THE NEGLECTED HISTORY OF STATE PROSECUTIONS FOR STATE CRIMES IN FEDERAL COURTS

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I. INTRODUCTION

The United States' system of government rests on an understanding that separate and often competing sovereignties—the federal government and the individual states—produce friction that leads to the best outcomes for the Nation.[1] The attempts of states to frustrate a national policy of honoring debt to Great Britain led to the formation of the Constitution.[2] At the same time, the states' willingness to fight against a central government was expected to remain an asset moving forward.[3] Into the twenty-first century, the states have kept the pressure on.[4]

One tool that Congress has used in this perpetual skirmish is the federal court system.[5] At various times, legislators have moved cases against officers carrying out federal policies into federal courts and expected the friendlier forum to thwart interference by state governments.[6] Today, the United States Code contains a "generalized" officer-removal provision that appears to combine several of its more tailored predecessors.[7] It allows removal of any "civil action or criminal prosecution that is commenced in a State court . . . against or directed to," among others, "any officer (or any person acting under that officer) of the United States or of any agency thereof, . . . for or relating to any act under color of such office."[8] The provision has a long lineage.[9]

During the War of 1812, federal trade embargoes met open resistance in New England.[10] Congress temporarily authorized removal to federal court of all suits or prosecutions against federal officers resulting from enforcement of federal customs laws in order to combat the resistance to the embargoes.[11]

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1. *See generally* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1494–1500 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–9 (1988).

2. Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1458.

3. Merritt, *supra* note 1, at 3–5.

4. *Id.* at 5–6; *see, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 505 (2007) (footnotes omitted) ("[A] group of States, local governments, and private organizations alleged in a petition for certiorari that the [EPA] has abdicated its responsibility under the Clean Air Act . . . .").

5. *See* ANDREW NOLAN & RICHARD M. THOMPSON II, CONGRESSIONAL POWER TO CREATE FEDERAL COURTS: A LEGAL OVERVIEW 9–11 (2014).

6. *Id.* at 10–11.

7. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 853–55 (7th ed. 2015).

8. 28 U.S.C. § 1442(a), (a)(1) (2018).

9. *See* FALLON ET AL., *supra* note 7, at 853 n.6.

10. JAMES H. ELLIS, A RUINOUS AND UNHAPPY WAR: NEW ENGLAND AND THE WAR OF 1812, at 33–37 (2009); *see also* 28 ANNALS OF CONG. 757–58 (1814) (explaining in the House of Representatives debates that Vermont courts refused to recognize the authority conferred on federal officers to enforce the embargo).

11. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198–99 (prohibiting relations with the enemy); Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 584–85 (1925).

Almost two decades later, when South Carolina threatened to nullify federal tariffs, Congress similarly authorized removal of any actions brought against customs officers for "any act done under the revenue laws of the United States, or under colour thereof."[12]

Northern states reinvigorated the desire for removal in the 1850s by refusing to enforce the Fugitive Slave Act.[13] In response, federal legislators unsuccessfully proposed a bill to allow "any officer of the United States, or other person" sued "for or on account of any act done under *any* law of the United States, or under color thereof," to remove the case to federal court.[14] "But only ten years later, when Civil War emergencies seemed to demand it, the very men who opposed [the 1855 bill] urged and secured the passage of several similar bills providing for removal of State criminal prosecutions."[15]

The text of the modern removal statute—like that of many of its predecessors—is quite broad.[16] It encompasses civil and criminal suits against federal officers, and purports to grant them access to federal court based purely on the defendant's employment and a nexus between that employment and the facts of the case.[17] But does that square with Article III of the Constitution?

Article III provides the list of "Cases" and "Controversies" that Congress can empower the federal courts to hear.[18] Some cases on the list are defined by the parties involved; "officer of the United States" is not one of these parties.[19] Others on the list are defined by the subject matter involved; "relating to federal office" is not one of these subjects.[20] And the list is an exclusive one.[21]

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12. Force Act, ch. 57, § 3, 4 Stat. 632, 633–34 (1833) (providing for the collection of duties and imports); *see* Warren, *supra* note 11, at 585.

13. *See* Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

14. CONG. GLOBE APP'X, 33d Cong., 2d Sess. 211 (1855) (emphasis added); *id.* (statement of Sen. Chase) ("[The bill's] object is to secure the stringent execution of the fugitive slave act."); Warren, *supra* note 11, at 587.

15. Warren, *supra* note 11, at 588.

16. 28 U.S.C. § 1442 (2018).

17. *Id.*

18. U.S. CONST. art. III, § 2, cl. 1.

19. *Id.* ("[T]o Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

20. *Id.* ("[A]ll Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction . . . .").

21. *E.g.*, Hodgson v. Bowerbank, 9 U.S. 303, 304 (1809) ("Turn to the article of the constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the constitution."). In the infamous case, *National Mutual Insurance Co. of District of Columbia v. Tidewater Transfer Co.*, Justice Jackson's plurality opinion, joined by Justice Black and Justice Burton, argued that through Article I, Congress could grant federal courts jurisdiction beyond the enumerated heads of Article III. Nat'l Mut.

In the nineteenth and early twentieth centuries, Congress and the courts rooted the officer-removal statutes within Article III's categorical list as cases "arising under" federal law.[22] In the 1879 case *Tennessee v. Davis*, the State of Tennessee argued that Congress could not give jurisdiction over state criminal cases to federal courts.[23] The Supreme Court disagreed and saw no constitutional hurdle at all.[24]

One hundred and ten years after *Davis*, the Court was confronted in *Mesa v. California* with the potential tension between the modern officer-removal provision and the scope of arising-under jurisdiction.[25] The Court held that the provision imposed an additional and admittedly atextual requirement: the officer must allege "a colorable federal defense."[26] Failing to read in that requirement, the Court noted, would "raise[] serious doubt whether, in enacting § 1442(a), Congress would not have 'expand[ed] the jurisdiction of the federal courts beyond the bounds established by the Constitution.'"[27] The Court was careful to avoid suggesting it had already sanctioned such an expansion.[28] It asserted that this interpretation merely followed how these statutes had always been read.[29]

Yet, tracing these removal statutes to their origins provides good reason to question *Mesa*'s reasoning and outcome.[30] This Article argues two points. One, the earlier incarnations of the officer-removal provision did not implicitly require any assertion of substantive federal law.[31] Two, the contemporary legislators and courts generally understood such cases to arise validly under federal law, even without such a requirement.[32] For all the

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Ins. of D.C. v. Tidewater Transfer Co., 337 U.S. 582, 592–96 (1949) (plurality opinion). That view was sharply repudiated by the remaining six Justices. *Id.* at 604–17 (Rutledge, J., joined by Murphy, J., concurring in result); *id.* at 626 (Vinson, C.J., joined by Douglas, J., dissenting); *id.* at 646–55 (Frankfurter, J., joined by Reed, J., dissenting). The view "has not been defended in a Supreme Court opinion ever since." Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389, 1411 (2010). It has also generally been rejected by later commentators. *See, e.g.*, Debra Lyn Bassett, *Statutory Interpretation in the Context of Federal Jurisdiction*, 76 GEO. WASH. L. REV. 52, 81 (2007).

22. U.S. CONST. art. III, § 2, cl. 1.

23. Tennessee v. Davis, 100 U.S. 257, 258 (1879).

24. *Id.* at 272.

25. Mesa v. California, 489 U.S. 121, 124 (1989).

26. *Id.* at 129.

27. *Id.* at 136 (second alteration in original) (citation omitted).

28. *Id.* at 137.

29. *Id.* at 133–34; *accord* Kenneth S. Rosenblatt, *Removal of Criminal Prosecutions of Federal Officials: Returning to the Original Intent of Congress*, 29 SANTA CLARA L. REV. 21, 28 (1989) (explaining that historically, the officer-removal statute was established "as a limited remedy to protect certain federal laws from state misinterpretation or defiance").

30. *See infra* Part II (discussing the different historical removal provisions that led to the modern statute).

31. *See infra* Part II.B (discussing the various statutes' texts).

32. *See infra* Part III (discussing how contemporary courts interpreted these cases and provisions).

controversy officer-removal statutes stirred (and there was much), compliance with Article III was not hotly contested.[33]

This Article hopes to shed light on one method that Congress has used to shield federal interests from the attempts of states to check central power and policy. Under modern federal-courts law, that method seems to push (if not exceed) the boundaries of congressional power.[34] The historical acceptance of officer-removal statutes suggest, however, that the power to grant jurisdiction is broader than assumed by modern courts and also lends much needed historical evidence to academic theories of protective jurisdiction.[35]

II. CONGRESS AND THE TEXT: CREATION OF THE OFFICER-REMOVAL STATUTES

This Part considers the handful of removal statutes (and a failed removal bill) that led to the modern provision. Section A details the congressional debates as to the scope and constitutionality of the statutes and why those debates matter. Ultimately, Congress had little concern that these provisions ran afoul of Article III.[36] Of course, this might not be surprising if, as *Mesa* states, the statutes impliedly required the officers to assert a federal defense.[37] Therefore, Section B explains why the differing language in the various provisions leads to the conclusion that no such implied requirement existed.[38]

A. Legislators' Beliefs in the Scope of Their Constitutional Power

Removal provisions were a harsh remedy to the Nation's greatest internal fractures.[39] As this Section details, the legislators' proposals prompted passionate and sometimes lengthy debates regarding the proper relationship between the federal and state governments.[40] Though these debates sometimes included difficult questions of the statutes' constitutionality, rarely was Article III the focus.[41]

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33. *See* Chicago & Nw. Ry. Co. v. Whitton, 80 U.S. 270, 288–90 (1871).

34. *See infra* Part II (discussing the officer-removal method).

35. *See infra* Part IV (discussing theories of protective jurisdiction).

36. *See infra* Part II.A (discussing the process of enacting these statutes).

37. Mesa v. California, 489 U.S. 121, 137–39 (1989).

38. *See infra* Part II.B (addressing and defending the claim that there is no implied requirement for officers to assert a federal defense).

39. *See supra* notes 10–15 and accompanying text (discussing the history of the United States government in the 1800s and the impact of the removal provisions).

40. *See, e.g.*, *infra* note 116 and accompanying text (noting that one debate took more than twelve hours).

41. *See infra* notes 201–209 and accompanying text (discussing a summary of the debates).

Why look at legislators' thoughts and legal theories at all? First, one may argue that a statute's meaning comes from its text, not the legislators' purposes or anticipated applications.[42] This Article, however, is less concerned with the best interpretation of each earlier statute than with an earlier era's understanding of Article III's limits. This series of statutes provides one lens through which to gauge this understanding. Legislators are presumed to act faithfully to the Constitution.[43] Whether or not legislators were *correct* in their interpretation of a statute, their views provide valuable insight into their understandings of constitutional power.

Second, these debates occurred in political and adversarial settings which may undermine participants' legal arguments.[44] But as Professor Anthony Bellia explained in a similar context, even if this counsels against assuming the "debates . . . evidence a *right* answer to the question," the debates may still help delimit the scope of *reasonable* argumentation.[45] Further, given the importance of these statutes, what a nineteenth-century federal prosecutor wrote with regard to one of these debates may be said of them all: "Nearly all of the speeches . . . were delivered after careful preparation, and upon mature deliberation, and the failure, therefore, of the opponents of the measure[s] to seriously question the constitutionality of the [provisions], is *evidence* that they considered [them] constitutional."[46]

1. The Force Act – 1833

Because there is no recorded legislative debate regarding the officer-removal statute enacted in 1815, this Article begins with the Force Act.

> [I]n any case where suit or prosecution shall be commenced in a court of any state, against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under colour thereof, or for or on account of any right, authority, or title, set up or claimed by such officer, or other person under any such law of the United States, it shall be lawful for the defendant in such suit or prosecution, at any time before trial [to file], upon a petition to the circuit court of the

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42. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998) ("But statutory prohibitions often go beyond the principal evil [Congress was concerned with] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

43. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

44. *See* Antony J. Bellia, Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263, 305 (2007).

