must follow if it adjudicates the claim.” He stressed, however, that there was “no need to reach the more difficult question of whether Congress has the delegated authority under the Constitution to require state courts to entertain a federal cause of action.”

This hypothetical addresses the issue of whether Congress has the power to mandate that state courts exercise jurisdiction over causes of action when they lack such jurisdiction otherwise. The basis of this power cannot be the Supremacy Clause alone. Justice Stevens, in his *Printz* dissent, seemed to be on the same page as Justice Thomas where he asked rhetorically, “[t]hat language [the Supremacy Clause] commands state judges to ‘apply federal law’ in cases that they entertain, but it is not the source of their duty to accept jurisdiction of federal claims . . ..” What is the “source of their duty” to accept federal claims? And what is the source of their inability to consider them?

Justice Thomas answered, “[t]his historical record makes clear that the Supremacy Clause’s exclusive function is to disable state laws that are substantively inconsistent with federal law—not to require state courts to hear federal claims over which the courts lack jurisdiction.” In other words, Congress can, consistent with respect for state judicial sov-

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68. Id.
69. Id.
71. Id. at 751 (citing RAOUL BERGER, CONGRESS V. THE SUPREME COURT 245 (1969) (The Supremacy Clause only “‘enacts what the law shall be’... [I]t defines the governing ‘supreme law,’ and if a State court has jurisdiction, it commands that that law shall govern.”)).
72. Id. at 764 n.8 (emphasis added).
73. Printz, 521 U.S. at 968 (Stevens, J., dissenting).
74. *Haywood*, 556 U.S. at 752 (Thomas, J., dissenting).
ereignty, take steps to preempt statutes that would remove certain causes of action from their courts. Stated more succinctly, “[a]lthough the Supremacy Clause does not, on its own force, pre-empt state jurisdictional statutes of any kind, it may still pre-empt state law once Congress has acted. Federal law must prevail when Congress validly enacts a statute that expressly supersedes state law . . . .” The key word is valid. And what makes the action valid is how Congress, pursuant to its enumerated power, alters the balance between the dual sovereigns. As Professors Samuel Jordan and Christopher Bader observe,

[the] power [of compulsory state-court jurisdiction] must flow from the natural operation of the [Supremacy] Clause; that is, the supremacy of a law enacted pursuant to a validly exercised congressional power. The obvious next question is: Where else in the Constitution could a federal power to compel state-court jurisdiction come from? The potential answers are Article I and Article III. But this is not to say that Congress is without the power to enact a federal law that trumps a state jurisdictional statute.

B. Mandatory Jurisdiction as an Originalist Matter

In Haywood v. Drown, writing alone, Justice Thomas offered an originalist analysis of the scope of Congress’ ability to compel state courts to exercise jurisdiction over federal causes of action. He explained that state courts can decline to exercise jurisdiction over federal matters. Thomas observed that the “history of the drafting and ratification” of Article III, Section I “establishes that it leaves untouched the States’ plenary authority to decide whether their local courts will have subject-matter jurisdiction over federal causes of action.” After discussing the vigorous debates during the ratification convention over the status of the lower courts, Thomas agreed with the “assumption that state courts would continue to exercise concurrent jurisdiction over federal claims [as] essential” to the Madisonian compromise. In conclusion, Thomas found, “[t]he Constitution’s implicit preservation of state authority to entertain federal claims, however, did not impose a duty on state courts to do so.”

75. Id. at 764 (emphasis added).
76. Samuel P. Jordan & Christopher K. Bader, State Power to Define Jurisdiction, 47 GA. L. REV. 1161, 1170 (2013). “Concurrency and obligation are, of course, not equivalent, but some highly probative original understandings of concurrent state-federal jurisdiction can support state-court jurisdictional freedom.” Id. at 1193.
77. For a critique and defense of this opinion, see id. at 1164.
78. Haywood, 556 U.S. at 743 (Thomas, J., dissenting).
79. Id. at 746.
80. Id. at 747; see also Collins, Article III Cases, supra note 2, at 144 (“It is . . . extremely difficult to argue from the debatable assumption that state courts would be under an obligation to take all Article III judicial business in the first instance—as a quid pro quo for the Constitution’s noninclusion of any reference to lower federal courts—to the conclusion that such a duty still existed when the second half of that bargain was decisively rejected (in the Madisonian Compromise, no less.”).
action, it is the end of the matter as far as the Constitution is concerned.” 81 Thomas explained, “[a]s a textual matter, however, the Supremacy Clause does not address whether a state court must entertain a federal cause of action; it provides only a rule of decision that the state court must follow if it adjudicates the claim.” 82

Thomas continued, “[t]he supremacy of federal law, therefore, is not impugned by a State’s decision to strip its local courts of subject-matter jurisdiction to hear certain federal claims. Subject-matter jurisdiction determines only whether a court has the power to entertain a particular claim—a condition precedent to reaching the merits of a legal dispute.” 83 “If the state court does not reach the merits of the dispute for lack of statutory or constitutional jurisdiction, the preeminence of federal law remains undiminished. Accordingly, the superiority of federal law as a substantive matter does not trigger an obligation on States to keep their courts jurisdictionally neutral with respect to federal and state-law claims.” 84 There is always a resort to federal courts for the same causes of action: “Jurisdictional statutes therefore by definition are incapable of undermining federal law,” as Section 1983 “necessarily operates without prejudice to the adjudication of the matter in a competent forum.” 85 “New York has the organic authority, therefore, to tailor the jurisdiction of state courts to meet its policy goals.” 86

Justice Thomas also disagreed with Justice Stevens’ reliance on The Federalist. Thomas explained, “Alexander Hamilton’s recognition of ‘concurrent jurisdiction’ should not be mistaken for a suggestion that the Constitution requires state courts to hear federal claims.” 87 But, Hamilton “remained skeptical that state courts could be forced to entertain federal causes of action when state law deprived them of jurisdiction over such claims.” 88 He merely understood, Thomas pointed out, that the States would be “divested of no part of their primitive jurisdiction” and state courts “in every case in which they were not expressly excluded by the future acts of the national legislature . . . [would] of course take cognizance of the causes to which those acts may give birth.” 89 Thus the state courts “would continue to entertain federal claims consistent with their

81. Haywood, 556 U.S. at 749.
82. Id. at 751 (citing Raoul Berger, Congress v. The Supreme Court 245 (1969)) (“The Supremacy Clause only ‘enacts what the law shall be’ . . . . [I]t defines the governing ‘supreme law,’ and if a State court has jurisdiction, it commands that that law shall govern”).
83. Id. at 755.
84. Id. at 756.
85. Id. at 769.
86. Id. at 770 (citing Fay v. Noia, 372 U.S. 391, 466–67 (1963) (Harlan, J., dissenting) (“The right of the State to regulate its own procedures governing the conduct of litigants in its courts, and its interest in supervision of those procedures, stand on the same constitutional plane as its right and interest in framing ‘substantive’ laws governing other aspects of the conduct of those within its borders.”)).
87. Id. at 746 n.1 (Thomas, J., dissenting).
88. Id. (citing Alexander Hamilton, The Examination, No. 6, 25 Papers 484, 487–88 (H. Syrett ed., 1977) (Jan. 2, 1802) (“[I]t is not to be forgotten, that the right to employ the agency of the State Courts for executing the laws of the Union, is liable to question, and has, in fact, been seriously questioned.”)).
89. Id. (citing The Federalist No. 82, supra note 4, at 132).
‘primitive jurisdiction’ under state law.” But, Thomas countered, Hamilton “remained skeptical that state courts could be forced to entertain federal causes of action when state law deprived them of jurisdiction over such claims.” "The Constitution," he wrote, “did not impose an obligation on the States to accept jurisdiction over such claims.” Rather, “[t]he Constitution instead left the States with the choice—but not the obligation—to entertain federal actions.”

C. State Courts Can Decline to Exercise Jurisdiction

The states, in various ways, have tested Congress’ power to mandate jurisdiction. The Supreme Court’s jurisprudence in this area has, until the late 20th century, been largely consistent. If a state court has competent jurisdiction to hear a federal cause of action, it could not dismiss the federal claim. If a state attempts to withdraw from a court of general jurisdiction cognizance of a federal cause of action, the Supreme Court can review the validity of that decision—though what is and is not permitted is far from settled. In most cases, the state was acting within its sovereign power to constitute courts. But, in recent years—largely from the pen of Justice John Paul Stevens—the Court has crafted an anti-discrimination principle, whereby states that withdraw jurisdiction for federal causes of action have acted unconstitutionally. This last line of cases is at odds with two centuries of jurisprudence, and it fails to completely account for state judicial sovereignty.

I. Printz v. United States

To review this line of case law, we will start with more recent cases, work backwards, and then return to the present to chronicle how it has changed. The most thorough discussion of mandates on state courts was engaged in Printz v. United States between Justices Scalia and Stevens. Printz involved the constitutionality of a provision of the Brady Handgun Violence Prevention Act that “command[ed] state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks . . . .” In a 5-4 decision, Justice Scalia found that the Act commandeered the state executive branches, in violation of principles of federalism. Scalia, and Stevens in the dissent, vigorously debated whether Congress could require state courts to act on behalf of the United States.

Much of their disagreement focused on obligations that Congress imposed on state courts. The Court in Printz suggested that Congress’ authority to “permit imposition of an obligation on state judges to en-

90. Id.
91. Id.
93. Id.
95. See id. at 935.
force federal prescriptions” was “perhaps implicit in one of the provi-
sions of the Constitution [Article III, § 1], and was explicit in another [the
Supremacy Clause, Article VI, cl. 2].” 96 Citing the “so-called Madisonian
Compromise, Article III, § 1, established only a Supreme Court, and
made the creation of lower federal courts optional with the Congress—
even though it was obvious that the Supreme Court alone could not hear
all federal cases throughout the United States.” 97 Here, because there
was no guarantee that any inferior federal courts would be constituted,
state courts could act in service of the federal government—but only with
their consent.

Further, the “Supremacy Clause, Art. VI, cl. 2, announced that ‘the
Laws of the United States . . . shall be the supreme Law of the Land; and
the Judges in every State shall be bound thereby.’” 98 This is unremarka-
ble, Scalia contended. Judges, unlike legislatures or executives, “applied
the law of other sovereigns all the time” under the doctrine of “principle
underlying so-called ‘transitory’ causes of action[,]” whereby “laws which
operated elsewhere created obligations in justice that courts of the forum
State would enforce.” 99 This principle is also implicit in the Full Faith
and Credit Clause, which “generally required such enforcement with respect
to obligations arising in other States.” Thus, it is “understandable why
courts should have been viewed distinctively in this regard.” 100

With this backdrop Justice Scalia cites a number of early statutes
“enacted by the first Congresses [that] required state courts” to take ac-
tion concerning matters of naturalization. 101 The first Naturalization Act
provided that an alien “may be admitted to become a citizen thereof on
application to any common law court of record, in any one of the
states . . . .” 102 It further provided that the state court “shall administer”
the oath, accept “proof” that “he is a person of good character,” and the
“Clerk of such Court shall record such Application.” 103 The provision
with the mandatory “shall,” seems to impose an affirmative obligation on
state judges. Justice Stevens observed that this is a “greater imposition
on state sovereignty[,]” than the Supremacy Clause’s command that state

96. Id. at 907; Saikrishna Prakash, Field Office Federalism, 79 VA. L. REV. 1957, 2032 (1993)
(“As a matter of original understanding, the Founding Generation understood that state courts could
be commandeered to enforce federal law.”); Collins, Article III Cases, supra note 2, at 45 (concluding
as an original matter that “states did not have to accept unwanted federal civil and criminal judicial
business, and that Congress could not compel them to do so.”).
97. Printz, 521 U.S. at 907 (citing CHARLES WARREN, THE MAKING OF THE CONSTITUTION 325–27 (1928)).
98. U.S. CONST., art. VI, cl. 2.
99. Id.; see also McKenna v. Fisk, 42 U.S. 241, 247–49 (1843) (“And it also appears from the au-
thorities which have been cited, that in a transitory action of trespass, it is only necessary to lay a ven-
ue for a place of trial, and that such venue is good without stating where the trespass was in fact com-
mitted, with a scilicet of the county in which the action is brought.”).
100. Printz, 521 U.S. at 907.
101. Id. at 905–06.
103. See id.
courts must “apply federal law in cases that state courts have consented to entertain.”

The Naturalization Act, passed in 1798 under President Adams, required the “clerk, or other recording officer of the [state] court before whom a declaration has been, or shall be made, by any alien, of his intention to become a citizen of the United States, to certify and transmit to the office of the Secretary of State of the United States.” Justice Stevens, in dissent, countered that the majority’s “description of these early statutes is both incomplete and at times misleading.” Focusing on the commands with the word “shall,” Stevens argued, “statutes of the early Congresses required in mandatory terms that state judges and their clerks perform various executive duties with respect to applications for citizenship.” This history seems to suggest that the state courts were obligated to exercise jurisdiction over certain tasks concerning national immigration policy.

Though, Scalia noted, “[i]t may well be, however, that these requirements applied only in States that authorized their courts to conduct naturalization proceedings” in the first place. In other words, state sovereignty placed a check on the ability of Congress to conscript the state courts into federal service. Congress could pass these statutes, but it wasn’t clear that state courts could comply if they lacked the jurisdiction to do so in the first place. Scalia explained that intrusions on state courts’ jurisdiction were limited to judicial matters: “the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.” But, it is not enough to say that state courts are so bound, because it is local legislation or state constitutions that defines their jurisdiction. State court judges cannot act in the absence of jurisdiction, and the federal government lacks the power to confer it onto them. Rather, the federal government can authorize them to hear these cases concurrently when it is consistent with their original jurisdiction. Though, if the presumption of concurrency is as strong as the Court has implied, no express delegation would even be necessary. Specific acts that do so are acting superfluously.

2. Holmgren and Jones

Justice Scalia cites two cases to support this discretion: Holmgren v. United States and United States v. Jones. In Jones, Justice Field explained that “from the time of its establishment [the federal] government

104. Printz, 521 U.S. at 967 (Stevens, J., dissenting).
105. Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567 (repealed 1802).
106. Printz, 521 U.S. at 949 (Stevens, J., dissenting).
107. Id. (emphasis added).
108. Id. at 906 (emphasis added).
109. Id. at 907 (emphasis added).
110. 217 U.S. 509 (1910); 109 U.S. 513 (1883).
has been in the habit of using, with the consent of the states, their officers, tribunals, and institutions as its agents.”\textsuperscript{111} With this consent, “[t]heir use has not been deemed violative of any principle or as in any manner derogating from the sovereign authority of the federal government; but as a matter of convenience and as tending to a great saving of expense.”\textsuperscript{112} In other words, these commands to state courts were more like requests, made against the background principles of state judicial sovereignty.

With respect to naturalization laws, Field noted, “jurisdiction thus conferred could not be enforced against the consent of the states . . . .”\textsuperscript{113} Congress cannot vest state courts with jurisdiction. But, “when its exercise was not incompatible with state duties, and the states made no objection to it, the decisions rendered by the state tribunals were upheld.”\textsuperscript{114} So, for courts of general jurisdiction, unless the state legislature said otherwise, it was presumed that state courts could exercise concurrent jurisdiction. “Whatever question might arise as to such delegation of authority,” Field stressed, “we can see none where the inquiry relates to an incidental fact, not involving in its ascertainment the exercise of any sovereign attribute.”\textsuperscript{115} In all these cases, Field noted that the states must be amenable to using their courts in this manner.\textsuperscript{116}

The second case Scalia cited, \textit{Holmgren v. United States}, considered an appeal from a conviction for “false swearing in naturalization proceedings” in a California court.\textsuperscript{117} The petitioner challenged his federal conviction on the grounds that the state court lacked jurisdiction to receive his false oath. Holmgren argued that “there is no constitutional power in Congress to confer jurisdiction upon the courts of a state in naturalization proceedings, involving admission to citizenship in the United States.”\textsuperscript{118} Citing the first Naturalization Act passed in 1790,\textsuperscript{119} the Court observed that “from the earliest history of the government,” Congress has “authorized such proceedings in the state as well as Federal courts.”\textsuperscript{120} Authorized, not obligated.

\begin{itemize}
  \item \textsuperscript{111} Jones, 109 U.S. at 519 (emphasis added).
  \item \textsuperscript{112} Id. at 519–20.
  \item \textsuperscript{113} Id. at 520.
  \item \textsuperscript{114} Id. (emphasis added).
  \item \textsuperscript{115} Id.
  \item \textsuperscript{116} Id. at 521.
  \item \textsuperscript{117} Holmgren v. United States, 217 U.S. 509, 515–16 (1910).
  \item \textsuperscript{118} Id. at 516.
  \item \textsuperscript{119} Id. at 517 ("It is undoubtedly true that the right to create courts for the states does not exist in Congress. The Constitution provides (art. 3, § 1) that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish. But it does not follow that Congress may not constitutionally authorize the magistrates or courts of a state to enforce a statute providing for a uniform system of naturalization, and defining certain proceedings which, when complied with, shall make the applicant a citizen of the United States. This Congress had undertaken to do in making provision for the naturalization of aliens to become citizens of the United States in a certain class of state courts,—those of record having common-law jurisdiction, a clerk and a seal. U. S. Rev. Stat. § 2165, U. S. Comp. Stat. 1901, p. 1329, since superseded by the act of June 29, 1906 (34 Stat. at L. 596, chap. 3592, U. S. Comp. Stat. Supp. 1909, p. 97"); Naturalization Acts of 1790, ch. 3; see also Frederick Van Dyne, Citizenship of the United States (1904)."
  \item \textsuperscript{120} Holmgren, 217 U.S. at 516 (emphasis added).
\end{itemize}
also referenced earlier Supreme Court decisions that involved oaths given in state court, yet neither weighed in on whether this practice was constitutionally obligated. But the question of conferring jurisdiction is different from whether the state courts are obliged to follow it.

In the very next paragraph, Justice Day noted that “[t]he question is not here presented whether the states can be required to enforce such naturalization laws against their consent.” This was the same language concerning consent used in Jones. In this case, the California Constitution, and state statutes “grant to the courts the power of naturalization, and the right to issue papers therefor.” In other words, the Golden State consented to this imposition of jurisdiction. Recognizing the sovereignty of the states, the Court concluded, “[u]nless prohibited by state legislation, state courts and magistrates may exercise the powers conferred by Congress under such laws.” This statement of law was consistent with how the Court, until fairly recently, viewed the issue of mandatory federal jurisdiction.

3. Stephens

Judicial sovereignty exists to place a check on mandatory jurisdiction for federal causes of action. To support this proposition, the Holmgren Court favorably cited Alexander Stephens, Petitioner, an 1855 decision of the Massachusetts Supreme Judicial Court by the renowned Chief Justice Lemuel Shaw. The General Court of Massachusetts (the legislature) passed a statute “restricting the several courts established by the laws of this commonwealth from exercising jurisdiction in [federal] cases of naturalization.” Under this law, state courts, even those of general jurisdiction, were prevented from exercising the obligations Congress enacted in the Naturalization Act.

The Supreme Judicial Court found this state statute valid. First, it was deemed unnecessary for the state courts to exercise jurisdiction here. Because the “congress ha[d] very properly provided for [the power of naturalization] by the courts of the United States,” the “superadded power by the act, giving the same jurisdiction to the courts of the State, is not necessary to the just rights of those entitled by law to the privilege of becoming citizens.” It was not necessary for the Massachusetts courts to also exercise jurisdiction because the federal courts were ably suited to

121. Stark v. Chesapeake Ins. Co., 11 U.S. 420 (1813) (affirming validity of oath given in York County, Maryland); Campbell v. Gordon, 10 U.S. 176, 182 (1810) (“It is true, that this requisite to his admission is not stated in the certificate; but it is the opinion of this court, that the court of Suffolk must have been satisfied as to the character of the applicant, or otherwise a certificate, that the oath prescribed by law had been taken, would not have been granted.”).
122. Holmgren, 217 U.S. at 517 (emphasis added).
123. Id.
124. Id. (emphasis added).
126. Id. at 559 n.A1.
127. Id. at 562.
handle those matters. (This argument holds true today. Anyone can bring any federal claim in any federal court that they could bring in state court, so long as venue is proper.) Thus, it was within Massachusetts’s sovereign power to shut its courthouse doors to these federal claims.

Further, the Supremacy Clause, under which state judges are bound to support supreme law, is no obstacle. “These powers given to state courts are therefore naked powers,” Chief Justice Shaw observed, “which impose no legal obligation on courts to assume and exercise them, and such exercise is not within their official duty, or their oath to support the constitution of the United States.”128 Congress cannot, by its own powers, vest jurisdiction on the state courts where their state legislatures have decided otherwise. These powers are merely “naked.”129 The fact that a federal law is enacted does not render it the supreme law of the land. Standing by itself, the law must not violate the Constitution. This notion of “naked powers” reflects the dynamic Justice Scalia described in Printz, where these duties imposed on state judges were subject to the state’s consent.130

In Stephens, principles of judicial sovereignty placed a check on Congress’ powers. Because “the government of this commonwealth has declared that the courts and magistrates appointed by it shall not exercise jurisdiction over the subject of naturalization,” the Supreme Judicial Court “shall not exercise jurisdiction over the subject of naturalization,” and “is not competent for this court to grant the present petition.”131 The case was dismissed.

4. Prigg v. Pennsylvania

Another precedent on point, cited by Chief Justice Shaw but not by Justice Day or Justice Scalia, is Prigg v. Pennsylvania. This case considered whether the Fugitive Slave Act preempted a Pennsylvania law that prohibited returning runaway slaves in Pennsylvania back to slave states. In this notorious 1842 opinion, Justice Story found the Fugitive Slave Act “to be clearly constitutional, in all its leading provisions, and, indeed, with the exception of that part which confers authority upon state magistrates.”132 It is the last element that is most relevant to our discussion. The Fugitive Slave Act required state judges to enforce the law. In this oft-forgotten portion of the opinion, which turned out to be quite significant,133 Story—who otherwise believed in autonomy of the two separate courts—found that state courts could be exempted from enforcing the

128. Id.
129. Id. at 563.
133. In the aftermath of Prigg, many states, relying on this proviso, banned their state magistrates from enforcing the Fugitive Slave Act, forcing federal agents to implement the law.
Fugitive Slave Act if state legislatures deprived them of jurisdiction to do so.\(^{134}\) After all, courts without jurisdiction can do nothing.