45. *Id.*

46. E.W.M. Mackey, *Removal of Criminal Causes from State Courts to Federal Courts*, 1 CRIM. L. MAG. 141, 159 (1880) (emphasis added).

> United States, . . . and the cause . . . shall be thereafter proceeded in as a cause originally commenced in that court . . . .[47]

In defiance of federal tariffs, South Carolina enacted an ordinance "declar[ing] the tariff acts of 1828 and 1832 'null, void, and no law, nor binding upon this State, its officers or citizens.'"[48] The ordinance required enactment of further laws to enforce the nullification,[49] and mandated that "[a]ll officers of the State . . . and all jurors were required to take an oath to obey the ordinance and the laws made to give it effect."[50] And importantly for this discussion, "no case of law or equity" requiring judicial determination of the validity of the ordinance, any laws passed to enforce it, or the federal tariffs, could be appealed to the Supreme Court of the United States; the state courts would ignore any impermissible appeals, except insofar as to hold the disobedient appellant in "contempt of the Court."[51] South Carolina legislators thus insulated the State from the effect of the federal tariffs and cut off access to any decision maker who might acknowledge their validity.[52]

The state legislature followed up in due course with a series of "most comprehensive and well designed" laws.[53] "The aim was to make enforcement [of the tariffs] appear so hopeless that it would not be attempted."[54] United States Senator Wilkins of Pennsylvania described the South Carolina laws as "harsh and oppressive."[55]

Congress sought to counteract the ordinance: "to meet legislation by legislation."[56] The resulting bill, commonly termed the Force Act, contained a removal provision akin to that used in 1815 to thwart New England's resistance to the embargoes, applicable to revenue officers sued or prosecuted "on account of any act done under the revenue laws of the United States, or

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47. Force Act, ch. 57, § 3, 4 Stat. 632, 633–34 (1833) (providing for the collection of duties and imports).

48. FREDERIC BANCROFT, CALHOUN AND THE SOUTH CAROLINA NULLIFICATION MOVEMENT 129 (1966); *see* 5 EDWARD CHANNING, A HISTORY OF THE UNITED STATES: THE PERIOD OF TRANSITION, 1815–1848, at 419–29 (3d ed. 1977); CONVENTION OF THE PEOPLE OF SOUTH CAROLINA, AN ORDINANCE, TO NULLIFY CERTAIN ACTS OF THE CONGRESS OF THE UNITED STATES, PURPORTING TO BE LAWS LAYING DUTIES AND IMPOSTS ON THE IMPORTATION OF FOREIGN COMMODITIES ¶ 2 (1832), *reprinted in* STATE PAPERS ON NULLIFICATION 28, 29 (1834); WILLIAM HARPER, THE REMEDY BY STATE INTERPOSITION, OR NULLIFICATION (1832).

49. BANCROFT, *supra* note 48, at 129; *see* CONVENTION OF THE PEOPLE OF SOUTH CAROLINA, *supra* note 48, ¶ 3, at 29.

50. BANCROFT, *supra* note 48, at 129; *see* CONVENTION OF THE PEOPLE OF SOUTH CAROLINA, *supra* note 48, ¶ 5, at 30.

51. CONVENTION OF THE PEOPLE OF SOUTH CAROLINA, *supra* note 48, ¶ 4, at 29.

52. *Id.*

53. 5 CHANNING, *supra* note 48, at 429.

54. BANCROFT, *supra* note 48, at 131.

55. 9 REG. DEB. 259 (1833) (statement of Sen. Wilkins).

56. *Id.*; *see id.* at 514 (statement of Sen. Rives) ("My plan, then, would be simply this: I would take up this new code of nullification, I would examine it in all its inventions, and apply to every one of its devices an effectual counteraction.").

under colour thereof."[57] The bill would work as follows: A collector in "the port of South Carolina is prosecuted. He is carried to prison . . . . [And] his property is carried off and sold."[58] In defense, the officer "sets forth that, under the laws of the United States, he was *obliged* to do his duty," to which the state prosecution responds that "the laws of the United States had been nullified; and the State laws had taken their place."[59] Undoubtedly, as Senator Wilkins explained: "Out of this issue," namely, whether the federal law imposed any cognizable duty and privilege on the officer, "springs a case provided for by the bill."[60] Removal would allow immediate access to a federal tribunal, which was uniquely important given South Carolina's prohibition on seeking an appeal in the Supreme Court of the United States.[61] Now, the officer could "defend himself [in a court] where the authority of the law was recognised."[62]

Wilkins dismissed the argument that "the case will arise under the State law."[63] This was appropriate given the leading cases on arising-under jurisdiction, *Osborn v. Bank of the United States*[64] and *Bank of the United States v. Planters' Bank of Georgia*, both decided roughly a decade earlier.[65] In *Osborn*, the Supreme Court held that "[e]very suit brought by the Bank" arose under federal law because the Bank was created by a federal charter, and thus,"[e]very thing done by the Bank, is done under the charter" whether or not any question as to the validity of the Bank's actions under the charter had been or would be contested.[66] While *Osborn* has received all the fame, its companion case, *Planters' Bank of Georgia*, was decided the same way and was a starker result.[67] While "it is arguable that the major premise" in *Osborn* revolved around the question of the Bank's "right under the

57. Force Act, ch. 57, § 3, 4 Stat. 632, 633–34 (1833) (providing for the collection of duties and imports).

58. 9 REG. DEB. 260 (1833) (statement of Sen. Wilkins).

59. *Id.* (emphasis added).

60. *Id.*

61. CONVENTION OF THE PEOPLE OF SOUTH CAROLINA, *supra* note 48, ¶ 4, at 29; *see* 9 REG. DEB. 419 (1833) (statement of Sen. Dallas) ("The ordinance says, in effect, although you may be a military, or naval, or civil officer of the United States, and engaged in the performance of your official duties, we will drag you into the State courts, and, when there, we will preclude your appealing to the constitution and laws under which you acted, and we will try you by a jury sworn to convict you, out and out."). As Senator Daniel Webster pointed out, even if Congress could effectively override the prohibition of appealing a final judgment of the South Carolina courts to a federal court, a "writ of error would only go on the law of the case," not the facts, and this measure would not solve the "impossib[ility]" of the officer "get[ting] any thing like a fair trial." 9 REG. DEB. 461 (1833) (statement of Sen. Webster); *id.* (statement of Sen. Wilkins).

62. 9 REG. DEB. 461 (1833) (statement of Sen. Webster).

63. *Id.* at 260 (statement of Sen. Wilkins).

64. Osborn v. Bank of the U.S., 22 U.S. 738, 759 (1824).

65. Bank of the U.S. v. Planters' Bank of Ga., 22 U.S. 904, 906–07 (1824).

66. *See Osborn*, 22 U.S. at 807; *cf. id.* at 887 (Johnson, J., dissenting) (providing an alternative approach to decide which "cases aris[e] under the laws of the United States").

67. *See Planters' Bank*, 22 U.S. at 910.

Constitution and laws of the United States to be free from state taxation,"[68] *Planters' Bank* presented questions as to whether "promissory notes" were "duly transferred, assigned and delivered" from Planters' Bank to the Bank of the United States,[69] a quintessential question of (nonfederal) contract law.[70] Because the revenue laws would immunize the officer from punishment for fulfilling his statutorily imposed duties, "the case" described in the Force Act would undoubtedly "arise[] out of the laws and constitution of the United States."[71]

Not everyone was as disposed to the provision as Senator Wilkins.[72] Senator Tyler of Virginia "disclaim[ed] the [nullification] policy adopted by" South Carolina,[73] but pointed out what was obvious yet clouded by excitement: this law was "applicable to every State in the Union" and reached far beyond confronting charges of nullification.[74]

> If an officer of the customs shall differ, in regard to any matter appertaining to his duties, with any citizen of Richmond, or any other place, and a quarrel should thereupon arise, and the custom-house officer shall beat and maltreat such citizen, no redress for the injury can be obtained in the State courts, and the action for damages can alone be brought in the federal courts. Nay, sir, if the revenue officer commit murder, cold-blooded murder, he is triable for the same only before the United States court, maugre the laws of Virginia, which prescribe the punishment for the offence, and the mode of trial.[75]

Senator Tyler was not quite right in saying that a murder prosecution against the officer would *only* be viable in federal court.[76] Nothing in the Force Act formally stripped state courts of jurisdiction.[77] It did, however, leave the choice in the hands of the revenue officer, which may practically have amounted to the same thing.[78]

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68. FALLON ET AL., *supra* note 7, at 793.

69. *Planters' Bank*, 22 U.S. at 904–05.

70. FALLON ET AL., *supra* note 7, at 793.

71. 9 REG. DEB. 260 (1833) (statement of Sen. Wilkins).

72. *Id.* at 360 (statement of Sen. Tyler).

73. *Id.* at 371 (statement of Sen. Tyler). South Carolina stood alone in its decision to go through with nullification, despite rumblings of such sentiments in other states in the past. 5 CHANNING, *supra* note 48, at 430; BANCROFT, *supra* note 48, at 144.

74. 9 REG. DEB. 373 (1833) (statement of Sen. Tyler).

75. *Id.*

76. *See id.*

77. Force Act, ch. 57, §§ 2–3, 4 Stat. 632, 633–34 (1833) (providing for the collection of duties and imports).

78. *See* FALLON ET AL., *supra* note 7, at 421–22 (listing "[c]oncurrent [j]urisdiction" between state and federal courts "[w]ith [r]ight of [r]emoval" as one way by which Congress can effectively regulate the jurisdiction of the state courts). There was one situation in which federal courts had power exclusive of the state courts. Only a federal court order could affect the disposition of any "property taken or detained by" the customs officer. Force Act, ch. 57, § 2, 4 Stat. 632, 633 (1833).

Yet the broader premise, that the provision would allow for federal-court jurisdiction over a suit arising out of any "beat[ing] and maltreat[ment]" by the officer, even for "cold-blooded murder," is telling.[79] While it is certainly not the only interpretation of the statute, there is no textual indication that it is incorrect.[80] No one contested Tyler's assertion, and in a legal article *supporting* the statute's constitutionality, a federal prosecutor expressly agreed with Tyler's interpretation.[81] In the House of Representatives, Representative Foster of Georgia "candidly admit[ted]" that "[w]here an officer is sued in a State court, for an act *required* by a law of the United States, it is a case 'arising under the laws of the United States,'" and "[t]he exercise of [federal] jurisdiction, it seems to me, for many reasons, ought to be provided for."[82] He drew a line before criminal prosecutions though.[83] Those involved uniquely state interests and "there [wa]s no warrant in the constitution" for federal jurisdiction.[84]

Throughout the debate, there was no mention by any legislator that the removal provision was invalid under Article III of the Constitution.[85] It was uncontroversial that the jurisdictional hook was the "arising under" head of that Article.[86]

Only Senator Wilkins spoke about Article III at length, arguing that: "There ought to be a judicial power co-extensive with the power of legislation, and a co-extensive executive power. Without this co-extensive power, legislation would be useless in a free Government. Neither domestic tranquility, nor uniformity of rules and decisions, can be secured without it."[87] Wilkins cited the Supreme Court's decisions in *Martin v. Hunter's Lessee*[88] and *Cohens v. Virginia*.[89] Both cases strongly affirmed the power of the federal courts (more specifically the Supreme Court) to entertain appeals from state courts.[90] And in *Martin*, the Court suggested that removal of a case

79. 9 REG. DEB. 373 (1833) (statement of Sen. Tyler).

80. *Id.*

81. Mackey, *supra* note 46, at 159.

82. 9 REG. DEB. 1874 (1833) (statement of Rep. Foster) (emphasis added).

83. *Id.* at 1874–75.

84. *Id.* at 1875.

85. *Id*. It is unclear whether Representative Foster grounded his argument that there was "no warrant in the constitution" for "criminal cases where a State is a party" in conceptions of the Eleventh Amendment (which may be read as specifically amending Article III). *Id.*; *see* U.S. CONST. amend. XI; John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1894 (1983). Or in conceptions of state sovereignty. *See infra* Part III.B (explaining the removal provisions' potential impact on state sovereignty). In any event, he did not allude to arising-under jurisdiction. 9 REG. DEB. 1874–75 (1833) (statement of Rep. Foster).