With respect to the “authority so conferred upon state magistrates, while a difference of opinion has existed, and may exist still, on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this court, that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation.”\(^{135}\) In other words, in the normal course, in courts of general jurisdiction, state courts were obligated to enforce federal law. But, state legislation could deprive state judges of subject matter jurisdiction concerning the Fugitive Slave Act. (Many states would go on to do just that after Prigg, preventing their state judges from being complicit in the Act.) This was effectively the reasoning relied on by Chief Justice Shaw in *Stephens*, in finding that the Massachusetts statute that deprived state courts of jurisdiction over naturalization matters was constitutional. In *Haywood v. Drown*, Justice Thomas likewise noted that in *Prigg v. Pennsylvania*, the Supreme Court concluded that the state courts could not “be compelled to enforce” the 1793 Fugitive Slave Act.\(^{136}\) The majority opinion by Justice Stevens in *Haywood* failed to discuss *Prigg*, though he would probably argue that this precedent was obviated—this is not entirely clear.

There are many other cases on point from this period finding limits on the ability of Congress to force the state courts to hear federal causes of action. In *Claflin v. Houseman*, the Court acknowledged that “[s]tate courts have, in certain instances, declined to exercise the jurisdiction conferred upon them.”\(^{137}\) The Court cited *United States v. Lathrop*, which found that a New York court lacked jurisdiction to hear a criminal prosecution under the laws of the United States, even though the federal statute provided that “such suit and recovery may be had before any court of the state, holden within the said district, having jurisdiction in like cases.”\(^{138}\)

The *Claflin* court drew attention to Justice Platt’s dissenting opinion. “I admit,” Platt wrote, that Congress cannot vest judicial power in a state court, nor transfer such power from the federal courts, so as to divest them of it; but there is a class of cases, in which I think Congress has a discretion to make the jurisdiction of the federal courts either exclusive or concurrent, as they shall judge expedient, from time to time.\(^{139}\) Citing *Martin v. Hunter’s Lessee*, and Hamilton in *The Federalist No. 82*, Justice Platt concluded that this case was one of concurrent jurisdiction. Yet, he clarified that “Congress cannot compel a state court to entertain

\(^{134}\) *Prigg*, 41 U.S. 585–86.

\(^{135}\) *Id.* at 561 (emphasis added).


\(^{137}\) *Claflin v. Houseman*, 93 U.S. 130, 140 (1876) (citing *United States v. Lathrop*, 17 Johns. 4 (N.Y. Sup. Ct. 1819)).

\(^{138}\) *Lathrop*, 17 Johns. at 11 (emphasis added).

\(^{139}\) *Id.* at 11–12.
such a suit. If they had said, imperatively, that state courts shall hold
cognizance in such cases, then, indeed, the question would have arisen,
whether they had a right to constitute us the organ of judicial power for
the United States?" Platt seemed to be suggesting that Congress would
actually rely on its power to “constitute tribunals” power to actually con-
stitute—or really commandeer—the state courts into service as federal
courts. Platt, consistent with other jurists, doubted Congress had this
power.

Virginia agreed with New York. In Jackson v. Rose, the highest
court in the Commonwealth found that Congress could not authorize the
state courts to have jurisdiction over a federal law, finding “[t]he Judici-
ary of one separate and distinct Sovereignty cannot either authorize, or
coeerce it to exercise the Judicial powers of such other separate and dis-
tinct Sovereign.” Other states followed Virginia’s lead.

In sum, Prigg, Stephens, Claflin, and Jones are all consistent with the
principles of judicial sovereignty. State courts, absent the consent of their
state legislatures or state constitutions—usually through a grant of gen-
eral jurisdiction—are not obliged to entertain federal causes of action. If
this consent is withdrawn by state legislatures, or even by constitutional
referendum, removing certain heads of jurisdiction, then state judges,
though bound by federal law under the Supremacy Clause, lack the jurisd-
ction to entertain those causes of action. Here, the states have control
of the jurisdiction of their courts. For even if the state judges are bound
by the supreme law of the land, the state courts only have the jurisdiction
conferred on them by the state legislatures. In other words, state judges
are bound to entertain federal claims, so long as they have the jurisdic-
tion from their states to entertain the claim.

The first principle of courts is that judges cannot act without juris-
diction. And jurisdiction is not inherent for the state courts, but granted
by their legislatures or state constitutions. Congress’ commandeering
power is thus limited by judicial sovereignty. The supremacy clause does
not completely resolve the issue, as the state legislatures are still permit-
ted to control the jurisdiction of their state courts. Even for courts of
general jurisdiction, certain causes of action may be excluded.

D. Limits on the Ability of State Courts to Decline to Exercise
Jurisdiction

While Prigg, Stephens, Claflin, and Jones articulated a broad view of
autonomy of state courts, decisions in the early 20th century began to
place some limits on the ability of state courts to decline to exercise ju-
risdiction. The validity of these early precedents, in light of later prece-
dents, is somewhat in dispute. Again, Justices Scalia and Stevens sparred on this point in *Printz*. Before delving into the early 20th century cases, I will turn to the Court’s most recent—and in my mind, deviant—stop in this line of case law.

1. **Haywood v. Drown**

   In *Haywood v. Drown*, the Empire State passed a law that “divests New York’s state courts of subject-matter jurisdiction over suits seeking money damages from correction officers” under 42 U.S.C. § 1983, and consolidated jurisdiction in specific courts of claims. In the court of claims, there were “strict conditions,” including a “90-day notice requirement,” no “jury trial,” no “attorney’s fees,” and plaintiffs were prohibited from “seeking punitive damages or injunctive relief.” The New York Court of Appeals upheld the law on the principle that so long as a State does not refuse to hear a federal claim for the “sole reason that the cause of action arises under federal law,” its withdrawal of jurisdiction will be deemed constitutional. The Supreme Court reversed. Writing for the majority, Justice Stevens found this transfer violated the Supremacy Clause. Justice Thomas, in dissent, took up Justice Scalia’s mantle from *Printz*: rejecting the imposition of a jurisdictional mandate on the state courts.

In *Haywood*, Justice Stevens relied on two main precedents to support the proposition that state courts cannot refuse to exercise jurisdiction over federal causes of action: *Testa v. Katt* and the *Second Employers Liability Cases (Mondou)*. In his *Printz* dissent, Justice Stevens earlier claimed that both of these precedents obviated the line of cases cited by Justice Scalia, including *Holmgren* and *Jones*. Stevens noted in *Printz*, “both of the cases relied upon by the majority rest on now-rejected doctrine,” and added, “[t]hat view was unanimously resolved to the contrary thereafter in” *Second Employers Liability Case* and *Testa v. Katt*. While Stevens may not have been correct in *Printz*, his opinion thirteen years later in *Haywood* arguably buried *Holmgren* and *Jones*. For the sake of simplicity, we will discuss the intersection of *Testa* and *Mondou* in the context of both *Printz* and *Haywood* together. All of these cases are consistent with the principle of judicial sovereignty that courts of general jurisdiction are obligated to hear federal causes of action. But none of these precedents—until Justice Stevens recast them—even hinted that Congress can require otherwise constituted state courts to hear any federal cause of action.

145. *Id.* at 734.
146. *Id.* at 732 (citing *Haywood*, 851 N.Y.S.2d at 88).
147. *See id.*
148. *Id.* at 777 (Thomas, J., dissenting).
149. *Id.* at 760 (citing *Testa v. Katt*, 330 U.S. 386, 394 (1947)).
150. *Id.* at 762 (citing Second Employers’ Liability Cases, 223 U.S. 1, 32 (1912)).
2. Mondou

The first case that Justice Stevens claimed abrogated Holmgren and Jones was Mondou v. New York, New Haven, & Hartford Railroad Co., (consolidated as the Second Employers Liability Cases). In this case, the Court was confronted with the question of whether a cause of action under the Federal Employers’ Liability Act (“FELA”) could be brought in a state court. Though the Court found that such an action could be brought in state court, it stressed that FELA did not act “to enlarge or regulate the jurisdiction of state courts.” Justice Van Devanter writing for a unanimous Court, explained that this case considered the “the duty of such a court, when its ordinary jurisdiction as prescribed by local laws, is appropriate to the occasion.”

What is this “ordinary jurisdiction”? In Connecticut—where Mondou originated—the law permitted courts of general jurisdiction to hear FELA claims. Van Devanter explained,

[we] say ‘when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion,’ because we are advised by the decisions of the [Connecticut] supreme court of errors that the superior courts of the state are courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction.

Here, the state legislature permitted its state courts to hear these federal causes of action. Like California, whose laws specifically granted jurisdiction for naturalization cases in Holmgren, Connecticut’s conferral of general jurisdiction, against the background presumption of concurrency, was sufficient for implied consent for this abrogation of state judicial sovereignty.

Van Devanter observed “[t]he suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist.” But this speaks to a situation where a court has subject matter jurisdiction over a federal cause of action, but the judge in question declines to exercise jurisdiction. Most importantly, the “existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication.” The existence of jurisdiction, as vested by the state, is a condition precedent to entertaining the federal claim. To drive this point home, Van Devanter asked rhetorically, “[b]ut this is no reason why the state courts should not be open for the

153. Id. (emphasis added).
154. Id. at 57.
155. Id.
156. Id. at 58 (emphasis added).
prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied.”

The key is that the court must be one of competent jurisdiction. Intransigent state judges, in courts of general jurisdiction, cannot make up excuses why they will not hear a federal cause of action. These cases, however, do not discuss legislative efforts to confine the subject matter jurisdictions of their state courts. As Justice Thomas explained in Haywood, “FELA neither provided for exclusive federal jurisdiction nor attempted to require state courts to entertain claims brought under it.”

Thomas added, “Connecticut had not deprived its courts of subject-matter jurisdiction over FELA claims; thus, the state court’s refusal to hear the claim was ‘not because the ordinary jurisdiction of the Superior Courts, as defined by the constitution and laws of the State, was deemed inadequate or not adapted to the adjudication of such a case.’”

Stated succinctly, the Mondou Court concluded “that rights arising under the act in question may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion.” As Justice Thomas explained in Haywood, “there was no question that the state court had subject-matter jurisdiction under state law to adjudicate the federal claim” and it could be heard in state court.

But without jurisdiction, what would happen? What if a state, like Massachusetts in Stephens, had passed a law denying their courts subject matter jurisdiction over FELA claims? Van Devanter does not address that issue here. But, in any case, state court jurisdiction is a prerequisite. Consistent with Jones and Holmgren, and attributes of judicial sovereignty, states must consent to these causes of action by the grant of jurisdiction.

3. Cases Between Mondou and Testa

Before we get to Testa v. Katt, the second case Justice Stevens relied on, there were a number of interim cases that continued the Mondou doctrine, with slight deviations. In Minneapolis & St. Louis Rail Road Company v. Bombolis, Chief Justice White recognized an essential principle upon which our dual constitutional system of government rests; that is, that lawful rights of the citizen, whether arising from a legitimate exercise of state or national power . . . are concurrently subject to be enforced in the courts of the state or nation when such rights come within the general scope of the jurisdiction conferred upon such courts by the authority, state or nation, creating them.

157. Id. (emphasis added).
159. Id.
160. Mondou, 223 U.S. at 59 (emphasis added).
161. Haywood, 556 U.S. at 757.
Thus, state courts that are granted jurisdiction by the state are presumed to have concurrent jurisdiction over federal causes of action. Though, for courts that are not of general jurisdiction, in the absence of this jurisdiction, the court may not need to exercise concurrent jurisdiction. The principle of judicial sovereignty articulated in *Mondou* continued, with a requirement of state consent to hear a federal cause of action.

Likewise in *McKnett v. St. Louis & San Francisco Railway Company*, the Supreme Court found that an Alabama court of general jurisdiction could hear a claim brought under the Federal Employers’ Liability Act. Writing for the Court, Justice Brandeis found that the “ordinary jurisdiction” of the Alabama circuit court is appropriate to enforce the right against this defendant conferred upon the plaintiff by the Federal Employers’ Liability Act. And its jurisdiction was invoked according to the rules of procedure prevailing in that court.” The Court, however, stopped short of saying how the case would have turned if this was not a court of general jurisdiction. Brandeis concluded, “[while Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers’ Liability Act, the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law.” Again, a court’s jurisdiction over all matters is a prerequisite for Congress to hear a cause of action.

Fifty years later, through some misleading ellipses, Justice Stevens would attempt to recast the holding of *McKnett* as holding that “the refusal to hear the FELA action constituted discrimination against rights arising under federal laws’ in violation of the Supremacy Clause.” The Supremacy Clause was never even mentioned in the opinion. Justice Brandeis’s complete sentence, entirely consistent with *Mondou, Douglas*, and their predecessors, is: “While Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers’ Liability Act, the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law.” The key point is that the Court was dealing with a state court of general jurisdiction that presumptively had concurrent jurisdiction over the matter. Justice Thomas correctly noted in *Haywood*, contrary to Justice Stevens’s misrepresentation, that “nothing in *Second Employers* [*Mondou*] suggested that the Supremacy Clause could preempt a state law that deprived the local court of subject-matter jurisdiction over the federal claim.”

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164. *Id.*
165. *Id.* at 233–34 (emphasis added).
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Thomas accurately summarized the holdings of *Claflin*, *Mondou*, and *Douglas*: “a state court’s inability to entertain a federal claim because of a lack of state-law jurisdiction is an ‘otherwise valid excuse’ that in no way denies the superiority of federal substantive law. It simply disables the state court from adjudicating a claim brought under that federal law.”169 All of the cases cited merely state that in a court of general jurisdiction, federal causes of action can be heard. These cases do not stand for the proposition that Congress can force states to add causes of action to their court’s jurisdiction, or that it would violate the Supremacy Clause for a state court of limited jurisdiction to decline cognizance over a federal cause of action.

4. Testa v. Katt

In *Testa v. Katt*, the Supreme Court rejected the Rhode Island Supreme Court’s finding that the Ocean State’s courts lacked jurisdiction to enforce a penal ordinance—rather than a civil law—imposed under the Emergency Price Control Act.170 The federal act provided for jurisdiction “in any court of competent jurisdiction,” including state courts. Citing *Claflin*, Justice Black rejected the idea that the federal law should be treated as if it were from a “foreign countr[y].”171 Rather, he found “the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, ‘anything in the Constitution or Laws of any State to the contrary notwithstanding.’”172 The key portion Justice Stevens relied on to characterize the holding was that a “‘state court cannot ‘refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.’”173

But this was not the entire holding. The Court, like in previous cases, stressed that a state court is required to hear a federal cause of action if it has “jurisdiction adequate and appropriate” under established local law to adjudicate [the] action.”174 The “adequate and appropriate” language, which is consistent with all of the cases previously decided, imposed “limits on Congress’ power to regulate the jurisdiction of state courts.”175 This analysis tracked, quite closely, the language from *Holmgren*, *Jones*, *Mondou*, *Douglas*, and *McKnett*, concerning the role states possess in defining the original jurisdiction of their state courts.

As Justice Thomas summarized in *Haywood*, “[a]s long as jurisdiction over a federal claim exists as a matter of state law, state-court judges

169. Id. at 759.
171. Id. at 389.
172. Id. at 391 (citing U.S. CONST. art. VI.).
174. Testa, 330 U.S. at 394 (emphasis added).
175. Bellia, supra note 2, at 951.
cannot sua sponte refuse to enforce federal law because they disagree with Congress’ decision to allow for adjudication of certain federal claims in state court.” 176 Or, as Justice Stevens accurately characterized the nature of the case in Printz, “state courts of appropriate jurisdiction must occupy themselves adjudicating claims brought by private litigants under the federal Emergency Price Control Act of 1942, regardless of how otherwise crowded their dockets might be with state-law matters.” 177 In his Printz dissent Stevens rejected his own later reading of Testa: “That characterization describes only the narrower duty to apply federal law in cases that the state courts have consented to entertain.” 178 But that is all Testa stood for.

Another case subsequent to Testa, not cited by Justice Stevens, makes a similar point. In United States v. Bank of New York & Trust, the Court found that “[i]t is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive.” 179 Chief Justice Hughes noted the presumption that both courts are competent to hear all cases. “Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States whenever those rights are involved in any suit or proceedings before them.” 180 The Court further explained that Congress “is free to invoke the jurisdiction of the state court for the determination of its claim.” 181 Again, Congress can only rely on the jurisdiction of the state courts, which is a matter of the state legislature’s prerogative. Congress must respect this attribute of judicial sovereignty of the states. As professor Anthony Bellia explained, “[i]n each of these cases, the Court suggested that Congress’ power to regulate the jurisdiction of state courts may be subject to structural constitutional limitations.” 182

Both Testa and Mondou, and everything in between, are consistent with Justice Scalia’s explanation that state courts “must entertain a claim arising under federal law ‘when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws.’” 183 To the extent that state legislatures can “regulate the ‘ordinary jurisdiction’ of their courts,” Scalia suggests, the states can still exclude cases from the state courts, consistent with Holmgren and Jones. 184 In all of these cases, the states’ consent—as manifested by their grant of jurisdiction to the state courts—was a condition for the exercise of jurisdiction over federal matters.

178. Id. (emphasis added).
179. 296 U.S. 463, 479 (1936).
180. Id. at 479 (citing Robb v. Connolly, 111 U.S. 624, 637 (1884)).
181. Id. (emphasis added).
182. Bellia, supra note 2, at 951.
183. Printz, 521 U.S. at 906 n.1 (emphasis added).
184. Id.
5. Howlett and Haywood, Revisited

This brings us back to the future. In two recent cases, Justice Stevens subtly recast and redefined the scope of the Court’s mandatory jurisdiction jurisprudence: Howlett v. Rose and Haywood v. Drown. First, in Howlett v. Rose, Justice Stevens held for the unanimous court that a Florida state court’s refusal to entertain a Section 1983 suit against the Sunshine State, based on state-law “sovereign immunity,” violated the Supremacy Clause. Second, in Haywood, Justice Stevens held that New York could not transfer jurisdiction over claims against prison officials from its court of general jurisdiction to a limited court of claims.

In Haywood, Justice Stevens identified “two narrowly defined circumstances” where “the presumption of concurrency . . . is defeated.” 185 First, “when Congress expressly ousts state courts of jurisdiction.” 186 Second, “[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts,” only a “valid excuse” will suffice. 187 In Haywood, Stevens only focused on the “latter circumstance.” The provenance of the “neutral state rule” and “valid excuse” test represents a departure from the entire line of precedents. Justice Thomas made this point in his dissenting opinion: “There is no textual or historical support for the Court’s incorporation of this antidiscrimination principle into the Supremacy Clause.” 188 And this isn’t simply Justice Thomas’ usual claim that an opinion is inconsistent with original meaning. He does assert that, but he alleged (rightfully, in my mind) that Stevens subtly distorted precedent to create a new power under the Supremacy Clause to compel state legislatures to vest state courts with jurisdiction—even if their rationale for removing jurisdiction is neutral and not out of a disapproval of federal law. As Thomas explained, “this Court has ‘never held that state courts must entertain § 1983 suits.’ Our decisions have held only that the States cannot use jurisdictional statutes to discriminate against federal claims.” 189 Transferring Section 1983 suits to courts of claims may have been done for neutral administrative reasons.

Justice Stevens took this test out of context from a short, four-page decision from 1929, Douglas v. New York, New Haven & Hartford Railroad Company. 190 In the final paragraph of his majority opinion, Justice Holmes considered a hypothetical case where a federal law purports “to require State Courts to entertain suits arising under it.” 191 The Federal Employers Liability Act, the law at issue in Douglas, only empowered state courts “to do so, so far as the authority of the United States is con-

186. Id.
187. Id. (emphasis added) (citing Howlett v. Rose, 496 U.S. 356, 372 (1990)).
188. Id. at 750.
189. Id. at 770.
191. Id. at 387.
cerned.” Holmes suggested that the New York Supreme Court, a court of general jurisdiction, if “given no discretion, being otherwise competent . . . would be subject to a duty” to hear the federal cause of action. In another scenario, where its jurisdiction was otherwise restrained by the state, however, the answer may be different. Holmes only hinted at this, closing with his opinion that “there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse.” Holmes does not even begin to explain what this “valid excuse” may be. In fact, these are the last two words of the opinion, followed by “[j]udgment affirmed.” Justice Van Devanter, the author of Mondou, dissented without opinion, joined by Chief Justice Taft and his fellow horseman Justice Butler. At best, this is a throwaway dictum, (unfortunately) common in Holmes’ opinions.

Yet, in Howlett v. Rose, Justice Stevens recast the “valid excuse” language quite broadly. He noted that “[a] state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of ‘valid excuse.’” In Howlett, Justice Stevens defined a “valid excuse” with respect to the Supremacy Clause: “An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.”

This is a misstatement of Justice Holmes’ dictum, which had nothing to do with the Supremacy Clause, or with a state disagreeing with federal law. Justice Holmes only stated that “there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse.” Justice Thomas observed in his dissent, “because the New York court lacked subject-matter jurisdiction under state law, it was not ‘otherwise competent’” to adjudicate the federal claim. States may have neutral reasons to rearrange the jurisdiction of their courts, concerning efficiency, budgets, and judicial resources. There is a short leap from the decision to transfer a Section 1983 claim from a court of general jurisdiction to a court of claims for budgetary reasons, to a Court finding this decision was motivated by a “disagreement” over the scope of state officer liability under federal law.

Additionally, Stevens cited Mondou for the proposition that “[t]he existence of the jurisdiction creates an implication of duty to exercise it.” As noted earlier, Justice Van Devanter’s opinion in Mondou was

192. Id.
193. Id. at 387–88.
194. Id. at 388.
195. Id.
196. See id.
198. Id. at 371 (emphasis added).
199. Id. at 374 n.19 (emphasis added).
201. Howlett, 496 U.S. at 369–70.
In short, Stevens crafted a new anti-discrimination principle for mandatory jurisdiction. “In determining whether a state law qualifies as a neutral rule of judicial administration, our cases have established that a State cannot employ a jurisdictional rule: ‘to dissociate [itself] from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.” 205 Thomas replied in dissent (correctly in my mind) that this passage is “lif[e] . . . entirely out of context,” and only reflects “McKnett’s neutrality command.” 206 Stevens explained that “although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies.” 207 At bottom, none of the cases cited actually say that Congress, under the Supremacy Clause, can force states to confer jurisdiction over federal claims to their state courts, or that the Supreme Court can invalidate laws withdrawing such jurisdiction.