86. 9 REG. DEB. 1874 (1833) (statement of Rep. Foster); *id.* at 514 (statement of Sen. Rives); *id.* at 260 (statement of Sen. Wilkins).

87. *Id.* at 260 (statement of Sen. Wilkins).

88. *Id.* (citing Martin v. Hunter's Lessee, 14 U.S. 304 (1816)).

89. *Id.* (citing Cohens v. Virginia, 19 U.S. 264 (1821)).

90. *Cohens*, 19 U.S. at 414–18; *Martin*, 14 U.S. at 342.

from state to federal court may be best understood as an exercise of the federal court's *appellate* (rather than original) jurisdiction.[91] Based on this understanding, as far as the Constitution was concerned, removing a trial from state to federal court was no different than the established practice of seeking a writ of error from the Supreme Court.[92] The *Martin* Court also posited that Article III might be best understood as requiring that some federal court have jurisdiction over *all* cases arising under federal law.[93] If this were true, then as mentioned before, South Carolina's bar on seeking any appeals to the United States Supreme Court of cases involving the federal revenue laws or the ordinance would make removal uniquely important to satisfy this constitutional demand.[94]

In the end, the Force Act passed with the removal provision intact, and the debate within Congress regarding removal of officer suits was tabled.[95] Before it ended, though, Senator Wilkins posed a prescient hypothetical.[96] Imagine, he said, that a state "pass[ed] a law to nullify" the Constitution's ban on state laws "discharg[ing]" escaped slaves from "[s]ervice or [l]abour" in another state and the corollary obligation to return them to "the [p]arty to whom such [s]ervice or [l]abour may be due."[97] The "jurors and judges" in the state were "all sworn" to acknowledge the validity of the hypothetical statute.[98] And finally, he continued, imagine the state fined and imprisoned any slave owner "found in pursuit" of the fleeing individual.[99] Wouldn't southern senators want a federal court to hear the case?[100] Two decades later, the answer came back a resounding yes.[101]

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91. *Martin*, 14 U.S. at 349–50.

92. Mackey, *supra* note 46, at 145–46 (explaining that one major purpose of the removal provision was to avoid the lengthy procedures required by the Judiciary Act); *see* Judiciary Act, § 25, 1 Stat. 73, 85–86 (1789).

93. *Martin*, 14 U.S. at 334.

94. *See supra* note 51 and accompanying text (discussing the scenario in which the removal statute would be important). Whether Article III poses such a requirement is hotly contested. *Compare, e.g.*, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 271–72 (1985) (arguing that Article III requires certain cases be amenable to federal-court jurisdiction), *with, e.g.*, John Harrison, *Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 206–08 (1997) (arguing that Article III does *not* set such requirements).

95. Force Act, ch. 57, § 3, 4 Stat. 632, 633–34 (1833) (providing for the collection of duties and imports).

96. 9 REG. DEB. 261 (1833).

97. U.S. CONST. art. IV, § 2, cl. 3; 9 REG. DEB. 261 (1833) (statement of Sen. Wilkins).

98. 9 REG. DEB. 262 (1833) (statement of Sen. Wilkins).

99. *Id.*

100. *Id.* at 261–62.

101. CONG. GLOBE APP'X, 33d Cong., 2d Sess. 211 (1855).

2. A Bill to Protect the Officers . . . Executing the Laws of the United States – 1855

> [I]f a suit be commenced . . . in any State court, against any officer of the United States, or other person, for or on account of any act done under any law of the United States, or under color thereof, or for or on account of any right, authority, claim, or title, set up by such officer, or other person, under any law of the United States, and the defendant shall . . . file a petition for the removal of the cause for trial into the next circuit court . . . the cause shall there proceed in the same manner as if if [*sic*] it had been brought there by original process. The party removing the cause is not, however, to be allowed to plead or give evidence of any other defense than that arising under a law of the United States.[102]

The passage of the Fugitive Slave Act of 1850 generated diverse reactions, from celebration, to acquiescence, to "open resistance" and violence.[103] By 1855, northern states had enacted a variety of "personal liberty laws," which, in varying formulations, "prohibited state officers from participating in the enforcement of" the Act,[104] provided "antikidnapping laws" to protect both fugitive slaves and freed black people from being kidnapped and sold into slavery under the guise of the Act,[105] and made the writ of habeas corpus available to those arrested as fugitive slaves.[106]

Whatever the actual effect of such "hostile legislation" and "hostile acts," southern states were outraged.[107] In a comprehensive report, a committee of the Virginia House of Delegates sought to evaluate the state of affairs at the time.[108] The committee determined that:

> No citizen of the South can pass the frontier of a non-slaveholding state and there . . . prove his right of ownership [to his escaped slave], without

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102. *Id.*

103. *Id.* at 243 (statement of Sen. Bayard); *id.* at 220 (statement of Sen. Benjamin) ("[I]n the execution of a constitutional and admitedly [*sic*] binding law of the Federal Congress, the officers of the United States, who endeavor to assert the majesty of the law, to vindicate it, to assist in its execution, are set upon by mobs, and their lives are not only threatened but absolutely taken in open day; . . . the blood of the slaughtered victims still smoke in the streets of Boston; . . . the officers of the United States, while so engaged in the execution of the laws of the country, are slaughtered in cold blood . . . ."); STANLEY W. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850–60, at 49–66 (2d ed. 1970); Jane H. Pease & William H. Pease, *Confrontation and Abolition in the 1850s*, 58 J. AM. HIST. 923, 927–30 (1972).

104. CAMPBELL, *supra* note 103, at 138–39.

105. *Id.* at 141.

106. *Id.* at 143.

107. 6 EDWARD CHANNING, A HISTORY OF THE UNITED STATES: THE WAR FOR SOUTHERN INDEPENDENCE, 1849–1865, at 94–95 (3d ed. 1977); CAMPBELL, *supra* note 103, at 146–47.

108. 6 CHANNING, *supra* note 107, at 95; *see* COMMONWEALTH OF VA., H.D. REP., RENDITION OF FUGITIVE SLAVES (1849), *reprinted in* HERMAN VANDENBURG AMES, STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 250 (1970).

> imminent danger of being prosecuted criminally as a kidnapper, . . . sued . . . for false imprisonment—imprisoned himself for want of bail, . . . or finally of being mobbed or being put to death in a street fight by insane fanatics or brutal ruffians.[109]

Their federal representatives felt similarly.[110]

For Congress, it was déja vu.[111] Like South Carolina had done earlier, "State after State, throughout the North, [wa]s directing its legislation, and not only directing its legislation, but . . . its courts of justice [wer]e perverting its jurisprudence in direct attacks upon the Constitution of the country . . . ."[112] The "idea of nullification about which we heard so much a few years ago" had merely "changed its locality," as "South Carolina [wa]s now taken into the arms and affectionately caressed by Ohio, Vermont, Michigan, Wisconsin, and Connecticut."[113]

If passed, the bill proposed in Congress would allow "any officer of the United States, or other person" who was either sued or prosecuted "for or on account of any act done under any law of the United States, or under color thereof," to remove the case to a federal court.[114] As discussed below, the bill also tightly restricted the defenses available to the officer.[115] The epic Senate debate which followed provided more than twelve hours of both rigorous legal arguments and vitriolic speeches.[116] Leaving aside issues pertaining solely to the Fugitive Slave Act, the debate centered on questions regarding the scope of the removal bill and its constitutionality, with the latter containing two sub-issues: state sovereignty and Article III jurisdiction.

The 1855 bill was both narrow and broad in scope.[117] It was narrow because "[i]t carefully provide[d] that no defense shall be set up" in federal court other than that the officer "was acting under the process of the law of the United States."[118] More specifically, according to Senator Toucey of Connecticut:

> [W]here an officer of the United States is sued for acts done in carrying out any law of the United States, and his defense depends *exclusively* upon

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109. COMMONWEALTH OF VA., *supra* note 108, at 250.

110. CONG. GLOBE APP'X, 33d Cong., 2d Sess. 211 (1855) (statement of Sen. Toucey); *id.* at 219–20 (statement of Sen. Benjamin); *id.* at 221–22 (statement of Sen. Bayard).

111. *Id.* at 220.

112. *Id.* at 219 (statement of Sen. Benjamin).

113. *Id*.

114. *Id.* at 211 (statement of Sen. Toucey).

115. *Id.*

116. *Id*. at 244 (noting that the debate began at 11:00 AM and continued through midnight, though the debate was still not over); CONG. GLOBE, 33d Cong., 2d Sess. 902–03 (1855) (noting that the debate took almost twelve hours).

117. *See* CONG. GLOBE APP'X, 33d Cong., 2d Sess. 211–12 (1855).

118. *Id.* at 211 (statement of Sen. Toucey).

> the *existence* of that law, and his action is under that law, the decision of his defense shall be transferred to the United States courts.[119]

It was broad because "the language of the bill" and "intent of its framers" seemed to capture "*every* suit against *every* man, who claims to have acted under color of a law of the United States . . . ."[120] Unlike past removal statutes, "[i]t [wa]s not confined" to the enforcement of any particular statute "alone, but extend[ed] to all cases where it is necessary" to enable federal officers to execute the law.[121] Commenting on the broad scope, Senator Douglas of Illinois illustrated the overarching "object" as one "to execute the laws, to prevent anarchy, to put down rebellion and violence against the constituted authorities of the country."[122]

With regard to states' sovereignty and rights, some considered the set-up an unconstitutional "subjection of the States and citizens to Federal authority," tantamount to an "overthrow of State rights," which would "establish a great central, consolidated, Federal Government."[123] As Senator Chase put it: "It is a step, let me say a stride rather, towards despotism."[124] Much of the objection lay specifically in the bill's usurpation of "the criminal jurisdiction of the States."[125] Criminal prosecution was the "highest duty" of the State, "investigating and punishing wrongs done to life or property within

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119. *Id.* (emphasis added); *see id.* at 219 (statement of Sen. Fessenden) ("[The bill] is intended simply and solely to deprive the courts of the several States of any and all power on any question arising under the fugitive slave act, or any other act of the United States . . . ."). *But see id.* at 221 (statement of Sen. Cooper) (giving the example of an "officer or agent [who] in the arrest of a fugitive slave should commit a wanton aggression on some citizen," and consequently be sued in trespass "before some State tribunal," and arguing that under the bill, that officer could "drag[]" the citizen to a "distant tribunal, thus increasing the expense, and virtually to [deny] him a redress for the injury which he has suffered"). Given, however, the language of the bill, Senator Toucey's description seems more accurate. *See id.* at 211 (providing the text of the bill, namely that "[t]he party removing the cause is not, however, to be allowed to plead or give evidence of any other defense than that arising under a law of the United States").

120. *Id.* at 212 (statement of Sen. Chase) (emphasis added). Earlier, Senator Chase had made similar comments:

> Why, sir, just think of the consequences of this bill. One man claims title to real estate under a patent of the United States, and enters upon the land and cuts some timber. It happens that somebody else claims a superior title, and sues him for trespass before a justice of the peace. Under this bill the defendant may remove the cause to the circuit court. So if a man engaged in the military service of the United States should maltreat, or even kill, a citizen, claiming that it was done in virtue of Federal law, whether criminally prosecuted by the State or sued in a civil action for damages, the defendant could remove . . . . Numberless other cases might be put, by way of illustration, and will doubtless occur to Senators.

Id. at 211.

121. *Id.* at 215 (statement of Sen. Douglas).

122. *Id.*

123. *Id.* at 211 (statement of Sen. Chase).