How does Stevens reply to these charges of distortion? He noted at the end of his opinion that “[f]inding this scheme unconstitutional merely confirms that the Supremacy Clause cannot be evaded by formalism.” 208 Further, he responded that “[t]he dissent’s proposed solution would create a blind spot in the Supremacy Clause.” 209 In the dissent’s conception of the Supremacy Clause,

a State could express its disagreement with (and even open hostility to) a federal cause of action, declare a desire to thwart its enforcement, and achieve that goal by removing the disfavored category of claims from its courts’ jurisdiction. If this view were adopted, the

204. Haywood, 556 U.S. at 777 (Thomas, J., dissenting).
205. Id. at 736 (citing Howlett, 496 U.S. at 731) (quotations omitted).
206. Id. at 771 (Thomas J., dissenting).
207. Id. at 736.
208. Id. at 742.
209. Id. at 741 n.8.
lesson of our precedents would be that other States with unconstitutionally burdensome procedural rules did not go far enough “to avoid the obligation to enforce federal law.”210 His response failed to reconcile any of the precedents, and relied on a utilitarian concern for what would happen if states could divest their courts of jurisdiction over federal claims. The Court’s precedents may not allow a state to “thwart” federal law, but may rely on other valid policies, within the police power, to structure its courts. Justice Stevens’s opinion also failed to come to grips with the principles of judicial sovereignty that has limited the power of Congress to intrude on the state’s autonomy.

Having established this new test, Justice Stevens proceeded to consider where the Court had applied it. In Howlett, Stevens identified “only three occasions [where the Court] found a valid excuse for a state court’s refusal to entertain a federal cause of action,” and each “involved a neutral rule of judicial administration.”211 These neutral rules of judicial administration do not involve discrimination against federal interests. First, in Douglas, “the state statute permitted discretionary dismissal of both federal and state claims where neither the plaintiff nor the defendant was a resident of the forum State.”212 Second, in Herb v. Pitcairn, the state court could not dismiss a FELA claim “‘because it [was] a federal one,’ [and the court] found no evidence that the state courts ‘construed the state jurisdiction and venue laws in a discriminatory fashion.’”213 Third, in Missouri ex rel. Southern Railroad Company v. Mayfield, a state court could apply the doctrine of forum non conveniens to bar adjudication of a FELA case if the State “enforces its policy impartially so as not to involve a discrimination against Employers’ Liability Act suits.”214 Stevens did not address that these decisions were likely mixed-motives cases. The decision to remove jurisdiction was made primarily for budgetary and resource reasons, but there also existed disapproval of federal policy. In virtually all cases, the latter will be present, as states seek to avoid paying out large judgments for Section 1983 cases.

After these broad pronouncements, and departures from previous cases, Haywood ends with a whimper and a narrow holding. Justice Stevens concluded that New York, having decided to “create courts of general jurisdiction that regularly sit to entertain analogous suits . . . is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy.”215 This is mostly consistent with all previous holdings; though it ignored the possibility that New York may have transferred the jurisdiction because of non-discriminatory reasons. Ste-

210. Id. at 739.
211. Howlett, 496 U.S. at 374.
212. Id. (citing Douglas, 279 U.S. 377 (“It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse.”)).
213. Id. (citing Herb v. Pitcairn, 324 U.S. 117, 122 (1945)).
214. Id. (citing Missouri ex rel. Southern Ry. Co. v. Mayfield, 340 U.S. 1, 4 (1950)).
vens’ opinion to some degree recognized the nature of judicial sovereignty, stressing that “States thus have great latitude to establish the structure and jurisdiction of their own courts.” To raise a question I will return to later, what if a state abolished all of its courts of general jurisdiction and left no forums available for federal causes of action?

Thomas’ framework in dissent is consistent with the Court’s previous precedents. First, “[i]t cannot be that New York has forsaken the right to withdraw a particular class of claims from its courts’ purview,” he wrote, “simply because it has created courts of general jurisdiction that would otherwise have the power to hear suits for damages against correction officers.” The mere act of the state creating courts of general jurisdiction cannot constitute a perpetual grant of jurisdiction over all federal causes of action. In this sense, “[t]he Supremacy Clause does not fossilize the jurisdiction of state courts in their original form.” But, there remains a limitation on the ability of the state to withdraw this jurisdiction. “Under this Court’s precedent,” Thomas wrote, “[s]tates remain free to alter the structure of their judicial system even if that means certain federal causes of action will no longer be heard in state court, so long as States do so on nondiscriminatory terms.”

In a footnote, Thomas elaborated that “the Supremacy Clause is concerned only with whether there is antifederal discrimination.” Thus states retain autonomy to structure their courts to promote efficiency in matters, through neutral jurisdictional rules, so long as the state is not discriminating against federal causes of action. In closing, Thomas noted, “[t]his Court’s jurisdictional neutrality command already guards against antifederal discrimination.”

Recently, Justice Thomas built on this framework in his dissenting opinion in Montgomery v. Louisiana. Writing for the majority, Justice Kennedy held that Alabama’s collateral-review courts were required to give retroactive effect to the Supreme Court’s Eighth Amendment decision in Miller v. Alabama. “Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement,” the Court concluded, “States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.” Justice Thomas’ dissent took the majority at its word, and urged states to simply eliminate such jurisdiction altogether. To “lessen

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216. Id. at 372 (citing Herb, 324 U.S. at 117; Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 222 (1916); Missouri v. Lewis, 101 U.S. 22, 30–31 (1880)).
217. Id.
219. Id. (Thomas, J., dissenting).
220. Id. (Thomas, J., dissenting) (emphasis added).
221. Id. at 773 n.11 (Thomas, J., dissenting).
222. Id. (Thomas, J., dissenting).
224. Id. at 722.
225. Id. at 731–32.
the burdens” of the Court’s decision, states can take the “modest path,” and “stop entertaining claims alleging that this Court’s Eighth Amendment decisions invalidated a sentence.”226 The federal courts remain open to entertain “such claims in the first instance.”227 Thomas reasoned, “[w]hatever the desirability of that choice, it is one the Constitution allows States to make.”

The judicial sovereignty issues inherent in mandatory cases are presented in reverse with respect to exclusive jurisdiction. Rather than mandating states expand their jurisdiction, exclusive jurisdictions mandate that states contract their jurisdiction.

IV. EXCLUSIVE FEDERAL JURISDICTION

The least explored aspect of state judicial sovereignty has been the power of Congress to divest the state courts of concurrent jurisdiction over federal causes of action. The Court has made clear that for Congress to divest state courts of jurisdiction over federal causes of action it must do so explicitly. The Court in Gulf Offshore v. Mobil Oil Corp restated the “straightforward” “general principle of state-court jurisdiction over cases arising under federal laws”: “state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication.”229 The Tafflin Court agreed, finding that “[t]his deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim.”230 But, the Court has not taken a consistent approach to explaining what enumerated power permits them to so regulate state court jurisdiction.

With mandatory jurisdiction, Congress can designate that state courts of general jurisdiction—which their state legislatures have already vested with general jurisdiction—are required to hear certain causes of action. After this vesting of jurisdiction, signifying consent, that jurisdiction cannot always be withdrawn. This is an intrusion upon judicial sovereignty. But an instruction that state courts cannot vest their courts with jurisdiction over federal causes of action is an even greater intrusion onto judicial sovereignty. I stress that this inquiry is separate and apart from a federal law preempting a state law. Rather, this discussion concerns a state court exercising jurisdiction over a federal claim. There is no preemption.

The basis for this divesting power has been grounded in the Necessary and Proper Clause, working in tandem with either the “inferior tribunals” clause, or a specific grant of power in Article I § 8. Yet, the Su-

226. Id. at 750.
227. Id.
228. Id.
preme Court has consistently recognized the significance of our system of “dual sovereigns” in permitting Congress to so regulate the state courts. The principle of state judicial sovereignty has played a key role in the development of this doctrine.

A. Exclusive Jurisdiction Statutes

Congress has designated federal jurisdiction as exclusive in several main areas: maritime prize cases, bankruptcy cases, patent and copyright cases, cases against consuls and vice consuls, cases concerning fines, penalties, or forfeitures under federal statutes, non-admiralty cases involving seizures under the laws of the United States on land or water, crimes against the United States, and others. Many of these grants stem directly from heads of jurisdiction in Article III, or grants of enumerated powers in Article I. Several more grants of exclusive jurisdiction appear outside Title 28, concerning antitrust law, the Securities Exchange Act, the Natural Gas Act, the Miller Act (concerning pay-

231. Bellia, supra note 2, at 950.
232. See generally 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE JURISDICTION AND RELATED MATTERS VENUE § 3527 (3d ed.).
233. 28 U.S.C. § 1333(2) (2012) (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of: Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.”).
234. Id. § 1334(a) (“Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.”).
235. Id. § 1338(a) (“The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights.”).
236. Id. § 1351 (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of all civil actions and proceedings against—(1) consuls or vice consuls of foreign states.”).
237. Id. § 1355(a) (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress.”).
238. Id. § 1356 (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction.”).
239. 18 U.S.C. § 3231 (“The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.”).
240. 28 U.S.C. § 1583 (“In any civil action in the Court of International Trade, the court shall have exclusive jurisdiction to render judgment upon any counterclaim, cross-claim, or third-party action of any party”); 28 U.S.C. § 1346(f) (“The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.”).
241. 15 U.S.C. § 78aa (“The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder . . . .”).
242. Id. § 26 (“Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . .”)
243. Id. § 717a (“The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder . . . .”).
ments and bonds for government contractors), 244 the Commodity Exchange Act claims brought by the “attorney general of any state,” 245 the Employee Retirement Income Security Act (“ERISA”), 246 the Hobbs Act, 247 the National Flood Insurance Act, 248 the Price Anderson Act, 249 the Federal Aviation Act claims, 250 the Federal Highway Administration Act, 251 Contract Disputes Act, 252 the Federal Torts Claims Act, 253 the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), and many others. 254 These latter grants have only a tangential relationship to enumerated powers in Article I, and have no grounding in Article III.

Several of these attributes of exclusive jurisdiction, however, were concurrent for much of early American history. For example, the Claflin Court observed that with “regard to naturalization—a subject necessarily within the exclusive regulation of Congress—the first act on the subject, passed in 1790, and all the subsequent acts, give plenary jurisdiction to the State courts.” 255 The Naturalization Act of 1790 permitted jurisdiction for “any common-law court of record in any one of the states . . . .” 256 The Naturalization Act of 1802 likewise allowed jurisdiction for “the supreme, superior, district or circuit court of some one of the states, or of the territorial districts of the United States, or a circuit or district court of the United States . . . .” 257

In his dissenting opinion in Arizona v. United States, Justice Scalia remarked that the “Constitution did not strip the States” of their authority with respect to immigration and “citizenship standards.” 258 Further, contrary to the modern state where the federal government purports to have complete control over immigration matters, “after the adoption of

244. 40 U.S.C. § 3133(3) (“A civil action brought under this subsection must be brought . . . in the United States District Court for any district in which the contract was to be performed and executed, regardless of the amount in controversy.”).
245. 7 U.S.C. § 13a-2(2) (“The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia, shall have jurisdiction of all suits in equity and actions at law brought under this section to enforce any liability or duty created by this chapter or any rule, regulation, or order of the Commission thereunder, or to obtain damages or other relief with respect thereto.”).
246. 29 U.S.C. § 1132(e)(1) (“Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.”).
251. Int’l Bhd. of Teamsters v. Dep’t of Transp., 932 F.2d 1292, 1297 (9th Cir. 1991).
256. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (emphasis added).
the Constitution there was some doubt about the power of the Federal Government to control immigration, but no doubt about the power of the States to do so.\textsuperscript{259} Scalia concluded that the Article I “naturalization power was given to Congress not to abrogate States’ power to exclude those they did not want, but to vindicate it.”\textsuperscript{260}

Though even today, the naturalization power is not completely within the jurisdiction of federal courts. For purposes of immigration law, “any court of record in any State having a seal, a clerk, and jurisdiction in actions in law or equity, or law and equity, in which the amount in controversy is unlimited”—in other words, a state court of general jurisdiction—is an “eligible court” to administer the oath of naturalization.\textsuperscript{261}

Likewise, patent claims were not always the sole dominion of the federal courts.\textsuperscript{262} As the Court relayed in \textit{Claflin},

the first patent law for securing to inventors their discoveries and inventions, which was passed in 1793, gave treble damages for an infringement, to be recovered in an action on the case founded on the statute in the Circuit Court of the United States, ‘or any other court having competent jurisdiction,’ meaning, of course, the State courts.\textsuperscript{263}

Justice Bradley noted, “[i]nventors had grants of exclusive right to their inventions before the Constitution was adopted, and the State courts had jurisdiction thereof.\textsuperscript{264} ‘The change of authority creating the right did not change the nature of the right itself.’\textsuperscript{265} With patents as a leading example, “[t]he assertion, therefore, that no such jurisdiction previously existed, must be taken with important limitations.”\textsuperscript{266} In this sense, grants of exclusive jurisdiction divested the state courts of their pre-existing jurisdiction. One article noted that during the early years of the Republic, “state patents were seen as an important policy tool for encouraging the private sector to invest in developing costly technology of unproven value that states deemed worthy of support.”\textsuperscript{267} However, “subsequent acts

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{259} Id. at 2513.
\item \textsuperscript{260} Id. at 2512.
\item \textsuperscript{261} 8 U.S.C. § 1421(b)(4)(B) (2012).
\item \textsuperscript{262} \textit{Exclusive Jurisdiction of the Federal Courts in Private Civil Actions}, 70 H A R V. L. R E V. 509, 511 (1957) (“Several of the reasons supporting exclusive jurisdiction are illustrated in the patent field. Although a patent gives its owner a right to exclusive use of the invention and may serve to deter infringement by others, the fact that a patent’s validity can be challenged in court indicates that the full value of the patent may not be realized until an authoritative judgment is obtained. Moreover, one erroneous decision in favor of an alleged infringer, even if followed by successful suits against other infringers, might largely undermine the value of a patent, since such a decision would permanently establish a competitor in the field. One result of the grant of exclusive patent jurisdiction may have been to diminish the likelihood of conflicting decisions on a particular patent.”).
\item \textsuperscript{263} \textit{Claflin v. Houseman}, 93 U.S. 130, 139–40 (1876).
\item \textsuperscript{264} Id. at 141.
\item \textsuperscript{265} Id.
\item \textsuperscript{266} Id.
\item \textsuperscript{267} Camilla A. Hrdy, \textit{State Patent Laws in the Age of Laissez Faire}, 28 B E R K E L E Y T E C H. L.J. 45, 45 (2013) (“[I]n the height of America’s supposed commitment to laissez faire economics, concurrent state patent powers were justified by a fundamental concern that Congress’s new and uniquely “hands-off” patent system was not a sufficient replacement for the active patent policies of state and colonial governments prior to adoption of the Constitution. Therefore, in the tradition of Alexander Hamil-
on the same subject were couched in such terms with regard to the juris-
diction of the circuit courts as to imply that it was exclusive of the State
courts; and now it is expressly made so.” 268 In this sense, after the first Pa-
tenent Act, Congress divested the state courts of subject matter jurisdiction
over patents.

Admiralty jurisdiction is not entirely exclusive. Plaintiffs are able to
bring suit in state court “even though [an] accident occurred on a naviga-
ble waterway and was thus subject to adjudication in the federal district
court under the admiralty jurisdiction, because of the ‘saving to suitors’
clause in the statute that gives the federal courts exclusive jurisdiction
over admiralty cases.” 269 This “clause allows persons who, were it not for
that exclusive jurisdiction, would have rights under ‘territorial’ (federal
or state) law, to enforce those rights outside the admiralty jurisdiction,
whether in federal or state court.” 270 In fact, suits filed in state court un-
der a “saving to suitors” clause cannot be removed, and thus federal
courts are deprived of admiralty jurisdiction. 271 Certain causes of action
under the Securities Exchange Act of 1933 can also be brought in state
court. 272 Same for the Federal Employers’ Liability Act 273 and civil rights
actions. 274

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§ 711; Dudley v. Mayhew, 3 N.Y. 9, 14 (N.Y. 1849); Elmer v. Pennel, 40 Me. 430, 434 (1855); Parsons v.
Barnard, 7 Johns. 144, 144 (N.Y. Sup. Ct 1810).

269. In re Complaint of Holly Marine Towing, Inc., 270 F.3d 1086, 1087 (7th Cir. 2001) (Posner,
J.).

270. Id.

WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3673 (1985)).

courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and
under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with
State and Territorial courts, except as provided in section 77p of this title with respect to covered class
actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this
subchapter.”) (emphasis added).

273. 45 U.S.C. § 56 (“Under this chapter an action may be brought in a district court of the Unit-
ed States, in the district of the residence of the defendant, or in which the cause of action arose, or in
which the defendant shall be doing business at the time of commencing such action. The jurisdiction of
the courts of the United States under this chapter shall be concurrent with that of the courts of the
several States.”).

274. Id. § 1983 (“Every person who, under color of any statute, ordinance, regulation, custom, or
usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any
citizen of the United States or other person within the jurisdiction thereof to the deprivation of any
rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party in-
jured in an action at law, suit in equity, or other proper proceeding for redress, except that in any ac-
tion brought against a judicial officer for an act or omission taken in such officer’s judicial capacity,
injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was
unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District
of Columbia shall be considered to be a statute of the District of Columbia.”).
Today, all federal criminal cases are exclusively heard in federal courts. But this was not always the case. Contrary to modern practice, in the early years of the Republic, before the creation and staffing of many federal courts, state courts would prosecute and hold trials for the violations of the criminal laws of the United States (of which there were not many). In 1806, Congress extended jurisdiction to state courts for “forfeitures and penalties under the revenue laws of the U.S.,” and the local “district attorneys” could “prosecute” those cases. Further, judges of those state courts were “authorized to exercise all and every power in the cases of a criminal nature” concerning the act. Another act in 1815 extended jurisdiction to “State and county courts, generally, of suits for taxes, duties, fines, penalties, and forfeitures arising under the laws imposing direct taxes and internal duties.” Justice Story was an early proponent for exclusive jurisdiction of criminal matters: “[N]o part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to State tribunals . . . .”

This practice changed, however, in the latter half of the 19th century. The District Court of South Carolina held in 1872 that “[S]tate courts cannot hold jurisdiction over offenses exclusively existing as offenses against the United States. Every criminal presentation must charge the offense as having been committed against the sovereign whose courts sit in judgment on the offender, and whose executive may pardon him.” This sentiment concerning the impact of congressional silence is consistent with the understanding that the Federal government is one of limited powers, whereas the state governments have general powers that predate the Constitution. In 1874, Congress withdrew this concurrent jurisdiction for criminal cases, and stated that “the jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states.” Today, the statute remains virtually unchanged. Professor Bellia, in agreement with Professor Collins, noted that “exclusive jurisdiction of penal actions arising under federal law . . . were consistent with general law principles.”

Because all criminal cases must be prosecuted by the United States, it would be entirely up to the United States as to where to file the criminal charges. Therefore, it is virtually impossible today for a federal crim-
inal matter to originate in a state court. (Unless a rogue district attorney files an indictment for a federal crime in state court). Therefore, my analysis focuses exclusively on exclusive jurisdiction for civil cases.

B. The Federalist, Again

In *The Federalist*, Hamilton offers a framework to understand when concurrent jurisdiction can give way to exclusive jurisdiction. Citing *Federalist 31*, “concerning the general power of taxation,” Hamilton explained that “States will retain all pre-existing authorities which may not be exclusively delegated to the federal head,” except for “three cases.”

First, Publius wrote, “where an exclusive authority is, in express terms, granted to the Union” by the Constitution. This view seems to suggest that parts of Article III may in fact designate certain matters exclusively for the federal courts. Hamilton wrote in *Federalist No. 80* that “each Article III head of jurisdiction served uniquely federal interests.” Professor Bellia observed, “Hamilton understood the power that the Constitution conferred upon Congress to constitute inferior federal tribunals to be a power to constitute them with exclusive jurisdiction over any and all Article III cases and controversies.” Later, Justice Story would return to this point.

Second, Hamilton noted that states cannot exercise jurisdiction “where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the States” by the Constitution. This suggests that Article III permits the cognizance of a specific cause of action in the federal courts, but it is not so limited. Therefore, Congress, acting pursuant to its Article I powers, would have to affirmatively prohibit the state courts from hearing this cause of action. Again, Hamilton does not explain by what enumerated, or implied powers, Congress can accomplish this goal.

Third, state courts must stand down “where an authority is granted to the Union [by the Constitution], with which a similar authority in the States would be utterly incompatible.” This rule would suggest a standard akin to preemption, where a duly enacted federal law, pursuant to the Supremacy Clause, trumps an “utterly incompatible” state law. But instead of preempting an act of the state legislature, the grant of the judicial power to a federal court would render a similar grant to a state court of general jurisdiction invalid. If these principles apply to state legislatures, Hamilton reasons, it should also apply to the courts. “Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main,

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285. Id.
287. Id.
289. Id.
just with respect to the former, as well as the latter. 290 Unfortunately, Hamilton did not explain the circumstances where such a “prohibit[ion]” or “utter[ly] incompatib[ility]” may exist.

With this understanding, Hamilton “lay[s] it down as a rule”—“the State courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the [three] enumerated modes.” 291 This rule is premised on three principles. First, Article III may designate matters for exclusive jurisdiction. Pursuant to the Supremacy Clause, these federal heads of jurisdiction would trump any state jurisdictional statute. (In this case, the Supremacy Clause justifies a separate constitutional command). Second, through its Article I powers, Congress can designate matters for exclusive jurisdiction. If these laws are duly enacted pursuant to Article I, the Supremacy Clause would trump any state jurisdiction. The Claflin court explained that Hamilton “infers that the State courts will retain the jurisdiction they then had, unless taken away in one of the enumerated modes.” 292

Third, absent a specific conflict, pursuant to the Constitution or Act of Congress, the states have an inherent concurrent jurisdiction. Nothing needs to be done, either by Congress or state legislatures to establish that jurisdiction, at least in state courts of general jurisdiction. But this phrasing does raise a question of what it means to “[r]etain the jurisdiction they now have.” 293 Hamilton provides a partial explanation to these questions. “But this doctrine of concurrent jurisdiction,” Hamilton explained, “is only clearly applicable to those descriptions of causes of which the State courts have previous cognizance.” 294 This would suggest that the presumption for concurrent jurisdiction will not remain after ratification. As for “cases which may grow out of, and be peculiar to, the Constitution to be established,” the presumption of concurrent jurisdiction may not be “equally evident.” 295 Hamilton did not elucidate what “grow out of” or “peculiar to” the Constitution means, though it implies jurisdiction over matters inherently of a federal nature.

Hamilton further explained that there are minimal concerns for sovereignty and federalism when divesting state courts of jurisdiction for future issues that they previously did not hold court over. Denying “the State courts a right of jurisdiction in such [new] cases” that “grow out of the Constitution,” can “hardly be considered as the abridgment of a pre-existing authority.” 296 Or more precisely, Hamilton observed “that the State courts will be divested of no part of their primitive jurisdiction.” 297 Though, Hamilton did not provide a definition of “primitive jurisdic-

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290. Id.
291. Id.
293. THE FEDERALIST NO. 82, supra note 4.
294. Id.
295. Id.
296. Id.
297. Id.
tion.” This may be akin to the “original jurisdiction” recognized in the line of cases discussed in Printz.

His explanation raises even more questions than it answers. Does this suggest that the state courts only retain jurisdiction that may be concurrent, as it existed in 1789? Would this also suggest that state courts would lack any concurrent jurisdiction for new causes of action created after 1789? What about states not yet established, and whose jurisdictions would only be established after the Constitution was ratified? Would those states have no concurrent jurisdiction? The answer to all of these questions must be no. Justice Thomas wrote, in a somewhat different context, “[t]he Supremacy Clause does not fossilize the jurisdiction of state courts in their original form.”

Justice Bradley in Claflin explained that as their previous jurisdiction could not be possibility extend to cases which might grow out of and be peculiar to the new constitution, [Hamilton] considered that, as to such cases, Congress might give the Federal courts sole jurisdiction. So, over all new federal matters, outside the state court’s primitive jurisdiction, Congress could create exclusive jurisdiction.

If this is true, then Congress would need to affirmatively vest state courts with concurrent jurisdiction for all new causes of action. But this has not been the practice. Instead, courts are presumed to have concurrent jurisdiction, even with congressional silence.

Justice Thomas, dissenting in Haywood v. Drown, remarked on this section: “Hamilton thus assumed that state courts would continue to entertain federal claims consistent with their ‘primitive jurisdiction’ under state law. But he remained skeptical that state courts could be forced to entertain federal causes of action when state law deprived them of jurisdiction over such claims.”

Thomas seemed to agree that jurisdiction that predated the Constitution, could not be divested. Professor James Collins explained further,

[t]he framers may well have assumed that the federal system would simply take the state courts as it found them; state courts could exercise a concurrent jurisdiction over any federal claims that fit comfortably within their pre-existing jurisdiction—what Hamilton in The Federalist call their primitive jurisdiction—so long as the federal claims were not, by virtue of congressional decree, subject to the exclusive jurisdiction of the federal courts.

Professor Bellia explained that the Hamiltonian view “read the Constitution to recognize a power in Congress that the law of nations did not recognize in sovereigns generally . . . . Hamilton claimed that Congress could render Article III cases and controversies ‘local’ [exclusive]

299. Claflin, 93 U.S. 130 at 141.
300. Haywood, 556 U.S. at 746 n.1 (Thomas, J., dissenting).
to federal courts in any circumstance. But this divestment is not plenary. Hamilton did not “contend that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the federal courts solely, if such a measure should be deemed expedient.” Stated otherwise, Congress needs more of a reason than “expedien[ce]” in order to relegate to exclusive jurisdiction some law based on a constitutionally enumerated power. The main rationale to limit this power would have to be the sovereignty of the states, and their judiciaries.

Further, here Hamilton was clearly speaking to his second category, wherein Congress’ Article I powers are relied on to designate causes of action for exclusive jurisdiction. If Article III did so automatically, no further action would need to be taken. Alas, Hamilton did not explain what the proper standard is, and what would amount to “expedien[ce].” Expedient seems similar to “convenie nt,” which is how Hamilton would describe the Necessary and Proper power to President Washington. (This was the standard Chief Justice Marshall adopted in McCulloch v. Maryland.) So we can speculate that the standard is something greater than the McCulloch Necessary and Proper standard. Though the presumption of concurrency may not be “equally evident” for new causes of action, Hamilton recognizes that it almost certainly exists.

Further, this section is also somewhat in tension with the “primitive jurisdiction” analysis, as here new causes of action, outside of a state court’s “primitive jurisdiction,” cannot be excluded from the state courts merely because it is “expedient.” In other words, state courts still have a presumption of concurrent jurisdiction, even for matters beyond their “primitive jurisdiction,” so long as Congress meets this light burden articulated in The Federalist.

Finally, The Federalist expressed a respect for the sovereignty of the state courts, while at the same time ensuring a fair forum for the adjudication of federal claims. Hamilton’s concerns for the “prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes” must trump these federalist concerns. Further, Hamilton explained that “courts constituted like those of some of the States would be improper channels of the judicial authority of the Union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.” Yet, respect for state judicial sovereignty, and the protection of a uniform federal law, would be protected not only by re-

302. Bellia, Congressional Power, supra note 2, at 974–75.
303. THE FEDERALIST NO. 82, supra note 4.
304. Alexander Hamilton, Opinion as to the Constitutionality of the Bank of the United States, in THE FEDERALIST (Paul Leicester Ford ed., 1898), http://avalon.law.yale.edu/18th_century/bank-ah.asp (“[N]ecessary often means no more than needful, requisite, incidental, useful, or conductive to. . . .”).
306. THE FEDERALIST NO. 82, supra note 4.
307. Id.
308. Id.
stricting jurisdiction in the first instance, but also through appellate re-
view.

In The Federalist No. 81, Hamilton wrote that that Congress’ “power
of constituting inferior courts is evidently calculated to obviate the ne-
cessity of having recourse to the Supreme Court, in every case of federal
cognizance.” But this does not lead to the conclusion that the state
courts cannot hear federal causes of action, and by no means indicates
that this jurisdiction must be exclusive. Instead, Hamilton wrote that the
inferior courts should be constituted to hear appeals from the state
courts. It was not at all obvious, in the Constitution of 1787, that the
Supreme Court would be the only avenue of review from the state
courts. In fact, the inferior federal courts so constituted could have sat in
judgment of the state courts. Professor Akhil Reed Amar wrote that
“state courts of general jurisdiction could hear any lawsuits that lay be-
Yond the reach of federal courts.” He added, “[t]rue, state courts of
general jurisdiction could entertain a wide range of federal-law cases—
whether the federal issue arose in the plaintiff’s complaint, the defend-
ant’s answer, or still later in the back-and-forth of litigation. Neverthe-
less, these state courts could not properly pronounce the last judicial
word on federal law.” While the state court judgment
had to be reviewable by some federal tribunal whenever a case
hinged on a claim of federal right, that federal tribunal did not need
to be the Supreme Court. All other federal courts were also clothed
with the judicial power of the United States, and therefore could
serve as courts of last resort.

Thus, Hamilton wrote, “if there was a necessity for confiding the
original cognizance of [federal] causes arising under those laws to [the
state courts] there would be a correspondent necessity for leaving the
door of appeal as wide as possible” to federal courts. To this concern,
Hamilton was “well satisfied . . . of the propriety of the appellate jurisdic-
tion, in the several classes of causes to which it is extended by the plan of
the convention. I should consider every thing calculated to give, in prac-
tice, an unrestrained course to appeals, as a source of public and private
inconvenience.”

In other words, this paper focused not on whether Congress can lim-
it the original jurisdiction of state courts, but whether an appeal to a fed-
eral court should lie. In the very next paragraph, Hamilton offered a
proposal to create
four or five or half a dozen districts; and to institute a federal court
in each district, in lieu of one in every State. The judges of these

309. Id. at 527.
310. THE FEDERALIST NO. 82, supra note 4.
311. AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 4532–33 (Kindle Ed. 2006).
312. Id. at 4542–45.
313. Id. at 4549–51.
314. THE FEDERALIST NO. 81 at 528 (Alexander Hamilton).
315. Id.
courts, with the aid of the State judges, may hold circuits for the trial of causes in the several parts of the respective districts. Justice through them may be administered with ease and despatch; and appeals may be safely circumscribed within a narrow compass.\footnote{316}{Id.}

Courts of appeals, with the “aid of state judges,” presumes that state courts retain jurisdiction over these matters in the first instance. This extends only to appeals. This approach both protects federal interest, and respects dual state sovereignty.

Hamilton concluded that Congress must take deliberate steps to “expressly exclude[]” a cause of action from concurrent jurisdiction; otherwise the state courts can “take cognizance of the causes to which those acts may give birth.”\footnote{317}{The Federalist No. 82, supra note 4, at 536.} Hamilton drove home the point forcefully about the dual sovereignty:

State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.\footnote{318}{Id.}

From this, we should learn that any limitations on state judicial sovereignty must contend with the principles of federalism inherent in our system of dual sovereigns.

\section{C. Judiciary Act of 1789}

\subsection{1. Sections 9 and 11}

From the very first Congress, certain cases were designated for exclusive jurisdiction, while others were reserved for concurrent jurisdiction. Section 9 of the Judiciary Act of 1789 provided that “the district courts shall have, \textit{exclusively} of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas.”\footnote{319}{Id. § 9, 1 Stat. at 77 (emphasis added).} Further, the district courts had “exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction” and “exclusive original cognizance of all seizures on land, or other waters.”\footnote{320}{Id. § 9, 1 Stat. at 77 (emphasis added).} The federal district courts, however, had “cognizance, \textit{concurrent} with the courts of the several States . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States,”\footnote{321}{Id. (emphasis added).} The district courts also had jurisdiction “\textit{concurrent} as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of
one hundred dollars." But, they had “jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls.”

Section 11 added that the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

But the federal courts “shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct.” This last proviso explains that Congress can take steps to confer exclusive jurisdiction—“or the laws of the United States shall otherwise direct”—but does not explain what those steps are.

2. Legislative Debate

This basis of exclusive and concurrent jurisdiction issue was not agreed upon by those in the First Congress who framed the Judiciary Act of 1789. The legislative debate from August 29–31 of 1789 suggests various lines of thinking. Representative James Madison (VA), taking a position in conflict with his fellow Publius, Hamilton, would have denied all state courts jurisdiction over federal matters. Madison explained, “a review of the constitution of the courts in many States will satisfy us that they cannot be trusted with the execution of the Federal laws.” While, in some of the States it is true they might, and would be safe and proper organs of such a jurisdiction; but in others they are so dependent on State Legislatures, that to make the Federal laws dependent on them, would throw us back into all the embarrassments which characterized our former situation [under the Articles of Confederation]. Here, Madison takes a narrow notion of concurrent jurisdiction, where it only exists over issues not of federal creation. Madison “did not see how it could be made compatible with the constitution, or safe to the Federal interests, to make a transfer of the Federal jurisdiction to the State courts, as contended for by the gentlemen who oppose the clause in question.”

322. Id. (emphasis added).
323. Id. (emphasis added).
324. Id. § 11, 1 Stat. at 78 (emphasis added).
325. Id. (emphasis added).
326. Id. § 11, 1 Stat. at 79.
328. Id. at 813.
329. Id.
330. Id.
current with the state jurisdictions” in “some cases.” Madison also re-
jected the proposal to “make the State courts [into] federal courts”—
what some deemed “constitute” to mean in Article I—which “is liable
to insuperable objections.” Madison’s position lost out, as the Judiciary
Act of 1789 expressly contemplates concurrent jurisdiction over federal
causes of action.

Representative Fisher Ames (MA) argued that new causes of “ac-
tion[], the cognizance whereof is created de novo”—that is, all federal
claims created by Congress—“are exclusively of federal jurisdiction; that
no person should act as judges to try them, except such as may be com-
missioned agreeably to the [federal] constitution.” Ames added,
“(c)auses of exclusive federal cognizance cannot be tried otherwise”—in
state courts—“nor can the judicial power of the United States be other-
wise exercised.” But Ames is not arguing that Congress must do some-
thing special to deem a federal cause of action exclusive. Rather, he as-
serts that when Congress creates a new cause of action, and “jurisdiction
is made de novo, a trust is to be exercised, and this can be done only by”
federal judges. This “trust” is in conflict with a general presumption of
concurrent jurisdiction. Though, Ames stressed that “[t]he State courts
were not supposed to be deprived by the constitution of the jurisdiction
that they exercised before, over many causes that may be tried now in the
national courts.” Equally importantly, Ames added that “[t]he law of
the United States is a rule to [state-court judges], but no authority for
them. It controlled their decisions, but could not enlarge their powers.”
This is consistent with Hamilton’s admonition that the state courts retain
their “primitive jurisdiction.” Further, this view is consistent with the
long-standing precedents that Congress cannot vest, or require state
courts to exercise, jurisdiction over federal causes of action.

In the very next speech on the House floor, Representative Michael
Stone (MD) expressed his concerns of the “defect[s]” of the state courts

331. Id. at 814.
332. See id. Representative Smith of South Carolina explained that state judges and courts could
double as federal judges and courts.
These several courts will have their limits defined, and will move within their respective orbits
without any danger of deviation. Besides, I am not persuaded that there will be a necessity for
having separate court-houses and jails; those already provided in the several States will be made
use of by the district courts. I remember when the court for the trial of piracy, under the authority
of Congress, was held at Charleston, the judges sat in the court-house; the prisoners were con-
fined in the jail, were under the custody of the constable, and were executed by the orders of the
sheriff of the district of Charleston. All these were State institutions, and yet the court was a fed-
ceral court.
Id. at 833.
333. Id. at 844; see Saikrishna Bangalore Prakash, Field Office Federalism, 79 VA. L. REV. 1957,
2013–30 (1993) (discussing views of Federalists, Anti-Federalists, and other contemporaries regarding
the interaction between state and federal courts).
334. 1 ANNALS OF CONG., supra note 327, at 839.
335. Id. at 838.
336. Id. at 807–08.
337. Id. (emphasis added).
338. Id. at 808 (emphasis added).
339. THE FEDERALIST NO. 82, supra note 4.
to “abridge the powers of the General Government.” 340 This rendered necessary “establishing a Judiciary for the United States.” 341 But, Stone stressed, this concern “involved . . . the jurisdiction of the Supreme Federal Court,” not the jurisdiction of the state courts of first instance. 342 This view was similar to Hamilton’s reasoning in Federalist 81, that the existence of appellate review by the federal Supreme Court would obviate problems of local allegiances. Stone, like Hamilton, did not see the federal courts as divesting the state courts of jurisdiction. “I apprehend in every thing else the State courts might have had complete and adequate jurisdiction.” 343 With the exception for cases “between State and State,” where the Supreme Court maintains original jurisdiction, “in all other cases the States could execute that authority which is reposed in the United States.” 344

But Stone, acknowledging that there may be “abuses” in the state courts, found that it might be “necessary for the due administration of justice, that the national jurisdiction be carried over such States.” It is unclear if he meant that the federal courts sitting in appellate jurisdiction over the state courts, or if the federal courts are the exclusive jurisdictional homes of certain federal causes of action. Based on the tenor of his discussion, I am inclined towards the former view. Because in fact, in the very next sentence, he suggests that this result is not “now essential,” and not “commanded by the Constitution.” 345

Yet, Stone stressed, this view would be “contrary to the principle of the bill, which proposes to establish the inferior courts with concurrent jurisdiction with the State courts.” 346 In other words, because the Judiciary Act of 1789 purports to vest concurrent jurisdiction over matters which the Constitution arguably limits to federal courts, he seemed to cast doubt on whether the Constitution in fact gives Congress the power to create courts of “exclusive cognizance.”

Stone, citing the Supremacy Clause, queries whether the “gentlemen be afraid that the State courts will not decide according to the supreme law?” 347 Under the Supremacy Clause, state judges, in contrast with their executive and legislative counterparts, are “bound” by the Supreme Law of the land. If they fail to do so, Stone explained that “it is in the discretion of Congress to refuse them the opportunity,” and deny state courts this jurisdiction. 348 Stone, thus seemed to think it is possible to deprive state courts of jurisdiction, 349 if they are not treating federal law as the supreme law of the land. Yet, because the Judiciary Act of

340. 1 ANNALS OF CONG., SUPRA note 327, at 809.
341. Id. at 810.
342. Id. at 809.
343. Id.
344. Id. at 809–10 (emphasis added).
345. Id. at 810.
346. Id.
347. Id.
348. Id.
349. Id.
1789 gives them “concurrent jurisdiction,” then Congress has “the power of giving them complete” jurisdiction. In other words, the greater power to give “concurrent jurisdiction” implies the lesser power to give the state courts exclusive jurisdiction prior to the constitution of the inferior courts.

These inferior courts need not be created until Congress “experienced the inadequacy of the State courts to the objects granted by the constitution to the participation of the Judiciary of the United States.”350 From this, Stone concluded, it is not necessary for the constitution of inferior federal courts, as the “State judges are bound to take cognizance of the laws of the United States, and are sworn to support the General Government.”351 Stone offers one exception for admiralty courts:

[T]here is a necessity for instituting Admiralty courts, though it is not because I consider the power of the State inadequate to that object; but because those courts are not instituted in all of them, and it is proper that there should be a maritime jurisdiction within the bounds of every State to determine cases arising within the same.352

In this sense, the federal courts would not be depriving the state courts of jurisdiction, but stepping in where the state courts did not have admiralty judges for disputes at sea. But where “admiralty courts [are] established in the different States,” and Congress “make[s] laws that affected admiralty cases, [the state courts] would be as much obliged to determine by [federal] laws as if [Congress] had instituted the courts” itself.353

Stone, further channeling Hamilton, suggests that the reason for creating federal courts with “separate jurisdictions” was based not on distrust of those state courts—this would “establish rivals”—but to prevent a “clash of jurisdiction.”354 “But if we honestly conduct upon the principle of the constitution—necessity, we may expect some good to result from the exercise of our powers, and prevent any clashing of jurisdiction; but to act on other principles must introduce confusion.”355 He suggests one possible source of exclusive jurisdiction commanded by the Constitution: “If it is the right of an alien or foreigner to sue or be sued only in the courts of the United States, then they have a right to that jurisdiction complete, and then Congress must institute courts for taking exclusive cognizance of all cases pointed out in the constitution.”356 In a case where a state court rules for the citizen, and the federal court rules for the alien, “What is to be done? Here is no tribunal to determine between them; it can only be determined by the sword.”357

350. Id.
351. Id.
352. Id. (emphasis removed).
353. Id. at 811.
354. Id.
355. Id. (emphasis original).
356. Id. at 810.
357. Id. at 812.
Also disagreeing with Ames was Representative James Jackson of Georgia, who would later serve as Senator, and Governor of the Peach State. Citing the Supremacy Clause, Jackson explained that state courts and judges are bound, and must “take cognizance of laws of the Union.”\footnote{358. \textit{Id.} at 814.} Jackson referred to Ames’s arguments as “specious” and “done away.”\footnote{359. \textit{Id.}} Jackson also rebutted Madison’s concerns, explaining that the Judiciary Act vests “concurrent jurisdiction in a large extent, where the United States and an alien are the party, or between citizens of one State and those of another.”\footnote{360. \textit{Id.} at 800.} Representative Smith of South Carolina explained more clearly, “[f]rom this view it appears that the district court is not clothed with any authority of which the State courts are stripped, but is barely provided with that authority which arises out of the establishment of a National Government, and which is indispensably necessary for its support.”\footnote{361. \textit{Id.} at 800.}

In \textit{Claflin}, Justice Bradley observed that the vision of exclusive jurisdiction as articulated by Hamilton in \textit{The Federalist No. 82} was “shared by the first Congress in drawing up the Judiciary Act of Sept. 24, 1789.”\footnote{362. \textit{Claflin v. Houseman}, 93 U.S. 130, 139 (1876).} In the act, “there is a constant exercise of the authority to include or exclude the State courts” from jurisdiction over federal issues.\footnote{363. \textit{Id.}} Further, under the Act, “where no direction is given on the subject, it was assumed, in our early judicial history, that the State courts retained their usual jurisdiction concurrently with the Federal courts invested with jurisdiction in like cases.”\footnote{364. \textit{Id.}} But this is not exactly right. In the final analysis, a single strand of thinking behind the scope of concurrent and exclusive powers cannot be found among those in the House of Representatives who debated the Judiciary Act of 1789.

 Likewise, in \textit{Gittings} Chief Justice Taney, ignoring the irony of \textit{Marbury v. Madison}, expressed his doubt “in pronouncing an act of congress passed in 1789 a violation of the constitution.”\footnote{365. \textit{Gittings v. Crawford}, 10 F. Cas. 447, 450 (Cir. Md. 1838) (No. 5465) (Taney, Circuit Justice).} Of course, it was his predecessor, Chief Justice Marshall, who invalidated a grant of mandamus jurisdiction in the Judiciary Act of 1789. Justice Story heaped praise on the framers of the Judiciary Act of 1789: It is an historical fact that, at the time when the Judiciary Act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system.\footnote{366. \textit{Martin v. Hunter’s Lessee}, 14 U.S. 304, 351 (1816).}
The Justices have afforded this bill a potentially-undeserved precedential sanctity and clarity.

But what is clear is that there was a general tenor of respect for the sovereignty of the state judiciaries. In a thoughtful and comprehensive article, Professor Bellia articulated a “discernable legal framework” to explain how those in the “Founding period and decades that followed ratification . . . analyzed questions of congressional power to assign federal actions to state courts.” 367 These public officials “considered whether general law principles of jurisdiction—to wit, jurisdictional principles of the law of nations—operated within the structure of the Constitution as a limitation on congressional power to allow or require state courts to hear certain cases.” 368 This dynamic was characterized by the general presumption of concurrent jurisdiction, unless the Constitution said otherwise. First, “general jurisdictional principles defined the relationship between congressional power and state court jurisdiction unless a specific constitutional provision remade that relationship in some regard.” 369 Second, recognizing our federalist system, “sovereignty interests” set the “general bounds on congressional power, subject to exceptions that specific provisions of the Constitution authorized.” 370 Third, among other “workable” standards, Congress could not “legislate in areas of ‘traditional state functions.’” 371 Each of these principles acknowledge that principles of federalism places limitations on federal regulation of state courts.