124. *Id.*

125. *Id.* at 212.

its jurisdiction."[126] It was, in short, an indictment against the States of the Union—"a declaration that you have no confidence in them . . . ."[127]

Yet there was little mention of any Article III barrier to the removal.[128] As Toucey explained:

> [T]he validity of the defense in such a case, as it is an action arising under the laws of the United States entirely, upon the service of the process, on any act done under the law of the United States, or the authority of the United States, may be decided by the courts of the United States.[129]

This was "a clear case, arising under the Constitution . . . ."[130] Senator Douglas concurred: "What, sir, is the bill? It is a simple provision that when a case is pending in the State courts, which arises under the laws of the United States, it may be transferred into the Federal courts. That is all."[131] Indeed, argued Douglas, for what other purpose did the Constitution establish the judicial power—and the Supreme Court in particular—than that "of determining the validity of an act of Congress"?[132] He might have added, as Senator Bayard from Delaware later did, that the federal courts were also meant to provide a shield to those "acting under the authority of the Union" from local prejudices and jealousies.[133] And indeed, "[u]nder the revenue laws, the right to transfer the jurisdiction ha[d] existed for many years without complaint as to its constitutionality."[134]

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126. *Id.*
127. *Id.* at 219 (statement of Sen. Fessenden).
128. *Id.* at 212 (discussing Article IV but not Article III).
129. *Id.* at 211 (statement of Sen. Toucey).
130. *Id.*
131. *Id.* at 214 (statement of Sen. Douglas).
132. *Id.* at 215.

> Mr. WADE. If the supreme court, the court of last resort, of a sovereign State, should declare that law unconstitutional, will he hold that the Federal courts may, over their heads, execute it violently? Who is the judge in the last resort, the State, or the Federal authority?
>
> Mr. DOUGLAS. I will tell the Senator. In the last resort, the State courts, within the limits of their jurisdiction, in the exposition of their own laws, are the highest tribunals; but in the execution of a provision of the Constitution of the United States, or a law of the United States, or a treaty of the United States, the Constitution has provided a Supreme Court as the highest and ultimate judicial tribunal, to which all others must yield obedience. . . . Hence, I say, that in case of a conflict between the Federal and State authorities upon a law within the scope of the Federal Constitution, the State law must yield of necessity to what the Constitution of the United States has declared to be the paramount law.

Id.

133. *Id.* at 243 (statement of Sen. Bayard).
134. *Id.*

3. An Act Relating to Habeas Corpus – 1863

> [I]f any suit or prosecution[] . . . has been or shall be commenced in any state court against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress, and the defendant shall[] . . . file a petition[] . . . for the removal of the cause for trial at the next circuit court of the United States, . . . the cause shall proceed therein in the same manner as if it had been brought in said court by original process . . . .[135]

On April 19, 1861, the Sixth Massachusetts Regiment passed through Baltimore on its way to Washington, D.C. "to respond to Lincoln's call for troops."[136] Maryland, which "enclosed Washington on three sides (with Virginia on the fourth)," housed a "large and resolute secessionist minorit[y]."[137] A riot broke out against the regiment, "a few soldiers opened fire," and the trip to Washington ultimately left sixteen dead and "several score" wounded.[138]

> For nearly a week [thereafter] Washington was virtually under siege. Marylanders destroyed the railroad bridges linking Baltimore with the North and cut the telegraph lines. A Confederate assault from Virginia was expected daily, and everyone predicted that it would be aided by the thousands of secessionist sympathizers in the city.[139]

Lincoln reacted by authorizing military officials to suspend the privilege of the writ of habeas corpus, if necessary, along the route taken by northern troops embarking toward the capital.[140] The President's claim that he possessed the authority to suspend the writ (and even further to delegate that power to someone else) was sharply contested and deeply controversial.[141]

The House of Representatives sought to gloss over the controversy with a new bill that "confirmed and made valid" Lincoln's "suspensions" of the writ and subsequent "arrests and imprisonments," indemnified him and all

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135. Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756–57 (relating to habeas corpus).

136. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 285 (1988).

137. *Id.* at 284.

138. *Id.* at 285.

139. DAVID HERBERT DONALD, LINCOLN 298 (1995).

140. Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1286 (2008).

141. *E.g.*, Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 273 (2014) (noting the suspensions "were extremely controversial"); *see Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (strongly rejecting the President's claim).

other executives "who ha[d] been concerned in making said arrests,"[142] and also delegated to Lincoln the "authority to declare the suspension" going forward.[143] The Senate's substitute bill included a removal provision.[144] Removal was allowed in any "suit or prosecution" in state court against any person "for any arrest or imprisonment made or other trespasses or wrongs done or committed" during the Civil War "by virtue or under color of any authority" of the President.[145]

In any such case, the removing defendant would be able to "plead the general issue and give this act and any special matter in evidence."[146] The amendment also provided that a finding of "reasonable or probable cause for the arrest or imprisonment or other wrong," or "good faith" by the officer "in making such arrest or imprisonment, or doing such act," would provide a complete defense.[147]

Unsurprisingly, the amendments triggered a harsh reaction within the House.[148] Much of the debate related to the decision to provide indemnity to executive officers.[149] Representative Wickliffe of Kentucky, however, mounted an attack regarding the removal provision's ability to withstand Article III scrutiny.[150] Wickliffe's arguments stemmed from those made by Representative May of Maryland a day earlier.[151] First, May had distinguished legislative precedent, explaining that the Force Act was limited in scope to suits against revenue officers.[152] In May's view, the justification for the Force Act was the need for "impartial administration of law" and protection of the "*supremacy of [federal] law*."[153] This bill, however, asserted a "monstrous power," which was different in kind: "[T]he right to remove a suit in all that comprehensive class of cases brought to redress wrongs committed 'under color of any authority derived from or exercised by or under the *President* of the United States,'" which was separate from and arguably "against [the] law" of the United States.[154]

Wickliffe took up the mantle the following day by tying May's arguments to Article III.[155] After reciting the Article's first two sections, he continued: "It will not be pretended that these arrests" embraced by the bill

142. H.R. 591, 37th Cong. § 1 (1862) (as referred to the S. Comm. on the Judiciary, Dec. 9, 1862).
143. *Id.* § 2.
144. *Id.* § 1 (as amended by the S. Comm. on the Judiciary, Jan. 15, 1863).
145. *Id.*
146. *Id.*
147. *Id.* § 2.
148. *See* CONG. GLOBE, 37th Cong., 3d Sess. 1102–07 (1863).
149. *Id.*
150. *Id.* at 1103–05.
151. *Id.*
152. *Id.* at 1069.
153. *Id.* (statement of Sen. May).
154. *Id.* (emphasis added).
155. *Id.* at 1103.

"were made under the Constitution. That instrument forbids them in unmistakable language."[156] It made no difference that "they were made under a military necessity, under martial law, [as that] d[id] not prove that the officer or agent of the military power was acting under or deriving power from the *Constitution* or an *act of Congress*."[157]

And if, indeed, the arrests had been rooted in "the Constitution or the laws of Congress, there [wa]s no necessity for the Senate's amendment," because appeal to the Supreme Court could be had by way of the "twenty-fifth section of the judiciary act of 1789."[158] Representative Wickliffe posited that:

> [T]here is no member of this House who will undertake to say that the arrest of a man by a marshal or by military authority—such arrests as have been the subject of debate here—has been done under the authority of the Constitution or of any act of Congress.[159]

All that was left were mere "cases between citizens of the same State[] for personal wrongs," which could now "be removed from the State court to a Federal court."[160] Citing *Martin v. Hunter's Lessee*,[161] *Mayor v. De Armas*,[162] and *Crowell v. Randell*,[163] Wickliffe reminded the House that courts had "repeatedly" determined that such disputes fell outside the scope of Article III without more; "the extent of the judicial power (of the United States court) is carefully defined and limited, and Congress [could not] enlarge it."[164]

To be sure, these were not everyday torts.[165] They were carried out pursuant to presidential orders.[166] No difference, Wickliffe said.[167]

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156. *Id.* (statement of Rep. Wickliffe). Wickliffe was likely alluding to the Fourth Amendment's ban on unreasonable seizures. *See* U.S. CONST. Amend. IV; CONG. GLOBE, 37th Cong., 3d Sess. 1476 (1863) (statement of Sen. Bayard) ("How, under the Federal Constitution, with the provisions of the fifth amendment before us, is it possible for the Senate of the United States to pass a law embodying that fourth section [of the bill]? Why, sir, it is nothing more than a return to the question of general warrants again. We have another provision in the amendments which is applicable to this. It is the fourth amendment . . . .").

157. CONG. GLOBE, 37th Cong., 3d Sess. 1103 (1863) (emphasis added) (statement of Rep. Wickliffe).

158. *Id.*

159. *Id.* at 1103–04.

160. *Id*.

161. Martin v. Hunter's Lessee, 14 U.S. 304 (1816).

162. Mayor v. De Armas, 34 U.S. 224 (1835).

163. Crowell v. Randell, 35 U.S. 368 (1836).

164. CONG. GLOBE, 37th Cong., 3d Sess. 1103 (1863) (statement of Rep. Wickliffe) (quoting The Genesee Chief, 53 U.S. 443, 452 (1851)).

165. *See id*.

166. *Id.*

167. *Id.*

> Here the Senate has inserted the name of the President instead of the Constitution. The third article of the Constitution declares that the cause of action or matter of defense, to give the Federal court jurisdiction, must *arise under the Constitution or the laws of the United States*. Unless the advocates of this bill can establish the fact that the *President* is the *Constitution* of the United States, that they are one and the same, the argument that this bill is in accordance with the requirement of that charter of civil and religious liberty totally fails.[168]

Ultimately, he concluded, "these cases do not arise under a law or under the Constitution, but out of the mere *ipse dixit* of some officer of the Government," and as such could not come within Article III's grant of arising-under jurisdiction.[169]

Following the House's refusal to acquiesce to the Senate's substitute bill,[170] a conference committee convened and agreed upon the language that was ultimately enacted.[171] The ability to remove cases against certain defendants for actions done "under color of any authority derived from or exercised by or under the President of the United States" survived.[172] So, too, did the grant of an automatic defense for "order[s] of the President, or under his authority," made during the war.[173] The defense could be "made by special plea, or under the general issue."[174]

4. The Force Act Amendment – 1866

> [I]n any case . . . where suit or prosecution shall be commenced in any court of any State against any [internal revenue] officer of the United States, . . . or against any person acting under or by authority of any such officer on account of any act done under color of his office, . . . and affecting the validity of this act or acts of which it is amendatory, it shall be lawful for the defendant, . . . [to file] a petition to the circuit court of the United States . . . and the cause . . . shall be thereafter proceeded in as a cause, originally commenced in that court; . . . That if any [internal revenue] officer . . . , or any person acting under or by authority of any such officer, shall receive any injury to his person or property, for or on account of any act by him

168. *Id.* Wickliffe also pressed that the requirement that judgment be entered for defendant where he acted in good faith or under authority of the President violated Article III as an impermissible intrusion into the judicial process. *Id.*; *see* H.R. 591 § 2 (1863) (as amended by the S. Comm. on the Judiciary, Jan. 15, 1863); *cf.* United States v. Klein, 80 U.S. 128, 146 (1871) (questioning whether Congress "may prescribe rules of decision to the Judicial Department of the government in cases pending before it").

169. CONG. GLOBE, 37th Cong., 3d Sess. 1103 (1863) (statement of Rep. Wickliffe).

170. *Id.* at 1107.

171. H.R. Rep. No. 37-45, at 5 (1863) (report of the Comm. of Conf.); CONG. GLOBE, 37th Cong., 3d Sess. 1479 (House of Representatives); *id.* at 1489 (Senate).

172. Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756–57 (relating to habeas corpus).

173. *Id.* § 4.