Hamilton, and several of the framers of the Judiciary Act of 1789, seemed to assume that the state courts would, unless federal law provided otherwise, have concurrent jurisdiction. What is the basis for this presumption? It is certainly not evident in the Constitution, which is mostly silent as to the role of state courts, with the exception of the Supremacy Clause, stating that “judges in every state shall be bound thereby” by the Supreme law of the land. 372 And the Judiciary Act of 1789 takes a varied view on this topic, giving the courts exclusive jurisdiction for some matters, but designating others as concurrent. If the state courts had complete concurrent jurisdiction, wouldn’t it only be necessary to explain where they did not? This is to say nothing of the fact that members of the First Congress, from James Madison down, could not agree on this issue. And there is no clear explanation of why the state courts would have assumed this jurisdiction. After 200 years, these questions are still unresolved, and the Supreme Court has never fully addressed them.

367. Bellia, supra note 2, at 951.
368. Id.
369. Id.
370. Id.
371. Id.
372. U.S. CONST., art. VI, cl. 2.
3. Are Sections 9 and 11 of the Judiciary Act of 1789 Constitutional?

While Marbury v. Madison famously found that Section 13 of the Judiciary Act of 1789, which purported to add “writs of mandamus” to the Supreme Court’s original jurisdiction, was unconstitutional, the validity of Sections 9 and 11 was never formerly tested. Several Justices, however, have opined on whether state courts could maintain concurrent jurisdiction.

In Gittings v. Crawford, Chief Justice Taney, sitting as Circuit Justice in his home state of Maryland, discussed in an extended dictum whether Section 9 of the Judiciary Act of 1789 was in fact constitutional.373 Taney recalled a case from five years earlier, Davis v. Packard.374 Charles A. Davis, who was the Consul-General of the King of Saxony, was sued in state court in New York. Writing for the Court, Justice Thompson found that the state court lacked jurisdiction. “As an abstract question, it is difficult to understand, on what ground a state court can claim jurisdiction of civil suits against foreign consuls.”375 Citing Article III, Thompson noted that the “judicial power of the United States extends to all cases affecting ambassadors, other public ministers, and consuls, &c.”376 Further, citing Section 9 of the Judiciary Act of 1789, Thompson recounted that “district courts of the United States, exclusively of the courts of the several states, [have] jurisdiction of all suits against consuls and vice-consuls.”377 The Davis Court said no more about the validity of this exclusive jurisdiction.

In Gittings, Chief Justice Taney reasoned that “[t]his language used by the court, with the point directly before them, can only be understood as an affirmand of the constitutionality of the [judiciary] act of 1789.”378 The New York court’s lack of jurisdiction, however, stems not from Article III, but from the Act itself. In this context, the state courts were not “impliedly excluded” due to “grant of original jurisdiction” of the Supreme Court. That is, Article III’s reservation of certain matters only for the Supreme Court’s original jurisdiction in no way excluded the state courts from hearing cases concerning consuls.379 Rather, the divestment of the state court’s jurisdiction was “placed on the grant of power to the courts of the United States generally” by Article III, and the Judiciary “[A]ct of 1789, which conferred the jurisdiction on the district courts, and excluded the state courts.”380 Taney concluded that because the “exclusion of the state courts” is derived from the Judiciary Act of 1789, that the act itself “was deemed [by the Davis court as] constitutional.”381

373. 10 F. Cas. 447, 449–50 (Cir. Md. 1838) (No. 5465) (Taney, Circuit Justice).
374. 32 U.S. 276 (1833).
375. Id. at 281.
376. Id.
377. Id.
378. Gittings, 10 F. Cas. at 449.
379. Id. at 449.
380. Id.
381. Id.
Taney also explained that Congress in different sections granted concurrent jurisdiction, signaling that they were fully aware of the different types of grants possible. In the “clause immediately preceding” the designation of exclusive jurisdiction or consuls, there is a grant of “concurrent” jurisdiction for certain suits involving the United States. But in all other cases, the presumption of concurrent jurisdiction remains. “[T]he state courts are not, and cannot, from the nature of our institutions, be excluded from all jurisdiction in such matters, and the grant of power to the courts of the United States has never been held to exclude them.”

Arguably this entire discussion is dicta. Justice Harlan explained in *Plaquemines Tropical Fruit Co. v. Henderson,* that *Gittings,* it is true, did not present any question as to the jurisdiction of the state courts; but it affirms the rule that the grant of original jurisdiction to a particular court in enumerated cases does not, of itself, import that the jurisdiction of that court is exclusive in such cases.

One point, which I raise purely for academic curiosity and will not dwell on for more than a moment, is that the Judiciary Act of 1789 preceeds the Tenth Amendment. Should this have any impact on the relationship between the Act, federalism, and principles of judicial sovereignty? Absolutely not. According to the Supreme Court’s modern federalism jurisprudence, this should not serve as any obstacle. In *Printz v. United States,* Justice Scalia found that the dissent “falsely presumes that the Tenth Amendment is the exclusive textual source of protection for principles of federalism. Our system of dual sovereignty is reflected in numerous constitutional provisions . . . and not only those, like the Tenth Amendment, that speak to the point explicitly.” For our “Constitution established a system of ‘dual sovereignty,’” and the states’ retained “‘residuary and inviolable sovereignty,’” which is “reflected throughout the Constitution’s text.” Federalism is in no way restricted to the Tenth Amendment. The consideration of judicial sovereignty in the Judiciary Act of 1789, which predates the Bill of Rights, illustrates this fact.

### D. Article III – All Federal Causes of Action

There are two possible broad theories of Article III exclusive jurisdiction. First, that Article III itself permits Congress to vest the federal courts with exclusive jurisdiction over certain, or perhaps all, federal causes of action. Justice Story argued that “all cases to which the judicial powers of the United States extended, they might rightfully vest exclu-

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382. *Id.* at 450.
383. *Id.*
386. *Id.* at 918 (citing *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991)).
387. *Id.* at 918–19 (citing THE FEDERALIST NO. 39 (James Madison)).
388. *Id.* at 919.
sive jurisdiction in their own Courts." Another vision, also articulated by Justice Story, was that jurisdiction was limited to all of the heads of jurisdiction in Article III prefaced by “all cases.” Those designated “controversies” could be heard in state court. The Supreme Court has taken the broader position that Article III designates certain causes of action as exclusive to the federal courts, and others are vested by virtue of Article I. In *Claflin*, Justice Bradley laid down a “general principle”—“where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself.” Thus the second means is through its Article I powers, where Congress can act to divest the state courts of jurisdiction. Some courts have intimated that the Supremacy Clause standing by itself is enough, but this can’t be right, as the Supremacy Clause is not a grant of power. Other courts have suggested the “in inferior courts” clause, coupled with the Necessary and Proper Clause, is sufficient to regulate state court jurisdiction. Others have suggested that the underlying grant of authority in Article I, Section 8, such as the bankruptcy or naturalization power, coupled with the Necessary and Proper Clause, is sufficient.

1. **Martin v. Hunter’s Lessee**

Justice Joseph Story championed, virtually alone among Justices, the view that the Constitution itself prevents state courts from hearing causes of action arising under federal law. Story first articulated his opinion in the canonical jurisdictional case of *Martin v. Hunter’s Lessee*. The facts of *Martin* are (or at least should be) familiar to all first-year law students. The Virginia Court of Appeals (the highest court in the Commonwealth) refused to recognize the appellate jurisdiction of the Supreme Court of the United States, and disregarded a mandate from above concerning the title to ownership of land in the Northern Neck of Virginia. The Commonwealth’s highest court found that Section 25 of the Judiciary Act of 1789, which extended “the appellate jurisdiction of the supreme court to this court, is not in pursuance of the constitution of the United States” and was unconstitutional. The majority opinion in this case of “great importance and delicacy” was authored by Justice Story.

Chief Justice Marshall, finding a conflict of interest, recused because he owned land in modern-day Fairfax, Virginia. (The same ethical scruples were apparently absent in *Marbury v. Madison*, where his grave failure to deliver William Marbury’s commission teed up the landmark case). Story found unconstitutional the “refusal of that Court to obey the mandate of” the Supreme Court.

391. *Hunter’s Lessee*, 14 U.S. at 323–24 (internal quotation marks omitted).
392. *Id.* at 324.
393. *Id.*
Beyond the holding, Story had an extensive discussion concerning the scope of exclusive jurisdiction. Justice Story read the exclusive jurisdiction of federal courts even more broadly than Hamilton. Wherever Article III enumerates an area where the judicial power extends, Congress can make those areas exclusive. “Congress, throughout the Judicial Act, and particularly in the 9th, 11th, and 13th sections, have legislated upon the supposition that, in all the cases to which the judicial powers of the United States extended, they might rightfully vest exclusive jurisdiction in their own Courts.”

Story read the vesting clause as doing so to the exclusion of all state courts: “the Constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction.”

Story opined that a “[g]rant of exclusive jurisdiction” may be warranted for cases “touching the safety, peace and sovereignty of the nation” out of a concern for “state prejudices, state jealousies, and state interests.” To Story there can be no state-court jurisdiction on any matter within the judicial power of the United States.

As Justice Story explained, “the whole judicial power of the United States should be at all times vested, either in an original or appellate form, in some Courts created under its authority.” Further, he observed, the language “the judicial power shall extend,” signifies an “absolute grant of judicial power.” These are all new powers, rather than referring to any “powers already granted, for the American people had not made any previous grant.” This reaffirms The Federalist, that the powers granted within the judicial power of the United States in no way impacted the preexisting judicial powers of the several states. “The Constitution was for a new Government, organized with new substantive powers, and not a mere supplementary charter to a Government already existing.”

In Hunter's Lessee, Story explained that the jurisdiction for “cases arriving under the constitution, laws, and treaties of the United States . . . could not exist in the state courts previous to the adoption of the constitution, and it could not afterwards be directly conferred on them.” But again, this would not speak to any pre-existing jurisdiction that the state courts had, or jurisdiction conferred on the state courts by their own law. It makes sense that the vesting clause confers no jurisdiction on the state courts—for they cannot be constituted as inferior courts—but this still does not answer the question of how Congress can withdraw matters from their jurisdiction.

394. Id. at 337 (emphasis added).
395. Id. at 335 (emphasis added).
396. Id. at 347.
397. Id. at 331.
398. Id. (emphasis in original) (internal quotation marks omitted).
399. Id. at 331–32.
400. Id. at 332.
401. Id. at 334–35.
402. C.f Prakash, supra note 96, at 1957.
Professor Collins explained that Story’s understanding was rooted in the Madisonian Compromise. Story justified his view that Congress was “bound to create some inferior (federal 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.”

For if a case to which the federal judicial power extended was not in the Supreme Court’s original jurisdiction, and if, in addition, the state courts were somehow constitutionally disabled from hearing it—as he supposed they could be—there would be an absence of any trial forum whatsoever for such a case if Congress created no federal courts to hear it in the first instance.

Collins added that “[f]or Story, it was less problematic to address the constitutional difficulty surrounding the homeless Article III case by insisting on the creation of lower federal courts, rather than by concluding that state courts would be jurisdictionally competent to hear such cases.” In other words, because Article III prohibited the state courts from hearing certain causes of action, and the Supreme Court must have appellate jurisdiction over these cases, some federal court must have original jurisdiction. And these must be the inferior courts, which, according to Story, Congress was required to constitute.

Story was not alone in holding this view. Professor Collins observed that “there is strong evidence that the shared understanding of eighteenth- and nineteenth-century lawyers, judges, and writers was that some Article III judicial business was off-limits to the state courts, by force of the Constitution alone.” In 1801, some members of Congress found it “very doubtful on constitutional grounds whether Congress could delegate [Article III] judicial powers to the State Courts.” Representative Roger Griswold (CT) said, in 1802, “the people . . . have declared by their Constitution that the courts shall exist; they have said that their confidence is not and ought not to be reposed in State courts for the decision of national causes or causes of a civil nature between citizens of different States; they have left nothing upon this subject for us to do, or to decide, but what relates to the form of organizing the national tribunals.”

In Plaquemines Tropical Fruit Co. v. Henderson, Justice Harlan quoted favorably Kent’s Commentaries discussion of the “clauses of the constitution relative to the judicial power of the United States.”

The conclusion, then, is that in judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of congress, and may be revoked and extinguished whenever they

403. Collins, Article III Cases, supra note 2, at 57.
404. Id. at 56–57.
405. Id. at 57.
406. Id. at 53.
407. 10 ANNALS OF CONG. 879 (Joseph Gales ed., 1801).
408. 11 ANNALS OF CONG. 770 (Joseph Gales ed., 1802).
think proper, in every case in which the subject-matter can constitutionally be made cognizable in the federal courts, and that, without an express provision to the contrary, the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter.\textsuperscript{409}

Thus, Congress can do so whenever it deems “proper” over any matter that can “constitutionally be made cognizable in federal courts,” as articulated in Article III.

Story’s view did not prevail. His extended discussion in \textit{Hunter’s Lessee} was not joined by all of the Justices. Driving the point home that much of Story’s discussion was not necessary to the holding, Justice Johnson concurred in a separate opinion, and stressed that the Court only ruled that its jurisdiction was “supreme over persons and cases as far as our judicial powers extend, but not asserting any compulsory control over the State tribunals.”\textsuperscript{410}

Justice Bradley in \textit{Claflin} likewise characterized Justice Story’s analysis as being “intimated . . . [in] obiter dictum.” Bradley wrote that “the State courts could not take direct cognizance of cases arising under the Constitution, laws, and treaties of the United States, as no such jurisdiction existed before the Constitution was adopted.”\textsuperscript{411} Yet, Bradley clarified that this reasoning only applied “as to jurisdiction depending on United States authority.”\textsuperscript{412} In other contexts, “the same jurisdiction existed (at least to a certain extent) under the authority of the States.”\textsuperscript{413} Bradley noted, “[i]nventors had grants of exclusive right to their inventions before the Constitution was adopted, and the State courts had jurisdiction thereof.”\textsuperscript{414} “The change of authority creating the right,” he continued, “did not change the nature of the right itself.”\textsuperscript{415} With patent as a key example, “[t]he assertion, therefore, that no such jurisdiction previously existed, must be taken with important limitations.”\textsuperscript{416} In other words, there were some areas where the state courts had jurisdiction before the Constitution, and by the grant of exclusive jurisdiction to the federal courts, these state courts were divested of jurisdiction.

Story effectively admitted this limitation. In \textit{Hunter’s Lessee}, he noted, without objection, that “it is plain that the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States not only might, but would, arise in the State courts in the exercise of their ordinary jurisdiction.”\textsuperscript{417} Citing the Supremacy Clause, which binds judges to the Constitution and the laws of the United States, Story explained that state judges “would be called upon to pronounce

\begin{itemize}
  \item \textsuperscript{409} 170 U.S. 511, 517–18 (1898) (citing 1 KENT, \textit{supra} note 10).
  \item \textsuperscript{410} Martin v. Hunter’s Lessee, 14 U.S. 304, 362 (1816).
  \item \textsuperscript{411} Claflin v. Houseman, 93 U.S. 130, 140–41 (1876).
  \item \textsuperscript{412} \textit{Id.} at 141.
  \item \textsuperscript{413} \textit{Id.}
  \item \textsuperscript{414} \textit{Id.}
  \item \textsuperscript{415} \textit{Id.}
  \item \textsuperscript{416} \textit{Id.}
  \item \textsuperscript{417} Martin v. Hunter’s Lessee, 14 U.S. 304, 340 (1816).
\end{itemize}
the law applicable to the case in judgment” according to the “supreme law of the land.” For examples, defendants in state criminal trials could assert that state laws violated the ex post facto clause.

Story did posit an alternate understanding in Hunter’s Lessee.

“[E]ven admitting that the language of the constitution is not mandatory, and that congress may constitutionally omit to vest the judicial power in courts of the United States, it cannot be denied that, when it is vested, it may be exercised to the utmost constitutional extent.” Here, Story seemed to imply that even if Article III does not compel this result, Congress can act, presumably pursuant to its Article I powers, to accomplish this exclusivity. Stated differently, “[t]he judicial power of the United States,” Story explained, “is unavoidably, in some cases, exclusive of all State authority, and in all others, may be made so at the election of Congress.” But this can’t be entirely correct, as there has been a longstanding tradition of state courts exercising concurrent jurisdiction, both for criminal and civil cases.

Story wrote that “it 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.” This would suggest that Article III itself designates certain areas as exclusive to the federal courts, and that Congress must take affirmative action for the matters to be heard in state courts. This is precisely the opposite standard of how the Court has construed Article III. The presumption is concurrent jurisdiction, and Congress must take steps otherwise to designate them as exclusive. In the end, Story’s view never caught on.

2. Houston v. Moore

Four years later, in a dissenting opinion in Houston v. Moore, Story repeated his view that state courts lack jurisdiction over any matter arising under federal law. Pennsylvania passed a law that effectively punished a delinquent for neglecting to perform his militia duties, as defined by an Act of Congress. In other words, Pennsylvania punished the absconder for violating an Act of Congress, subject to court martial in Pennsylvania. In Moore, Justice Bushrod Washington concluded that a Pennsylvania state court martial could punish a delinquent militiaman for violating the laws of the United States.

Houston, “a private, enrolled in the Pennsylvania militia, and belonging to the detachment of the militia which was ordered out by the Governor of that State, in pursuance of a requisition from the President of the United States . . . . neglected to march with the detachment to the

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418. Id. at 340–41.
419. Id. at 337.
420. Id. at 336–37.
421. Id. (emphasis added).
422. Houston v. Moore, 18 U.S. 1, 32 (1820).
appointed place of rendezvous.” Houston sought to instruct the jury during the court martial that the Pennsylvania statute was “contrary to the constitution of the United States, and the laws of Congress made in pursuance thereof, and are, therefore, null and void.” In other words, the statute was unconstitutional, and the court martial lacked jurisdiction. The court martial instructed the jury that the statute was constitutional, and the jury convicted him. The Supreme Court of Pennsylvania affirmed the judgment. The federal law in question was silent concerning exclusive or concurrent jurisdiction. On appeal to the Supreme Court, Justice Washington found that the statute was constitutional.

Justice Story dissented.

If, then, we strip the case before the Court of all unnecessary appendages, it presents this point, that Congress had declared that its own Courts Martial shall have exclusive jurisdiction of the offence; and the State of Pennsylvania claims a right to interfere with that exclusive jurisdiction, and to decide in its own Courts upon the merits of every case of alleged delinquency.

Echoing the second of Hamilton’s factors for exclusive jurisdiction identified in The Federalist No. 82, Story asked rhetorically whether “more direct collision with the authority of the United States [can] be imagined?” This is not to say that the Pennsylvania statute was in conflict with federal law—in fact it parroted it verbatim—but whether Pennsylvania courts could have jurisdiction to hear it. Assuming, without argument, “that Congress may constitutionally delegate to its own Courts exclusive jurisdiction over cases arising under its own laws,” Story reasoned that since the “penalty is prescribed to be recovered in a special manner, in a special Court [federal court], it excludes a recovery in any other mode or [state] Court.” This is even if Congress does nothing to expressly exclude the state courts. Professor Collins reads Story’s understanding of exclusive jurisdiction to “suggest that the state courts would be disabled from hearing some Article III cases by operation of the Constitution itself.”

Commenting on the majority opinion in Moore, Justice Bradley opined in Claflin that the holding “was based upon the general principle that the State court had jurisdiction of the offence, irrespective of the authority, State or Federal, which created it.” Unless the courts were “prohibited by the exclusive jurisdiction of the Federal courts,” then “these courts might exercise jurisdiction on cases authorized by the laws of the State,” regardless of whether “Congress could confer jurisdiction.

423. Id. at 3.
424. Id. at 4.
425. Id. at 71–72.
426. Id. at 72.
427. Id. at 72. This was somewhat the issue in Arizona v. United States, 132 S. Ct. 2492 (2012).
428. Houston, 18 U.S. at 71.
429. Collins, Article III Cases, supra note 2, at 55.
upon the State courts.”

Though, Justice Bradley cast doubt on the holding of that case where “perhaps, the court went further, in that case, than it would now,” as the Pennsylvania law on the “same subject [as the federal law] might well have been regarded as void.” Brushing aside that issue, the Court concluded, “[b]e this as it may, it was only a question of construction; and the court conceded that Congress had the power to make the jurisdiction of its own courts exclusive.”

E. Article III—“All Cases”

1. Nott and Story

Another view concerning the scope of exclusive jurisdiction suggests that only three of the heads of jurisdiction listed in Article III are impermissible in the state courts. More precisely, exclusive jurisdiction does not extend to all of the heads listed in Article III, Section 2, but instead to only the heads prefaced by the modifier “all cases,” and not the heads prefaced by the modifier “controversies.” Article III, Section 2 provides, in its entirety:


The first three are “all cases,” and the rest are “controversies.”

431. Id.
432. Id. at 142.
One of the earliest proponents of this view was Representative Abraham Nott (S.C.), who served in the first Congress. In 1801 he contended that federal courts must, in accordance with Article III, maintain exclusive jurisdiction of “all Cases,” but not “any Controversy.”434 In contrast, the state courts could hear the Article III “controversies.”435 As fate would have it, two decades later, Nott would have the occasion to weigh in on this topic as a Justice on the Constitutional Court of Appeals of South Carolina.436 For the majority, Justice Huger found that “[t]he Federal Courts have not exclusive jurisdiction with regard to offences committed by foreign Consuls in the United States; but the Consul is amenable to the laws of the state in which he commits an offence.”437

Nott dissented, finding “the jurisdiction belongs exclusively to the Courts of the United States.”438 Nott locates this cause of action within the “all cases” category of Article III. “Those belonging to the first class are all cases arising under the Constitution, the Laws of the United States and Treaties made or which shall be made under their authority; all cases affecting Ambassadors, public Ministers and Consuls, and all cases of Admiralty and Maritime jurisdiction.”439 For these cases, the federal courts had exclusive jurisdiction. “The second class includes all the other cases which follow in the succeeding part of the section.”440 These

434. 10 ANNALS OF CONG., supra note 407, at 895.
435. See id.
438. Id. at 226 (Nott, J., dissenting).
439. Id. at 227 (Nott, J., dissenting).
440. Id. (Nott, J., dissenting).
were the cases not arising under federal law, and could be heard in state courts.

In *Martin v. Hunter’s Lessee*, Justice Story also discusses this two-tier approach. Story explained that with respect to “all cases” relating to “the national sovereignty” enumerated in “the first class” of Article III—as opposed to the “controversies” which lack the modifier “all”—the State courts could not ordinarily possess a direct jurisdiction. These cases, involving “ambassadors, other public ministers, and consuls . . . admiralty and maritime jurisdiction,” “enter into the national policy, affect the national rights, and may compromit [sic] the national sovereignty,” and “affect not only our internal policy, but our foreign relations.”