174. *Id.*

> done, under any law of the United States, for the collection of taxes, he shall be entitled to maintain suit for damage therefor in the circuit court of the United States, in the district wherein the party doing the injury may reside or shall be found.[175]

In 1866, the House Committee on the Judiciary revisited the Force Act's removal provision in an attempt to "confin[e] the operations of the act to officers and persons acting under them and by their authority."[176] Some thought that the Force Act's application to "any case" "against any officer of the United States, *or other person*" was "by inadvertence."[177] As a result of the decades-old error, "all cases arising under State laws in connection with any trade or business for which the [federal] law requires a license to be taken out, or . . . a special tax to be paid may be removed into the United States court."[178]

In debating an amendment to the statute, Representative Hale of New York asked "whether" the proposed provision "is confined to those cases in which the validity of constructions of the act is in question."[179] Representative Wilson of Iowa (rather unhelpfully) replied by rereading the first section of the proposed amendment, which contained no such limitation.[180] The proposed amendment covered "any case, civil or criminal, where suit or prosecution shall be commenced . . . against any officer of the United States, appointed under or acting by authority of the" revenue laws, "or against any person acting under or by authority of any such officer, or against any person holding property or estate by title derived from any such officer."[181]

> Mr. WILSON, of Iowa. In perfecting this amendment the Committee on the Judiciary availed themselves of the [Force Act] of 1833, which has already received a construction. The only change that is made is in confining the operation of the act to persons who were officers or acting under the authority of officers. That act included other persons.
>
> Mr. HALE. It strikes me, after hearing the explanation of the gentleman from Iowa, [Mr. WILSON,] that his amendment is altogether too meager in its provisions if it is intended to confine it to suits brought against persons who—
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> Mr. WILSON, of Iowa. Brought against them for any act *performed by them as officers*.

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175. Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171–72.

176. CONG. GLOBE, 39th Cong., 1st Sess. 2848 (1866) (statement of Rep. Wilson).

177. *Id.*; Force Act, ch. 57, § 3, 4 Stat. 632, 633–34 (1833) (emphasis added) (providing for the collection of duties and imports).

178. CONG. GLOBE, 39th Cong., 1st Sess. 2848 (1866) (statement of Rep. Wilson).

179. *Id.* (statement of Rep. Hale).

180. *Id.*

181. *Id.* (statement of Rep. Wilson).

> Mr. HALE. It does not say so.[182]

To remedy the problem, Hale moved to amend the amendment, and Wilson accepted without further comment.[183] The new amendment limited the scope to cases seeking redress for injuries "on account of any act done under color of his office,"[184] a throwback to the 1833 text,[185] and then significantly narrowed it further by requiring that the case "involv[e] the construction of this act."[186] "Construction" of a statute referred then, as it does now, to determining the statute's meaning and perhaps its scope.[187] The House then moved on to the next proposal.[188]

The same section of the amendment also added a category of cases that could be originally filed in federal court: Where the officer or person acting under his authority "receive[d] any injury to his person or property, for or on account of any act by him done, under any law of the United States, for the collection of taxes, he [was] entitled to maintain suit for damage" in federal court.[189] Because the amendment does not provide the officer with any special cause of action to vindicate such injuries, this was a clear grant of federal-court jurisdiction for a mere tort action.[190] In contrast to the limitation that federal officers could only remove cases "affecting the validity of this act," though, the grant of original jurisdiction for an officer's tort claim had no such requirement.[191]

5. The Expansion of Habeas Corpus Removal – 1869

> [T]he [removal] provisions of [the 1863 Act Relating to Habeas Corpus] extend to any suit or action at law, or prosecution, civil or criminal, . . . commenced in any State court against . . . common carriers of goods, wares, or merchandise, for any loss or damage which may have happened to any goods, wares, or merchandise whatever, which shall have been delivered to any such . . . common carriers, where such loss or damage shall have been occasioned by the acts of those engaged in hostility to the government of the United States during the late rebellion, or where such loss or damage

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182. *Id.* (alteration in original) (emphasis added).

183. *Id.*

184. *Id.* (statement of Rep. Hale).

185. Force Act, ch. 57, § 3, 4 Stat. 632, 633–34 (1833) (providing for the collection of duties and imports).

186. CONG. GLOBE, 39th Cong., 1st Sess. 2848 (1866) (statement of Rep. Hale).

187. SAMUEL JOHNSON, ENGLISH DICTIONARY, AS IMPROVED BY TODD 229 (J.E. Worcester ed. 1859).

188. CONG. GLOBE, 39th Cong., 1st Sess. 2848 (1866).

189. Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171–72 (providing that revenue officers can remove the suit to a federal circuit court).

190. *Id.*

191. *Id.*

> shall have been occasioned by any of the forces of the United States, or by any officer in command of such forces . . . .[192]

Finally, in 1869, "Congress, without explanation, provided for the removal from state to federal court of actions against common carriers for damage or loss occasioned by the Civil War."[193] The provision materially differs from those previously discussed in that it does not regulate suits against federal officers.[194] Further, we cannot gain much insight regarding the mindset of individual legislators as there is no readily available legislative history. The expansion, however, is still significant for our discussion. It is far from clear what federal law would be involved in these "suit[s] or action[s] at law" brought against common carriers.[195] The statute reached claims "for any loss or damage which may have happened to . . . merchandise" as long as the loss had been caused by those engaged in battle during the Civil War.[196]

Recently, Professor David Currie noted the passage of the Act in an otherwise unrelated discussion.[197] He stated: "Why Congress thought such cases arose under federal law, as it apparently concluded, is beyond me."[198] Contrast this removal provision with one passed a year earlier by the same Congress, for "any corporation, or any member thereof," as long as the defendant claimed to "have a defence arising under or by virtue of the Constitution of the United States, or any treaty or law of the United States."[199] Congress knew how to insert substantive-federal-law prerequisites into these provisions when it wanted.[200] Unfortunately, judicial, executive, and even scholarly discussion of the common-carrier provision is just as absent as any debate or discussion amongst the legislators who enacted it.

Legislators sparred passionately in these debates.[201] They disputed the appropriate scope of federal power generally, the extent to which state courts must be respected and left alone, and the authority of Congress to pass many of the laws and statutory schemes that undergirded the authority of the officers whom Congress sought to protect.[202] However, the few arguments raised regarding Article III viability did not get much traction.[203] Senators

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192. Act of Jan. 22, 1869, ch. 13, 15 Stat. 267 (extending removal from state court to federal court for common carriers).

193. David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 437 n.333 (2008).

194. Act of Jan. 22, 1869, ch. 13, 15 Stat. 267.

195. *Id.*

196. *Id.*

197. Currie, *supra* note 193, at 437 n.333.

198. *Id*.

199. Act of July 27, 1868, ch. 255, § 2, 15 Stat. 226, 227.

200. *See id.*

201. *See supra* notes 150–169 and accompanying text (discussing the strong views of the speakers).

202. *See id*.

203. CONG. GLOBE, 37th Cong., 3d Sess. 1103 *passim* (1963).

Wilkins,[204] Toucey,[205] Douglas,[206] and Bayard[207] each expressed their confidence in the conformity of different removal provisions with the Constitution. In contrast, Representative Wickliffe argued that when it came to the 1863 Act, the removal was plainly unconstitutional.[208] Yet even Wickliffe's arguments must be understood in the context of a unique proposal—one that "inserted the name of the President instead of the Constitution" as the source of law underlying the controversies embraced by the bill.[209]

Depending on the scope of the issues which could be raised, or which needed to exist in these suits, perhaps the arising-under question was not difficult (at least when an officer's authority was derived from a statute rather than an executive order).[210] If, as *Mesa* held, these statutes all came with an implied limitation that only federal defenses could be raised, there would be little need to argue about whether they arose under federal law.[211] To understand the actual scope of these statutes, we must analyze the text.

B. When It Wants to Impose Restrictions, Congress Knows How

Officer-removal provisions were enacted in 1815, 1833, 1863, and 1866, and a fifth was seriously debated in 1855.[212] Looking at the scope of cases which each provision embraced, there is a clear pattern of providing express limitations when Congress sought to narrow the subject matter of suit which could be removed.[213] After addressing how to evaluate the differing statutory texts, this Article will look at the 1815 and 1866 Acts, as well as the 1855 bill, all of which included such express limitations. Then this Article will turn to the 1833 and 1863 Acts, which contained no such limitation.

1. What Is the Proper Method of Statutory Interpretation?

A preliminary question arises here: What are the appropriate means of statutory interpretation? Though this Article ultimately concludes that the

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204. *See supra* notes 64–71, 87–94 and accompanying text (discussing Sen. Wilkins' views).
205. *See supra* note 130 and accompanying text (discussing Sen. Toucey's views).
206. *See supra* notes 131–132 and accompanying text (discussing Sen. Douglas' views).
207. *See supra* notes 133–134 and accompanying text (discussing Sen. Bayard's views).
208. *See supra* notes 150–169 and accompanying text (discussing Rep. Wickliffe's views).
209. CONG. GLOBE, 37th Cong., 3d Sess. 1103 (1863) (statement of Rep. Wickliffe).
210. *See, e.g.*, Mesa v. California, 489 U.S. 121 (1989).
211. *Id.* at 137 ("We are not inclined to abandon a longstanding reading of the officer removal statute that clearly preserves its constitutionality and adopt one which raises serious constitutional doubt.").
212. *See supra* Part II.A (explaining the origins of the statutes).
213. *See infra* notes 240–280 and accompanying text (reviewing the text of the different officer-removal statutes).

various options outlined below will yield the same result, it is worth being purposeful in one's methodology.

The goal is to ascertain the *legal effect* these statutes would have had when invoked. The logical focus then is on statutory interpretation as it would be carried out in the courts. But should we put ourselves in the shoes of a nineteenth-century court or a modern one?[214] Modern courts' appreciation for the text of the statute naturally has greater resonance with current legal thought, but the nineteenth-century courts were the ones in a position to give the words effect.[215] Some might also contend that Congress passed these statutes against the backdrop of then-prevailing statutory-interpretation methods.[216]

As Professor William Blatt documented: "The nineteenth century witnessed two overlapping movements" in interpretation.[217] The first movement was a dichotomy of "technicality and liberality."[218] So-called remedial statutes received a "liberal" construction, which meant that "it [wa]s the business of the judges so to construe the act, as to suppress the mischief" which the statute was meant to rectify "and advance the remedy."[219] The removal statutes, enacted "for [the] protection of officers"[220] and to cure a "defect[]" in the existing system,[221] would be deemed remedial statutes.[222] Thus, courts "may . . . extend[the provisions] to include cases clearly within the mischief they were intended to remedy, unless such construction does violence to the language used."[223] In other words, interpretation should yield an expansive statutory scope.[224] The second movement emphasized legislative intent.[225] In short, courts adopted one of three approaches to best ascertain the intent of the legislature: A purposivist approach whereby "[s]tatutes are not to be taken according to their very words, but . . . extended . . . or restrained . . . according to the sense and meaning of the legislature";[226]

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214. *Cf.* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003) (considering how founding-era interpretive conventions impact originalists' approach to the Constitution).

215. *Id.*

216. *E.g.*, Bond v. United States, 572 U.S. 844, 857 (2014) (acknowledging that Congress legislates against "background principles of construction").

217. William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 805 (1985).

218. *Id.* at 801.

219. *Id.* at 804, 806; J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 409, 522 (1891).

220. Blatt, *supra* note 217, at 807 n.42.

221. SUTHERLAND, *supra* note 219, § 408, 521–22.

222. *See* Blatt, *supra* note 217, at 804–08.

223. SUTHERLAND, *supra* note 219 § 410, 523 ("This is all the difference between a liberal and a strict construction. A case may come within one unless the language excludes it; while it is excluded by the other unless the language includes it.").

224. *Id.*

225. Blatt, *supra* note 217, at 808–10.

226. *Id.* at 811 (quoting Holbrook v. Holbrook, 18 Mass. 248, 254 (1822)).

a plain-meaning approach which required adherence to clear statutory language;[227] or the "golden rule," also called the presumption against absurdity.[228]

Modern statutory interpretation principles begin with the text of the statute; a clear text spells the end of the inquiry.[229] This fits well with the legislative-intent-via-plain-meaning approach described above.[230] What if the text is clear, but the result seems crazy? Courts today widely recognize the rule against absurdity, even though judges set different thresholds for what is absurd.[231] Of course, this aligns with the legislative-intent-via-golden-rule approach.[232]

How about liberal and purposivist interpretations? Such approaches still exist but no doubt they are less in style than they once were.[233] A liberal interpretation of the removal statutes would seek to provide *more* protection to federal officers and thus a more expansive interpretation of the removal statutes than a modern approach.[234] Similarly, the overall legislative intent (for a purposivist interpretation) would provide more removal and more protection.[235] Of course, one could argue that ascertaining a single legislative intent, when there were so many factions, is impossible.[236] Adopting the approach used by nineteenth-century courts that sought to propound the legislative purpose, however, requires taking seriously that this crystallized intent exists and has legal significance.[237]

Therefore, if a modern approach to the statutes suggests that the removal provisions were expansive, as Subsections 2 and 3 argue it does, then nineteenth-century courts applying the plain-meaning and golden-rule approaches would have agreed.[238] It follows *a fortiori* that those courts applying liberal or purpose-based interpretations would have reached a

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227. *Id.* at 812.

228. *Id.* at 813–14 (citations omitted).

229. *E.g.*, Culbertson v. Berryhill, 139 S. Ct. 517, 521–22 (2019); Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 631–32 (2018); Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1010 (2017).

230. *See supra* note 227 and accompanying text (discussing the plain-meaning approach).

231. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 37, 234 (2012); CALEB NELSON, STATUTORY INTERPRETATION 50–51 (2011).

232. *See supra* note 228 and accompanying text (discussing the golden rule).

233. *See* NELSON, *supra* note 231, at 224; Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998).

234. *See supra* notes 219–224 and accompanying text (discussing liberal constructions).

235. Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 361 (1992).

236. *E.g.*, John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 431–39 (2005).

237. *See supra* note 226 and accompanying text (discussing the legislative-intent approach).

238. *See supra* notes 227–228 and accompanying text (discussing the plain-meaning approach and the golden rule).

similar conclusion.[239] To cover my bases, then, this Article applies a modern approach to interpreting these statutes: this means sticking to the text.

2. Officer-Removal Statutes Subject to Express Limitations

> *1815.*
> That if any suit or prosecution be commenced in any state court, against any . . . officer, . . . for any thing done, or omitted to be done, as an officer of the customs, or for any thing done by virtue of this act or under colour thereof, and the defendant shall . . . file a petition for the removal of the cause for trial at the next circuit court of the United States . . . the cause shall there proceed in the same manner as if it had been brought there by original process[] . . . *And provided also*, That . . . it shall be lawful for [the defendant] to plead the general issue, and give this act and any special matter in evidence.[240]

The 1815 Act spelled out the appropriate pleadings the defendant could enter. "[I]t [was] lawful for [the person removing] to . . . give this act and any special matter in evidence."[241] To put a "special matter in evidence" was to go beyond "repel[ling] the evidence of the plaintiff," and instead seek to prove an affirmative argument on which the defendant bears the burden of persuasion.[242] Even if the scope of permissible "special matter[s]" under the 1815 Act was broad, it is clear that Congress affirmatively prescribed the pleadings available to the defendant upon removal.[243]

> *1855.*
> [I]f a suit be commenced . . . in any State court, against any officer of the United States, or other person, for or on account of any act done under any law of the United States, or under color thereof, or for or on account of any right, authority, claim, or title, set up by such officer, or other person, under any law of the United States, and the defendant shall[] . . . file a petition for the removal of the cause for trial into the next circuit court . . . the cause shall there proceed in the same manner as if if [*sic*] it had been brought there by original process. The party removing the cause is not, however, to be allowed to plead or give evidence of any other defense than that arising under a law of the United States.[244]

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239. *See supra* notes 234–235 and accompanying text (explaining that these approaches would yield an expansive interpretation).

240. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198–99.

241. *Id.*

242. Moyer v. Fisher, 24 Pa. 513, 515–16 (1855) (emphasis omitted) ("In general, notices of special matter are only necessary where it is intended to give evidence of matters not properly admissible under the pleading."); *see* Chambers v. Games, 2 Greene 320, 323–24 (Iowa 1849).

243. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 199.

244. CONG. GLOBE APP'X, 33d Cong., 2d Sess. 211 (1855).

The bill stated that "[t]he party removing the cause is not . . . to be allowed to plead or give evidence of *any other defense* than that *arising under* a law of the United States."[245] The whole bill was described as "clear upon its face" and this limitation was no exception.[246]

> *1866.*
> [I]n any case, . . . where suit or prosecution shall be commenced in any court of any State against any [internal revenue] officer of the United States, . . . or against any person acting under or by authority of any such officer on account of any act done under color of his office, or against any person holding property or estate by title derived from any such officer, concerning such property or estate, *and affecting the validity of this act or acts of which it is amendatory*, it shall be lawful for the defendant[] . . . [to file] a petition to the circuit court of the United States . . . and the cause . . . shall be thereafter proceeded in as a cause, originally commenced in that court; . . . . *Provided further*, That if any officer appointed under and by virtue of any act to provide internal revenue, or any person acting under or by authority of any such officer, shall receive any injury to his person or property, for or on account of any act by him done, under any law of the United States, for the collection of taxes, he shall be entitled to maintain suit for damage therefor in the circuit court of the United States, in the district wherein the party doing the injury may reside or shall be found.[247]

One should wonder to what the emphasized "affecting the validity" language attaches.[248] Maybe it is part of the "concerning such property or estate" clause. If so, only cases "concerning such property or estate" need to "affect[] the validity of this act."[249] Alternatively, maybe it is not part of any previous clause but rather qualifies all the items in the list.[250] If so, then any case listed must also "affect[] the validity of this act" in order for it to be removed.[251] Here, we must acknowledge two potentially applicable canons of statutory interpretation: the last-antecedent rule and the series-qualifier principle.[252]

The two canons lead to different interpretations of the provision, but both negate the contention that Congress provided limitations in its removal statutes by implication. The last-antecedent rule dictates that the qualifying phrase modifies only its nearest reference: "Against any person holding property or estate by title derived from any such officer, concerning such

245. *Id.* (emphasis added).
246. *Id.* at 212 (statement of Sen. Toucey).
247. Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171–72 (emphasis added).
248. *Id.*; *see* NELSON, *supra* note 231, at 224–25.
249. Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171.
250. *See* NELSON, *supra* note 231, at 224–25.
251. Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171.
252. *See* NELSON, *supra* note 231, at 224–25.

property or estate."[253] A suit brought against an internal revenue officer or a person acting under authority of such officer, would *not* need to involve "the validity of this act" to qualify for removal.[254] The limitation would only apply in cases involving "property or estate."[255]

In contrast, the series-qualifier principle dictates that "so long as the modifying clause 'is applicable as much to the first and other words as to the last,'" the clause must "be read as applicable to all."[256] Any case listed within section 67—whether it was against "any [internal revenue] officer of the United States," "any person acting under or by [the officer's] authority," or "any person holding property or estate by title derived from any such officer"—would have to involve "the validity of this act" to be eligible for removal.[257] Using either canon results in a removal provision with particularly circumscribed applicability.

Congress was capable of exercising, and did exercise, discretion in narrowing the category of disputes that fit within a removal statute.[258] It did so by providing such instructions in the text.[259]

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253. Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171; SCALIA & GARNER, *supra* note 231, at § 20, 152; NELSON, *supra* note 231, at 225.

254. Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171.

255. *Id.*

256. Lockhart v. United States, 136 S. Ct. 958, 970 (2016) (Kagan, J., dissenting) (quoting Paroline v. United States, 134 S. Ct. 1710, 1721 (2014)); SCALIA & GARNER, *supra* note 231, at § 19, 147.

257. Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171–72.

258. *See supra* notes 240–257 and accompanying text (discussing explicit limitations).

259. It is curious then that Justice Strong, in *Tennessee v. Davis*, described the codification of the 1866 Act as "almost identical" to the Force Act. Tennessee v. Davis, 100 U.S. 257, 269 (1879). The two differed in a fundamental way—what defenses could be presented. *Compare supra* notes 247–57 and accompanying text (discussing the 1866 amendment), *with infra* notes 260–272 (discussing the Force Act). The Revised Statutes sought to codify, for the first time, the seventeen chronologically ordered volumes of the Statutes at Large. *See* Erwin C. Surrency, *The Publication of Federal Laws: A Short History*, 79 LAW LIBR. J. 469, 478–79 (1987); *see also* KENT C. OLSON, PRINCIPLES OF LEGAL RESEARCH § 3.4, 75 (2d ed. 2015). Unsurprisingly, there were plenty of errors, especially regarding little details. *See, e.g.*, Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1014 (1938). In the codification, the punctuation within the pertinent part of section 67 of the 1866 Act was altered.

One clause allowed removal of "any civil suit or criminal prosecution . . . [brought] against any officer appointed under or acting by authority of any revenue law of the United States . . . or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law." REV. STAT. § 643. An entirely separate clause, marked off by a semicolon, allowed removal of any case that "commenced against any person *holding property or estate* by title derived from any such officer, *and affects the validity of any such revenue law*." *Id.* (emphasis added). The codification removed the 1866 Act's ambiguity as to what the "affect[ing] the validity" clause modified. *See id.*

3. Officer-Removal Statutes with No Express Limitations

> *1833.*
> [I]n any case where suit or prosecution shall be commenced in a court of any state, against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under colour thereof, or for or on account of any right, authority, or title, set up or claimed by such officer, or other person under any such law of the United States, it shall be lawful for the defendant in such suit or prosecution . . . [to file] a petition to the circuit court of the United States, . . . and the cause . . . shall be thereafter proceeded in as a cause originally commenced in that court . . . .[260]

In contrast to the aforementioned provisions, section 3 of the Force Act contained no clear limitations on the type of arguments that could trigger, or be raised in, a removed prosecution.[261] As mentioned earlier, Congress amended the Force Act in 1866 to narrow its scope.[262] The amendment was meant to correct the Force Act's "inadverten[t]" breadth,[263] applying to "any case" "against any officer of the United States, *or other person*."[264] The need for the correction suggests that relevant actors did not infer silent limitations from the text.

Representative Wilson's illustration of the Force Act's overbroad application might suggest otherwise.[265] He explained that "parties [were] claiming that the payment of [federal] tax authorized them to conduct" business proscribed by state law and they could remove cases challenging that business.[266] This sounds like a preemption claim and would clearly arise under federal law in the constitutional sense. But nothing in the Force Act explicitly limited it to such claims.[267] On the surface, then, Wilson appeared to be inferring a silent limitation.

However, it would be difficult to think of any claim a *non-officer* defendant might assert under the Force Act which would trigger removal yet not fit Wilson's scenario. Removal was only possible for suits commenced "on account of any act done under the revenue laws, . . . or under colour thereof, or for . . . any right, authority, or title, set up or claimed by" the

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260. Force Act, ch. 57, § 3, 4 Stat. 632, 633–34 (1833) (providing for the collection of duties and imports).

261. *Id.*

262. *See supra* notes 175–178 and accompanying text (citing the 1866 amendment, Rep. Wilson's statements in the Congressional Globe, and the Force Act).

263. CONG. GLOBE, 39th Cong., 1st Sess. 2848 (1866) (statement of Rep. Wilson).

264. Force Act, ch. 57, § 3, 4 Stat. 632, 633–34 (1833) (emphasis added).

265. CONG. GLOBE, 39th Cong., 1st Sess. 2848 (1866).

266. *Id.* (statement of Rep. Wilson).