There is one deficiency in the “all” and “any” theory that I have not seen addressed elsewhere. Article III designates “all cases . . . arising under . . . Treaties made” in the top-tier category of exclusive jurisdiction. This would suggest that Article III demands that these cases be vested solely in federal courts. The Judiciary Act of 1789, however, vests concurrent jurisdiction for suits “where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” If the “top-tier” theory is correct, how can it be that “all cases . . . arising under . . . Treaties” can be brought in state court? Here, there is at least one instance where an “all case” was explicitly designated for concurrent jurisdiction by the Judiciary Act of 1789. This presumes, of course, that the Judiciary Act of 1789 was correct in this regard.

2. Field

In *The Moses Taylor*, Justice Field commented on Story’s view. “[T]he learned justice [Story] appears to have thought the variation in the language” between the top tier and second tier was “the result of some determinate reason.” Field continues, noting that Story seemed to “suggest[] that, with respect to the first class, it may have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to all cases, and, with

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441. *Martin v. Hunter’s Lessee*, 14 U.S. 304, 334 (1816) (“The first class includes cases arising under the constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class the expression is, and that the judicial power shall extend to all cases; but in the subsequent part of the clause which embraces all the other cases of national cognizance, and forms the second class, the word ‘all’ is dropped seemingly ex industria. Here the judicial authority is to extend to controversies (not to all controversies) to which the United States shall be a party, &c. From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason, and it is not very difficult to find a reason sufficient to support the apparent change of intention.”); Shane Pennington, *Cases, Controversies, and the Textualist Commitment to Giving Every Word of the Constitution Meaning*, 14 TEX. REV. L. & POL. 180 (2009).
443. Id. at 335.
446. 71 U.S. 411, 429 (1866).
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respect to the latter class, to leave it to Congress to qualify the jurisdiction in such manner as public policy might dictate.” 447 Field, noted that [t]he vital importance of all the cases enumerated in the first class to the national sovereignty is mentioned as a reason which may have warranted the distinction, and which would seem to require that they should be vested exclusively in the national courts, a consideration which does not apply, at least with equal force, to cases of the second class. 448 Field wrote that it “is manifest that the judicial power of the United States is in some cases unavoidably exclusive of all State authority, and that in all others it may be made so at the election of Congress.” 449

Field viewed that the Judiciary Act of 1789 “proceeded upon this supposition” and “is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts.” 450 In this sense, Field sees Article III and the Judiciary Act of 1789 as concurrent. Many of the causes of action deemed for exclusive jurisdiction overlap with the “all cases” listed in Article III:

It declares that in some cases, from their commencement, such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the State courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offences, are placed, from their commencement, exclusively under the cognizance of the Federal courts. 451

But is Field actually saying that this result is compelled by Article III, or that Article III authorizes it, and “Congress may rightfully vest exclusive jurisdiction in the Federal courts?” 452 Backing away from the constitutional standard, Field seemed to suggest that it is the statute, not Article III, that divests the state courts of jurisdiction. “The cognizance of civil causes of admiralty and maritime jurisdiction vested in the District Courts by the ninth section of the Judiciary Act, may be supported upon like considerations.” 453 That is, it cannot be “seriously questioned” whether Congress has the power to do so. 454 But, Field stressed that it was the Judiciary Act of 1789, and not the Constitution, which divested state courts of jurisdiction over admiralty. “It has been made exclusive by Congress, and that is sufficient, even if we should admit that in the absence of its legislation the State courts might have taken cognizance of

447. Id.
448. Id.
449. Id.
450. Id. (emphasis added).
451. Id. at 429–30.
452. Id. (emphasis added).
453. Id. at 430.
454. Id.
these causes.” Without the Judiciary Act of 1789, the state courts would still have jurisdiction over these matters.

Along the same lines, in *Martin v. Hunter’s Lessee*, Justice Story explained that the only type of admiralty jurisdiction that is not exclusive, and where the states can exercise concurrent jurisdiction, is where they possessed that sort of jurisdiction prior to the Constitution. “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.” This reasoning presumes that states cannot offer new grants of jurisdiction over these matters following Article III.

But, Field seemed to double back, hewing closer to an Article III analysis. Quoting Story’s Commentaries on the Constitution, he explained, “’[t]he admiralty jurisdiction,’ said Mr. Justice Story, ‘naturally connects itself, on the one hand, with our diplomatic relations and the duties to foreign nations and their subjects; and, on the other hand, with the great interests of navigation and commerce, foreign and domestic.” He concluded with a policy ground that seemed rooted in the Constitution itself. “There is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort, which cannot be wielded, except for the general good, and which multiplies the securities for the public peace abroad, and gives to commerce and navigation the most encouraging support at home.”

3. **Amar**

The leading modern-day advocate of this two-tier view is Professor Akhil Reed Amar. Amar refers to the “all cases” as “top-tier” cases for federal jurisdiction. The “bottom-tier” instances of federal jurisdiction are modified not by the word “all,” but by the word “any.” Amar explained, “[f]ederal courts had to be the last word in ‘all’ top-tier cases,

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455. *Id.*
456. *Id.*
458. *Id.*
459. *Id.* at 327.
460. *Id.*
461. AMAR, supra note 311, at 4611–12 (“When questions about the 1789 Act eventually reached the Supreme Court, the justices, in a series of landmark opinions authored by John Marshall and Joseph Story, highlighted the Judicial Article’s two-tiered structure. As Story—himself a former congressman, as was Marshall—explained, “congress seem, in a good degree, in the establishment of the present judicial system, to have adopted this distinction” between the two tiers, a distinction which the Court’s opinion “brought into view in deference to the legislative opinion, which has so long acted upon, and enforced it.”).
but not necessarily all bottom-tier lawsuits. But for the bottom-tier controversies, “Congress was free to decide, thanks to the necessary-and-proper clause, whether federal courts should hear all of these lawsuits, or some of them, or none of them.” Yet, neither of these propositions indicates that the jurisdiction must, or even can, be exclusive. Rather, the involvement of federal review is only a necessity for an appeal, not in the first instance. The key for the top tier claims, which “derived from the Constitution itself, federal statutes, or federal treaties,” would be “ultimately adjudicated by a federal judiciary” on appeal. And for bottom-tier disputes, for which “disputes might turn solely on state-law issues over which state courts were traditionally seen as authoritative. Federal jurisdiction was nevertheless permissible,” but by no means exclusive.

Professor John Harrison takes the opposite position. He explained that Nott’s “form of two-tierism, however, seems not to have been Amar’s . . . strain according to which federal exclusivity meant real exclusivity: he appears to have believed a state court could not decide, even in the first instance, a case that arose directly under federal law.” A state judiciary hostile to some federal program might so manipulate the trial process as to make appellate review inadequate, or the cost of trial on a charge that should have been dismissed might prejudice federal interests.” Harrison contended that “[i]n such situations, full vindication of federal law may require a federal forum from the outset.” In other words, exclusive jurisdiction is required.

4. Claflin

In any event, this two-tier view has not been accepted by the Supreme Court. The Claflin court noted that “[s]ome have supposed wherever the Constitution declares that the judicial power shall extend to ‘all cases,’” including “all cases in law and equity arising under the Constitution, laws, and treaties of the United States”—the “jurisdiction of the Federal courts is necessarily exclusive.” In contrast, others contended that “where the power is simply extended ‘to controversies’ of a certain class—as, ‘controversies to which the United States is a party,’—the jurisdiction of the Federal courts is not necessarily exclusive.” The Court rejected this supposition, explaining that “no such distinction seems to

462. Id. at 4578–79.
463. Id. at 4580–81.
464. Id. at 4586–91.
465. Id. at 4592–93.
466. 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, 239 n.101 (1997). Harrison also noted that Nott’s view was not that of Professor Akhil Amar (“[H]owever, seems not to have been Amar’s.”). Id.
467. Id. at 234.
468. Id.
469. Claflin v. Houseman, 93 U.S. 130, 139 (1876).
470. Id.
have been recognized by Congress, as already seen in the Judiciary Act; and subsequent acts show the same thing.”

Also expressing doubt on this view of exclusive jurisdiction was Justice John Marshall Harlan I. Justice Harlan observed that public ministers can only be sued in the Supreme Court’s exclusive jurisdiction. In this sense, the Judiciary Act of 1789’s reservation of original jurisdiction divests the state courts of concurrent jurisdiction. It provided that the Supreme Court “shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers.” Harlan explained that “public ministers were protected from the compulsory process of any court other than one suited to their high positions.” But, as Harlan explained, the same public ministers can bring suit in any jurisdiction of their choice. The latter clause of the Judiciary Act states that the Supreme Court shall have “original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers.”

Harlan added, the ministers “were left free to seek redress for their own grievances in any court that has the requisite jurisdiction. No limits were set on their powers of choice in this particular.” Yet neither result is compelled by Article III, Section 2, which only provides that the Supreme Court over “cases affecting Ambassadors, other public ministers . . . shall have original Jurisdiction.”

Taking a position somewhere between Justice Story’s “all federal” view and Abraham Nott’s “two-tiered” view is Justice Bradley. In Claflin, Justice Bradley laid down a “general principle”—“where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself.” In other words, he suggested that some jurisdiction is made exclusive “by the Constitution itself,” and other jurisdiction can be made exclusive by Congress. The former through Article III, the latter through Article I.

Professor Collins identified a “problematic . . . limitation hinted at” in this portion of Claflin. While “[m]ost discussions of exclusive federal court jurisdiction today focus on the question of exclusivity created by federal statutes, not the Constitution,” Justice Bradley seemed to imply that “perhaps the Constitution itself made some federal jurisdiction exclusive.” Further, Bradley did not opine—unlike Story or Nott—when

471.  Id.
473.  Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80 (emphasis added).
474.  Plaquemines Tropical Fruit Co., 170 U.S. at 520.
475.  § 13, 1 Stat. 73 at 80 (emphasis added).
476.  Plaquemines Tropical Fruit Co., 170 U.S. at 520.
477.  U.S. CONST. art. III § 2, cl. 2.
479.  Collins, Article III Cases, supra note 2, at 52.
480.  Id. at 52–53.
the Constitution makes jurisdiction exclusive, short of rejecting both views. Though Collins noted the limitations of this dictum:

I do not mean to overstate the point. *Claflin* itself did not pursue the idea beyond mentioning it. And the idea that state courts might be constitutionally disabled from exercising concurrent jurisdiction over a particular slice of Article III business poses clear problems for the [Madisonian] Compromise and the traditional understanding of state court judicial competence.481

The alternate reading by Professor Collins, which I find more plausible, is “not a[n] acknowledging that any particular Article III business is in fact exclusive by operation of the Constitution, but as simply repeating a constitutional principle that takes such a ‘theoretical’ position as its starting point.”482 This is the closest the Supreme Court has come to addressing whether Article III, by its own force, designates certain causes of action for exclusive jurisdiction. As Justice Field observed in *The Moses Taylor*, “[h]ow far this judicial power is exclusive [by Article III], or may, by the legislation of Congress, be made exclusive, in the courts of the United States, has been much discussed, though there has been no direct adjudication upon the point.”483 Field himself ducked this issue, and “avoided the question whether the Constitution itself mandated such exclusivity, noting that the jurisdictional statute enacted by Congress was ‘sufficient’ answer to oust state courts of jurisdiction in civil actions arising under admiralty and maritime law.”484 Professor Bellia noted that “[e]ach argument . . . that federal courts must have exclusive jurisdiction over all or some Article III cases and controversies relied upon Article III as specifically rendering federal jurisdiction exclusive.”485 Reflecting this uncertainty, *Federal Practice & Procedure Jurisprudence* observed that “Congress probably has the power to give the federal courts exclusive jurisdiction over all of the matters enumerated in Article III of the Constitution.”486

In any case, the Article III vision of exclusive jurisdiction only provides a partial explanation for the current state of exclusive jurisdiction. Most of the statutes in existence today have no grounding to the exclusive heads listed in Article III. If exclusive jurisdiction must be grounded in Article III, that does not explain all exclusive jurisdiction statutes premised on Article I. Thus, the answer must reside somewhere in the middle, closer to Justice Bradley’s dictum.

481. *Id.* at 53.
482. *Id.*
483. *Id.* at 83 n.53 (emphasis omitted).
484. *Id.* at 78–79.
F. Excluding State Court Jurisdiction

The Court has consistently held that the state courts are presumed to maintain concurrent jurisdiction, unless Congress takes steps to specifically preclude them from hearing the claims. While the former grant of concurrent jurisdiction likely stems from the Constitution itself, the Court has failed to articulate a single line of reasoning concerning the power to divest the state courts of this jurisdiction. Yet, all the opinions that have addressed this issue are in agreement that Congress must speak clearly to vest federal courts with exclusive jurisdiction. Citing The Moses Taylor and Martin v. Hunter’s Lessee, the Claflin court stressed that “where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction.”\(^{487}\) This divesting type of jurisdiction is “sometimes exclusive by express enactment and sometimes by implication.”\(^{488}\) Chief Justice White used similar language in Minneapolis & St. Louis Railroad Road Company v. Bombolis: jurisdiction is concurrent “unless excepted by express constitutional limitation or by valid legislation to that effect.”\(^{489}\) He did not suggest what would make such divesting legislation “valid.”

In Yellow Freight System, Inc. v. Donnelly, the Court found that Title VII’s language that “‘[e]ach United States district court . . . shall have jurisdiction of actions brought under this subchapter,’” did not “ou[s]t state courts of their presumptive jurisdiction.”\(^{489}\) The Court in Gulf Offshore v. Mobil Oil Corp. restated the “straightforward,” “general principle of state-court jurisdiction over cases arising under federal laws”: “state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication.”\(^{490}\) Congress, the Court explained, “may confine jurisdiction to the federal courts either explicitly or implicitly.”\(^{491}\) To “rebut[]” this presumption, and divest state courts of jurisdiction, the Court must find an “explicit statutory directive, [an] unmistakable implication from legislative history, or . . . a clear incompatibility between state-court jurisdiction and federal interests.”\(^{492}\)

The Tafflin court agreed, finding that “[t]his deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim.”\(^{493}\) In Tafflin, Justice Scalia concurred, joined

\(^{487}\) Claflin v. Houseman, 93 U.S. 130, 137 (1876) (citing The Moses Taylor, 71 U.S 411, 429 (1866) (Field, J.), Martin v. Hunter’s Lessee, 14 U.S. 304 (1816) (Story, J.), and Ex parte McNeil, 80 U.S. 236 (1871) (Swayne, J)).
\(^{488}\) Id.
\(^{489}\) 241 U.S. 211, 221 (1916) (emphasis added).
\(^{492}\) Id. at 478.
\(^{493}\) Id.
by Justice Kennedy, rejecting the dictum from *Gulf Offshore* that the presumption of concurrent jurisdiction can be rebutted by an ""explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.""495 Scalia explained:

State courts have jurisdiction over federal causes of action not because it is 'conferred' upon them by the Congress; nor even because their inherent powers permit them to entertain transitory causes of action arising under the laws of foreign sovereigns . . . but because ‘[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are.'496

Citing Justice Washington’s opinion in *Houston v. Moore*, Scalia added that ""it therefore takes an affirmative act of power under the Supremacy Clause to *oust* the States of jurisdiction—an exercise of what one of our earliest cases referred to as ‘the power of congress to withdraw’ federal claims from state-court jurisdiction.""497 (Oddly enough, Scalia’s 1990 opinion in *Tafflin* takes a somewhat different view on the power of the Supremacy Clause than his 1996 opinion in *Printz*. It cannot be the Supremacy Clause alone that divests the state courts of jurisdiction.)

In that 1820 decision, President Washington’s nephew wrote:

I can discover, I confess, nothing unreasonable in this doctrine; nor can I perceive any inconvenience which can grow out of it, so long as the power of Congress to withdraw the whole, or any part of those cases, from the jurisdiction of the State Courts, is, as I think it must be, admitted.498

Speaking to a notion of judicial sovereignty, Scalia added that ""[a]s an original proposition, it would be eminently arguable that depriving state courts of their sovereign authority to adjudicate the law of the land must be done, if not with the utmost clarity.""499 Or, in the words of Hamilton in *The Federalist No. 82*, the “State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressely prohibited.”500

*Mims v. Arrow Financial Services* presented the problem of concurrent jurisdiction in reverse. The plain language of the Telephone Consumer Protection Act (""TPCA"") seemed to vest jurisdiction *exclusively* in state courts, and no jurisdiction was vested in the federal district courts. This issue divided the lower courts, as some read the statute literally, and others extended jurisdiction to federal courts. In *Mims*, the dis-

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495. *Id.* at 460 (Scalia, J., concurring) (internal quotation marks omitted) (citing Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981)).
496. *Id.* at 449 (citing Claflin v. Houseman, 93 U.S. 130, 136–37 (1876)).
497. *Id.* at 470 (citing Houston v. Moore, 18 U.S. 1, 26 (1820)).
500. *Id.* (citing THE FEDERALIST NO. 82, supra note 4) (emphasis added).
The district court found that it “lacked subject matter jurisdiction . . . because Congress vested jurisdiction over [private actions under] the TCPA exclusively in state courts.”

The Court explained that “[i]n cases ‘arising under’ federal law, we note, there is a ‘deeply rooted presumption in favor of concurrent state court jurisdiction,’ rebuttable if ‘Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim.’” Congress can overcome “[t]he presumption of concurrent state-court jurisdiction” with “an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.”

The Court in Mims rejected the respondent’s argument that the later-in-time and more specific TCPA displaced the general presumption of concurrent jurisdiction under 28 U.S.C. § 1331. Writing for the Court, Justice Ginsburg replied, “Section 1331, our decisions indicate, is not swept away so easily.” As a rule, “when federal law creates a private right of action and furnishes the substantive rules of decision, the claim arises under federal law, and district courts possess federal-question jurisdiction under §1331,” even when Congress does not explicitly say there is federal court jurisdiction. Rather, “[t]hat principle endures unless Congress divests federal courts of their §1331 adjudicatory authority.”

The Court also cited a dissenting opinion from then-Circuit Judge Alito, who found that the “divestment of district court jurisdiction” should be found no more readily than “divestment[t] of state court jurisdiction,” given “the longstanding and explicit grant of federal question jurisdiction in 28 U. S. C. §1331.” There was “[n]othing in the permissive language of §227(b)(3) [that] makes state-court jurisdiction exclusive, or otherwise purports to oust federal courts of their 28 U.S.C. § 1331 jurisdiction over federal claims.” Justice Ginsburg concluded that “the District Court retains §1331 jurisdiction over Mims’s complaint un-

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502. Id. at 748 (citing Tafflin, 493 U.S. at 458–59).
503. Id. (citing Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981)) (internal quotation marks omitted).
504. Id. at 749.
505. Id.
506. Id. at 748–49.
509. Id.
less the TCPA, expressly or by fair implication, excludes federal-court adjudication.\textsuperscript{510}

As stated in \textit{Federal Practice \& Procedure Jurisprudence}, “[u]nless Congress expressly makes federal court jurisdiction exclusive, federal and state courts have concurrent jurisdiction to try federal claims.”\textsuperscript{511} But none of these courts have articulated a complete explanation of what empowers Congress to offer such explicit divestments of jurisdiction. Even after two centuries of routinely doing so, the question \textit{how} Congress can “require or allow state courts to exercise jurisdiction over certain kinds of actions” remains “unresolved by the Supreme Court today.”\textsuperscript{512}

\textbf{G. \textit{Constitute Tribunals” Clause}}

Regardless of whether any single Article III exclusive jurisdiction framework is correct, Congress has deemed many matters subject to exclusive jurisdiction that are outside of the heads enumerated in Article III. For these cases, Congress must rely on its Article I powers. In this section, I explore the various and disjointed approaches the Court has taken to define the scope of its Article I powers to limit the jurisdiction of the state courts.

Several courts have grounded the power of Congress to grant exclusive jurisdiction to the federal courts through the “constitute tribunals” clause. Article I, Section 8, clause 9 gives Congress the power “[t]o constitute Tribunals inferior to the supreme Court.”\textsuperscript{513} The only Court created by the Constitution is the Supreme Court, and Congress had the option—which virtually everyone agreed it would exercise—to create, or “constitute Tribunals inferior to the Supreme Court.”\textsuperscript{514} Congress, acting pursuant to its necessary and proper power, has the authority to create and vest federal courts with different aspects of the “judicial power” of Article III.

Professor Bellia noted that “Congress historically has deprived state courts of jurisdiction to hear certain federal actions” acting “pursuant to its specific enumerated power under Articles I and III to constitute inferior federal tribunals and to make all necessary and proper laws for carrying that power into execution (including defining the jurisdiction of federal courts).”\textsuperscript{515} The argument would go something like this: in order to ensure that the federal district courts have effective original jurisdiction over certain federal matters, the state courts cannot exercise concurrent jurisdiction. Surprisingly, the Supreme Court has never made this simple argument, directly at least.

\begin{footnotes}
\item[510.] Id.
\item[511.] WRIGHT \& MILLER, supra note 232, at § 3527.
\item[512.] U.S. CONST., art. I, § 8, cl. 9.
\item[513.] Id.
\item[514.] U.S. CONST., art. III.
\item[515.] State Court Procedures, supra note 2, at 1006.
\end{footnotes}
The Court, in Cary v. Curtis, reasoned that Congress has “the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.” 516 This broad authority would seem to be viewed as a necessary and proper incident of the constitute tribunals power. Further, it can be exercised virtually any time, so long as it is “proper for the public good.” 517 Though, the facts of Curtis dealt not with “exclusive” jurisdiction, but the presumption for “limited” jurisdiction of the federal courts, as opposed to “general” jurisdiction. That is, the federal courts only have that jurisdiction which Congress vests them with.

The “limited, concurrent, or exclusive” line from Cary has been cited by the Court several times, almost always for the “limited” part, 518 but only once (by my count) for the “exclusive” part. (One opinion used similar language, but offered no citation to Cary, and the issue of exclusive jurisdiction of federal courts was not relevant.) 519 That lone case was Lockerty v. Phillips, decided at the height of World War II. In that case, the Court considered the jurisdiction of the Emergency Court, which withdrew jurisdiction over price orders from “every other federal and state court.” 520 (Many of the Court’s precedents concerning Congressional regulation of state courts stemmed from numerous Depression-era and

516. 44 U.S. 236, 245 (1845) (emphasis added).
517. Id. at 245.
518. Ankenbrandt v. Richards, 504 U.S. 689, 698 (1992) (holding that domestic relations exception to federal jurisdiction does not bar suit); see also Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433 (1989) (“We start from the settled proposition that the subject-matter jurisdiction of the lower federal courts is determined by Congress . . . .”); Fair Assessment in Real Estate Ass’n, Inc. v. McNary, 454 U.S. 100, 125 (1981) (“Subject of course to constitutional constraints, the jurisdiction of the lower federal courts is subject to the plenary control of Congress.”); Owen Equip. & Erection Co. v. Koegler, 437 U.S. 365, 372 (1978) (“For the jurisdiction of the federal courts is limited not only by the provisions of Art. III of the Constitution, but also by Acts of Congress.”); Palmore v. United States, 411 U.S. 389, 400-01 (1973) (“The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress.”); Glidden Co. v. Zdanok, 370 U.S. 530, 551–52 (1962) (stating that federal courts “remained constantly subject to jurisdictional curtailment”); Bruner v. United States, 343 U.S. 112, 114 (1952) (“The power of Congress to withhold jurisdiction from the District Court ‘in the exact degrees and character which to Congress may seem proper for the public good’ is not challenged.”) (footnote omitted); Nat’l Mut. Ins. Co. of Dist. of Col. v. Tidewater Transfer Co., 337 U.S. 582, 627 (1949) (“It has long been settled that inferior federal courts receive no powers directly from the Constitution but only such authority as is vested in them by the Congress.”) (Vinson, C.J., dissenting); Kentucky v. Powers, 201 U.S. 1, 24 (1906) (Harlan, J.) (“We say, by any statute, because the subordinate judicial tribunals of the United States can exercise only such jurisdiction, civil and criminal, as may be authorized by acts of Congress. Chief Justice Marshall, speaking for this court, has said that ‘courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.’”) (quoting Ex Parte Bollman, 8 U.S. 75, 93 (1807) (Marshall, C.J.)); Sheldon v. Sill, 40 U.S. 441, 443 (1850) (“The general principle for which we contend is the necessity of legislation to define and vest jurisdiction in the Circuit Court.”).
519. Rosado v. Wyman, 397 U.S. 397, 402 (1970) (Harlan, J.) (“Jurisdiction over federal claims, constitutional or otherwise, is vested, exclusively or concurrently, in the federal district courts.”).
520. 319 U.S. 182, 187 (1943).
war-time emergency laws that attempted to rely on state courts, or exclude state courts."

Chief Justice Stone, writing for a unanimous Court, found that “[t]he Congressional power to ordain and establish inferior courts includes the power ‘of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.’” Beyond a citation to Cary, there was no further analysis to justify this analysis. The only court to rely on Cary for the proposition that Congress can limit state court jurisdiction for the “public good” was Lockerty, which offered no meaningful explanation of this power.

Another World War II case reaches a similar result. In Bowles v. Willingham, Justice Douglas declined to resolve whether Congress could “constitutionally withhold from the courts of the States jurisdiction . . . on constitutional grounds.” Instead, his analysis sounds in Congress’ exercise of its Article I powers to constitute the inferior tribunals. Bowles presented a constitutional challenge to the Emergency Price Control Act of 1942, originally filed in state court. The Administrator of the Office of Price Administration brought a suit in federal court to restrain the plaintiff from “further prosecution of the state proceedings and from violation of the Act, and to restrain [the] County sheriff, from executing or attempting to execute any orders in the state proceedings.”

Douglas rejected the challenge. Because the “controversy arises under the Constitution and laws of the United States and is therefore within the judicial power of the United States as defined in Art. III, § 2 of the Constitution[,]” then “Congress could determine whether the federal courts . . . it established should have exclusive jurisdiction of such cases or whether they should exercise that jurisdiction concurrently with the courts of the States.”

Here, Douglas seemed to be relying on both the Article I power to constitute tribunals, and the grant of “arising under” jurisdiction in Article III. In other words, Congress has the power to limit jurisdiction to the federal courts for any statute “arising under” federal law in the scope of Article III. Justice Douglas cites Justice Harlan’s opinion in Plaquemines, among others, for this broad federal power. Douglas concluded, “the authority of Congress to withhold all jurisdiction from the


523. Id. at 505.


525. See supra text accompanying note 476.
state courts Obviously includes the power to restrict the occasions when that jurisdiction may be invoked."\textsuperscript{526} This analysis simply assumes the answer: Because Congress can give exclusive jurisdiction to the federal courts, that means that it can divest the state courts of jurisdiction in specific cases. But that does not answer the threshold question of what power enables Congress to give exclusive jurisdiction to the federal courts. To revisit Justice Thomas's dissent in \textit{Haywood v. Drown}, he noted that there was “no need to reach the more difficult question of whether Congress has the delegated authority under the Constitution to require state courts to entertain a federal cause of action.”\textsuperscript{527} Likewise, an even-more difficult question remains unanswered of “whether Congress has the delegated authority under the Constitution to” prevent “state courts [from] entertain[ing] a federal cause of action.”\textsuperscript{528}

\textbf{H. Specific Grant of Enumerated Power}

The Court, when it has addressed the constitutional basis to vest exclusive jurisdiction to state courts, has at other times seemed to rely on a combination of the specific enumerated power that justifies the underlying substantive law, coupled with the Necessary and Proper power. Writing for a unanimous Court in \textit{Kalb v. Feuerstein}, Justice Black stated “[t]he States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land.”\textsuperscript{529} This is correct, only so far as the supreme law of the land—the act of Congress—is in fact constitutional. Thus, it does not follow automatically that the power to limit jurisdiction flows from (in this case) Congress’ Article I bankruptcy powers. But, Justice Black is correct that a state law, in conflict with a valid federal bankruptcy law, would prohibit the state from vesting their courts with such jurisdiction. “If Congress has vested in the bankruptcy courts exclusive jurisdiction over farmer-debtors and their property, and has by its Act withdrawn from all other courts all power under any circumstances to maintain and enforce foreclosure proceedings against them, its Act is the supreme law of the land which all courts—State and Federal—must observe.”\textsuperscript{530} In other words, if a valid federal law provides that state law cannot legislate in an area of bankruptcy, that state would be preempted, and the delegation of jurisdiction would be void.

Justice Black suggested that the grant of an enumerated power in Article I, Section 8 over bankruptcy to Congress, gives it the power to provide for exclusive jurisdiction: “The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State or Federal, can exercise over the

\begin{footnotes}
\item 526. \textit{Bowles}, 321 U.S. at 512 (emphasis added).
\item 528. \textit{Id}.
\item 529. 308 U.S. 433, 439 (1940).
\item 530. \textit{Id}.
\end{footnotes}
person and property of a debtor who duly invokes the bankruptcy law.\(^531\)
He seemed to be describing a plenary power over the state courts. But
that is not necessarily right. Though today federal bankruptcy law has
been found to preempt all state laws, nothing in the Constitution inher-
ently gives it exclusivity over bankruptcy. In the early days of the Repub-
lic, “state law continued to govern most routine debtor-creditor rela-
tions . . . .”\(^532\) The first national bankruptcy law was not passed until 1800,
but did not make it past 1803.\(^533\) A subsequent bankruptcy law was not
enacted until 1841, and later 1867.\(^534\) Black suggested that there are no
limits on this power to divest state courts of jurisdiction: “The wisdom
and desirability of an automatic statutory ouster of jurisdiction of all ex-
cept bankruptcy courts over farmer-debtors and their property were con-
siderations for Congress alone.”\(^535\)

A potential analogue of exclusive jurisdiction is the removal power.
By allowing a defendant to remove a cause of action from state court to
federal court, Congress through the removal statute is divesting the state
courts of jurisdiction. In *Martin v. Hunter's Lessee*, Justice Story opined
on the basis of the removal power.

This power of removal is not to be found in express terms in any
part of the Constitution; if it be given, it is only given by implica-
tion, as a power necessary and proper to carry into effect some ex-
press power. The power of removal is certainly not, in strictness of
language; it presupposes an exercise of original jurisdiction to have
attached elsewhere.

But “necessary and proper to carry into effect” what “express power?” Is
it the enumerated power itself to provide for bankruptcy, or patents, or
interstate commerce? Once a case is removed, the state court is perma-
nently deprived of subject matter jurisdiction over that matter.

Justice Field alludes, perhaps, to the removal power in *The Moses
Taylor*.

By subsequent legislation of Congress, and particularly by the legis-
lation of the last four years, many of the cases, which by the Judiciary
Act could only come under the cognizance of the Federal courts
after final judgment in the State courts, may be withdrawn from the
concurrent jurisdiction of the latter courts at earlier stages, upon
the application of the defendant. The constitutionality of these pro-
visions cannot be seriously questioned, and is of frequent recogni-
tion by both State and Federal courts.\(^537\)

\(^{531}\) *Id.*

\(^{532}\) Todd Zywicki, *Bankruptcy Clause*, HERITAGE, http://www.heritage.org/constitution#1/
articles/1/essays/41/bankruptcy-clause (last visited May 26, 2016).

\(^{533}\) *See id.*

\(^{534}\) *See id.*

\(^{535}\) *Kalb*, 308 U.S. at 439.

\(^{536}\) *Martin v. Hunter's Lessee*, 14 U.S. 304, 349 (1816).

\(^{537}\) *The Moses Taylor*, 71 U.S. 411, 430 (1867) Professor Weinberg’s article states that this case
“suggests that Congress affects the jurisdiction of state courts in various ways—for example, by re-
moval—and argues that ‘national interest’ should govern Congress’s authority to regulate the jurisdic-
It is unclear if this was referring to the removal power. Keeping with the plenary, Marshall-view of Necessary and Proper, Story explained that “[C]ongress is not limited by the constitution to any particular mode, or time of exercising [the removal power], it may authorize a removal [from state court] either before or after judgment. The time, the process, and the manner must be subject to its absolute legislative control.”

In this sense, Field views the removal power as a species of the “appellate power,” even though it “would equally trench upon the jurisdiction and independence of state tribunals.” This power acts directly “upon the State courts.”

Story tees up a fascinating hypothetical—what if a state court refuses to give up jurisdiction following a removal, believing the removal statute to be unconstitutional? “If state courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction?” A similar analysis would prevail if a state court believed a grant of exclusive jurisdiction to be unconstitutional, and entertained a claim over a head of exclusive jurisdiction. What happens here? “In respect to criminal cases, there would at once be an end of all control, and the state decisions would be paramount to the constitution . . . .” For “civil suits[,] the courts of the United States might act upon the parties, yet the state courts might act in the same way; and this conflict of jurisdictions would not only jeopardise private rights, but bring into imminent peril the public interests.” In other words, jurisdictional bedlam.

1. Preemption of Jurisdiction for State Law Claims

In a related context, the Court has held that federal causes of action preempt state causes of action, even if the latter are brought in state court. International Longshoremen’s Association, AFL-CIO v. Davis presented the question whether a state tort cause of action, brought in a state court, was preempted by the National Labor Relations Act. Justice White, writing for the Court, found that the state court’s jurisdiction was actually preempted. The Court rejected the Alabama Supreme Court’s finding that “the Mobile County Circuit Court, as a state court of general jurisdiction, had subject-matter jurisdiction over the simple [state] tort claim of misrepresentation . . . .” The Court explained that here “jurisdiction provided by state law is itself pre-empted by federal

538. Martin, 14 U.S. at 349.
539. Id. at 350.
540. Id. at 350-51.
541. Id. at 351.
542. Id. at 351.
544. Id. at 387.
law vesting exclusive jurisdiction over that controversy in another body.\textsuperscript{545}

The issue, White explained, is “not whether state law gives the state courts jurisdiction over particular controversies . . . .”\textsuperscript{546} Rather, “[i]t is clearly within Congress’ powers to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate under the Constitution.”\textsuperscript{547} The Court grounds this preemption analysis as “the practical manifestation of the Supremacy Clause, [which] is always a federal question.”\textsuperscript{548}

But let’s assess what this holding is, and is not, saying. It is uncontroversial that a state-law tort cause of action would be preempted by a federal cause of action. It is certainly true that a “determination of congressional intent and of the boundaries and character of a pre-empting congressional enactment is one of federal law.”\textsuperscript{549} Accordingly, a state law granting jurisdiction to a state court to hear that tort would itself be preempted. But this holding does not speak to why a state court cannot entertain a federal cause of action—raising no conflict between state and federal law. This preemption does not conflict with the general presumption of concurrency. In the case of exclusive jurisdiction statutes, Congress has not set out to preempt any state law, and the state has not passed a law concerning this matter, beyond a grant of general jurisdiction.

As an aside, it is debatable whether Congress actually intended to pre-empt state-court-subject-matter jurisdiction. Concurring in part, on behalf of Justices Powell, Stevens, and O’Connor, Justice Rehnquist agreed with the majority that “Congress could, if it wished, forbid Alabama to impose [a] procedural rule,\textsuperscript{550} in their “courts of general jurisdiction,” requiring the defendant to plead preemption as “an affirmative defense.”\textsuperscript{551} But, in this case, “Congress has never said a word about pre-emption of state-court jurisdiction.”\textsuperscript{552} Rehnquist asserts that the majority “must rely on a far more dimly refracted version of congressional intent” that “is far too thin a reed to support the perverse application of the doctrine in the present case.”

I. Preemption of State Procedure

While the Supreme Court has not addressed directly whether the Necessary and Proper Clause provides the power to divest state courts of jurisdiction, the Justices have explained that this elastic power allows Congress to toll state statutes of limitations. This reasoning does have

\textsuperscript{545} Id. at 387–88 (emphasis omitted).
\textsuperscript{546} Id.
\textsuperscript{547} Id. at 388 (citing Kalb v. Feuerstein, 308 U.S. 433 (1940)).
\textsuperscript{548} Id.
\textsuperscript{549} Id.
\textsuperscript{550} Id. at 400 (Rehnquist, J., concurring).
\textsuperscript{551} Id. at 401.
implications for federalism and judicial sovereignty. *Jinks v. South Carolina* considered the constitutionality of 28 U.S.C. § 1367 (the supplemental jurisdiction statute), which tolls the applicable state statute of limitations while a separate cause of action is pending in federal court. In that case, “[r]espondent and its amici first contend that § 1367 is facially invalid because it exceeds the enumerated powers of Congress.” Justice Scalia, writing for a unanimous Court, rejected that argument.

Although the Constitution does not expressly empower Congress to toll limitations periods for state-law claims brought in state court, it does give Congress the authority “[t]o make all Laws which shall be necessary and proper for carrying into Execution [Congress’ Article I, §8,] Powers and all other Powers vested by this Constitution in the Government of the United States . . . .”

Which enumerated power is being executed? Scalia explained “that § 1367(d) is necessary and proper for carrying into execution Congress’ power ‘[t]o constitute Tribunals inferior to the supreme Court,’ and to assure that those tribunals may fairly and efficiently exercise ‘[t]he judicial Power of the United States,’ Art. III, § 1.” While the “federal courts can assuredly exist and function in the absence of §1367(d) . . . we long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be ‘absolutely necessary,” to the exercise of an enumerated power.” Relying on *McCulloch v. Maryland*, Scalia concluded, it suffices that §1367(d) is ‘conducive to the due administration of justice’ in federal court, and is ‘plainly adapted’ to that end. In short, the federal statute tolling the state statute of limitations is ‘conducive to the administration of justice’ . . . . By providing a straightforward tolling rule in place of this regime, § 1367(d) unquestionably promotes fair and efficient operation of the federal courts and is therefore conducive to the administration of justice.

Further, this federal statute is “‘plainly adapted’ to the power of Congress to establish the lower federal courts and provide for the fair and efficient exercise of their Article III powers.” Scalia, citing one of the few limitations that Chief Justice Marshall placed on the Necessary and Proper power in *McCulloch*, noted that “[t]here is no suggestion by either of the parties that Congress enacted § 1367(d) as a ‘pretext’ for ‘the accomplishment of objects not entrusted to the [federal] government . . . .’” Further, this is not a case, like *Lopez* or *Morrison*, where “the connection between § 1367(d) and Congress’s authority over the

553. *Id.* at 461 (citing Art. I, § 8, cl. 18).
554. *Id.* at 462 (internal citations omitted).
555. *Id.* at 462–63 (citing *McCulloch* v. Maryland, 17 U.S. 316, 414 (1819)).
556. *Id.* at 462–63 (citing *McCulloch*, 17 U.S. at 417, 421).
557. *Id.* at 464.
558. *Id.* (citing *McCulloch*, 17 U.S. at 423).
federal courts [is] so attenuated as to undermine the enumeration of powers set forth in Article I, §8 . . . .”

Justice Scalia did explain other instances where statutes of limitations were tolled under the Necessary and Proper Clause. In *Stewart v. Kahn*, the Court “upheld as constitutional a federal statute that tolled limitations periods for state-law civil and criminal cases for the time during which actions could not be prosecuted because of the Civil War.”

Scalia explained that the “law was both Necessary and Proper to carrying into effect the Federal Government’s war powers, because it ‘remed[ied] the evils’ that had arisen from the war.” (Aren’t these the President’s, and not the Congress’ war powers? Can the Necessary and Proper Clause bolster Article II power?)

Justice Swayne, writing for the Court in *Kahn*, held,

considering the evils which existed, the remedy prescribed, the object to be accomplished, and the considerations by which the lawmakers were governed—lights which every court must hold up for its guidance when seeking the meaning of a statute which requires construction—we cannot doubt the soundness of the conclusion at which we have arrived.

The war power, broadly construed, carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections.

The concerns for sovereignty of states following the Civil War would seem to be somewhat diminished. In particular, as this case arose during Reconstruction, in a civil suit filed by a citizen of New York against a citizen of New Orleans, in Louisiana Court, over collecting on a promissory note from 1860.

After discussing the “necessity,” the Court turns to whether it is a “proper’ exercise of Congress’s Article I powers,” and considers whether “it violates principles of state sovereignty.” This section speaks to judicial sovereignty. Yet, the Court’s analysis falls just short of elucidating our query. Justice Scalia cites the argument of the respondent who “views §1367(d)’s tolling rule as a regulation of state-court ‘procedure,’ and contends that Congress may not, consistent with the Constitution, prescribe procedural rules for state courts’ adjudication of purely state-law claims.”

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560. Id. at 461–62 (citing Stewart v. Kahn, 78 U.S. 493 (1871)).
561. Id. at 462 (citing *Kahn*, 78 U.S. at 507).
562. Kahn, 78 U.S. at 505.
563. Id. at 507.
565. Id. (emphasis added) (internal quotations omitted).
For this proposition, Justice Scalia cites two sources. First, Federal Regulation of State Court Procedures by Anthony Bellia. As Bellia noted, “[t]he bounds of federal authority over the way state courts conduct their business have remained undefined for over 200 years.” Indeed, not even James Madison was certain of the contours of that answer. “In 1791, James Madison was asked whether a federal law operated to repeal certain state court rules of procedure. His response was that “[t]his question probably involves several very nice points.”

Similarly, Professor Martin Redish explained that “[w]hile the Supreme Court has uniformly upheld congressional power to require state court adjudication of federal claims, it has paid surprisingly little attention to the issue of the extent of a state court’s obligation to employ federal procedures in the conduct of those adjudications.” In light of the “recognition of the judicial commandeering power,” Redish observed, “it would seem reasonable for the Court to provide considerably more attention than it has to date to determine the extent to which the state obligation to enforce substantive federal claims should simultaneously dictate an obligation to employ preexisting federal procedures in the course of those adjudications.” Though Redish’s article, like Bellia’s, focuses on “federal power to commandeer state courts and the implications of that power for the modern doctrine and theory of judicial federalism,” with respect to federal procedural rules. Bellia’s article focuses on the “next frontier of federalism”—“procedural rules that state courts must follow in state law cases.” Bellia noted that “[s]ome scholars seem to have assumed that Congress lacks the power to regulate state court litigation of state claims.”

Second, Scalia referenced an Office of Legal Counsel opinion from 1989 by future Attorney General William Barr, titled Congressional Au-
authority to Require State Courts to Use Certain Procedures in Products Liability Cases. The key finding of the opinion was that “potential constitutional questions” arise when Congress “attempts to prescribe directly the state court procedures to be followed in products liability cases.”

The memo noted that it “is well established that Congress generally may require state courts of appropriate jurisdiction to entertain causes of action arising under federal law, at least where there is an analogous state-created right enforceable in state court.” Echoing the Federalist philosophy that pervaded the Reagan and early Bush Justice Departments, the memo observed that “[d]ifferent questions are presented where Congress does not enact a substantive law of products liability to be applied by the states, but simply attempts to prescribe directly the state court procedures to be followed in products liability cases arising under state law.” Again, this jibes with Scalia’s note about “purely state law claims.” The memo continues, “[s]uch an action raises potential constitutional questions under the Tenth Amendment, since state court procedures in applying state law would appear to be an area that is generally within a state’s exclusive control.” The memo cites Henry M. Hart, Jr., who wrote, “[t]he general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.”

Along similar lines, Professor Laurence Tribe testified before Congress that a federal law regulating state court procedures raises “serious questions” about its constitutionality. “For Congress directly to regulate the procedures used by state courts in adjudicating state law tort claims—to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco suits—would raise serious questions under the Tenth Amendment and principles of federalism.”

Justice Scalia did not seem to accept that this distinction between “procedure” and “substance” even exists. “Assuming for the sake of argument that a principled dichotomy can be drawn, for purposes of determining whether an Act of Congress is “proper,” between federal laws that regulate state-court ‘procedure’ and laws that change the “substance” of state-law rights of action, we do not think that state-law limitations periods fall into the category of “procedure” immune from congres-
Relying on, among other cases, *Erie Rail Road Company v. Tompkins*, Scalia concluded that the statute of limitation is substantive, and not procedural. 582

Why this falls short of elucidation is that even if the Court accepted this distinction, it would only speak to “purely state-law claims.” Likewise, Bellia’s article focuses on “[f]ederal regulation of the procedures by which state courts enforce not federal but state rights of action.” 583 This leaves open whether there are any judicial sovereignty concerns about state courts not being able to hear federal law causes of action. It does speak to whether a state, who had pre-existing jurisdiction in certain areas prior to the assertion of exclusive federal jurisdiction, could raise sovereignty concerns to their courts of general jurisdiction hearing these cases.