267. Force Act, ch. 57, § 3, 4 Stat. 632, 633–34 (1833).

individual "under any such law."[268] A federal officer could conceivably perform all sorts of *ultra vires* acts under the "colour" or guise of federal authority.[269] In contrast, a non-officer must—at the very least—perform behavior the law purportedly mandates in order to act under color of that law.[270] The law does not confer on her any independent badge of authority.[271] In context, then, Wilson's statement provided a fair description of the statute just as it was written.[272]

> *1863.*
> [I]f any suit or prosecution, . . . has been or shall be commenced in any state court against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress, and the defendant shall[] . . . file a petition[] . . . for the removal of the cause for trial at the next circuit court of the United States, . . . the cause shall proceed therein in the same manner as if it had been brought in said court by original process . . . .[273]

The 1863 Act provided no limitation on the available pleadings for the federal officer.[274] He could remove the case under section 5 so long as the suit was "for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done," during the Civil War "by virtue or under color of" presidential or statutory authority.[275]

It is unlikely, though, that there was much variation amongst the officers' pleadings. Section 4 made any "order of the President, or under his authority," a complete defense against "any action or prosecution" for "search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of" that order.[276] Section 4 curiously omitted "other trespasses or wrongs done or committed" from the claims against which a presidential order provided a complete defense, even though

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268. *Id.*

269. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961) (examining a violation of the Federal Civil Rights Act); Winter, *supra* note 235, at 325–26 (internal quotations omitted) (internal citations omitted) ("[T]he phrase *Colour of his Office* appears as early as the thirteenth century," which "Sir Edward Coke explained" covered acts "when [the officer] hath no warrant at all").

270. *Cf.* Watson v. Philip Morris Co., 551 U.S. 142, 145, 151–52 (2007) (emphasis omitted) (holding that compliance with the law is insufficient to satisfy the modern officer-removal provision's "any person acting under that officer" language).

271. *See id.* at 152.

272. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2848 (1866) (statement of Rep. Wilson).

273. Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756–57 (relating to habeas corpus).

274. *See id.*

275. *Id.*

276. *Id.*

such claims triggered the defendant's ability to remove.[277] However, section 4 also provided that the presidential order was a complete defense against "any search [or] seizure" claim—language which section 5 did not include in explaining when removal was available.[278] Comparing the conflicting language—"other trespasses or wrongs," on the one hand, and "search[es] [and] seizure[s]," on the other—there may be little practical daylight between suits which were removable under section 5 and suits subject to a complete defense under section 4.[279]

What does this tell us? While it is not a foregone conclusion that every federal officer who removed under section 5 of the 1863 Act would plead a section 4 complete defense, it is extremely likely. Thus, while the 1863 Act provided no limitation on the defenses available to officers, it is likely almost every officer relied on the complete defense afforded by presidential order. Because the federal statute itself made the order a defense, this would always provide a federal rule of decision.[280]

III. ENFORCEMENT PASSES MUSTER: THE EXECUTIVE AND (MOSTLY) THE COURTS

What did prosecutors, defendants, and courts—the actors using the provisions in practice—understand the statutes to mean? Did the answer to that question trigger constitutional concern? This Part seeks to answer those questions.

A. The Executive Encourages the First Removal: The Case of Hardeman Owens

There is little information in the federal reporters regarding early uses of the officer-removal statutes.[281] "The earliest case of removal of a State criminal indictment" never made it to trial[282] and involved a twist on the ordinary process of removal.[283]

The United States and the Creek Tribe had entered into the Treaty of Cusseta.[284] This led to disagreement as to the Treaty's scope between the Alabama government and its citizens on one side and the federal government

277. *Id.*
278. *Id.* §§ 4–5.
279. *See id.*
280. *See* Cohens v. Virginia, 19 U.S. 264 (1821).
281. *See* Warren, *supra* note 11, at 590.
282. *Id.*; *see* 10 REG. DEB. 2712 (1834) (statement of Rep. Gilmer) ("This was, indeed, the first attempt which had been made to enforce the law . . . commonly called 'the force bill.'").
283. *See* 10 REG. DEB. 2711 (1834) (statement of Rep. Gilmer).
284. Treaty with the Creeks, 7 Stat. 366 (1832).

on the other.[285] The result was white settlers planting their crops and making improvements on land that was then occupied by the Creeks and which the Treaty held in abeyance, off-limits to the settlers.[286]

Secretary of War Lewis Cass issued orders to the United States deputy marshal and military forces stationed at a nearby fort to remove the settlers.[287] One target of removal was Colonel Hardeman Owens, a county commissioner.[288] To cut an exciting story (as told by the officers, at least[289]) short, Owens gave the marshal and federal officers chase (and attempted to lure them onto a land mine), before he was finally "surrounded."[290] Upon "dr[a]w[ing] his arms" and "firing upon the sergeant," Owens was fatally shot by a federal officer.[291]

The grand jury indicted eight federal officers for Owens's murder,[292] and the circuit court made "a formal demand . . . upon Major McIntosh, the commanding officer of Fort Mitchell, for their delivery into the custody of the civil authorities."[293] McIntosh refused.[294] He did so for "the simple fact[] that the soldier who shot Hardiman Owens [*sic*] was in the lawful execution of his duty."[295] Governor Gayle—walking a political tightrope—"assert[ed] his legal power to call out the militia of the State to enforce" its judicial

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285. 4 TRANSACTIONS OF THE ALABAMA HISTORICAL SOCIETY 1899–1903, at 145–49 (Thomas McAdory Owen ed., 1904) [hereinafter ALABAMA HISTORICAL SOCIETY].

286. ALBERT JAMES PICKETT, HISTORY OF ALABAMA AND INCIDENTALLY OF GEORGIA AND MISSISSIPPI, FROM THE EARLIEST PERIOD 686 (1878); *see* Treaty with the Creeks, art. V, 7 Stat. 366 (1832).

287. PICKETT, *supra* note 286, at 687; 4 ALABAMA HISTORICAL SOCIETY, *supra* note 285, at 149; *see* Treaty with the Creeks, art. V, 7 Stat. 366 (1832).

288. 4 ALABAMA HISTORICAL SOCIETY, *supra* note 285, at 149.

289. *Id.* at 149 n.9. The recounting of this episode comes from only one side of the struggle—namely the federal officers. *Id.* "[N]o person [was] present but the Soldiers and perhaps the wife of the deceased," making it "difficult if not impossible to get an entirely correct account of the affair." Enquirer, *Columbus, Ga.*, NORTH-CAROLINA STAR, Aug. 23, 1833, at 3.

290. Letter from Jeremiah Austill, Deputy Marshal for the So. Dist. of Ala., to Lewis Cass, Sec'y of War (July 31, 1833), *reprinted in* H.R. Doc. No. 23-149, at 9–10 (1834) (256 U.S. CONG. SERIAL SET).

291. *Id.*; *see also* 4 ALABAMA HISTORICAL SOCIETY, *supra* note 285, at 149 (explaining the background to Owens' death).

292. *Intruders on the Creek Lands*, NILES' WEEKLY REGISTER, Nov. 16, 1833, at 189, 190; PICKETT, *supra* note 286, at 687; *see also* 10 REG. DEB. 2316 (1834) (statement of Rep. Jones).

293. 4 ALABAMA HISTORICAL SOCIETY, *supra* note 285, at 150; Nat'l Intelligencer, *Article 18*, ATKINSON'S SATURDAY EVENING POST, Nov. 2, 1833, at 3.

294. *See, e.g.*, Letter from P.T. Harris, Circuit Judge of Russell Cty., Ala., to John Gayle, Governor of Ala. (Oct. 17, 1833), *reprinted in* H.R. Doc. No. 23-149, at 17 (1834) (256 U.S. CONG. SERIAL SET); 4 ALABAMA HISTORICAL SOCIETY, *supra* note 285, at 150–51; Nat'l Intelligencer, *supra* note 293, at 3.

295. Letter from J.S. McIntosh, Commanding Major of the Battalion for the Fourth Infantry, to Wm. D. Pickett, Solicitor for the Eighth Judicial Circuit (Oct. 15, 1833), *reprinted in* H.R. Doc. No. 23-149, at 15–16 (1834) (256 U.S. CONG. SERIAL SET); *see* 10 REG. DEB. 2316 (1834) (statement of Rep. Jones) ("It is known to every one . . . that Owens was killed by a soldier, acting under the order of his officer and the deputy marshal."); *id.* at 2710 (statement of Rep. Gilmer) ("[A]cting under the immediate orders of the deputy marshal . . . who, it was alleged, acted under instructions from the President of the United States.").

process, while pleading his case to Secretary Cass and the President so as to "avoid armed conflict."[296]

Gayle trusted the federal authorities would deliver the offenders to the State's courts for prosecution.[297] He was half-right.[298] Cass explained to Francis Scott Key, the Federal Commissioner sent to Alabama to negotiate a proper course with Gayle, his instructions. [299] The President was keen on balancing the need for obedience to state law with the need to defend "the marshal and the military force . . . against vexatious proceedings"; "in every instance where these" "vexatious proceedings" "[wer]e instituted" against federal military personnel, Key was to "without delay, . . . have the matter brought before a judge of the United States."[300] While the exact sequence of events is not clear, in the end, the President "issued orders that the[se] cases sh[ould] be taken from the State to the Federal courts."[301] The federal and state governments settled the issue before a trial ever commenced.[302]

In the House of Representatives, legislators expressed outrage over the President's involvement.[303] Georgia's Representative Gilmer exclaimed that "[t]o control the jurisdiction of a State over persons charged with the commission of crimes within its limits, was an assumption of a higher power than had yet been exercised by this Government over the States."[304]

In the sense that the removal statutes had not yet been utilized, this was true.[305] But is *exercising* a power which the federal government had unequivocally claimed just a year earlier (and before that in the 1815 Act) a meaningful new encroachment? Recall Senator Tyler's illustration of "the revenue officer [who] commit[ted] murder, cold-blooded murder," and would have his case adjudicated "before the United States court, maugre the laws of Virginia," in a Senate debate just a year and one week earlier.[306] However, the President's direct "interfere[nce] so far with [State] laws" was new, and Gilmer was surely correct that nothing in the Force Act purported to give the Executive any power or role to play in this state-based litigation.[307]

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296. 4 ALABAMA HISTORICAL SOCIETY, *supra* note 285, at 151; *see* Letter from John Gayle, Governor of Ala., to Lewis Cass, Sec'y of War (Oct. 23, 1833), *reprinted in* H.R. Doc. 23-149, at 13 (1834) (256 U.S. CONG. SERIAL SET).

297. *See* 4 ALABAMA HISTORICAL SOCIETY, *supra* note 285, at 151.

298. PICKETT, *supra* note 286, at 687.

299. *Id.* Key is remembered for a different reason: writing "The Star-Spangled Banner." *Id.*

300. Letter from Lewis Cass, Sec'y of War, to Francis S. Key, Esq. (Oct. 31, 1833), *reprinted in* H.R. Doc. No. 23-149, at 22–23 (1834) (256 U.S. CONG. SERIAL SET).

301. 10 REG. DEB. 2316 (1834) (statement of Rep. Jones); *id.* at 2709 (statement of Rep. Gilmer).

302. PICKETT, *supra* note 286, at 687; *see* 10 REG. DEB. 2713 (1834) (statement of Rep. Clay).

303. *See* 10 REG. DEB. 2711 (1834) (statement of Rep. Gilmer).

304. *See id.* (statement of Rep. Gilmer).

305. *See id.* at 2712 (statement of Rep. Gilmer).

306. 9 REG. DEB. 373 (1833) (statement of Sen. Tyler).

307. *See* 10 REG. DEB. 2711–12 (1834) (statement of Rep. Gilmer); Force Act, ch. 57, §§ 2–3, 4 Stat. 632, 633–34 (1833).

Representative Jones, also from Georgia, warned that such assertions of power might lead to open defiance by the states and their judiciaries; he pointed to the case of George "Corn" Tassels.[308] At the President's urging, the United States Supreme Court had halted Tassels's case in the Georgia courts so as to have an opportunity to issue a writ of error.[309] "In answer," the State of Georgia hung Tassels instead.[310]

B. State and Federal Courts Uphold the Statutes Against Constitutional Attack

The first two cases upholding the removal provisions against constitutional challenges rejected claims that such jurisdiction violated states' rights and offered a broad understanding of arising-under jurisdiction.[311] They described the actions of a federal officer as similar to those of a foreign ambassador that is physically in one nation but governed by the laws of a separate sovereign.[312]

There was a very serious concern that allowing removal of prosecutions for violations of state law into federal court constituted an impermissible intrusion into a quintessential state police power.[313] Senator Chase, in reference to the 1855 bill, had called such a removal provision "the overthrow of State rights."[314] In at least one instance, the State's prosecution declined to appear in federal court at all.[315] It chose to suffer an acquittal rather than dignify the federal court's assertion of jurisdiction.[316] As a result, despite multiple removal provisions' express reach to "any case where suit or prosecution shall be commenced in a court of any state,"[317] some courts read the statutes to reach only civil suits.[318]

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308. 10 REG. DEB. 2315–16 (1834).