In the end, Congress did not prescribe a procedural rule for state-law claims. “But, the Court notes this power is not ‘unlimited.’ To sustain §1367(d) in this case, we need not (and do not) hold that Congress has unlimited power to regulate practice and procedure in state courts.” 584 As the Court noted in *Wolfe v. North Carolina*, “[w]ithout any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise . . . .” 585

While Scalia did not explicate the origin of these limits, the citation to *Printz* suggests that it is implicit in our federalist system. In fact, the cited section of *Printz* cited discusses the majority opinion’s Necessary and Proper Clause analysis. The commandeering law in question fails under the Necessary and Proper Clause, not because of the “Tenth Amendment but the Necessary and Proper Clause itself. When a ‘La[w] . . . for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a ‘La[w] . . . proper for carrying into Execution the Commerce Clause,’ and is thus, in the words of The Federalist, ‘merely [an] act[ of usurpation] which ‘deserve[s] to be treated as such.’” 586 In sum, concern for state sovereignty does place some limit on the ability of the Congress to regulate the procedural aspects of state courts.

### V. STATE JUDICIAL SOVEREIGNTY

While much attention has been paid to the sovereignty of the states, in particular their executive and legislative branches, scant attention has

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582. *Id.*
583. *State Court Procedures, supra note 2*, at 951.
been focused on the sovereignty of the judicial branch. The state courts, routinely charged with the application and enforcement of federal law, are still agents of the state wherein they reside. I refer to these limitations on the federal power with respect to the courts as state judicial sovereignty. The Court’s recognition of judicial sovereignty has manifested in three lines of cases. First, where Congress recognizes that the state courts maintain concurrent jurisdiction over federal causes of action. Second, where Congress mandates that state courts hear certain federal causes of action. Third, in cases where Congress deprives state courts of jurisdiction over certain federal matters through exclusive jurisdiction statutes. Though the case law has been somewhat inconsistent, all of these cases recognize that Congress lacks plenary power in either regard, due to a respect for the sovereignty of the state courts in our constitutional order.

The Court’s precedents concerning concurrent, mandatory, and exclusive jurisdiction reveal three attributes of judicial sovereignty. First, state judges, however appointed or elected, in any court of competent jurisdiction as defined by state law, are entrusted by the Constitution to faithfully apply federal law. This state judge sovereignty is implicit in Article VI, and has been consistently upheld by the Supreme Court. Yet, state judges are still dependent on state legislatures for, among other things, granting them jurisdiction to exercise that federal obligation. I refer to this attribute as state judge sovereignty.

Second, state legislatures and constitutions have vast discretion in structuring their state courts, even with respect to how their state judges consider federal claims. I refer to this attribute as state jurisdictional sovereignty. Though in recent years the Court has identified limits on this power, it remains ill-defined. Third, efforts by Congress to either mandate that state courts entertain certain causes of action, or deprive those courts of jurisdiction, are constrained by the principles of judicial sovereignty through the anti-commandeering principle. Though state judges are bound by federal law under Article VI, they can only act where there is pre-existing jurisdiction, as afforded by the state legislature. Because Congress lacks the power to vest state courts with jurisdiction, mandatory or exclusive jurisdiction that alters state court jurisdiction may run afoul of state jurisdictional sovereignty.

A. State Judge Sovereignty

The mere fact that the judges of the states, unlike their executive and legislative counterparts, are bound by the Constitution under the Supremacy Clause does not make them federal agents. It is clear that state judges are bound by the supreme law of the land, regardless of how they are appointed, or elected, or what court they sit in. But, as in any court, they can only act when vested with jurisdiction by the state legislature or constitution. For “[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when
it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."  

In other words, when state judges lack jurisdiction, they are unable to do anything with respect to federal law. Thus, the state possesses a small, yet significant check on the ability of the state judges to be bound by the Constitution. And, under Article VI, the state legislature does not bear the same binding relationship with the central government. State judges are dependent on state legislatures to vest them with the appropriate jurisdiction. In this sense, the state legislatures place an additional limitation on federal power and promote their police power. State judge sovereignty places limits on the ability of Congress to regulate the state courts.

The Supremacy Clause cannot be understood to impose a “duty for state courts to adjudicate federal claims, but merely an oath to not contravene such laws when properly brought before them.”  

In this sense, pre-existing subject-matter jurisdiction is a condition precedent. As Justice Thomas explained in *Haywood*, “there was no question that the state court had subject-matter jurisdiction under state law to adjudicate the federal claim” and it could be heard in state court. Thus, in the normal course of matters, a suit can be brought in any state, where the presumption is that there would be concurrent jurisdiction.

But once a state judge is vested with this jurisdiction over federal claims, she will usually have to exercise it. In virtually all of the Court’s cases involving mandatory jurisdiction, the state court that declined to hear a federal cause of action was a court of general jurisdiction. What obfuscates the Court’s jurisprudence in this area is that all states have state courts of general jurisdiction. It always seems like the states have consented. But this need not be the case. When a judge in a state court of general jurisdiction, however, declines to exercise jurisdiction over a federal cause of action, for virtually any reason, she is acting unconstitutionally. A court of general jurisdiction, under normal circumstances, would have the jurisdiction to entertain federal cases. The courts of general jurisdiction “have the power to hear and determine all matters, legal and equitable, except insofar as these powers have been expressly denied.”  

In these courts of general jurisdiction, “the presumption is that they have subject matter jurisdiction unless a showing can be made to the contrary . . . .” Often this jurisdiction is granted by the state Constitution itself.

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590. 20 AM. JUR. 2D *Courts* § 66 (2016).
591. Id.
592. *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000). A Texas district court, however, is a court of general jurisdiction. Our Constitution provides that the jurisdiction of a district court “consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies,
In *Haywood*, Justice Stevens suggested, somewhat as an aside, that “[a] State’s authority to organize its courts, while considerable, remains subject to the strictures of the Constitution.”\(^593\) Consider a thought experiment for a moment. What if a state had never established a state court of general jurisdiction, or alternatively a state abolished its courts of general jurisdiction and replaced them with courts of limited, specific jurisdiction? (Put aside for the moment any “Guarantee Clause” or “Due Process Clause” issues). In such a case, there are no courts in the states with competent jurisdiction to entertain federal causes of action. (Of course, federal courts remain open for business). A resident brings a federal claim in a state court, and the claim is dismissed for want of jurisdiction. State judges, bound by federal law, would not have the venue to do anything about it, due to state law. What could Congress do? Command the state legislature to constitute new courts? And then what? What would, or could, the Supreme Court do? Perhaps it would hold that the elimination, or lack, of state courts of general jurisdiction violates the Constitution. Or rewrite their jurisdictional statutes so there is jurisdiction for federal claims? You see the problem here.

While the Court can invalidate a statute, such as the one in *Haywood*, that divests a court of general jurisdiction of cognizance over a specific federal cause of action, the plaintiff would have no possible remedy if there was not a pre-existing grant of jurisdiction, or such courts that were subsequently taken away. The answer to this thought experiment illustrates the limitations judicial sovereignty places on the “power” of the Supremacy Clause. State courts have historically been able to hear federal causes of action because state legislatures deemed them capable of doing so. But nothing in the Constitution requires this. And no remedy by the Supreme Court can compel it.

The cases the Court has considered in this area make clear that state legislatures must consent to granting jurisdiction over federal claims to their state courts. Even the Court’s opinion in *Haywood* did not say, clearly at least, that Congress can compel jurisdiction without consent. Rather, only the withdrawal of pre-existing jurisdiction, based on some sort of discriminatory animus, violates the Constitution. Congress cannot require a state court to hear a matter, where the state does not consent. This is usually manifested through a state denying its courts jurisdiction over a matter. When a federal grant of jurisdiction is inconsistent with a state exclusion of jurisdiction, the state courts cannot hear the case.

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\(^{593}\) 556 U.S. at 740–41.
On the other hand, the creation, or maintenance, of state courts of general jurisdiction can be viewed as some form of tacit consent for state judges to hear these cases. A state statute that creates or vests a court with general jurisdiction must operate against the backdrop of the longstanding, deeply rooted notion of concurrent jurisdiction. This may be implicit in several of the Court’s cases focusing on concurrent jurisdiction. Subsequent divestments of this jurisdiction from the state courts of federal jurisdiction must be considered in light of the specific cause of action being withdrawn. There may be valid, or invalid, reasons for withdrawing certain causes of action from their jurisdiction.

Because the Constitution does not obligate states to create courts of general jurisdiction—so long as the extant courts would satisfy the Due Process or Guarantee Clauses—there can be no constitutional requirement that state courts exercise concurrent jurisdiction. But once state courts of general jurisdiction exist, state judges on those courts are bound to entertain federal cases. But this is the state’s prerogative. Stated otherwise, state judge sovereignty commands the state judge to entertain federal causes of action only when her state has granted her jurisdiction, but forbids the judge from declining to exercise federal jurisdiction when her state has so granted. In this sense, the state legislature maintains a check on the ability of its state courts to participate in federal causes of action. The limit, however, of the state controlling that jurisdiction is subject to what I call state jurisdictional sovereignty.

B. State Jurisdictional Sovereignty

The Constitution respects a state’s prerogative to define the jurisdiction of its own state courts. In the simplest sense, the limitation of the scope of the judicial power by Article III, rather than vesting of complete jurisdiction as Congress may see fit, was another method of promoting federalism. For our “Constitution established a system of ‘dual sovereignty,”’594 and the state’s retained “residuary and inviolable sovereignty,”595 which is “reflected throughout the Constitution’s text.”596 One of the provisions cited by Justice Scalia in Printz was “the Judicial Power Clause, Art. III, § 2,” which places limitations on federal jurisdiction, thus preserving the autonomy and sovereignty of the state judiciaries. Federalism precedes our Tenth Amendment.

Concerns for state sovereignty at this early juncture speak to this embedded principle of our Constitution. Jurisdiction that the federal courts lack is jurisdiction the state courts reserve. The conclusion of Justice Thomas’s dissent in Haywood elucidates the federalist nature of mandating that courts exercise jurisdiction.

595. Id. at 918–19 (citing THE FEDERALIST NO. 39, at 245 (James Madison)).
596. Id.
In order to protect the delicate balance of power mandated by the Constitution, the Supremacy Clause must operate only in accordance with its terms. By imposing on state courts a duty to accept subject-matter jurisdiction over federal § 1983 actions, the Court has stretched the Supremacy Clause beyond all reasonable bounds and upended a compromise struck by the Framers in Article III of the Constitution.597

Under principles of state jurisdictional sovereignty, states retain plenary control to alter and modify their state courts. In Haywood, Justice Thomas cites Justice Frankfurter, joined by Justice Jackson, for just this notion.

The federal law in any field within which Congress is empowered to legislate is the supreme law of the land in the sense that it may supplant state legislation in that field, but not in the sense that it may supplant the existing rules of litigation in state courts. Congress has full power to provide its own courts for litigating federal rights. The state courts belong to the States. They are not subject to the control of Congress though of course state law may in words or by implication make the federal rule for conducting litigation the rule that should govern suits to enforce federal rights in the state courts.598

Congress’ power to control the state courts falls somewhere between Article III and Article I. While there is significant evidence that sections of Article III were intended to vest exclusive jurisdiction in the federal courts, at best this would only offer a partial solution for today’s battery of exclusive jurisdiction statutes, many of which have no connection to those heads of jurisdiction. Thus, Congress would need to rely on their Article I powers to “constitute tribunals,” or another specific grant of power, coupled with the necessary and proper power.

As the Court recognized in New York v. United States, stated in Printz v. United States, and held in NFIB v. Sebelius, a law may be necessary, but not proper, when its action conflicts with federalism.

Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . .

The Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.599 Likewise, Justice Scalia would revisit this theme in his concurring opinion in Bond v. United States,600 relying on the significant article Rethinking the Federal Eminent Domain Power by Professor William Baude.601

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598. Id. at 756 (quoting Brown v. Gerdes, 321 U.S. 178, 193 (1944) (Frankfurter, J., concurring)).
“As Chief Justice Marshall said regarding it, no ‘great substantive and independent power’ can be ‘implied as incidental to other powers, or used as a means of executing them.’ No law that flattens the principle of state sovereignty, whether or not ‘necessary,’ can be said to be ‘proper.’”602 The propriety of the act must be judged with respect to principles of state sovereignty, and in this case, judicial sovereignty.

While the cases cited in New York, Printz, NFIB, and Bond all concern Congress’ intrusion on the state legislative and executive branches,603 similar considerations apply to state courts. “State sovereignty” in all of its forms—executive, legislative, and judicial—“is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”604 As the Chief Justice explained in NFIB v. Sebelius, “[b]ecause the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed.”605 Certainly one of the essential features of local governments is the state courts. Roberts continued, “[t]he Framers thus ensured that powers which ‘in the ordinary course of affairs, concern the lives, liberties, and properties of the people’ were held by governments more local and more accountable than a distant federal bureaucracy.”606 Among these powers are the powers to define local courts, suited to the needs of the state.

Alden v. Maine addressed the jurisdictional sovereignty issue in a related context—whether Congress could abrogate a state’s sovereign immunity to private suits in its own courts. In a 5-4 decision, the Court held that Congress could not. The Court found that the “specific Article I powers delegated to Congress . . . by virtue of the Necessary and Proper Clause or otherwise” does not provide the “incidental authority to subject the States to private suits,” even if it is a “means of achieving objectives otherwise within the scope of the enumerated powers.”607 In other words, even if Congress can pursue certain ends pursuant to their enumerated powers, Article I does not provide it with the means to do so, if doing so entails subjecting a state to private suits in its own court. In fact, the Court in Alden v. Maine relied on the same limiting proviso in the state jurisdictional cases like Mondou and Testa, explaining that Congress “may require state courts of adequate and appropriate jurisdiction to enforce federal prescriptions.”608 There was a respect for the state’s right to define the jurisdiction of its courts.

602. Bond, 134 S. Ct. at 2101.
606. Id. (citing THE FEDERALIST NO. 45, at 293 (James Madison)).
608. Id. at 752 (emphasis added) (internal quotation marks omitted).
Congress can, however, subject states to suits for damages in federal courts, pursuant to its powers under Section 5 of the 14th Amendment to enact “appropriate legislation[] to enforce] the provisions of this article.”\textsuperscript{609} This analysis seems to suggest that even if the law is necessary, it may not be proper. Similar attributes of state jurisdictional sovereignty should limit Congress’ ability to commandeer state courts into hearing federal causes of action, or deprive state courts of their jurisdiction. Article I powers may not be enough if they conflict with the principles of federalism.

Would not compelling a state court to undertake improper obligations be more of an infringement on sovereignty than conscripting local law enforcement officials to run background checks, requiring states to take title to radioactive waste, or forcing people to buy broccoli insurance? Justice Stevens seemed to suggest as much in his \textit{Printz} dissent, noting that requiring state courts to hear certain cases is “a much greater imposition on state sovereignty than the Court’s characterization”\textsuperscript{610} of the facts in \textit{Printz}.

Preventing a state court of general jurisdiction from exercising subject matter jurisdiction over a federal cause of action, or alternatively an area of law in which the state has historically legislated, may run afoul of Chief Justice Marshall’s prohibition in \textit{McCulloch} if it is no longer proper for Congress to “compel the states to . . . prohibit those acts.”\textsuperscript{611} Or, perhaps by prohibiting state legislatures from passing jurisdictional statutes that provide concurrent jurisdiction over certain areas where the states may be competent to legislate runs afoul of these federalism concerns.

Would it be, in the language of \textit{McCulloch}, “a great substantive and independent power”\textsuperscript{612} to divest state courts of jurisdiction? Even if this is a necessary—read convenient—exercise of federal power, are the means chosen proper, in light of the federalism costs of this intrusion on state sovereignty? In most cases, the answer to this question is “yes.” Unlike the unprecedented expansion of federal power resulting from the Affordable Care Act, or the Brady Handgun Control Act, or the Take Care provisions in \textit{New York}, exclusive jurisdiction statutes have a lengthy pedigree in our Republic, stretching back to the Judiciary Act of 1789. But, these exclusive statutes are limited to items generally thought to be within the natural orbit of federal power.

While the existing grants of exclusive jurisdiction are long-standing, uncontroversial, and well-accepted, future acts of Congress to divest state courts of certain matters, long within their police power, could run afoul of this principle. Let’s consider another thought experiment. Imagine that Congress enacted a new wide-ranging federal domestic law statute

\textsuperscript{609} City of Boerne v. Flores, 521 U.S. 507, 517 (1997) (citing U.S. \textsc{Cons.}, amend. XIV).
\textsuperscript{610} Printz v. United States, 521 U.S. 898, 967 (1997).
\textsuperscript{611} \textit{Id.} at 924 (quoting New York v. United States, 505 U.S. 144, 166 (1992)).
\textsuperscript{612} \textit{McCulloch} v. Maryland, 17 U.S. 316, 411 (1819).
that would preempt various aspects of state family law. Under the holding of *NFIB*, this intrusion into matters traditionally within the state police power, even if necessary to execute the new federal law, would almost certainly not be proper. (Arguably this reasoning offers another ground to invalidate the Defense of Marriage Act.)

Focus on two scenarios. First, in response to this law, a state withdraws from all of its family and general courts jurisdiction over this new federal law. “Let them go to federal court,” the state says! A resident brings a domestic law claim under the federal law in state court. The judge, bound by federal law, lacks jurisdiction, and would have to dismiss the case. Would the United States have any remedy to ensure the state courts could hear these cases? Would the plaintiff be able to seek an order forcing the state to vest their courts with this jurisdiction?

In an alternate scenario, the federal act divests all existing state courts of their subject matter jurisdiction of family law matters, brought under federal law. Congress does not deem the state courts an effective forum to apply these new family laws, even though the state jurisdictional statute confers general jurisdiction. Further, Congress wants to avoid conflicting and contradictory rulings on matter of domestic affairs. This is separate from the issue of whether the federal act preempts the state law, so assume there is no preemption. Could Congress shrink the jurisdiction of the state courts? In effect, this would nullify the existing state family laws, as no one could ever litigate under them in state court. Consistent with the Court’s longstanding precedents, Congress would lack the power to either enlarge or contract a state court’s jurisdiction, and this act would be unconstitutional. But it would be unconstitutional for infringing of a state’s jurisdictional sovereignty.

State jurisdictional sovereignty, however, may cut both ways. The federal government cannot create subject matter jurisdiction in state courts. This would constitute an unlawful infringement on state autonomy and its police power. Further, Congress lacks the power to require state legislatures to vest their courts with subject matter jurisdiction over federal causes of action, or alternatively require the states to create new courts to hear such matters. But once state legislatures create courts of general jurisdiction that are bestowed with the “deeply rooted” presumption of concurrency, the states have consented to participate in this aspect of our “dual sovereignty.” Thus, efforts by state legislatures to then remove that right, which their citizens have become accustomed to, may be subject to “constitutional strictures.” Efforts to remove that jurisdiction due to nothing more than an attempt to frustrate or express disapproval of federal policy would likely be unconstitutional. Efforts to shift that jurisdiction due to some sort of neutral, administrative policy should be, contrary to *Haywood*, permissible. The judicial sovereignty knife cuts both ways. In other words, states have the initial decision to opt in, but once consent has been granted, federal courts can consider the circumstances under which the jurisdiction was withdrawn or transferred.
C. Commandeering of State Courts

Having addressed the role of the state judges in terms of state judge sovereignty, and the state legislatures in terms of state jurisdictional sovereignty, I now turn to the limitations these principles place on the power of Congress to regulate state court jurisdiction. Only recently has the Supreme Court held that the Supremacy Clause places limitations on the ability of the states to withdraw certain federal causes of action from their courts of general jurisdiction, and transfer them to alternate courts of limited jurisdiction. If states are not obligated to create courts to hear federal claims, and could abolish their courts which could hear federal claims, it does not necessarily follow that it is unconstitutional to withdraw or transfer jurisdiction over these claims to different courts. Such a holding amounts to commandeering of the state legislatures, and forcing them to provide jurisdiction for federal causes of action. Any question about whether Congress has this power must be considered against the federalism backdrop of commandeering, in light of principles of judicial sovereignty.

Though the analogy is not precise, efforts to mandate that state courts, or alternatively prevent state courts, from hearing certain causes of action has shades of the Court’s commandeering jurisprudence. Bellia states the question directly: “If Congress lacks authority to ‘commandeer’ state legislatures and state executives, what authority does it have to ‘commandeer’ state judiciaries? While the Court has been rebuffing Congress’ attempts to use state legislatures and executives to implement federal law, Congress has turned its attention to regulating the state courts.”613 In the words of the Chief Justice in NFIB, by permitting the states to exercise the “independent power” over its own courts, it “serves as a check on the power of the Federal Government: ‘By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.’”614 Commandeering state courts, by denying them jurisdiction over certain causes of action, thus totally deprives states control over certain “concerns of public life.”615 Granted, some of these areas will be purely a matter of federal law, preempting any relevant state laws, but some areas of exclusive jurisdiction are not so constrained. In this sense, Congress is crowding out the state courts, and the jurisdictional sovereignty of the state, in violation of the principles of federalism. The jurisdiction of the state courts is quintessentially within the police power of the state. Limitations on this jurisdiction imposes federalism costs.

A question the Court has never answered is what happens if a state lacks state courts of general jurisdiction. Could a federal statute actually, by itself, create subject matter jurisdiction? The answer is almost certain-

613. State Court Procedures, supra note 2, at 950.
615. Id. (quoting Bond, 564 U.S. at 222).
ly no. At least no more than Congress can commandeer state legislative and executive branch officials to engage in federal duties. And nothing in the “state judges” clause is to the contrary. Judges can only be bound by federal law, and hear federal causes of action, if they have jurisdiction. Would it violate the Constitution for a state to create only courts of limited jurisdiction that can only hear state law issues? Can Congress “confer” jurisdiction on state courts?

Congress lacks the Article I powers to vest state courts with jurisdiction. They can only invoke the pre-existing jurisdiction of the state courts. In recognition of this principle, Congress cannot commandeer the state legislature by forcing them to vest their state courts with jurisdiction. This is within the autonomy of the states. Yet, if a state court lacks any courts of general jurisdiction, Congress would be helpless to mandate that the state courts hear a cause of action. In that state, the citizen could always turn to a federal court to vindicate a federal right.

In sum, all of these principles stand for the conclusion that our federalism must also respect the jurisdiction of the state courts, as an inherent attribute of state sovereignty. Because state judges can only exercise jurisdiction if permitted by the state, any efforts by Congress over concurrent, mandatory, or exclusive jurisdiction would run into legislative, and by extension judicial, commandeering issues that raise serious constitutional doubts.