309. *See id.*

310. *Id.*; *see* Cherokee Nation v. Georgia, 30 U.S. 1, 12 (1831) (statement of the case).

311. *See* State v. Hoskins, 77 N.C. 530 (1877); Findley v. Satterfield, 9 F. Cas. 67 (C.C.N.D. Ga. 1877) (No. 4792).

312. *See infra* notes 333–340 and accompanying text (discussing this view).

313. Mackey, *supra* note 46, at 142.

314. CONG. GLOBE APP'X, 33d Cong., 2d Sess. 211 (1855) (statement of Sen. Chase).

315. *See* Delaware v. Emerson, 8 F. 411, 411 (C.C.D. Del. 1881).

316. *See id.*; *see also* Virginia v. Felts, 133 F. 85, 95 (C.C.W.D. Va. 1904) ("If, after reasonable opportunity to prosecute, the state officers decline or fail so to do, . . . the proper course is to direct a verdict of acquittal.").

317. *See* Force Act, ch. 57, § 3, 4 Stat. 632, 633–34 (1833); Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198 ("any suit or prosecution"); Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756–57 (relating to habeas corpus) ("any suit or prosecution, civil or criminal"). Though the addition of the clarifier, "civil or criminal," in the 1863 statute might be seen as indicating a broader scope than the prior statutes, "[t]his made no change in the meaning," as "[t]he well-understood legal signification of the word 'prosecution' [was] a criminal proceeding at the suit of the government." Tennessee v. Davis, 100 U.S. 257, 269 (1879).

318. Commonwealth v. Casey, 94 Mass. 214, 217–18 (1866); State v. Elder, 54 Me. 381, 383 (1866).

Perhaps surprisingly, one of the first two decisions expressly recognizing the provisions' applicability to criminal prosecutions came from a state court.[319] In *State v. Hoskins*, an internal revenue officer, while collecting federal taxes in North Carolina, "did what but for his office would have been an assault and battery, and a breach of the law of North Carolina," and was indicted in state court.[320] Hoskins properly filed his petition for removal with the Circuit Court of the United States for the Western District of North Carolina.[321] The state superior judge halted its proceedings in compliance with the federal court's order.[322]

The question before the Supreme Court of North Carolina was whether the superior judge's action was "proper."[323] This hinged on the validity of the removal statute itself.[324] The substantial issue was one of states' rights.[325] It did not revolve around arising-under jurisdiction. The defendant was, indeed, asserting a defense of privilege granted by the internal revenue statutes,[326] and there would have been no question that the case arose under federal law.[327]

However, the court's discussion of the root of federal authority to provide jurisdiction over these suits suggested a broad understanding of what constituted federal law. The State argued the provision constituted "a violation of" her exclusive and indefeasible "right to try offenders against her criminal law."[328] While accepting as "undoubtedly true" that the State "must try every offence against her 'peace and dignity,'" and that, furthermore, "the United States has no jurisdiction to try offences against the State by her citizens, or in any manner to interfere in the police regulations of the State," the court found that no such concern was implicated by this case.[329] The "fallacy" of the State's argument "consist[ed] in supposing that the matter in hand ha[d] *any* thing to do with the State or the State with it," the apparent

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319. *See* State v. Hoskins, 77 N.C. 530 (1877); Findley v. Satterfield, 9 F. Cas. 67 (C.C.N.D. Ga. 1877) (No. 4792). These cases were issued the same year and it is unclear which was published first.

320. *Hoskins*, 77 N.C. at 532.

321. *Id.* at 530 (syllabus).

322. *See id.* (syllabus).

323. *See id.* at 533.

324. *See id.* at 533–34.

325. *Id.* at 536. The defendants also asserted that criminal prosecutions were not really covered by the statute, despite being "expressly named in the Act," because no specific procedure for criminal (as opposed to civil) removal was prescribed. *Id.* Every member of the court had no trouble dismissing this. *Id.*; *see id.* at 550 (Rodman, J., dissenting).

326. *See infra* notes 413–419 and accompanying text (discussing what privileges and rights arise under federal law).

327. *Hoskins*, 77 N.C. at 532; *see also id.* at 553 (Rodman, J., dissenting) ("If the officer acted in what he did within the scope of his duty, it would be a defence in the State Court," and after going through the state courts, "the error could be corrected on appeal to the Supreme Court of the United States").

328. *Id.* at 536–37.

329. *Id.* at 537.

implication of its criminal law notwithstanding.[330] This principle was affirmed in *Tennessee v. Davis*.[331]

How could it be, one might wonder, that an assault and battery within North Carolina, against its laws, would not be of any relevant concern to that State? The *Hoskins* court answered this question based on principles of international law.[332]

The removal statute operated as preemptive protection "of [the Nation's] citizens and tax payers," just as foreign nations endowed their "public minister[s], or agent[s]" sent into foreign territory with "an entire exemption from the local jurisdiction, civil and criminal," though susceptible to removal from the territory.[333] The court cited to a passage from *Wheaton's International Law* which elaborates further:

> Representing the rights, interests, and dignity of the sovereign or State by whom [the public minister] is delegated, his person is sacred and inviolable. To give a more lively idea of this complete exemption from the local jurisdiction, the fiction of extra-territoriality has been invented, by which the minister, though actually in a foreign country, is supposed still to remain within the territory of his own sovereign. He continues still subject to the laws of his own country . . . .[334]

The officer was not protected from guilt when he was not acting as an officer.[335] "Not at all. He [was] just as guilty, and may be convicted—hung it may be—just as if he was not an officer."[336] But where he claimed to have acted as a servant, then "he [was] entitled to have his case passed upon by the power which appointed him. To his own master he must stand or fall."[337] The *Hoskins* court concluded that, as long as a "federal ingredient" was involved, federal law was "supreme," and the federal government "acts" in its domain "as if there were no State in existence."[338]

A federal circuit court also invoked principles of international law when it upheld a removal provision.[339] In *Findley v. Satterfield*, the court noted that if Congress can require "a [foreign] prisoner [to] be delivered from the custody of the state courts by habeas corpus, in order that the government may be unembarrassed in its international duties, [it] can . . . similarly

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330. *Id.* (emphasis added).
331. Tennessee v. Davis, 100 U.S. 257, 266–67 (1879).
332. *Hoskins*, 77 N.C. at 533, 538–40.
333. *Id.* at 538–40 (citation omitted).
334. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 224, 299–300 (Richard Henry Dana, Jr. ed., 8th ed. 1866) (cited in *Hoskins*).
335. *See Hoskins*, 77 N.C. at 547.
336. *Id.*
337. *Id.*
338. *Id.* at 538.
339. *See* Findley v. Satterfield, 9 F. Cas. 67 (C.C.N.D. Ga. 1877) (No. 4792).

[require his] deliver[y] . . . in order that the government may be unembarrassed in the collection of its revenue."[340]

This understanding of discrete and siloed federal and state domains reflected the view espoused by the Supreme Court at the time. "[T]he powers of the General government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres."[341]

These descriptions of insulated federal spheres of control echo many of the underlying principles of the twentieth-century academic theory of protective jurisdiction.[342] Professors Herbert Wechsler and Paul Mishkin laid the groundwork for a limiting principle to the 1824 case that remains, to this day, the leading articulation of arising-under jurisdiction: *Osborn v. Bank of the United States*.[343] Recall that in that case, the Supreme Court gave an expansive understanding of the term: Whenever there is a federal "ingredient of the original cause," the case arises under federal law notwithstanding the actual question in controversy.[344]

Wechsler in 1948,[345] and Mishkin in 1953,[346] argued that "federal question jurisdiction [reaches] cases *implicating federal powers or interests*, even though the legal claims at issue rest on state law."[347] Though Wechsler and Mishkin provided different formulations of the theory, as have others, "in its broadest form, the theory of protective jurisdiction" validates providing federal-court jurisdiction "to prevent discrimination against or hostility toward federal instrumentalities or interests" without any question of what law will determine the merits of the case.[348]

According to Wechsler, "[a] grant of jurisdiction is [simply] one mode by which the Congress may assert its regulatory powers" under Article I.[349] Congress's authority to provide substantive regulation in certain areas, e.g., interstate commerce, includes the lesser power "to let the states provide the rule [of decision] so long as jurisdiction to enforce it has been vested in federal court."[350]

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340. *Id.* at 69.

341. *In re* Tarble, 80 U.S. 397, 406 (1871).

342. *See* Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224–25 (1948); *see generally* Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953).

343. *See* Osborn v. Bank of the U.S., 22 U.S. 738 (1824).

344. *Id.* at 823.

345. Wechsler, *supra* note 342, at 224–25.

346. Mishkin, *supra* note 342, at 157.

347. Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CALIF. L. REV. 1775, 1775 (2007) (emphasis added).

348. FALLON ET AL., *supra* note 7, at 800.

349. Wechsler, *supra* note 342, at 225.

350. *Id.* at 224.

In contrast, Mishkin limited the idea of protective jurisdiction to cases "in [an] area" in which "there is an articulated and active federal policy regulating [the] field."[351] Only then would there be sufficient federal interests under which the case could arise.[352] Within that field, though, all cases, whether courts decided them under federal or nonfederal law, would equally merit federal jurisdiction.[353]

The officer-removal provisions would fit comfortably within Mishkin's theory of protective jurisdiction.[354] The statutes operated within elaborate schemes of federal regulation that touched the most sensitive interests of domestic security and stability.[355] Whenever an officer acted in furtherance of those policies and regulatory schemes courts could consider his actions to arise under federal law, just like a foreign minister's day-to-day conduct abroad would arise under the law of his home nation, notwithstanding that not all of his conduct was necessarily dictated by any law in particular.[356]

Contrast a tighter understanding of what the removal statutes required in *Illinois v. Fletcher*.[357] Fletcher and Yat-taw were federal deputy marshals assigned to monitor a congressional election in Chicago.[358] "[A] disturbance and breach of the peace occurred between" fellow deputy marshal James Smith "and a large number of persons incited thereto by special constables of said Cook county."[359] To "quell [the] disturbance," protect Smith from threats of "personal violence and injury," and "preserve order," the defendants arrested Smith and took him into custody.[360] While defendants were en route to the federal commissioner "to make complaint against" Smith, they were "assaulted and fired upon" by a crowd insisting that they bring Smith to the *state* authorities.[361] A local man was killed in the aftermath and the defendants were arrested and charged with murder.[362]

Assuming that the defendants indeed shot and killed the victim, the court determined that they were not acting under color of office in carrying Smith to the federal commissioner.[363] First, breaching the peace was not part

351. Mishkin, *supra* note 342, at 192.
352. *See id.* at 195.
353. *See id.* at 192.
354. *See id.* at 195.
355. *See id.*
356. *See* State v. Hoskins, 77 N.C. 530, 538–40 (1877); Mishkin, *supra* note 342, at 195.
357. Illinois v. Fletcher, 22 F. 776 (C.C.N.D. Ill. 1884).
358. *Id.* at 776.
359. *Id.* at 777.
360. *Id.*
361. *Id.*
362. *Id.*
363. *Id.* at 779. An alternative holding was that, by insisting that they had not in fact shot the victim, the defendants failed to satisfy the removal statute. *Id.* at 778. The Supreme Court rejected this understanding of section 643 two years later. *See* Cleveland, Columbus, Cincinnati & Indianapolis R.R. Co. v. McClung, 119 U.S. 454, 461 (1886); *see also* Maryland v. Soper, 270 U.S. 9, 32–33 (1926) (expressly overruling this aspect of *Fletcher*).

of Smith's line of duty, so it was not within the defendants' to protect him from the fallout.[364] Second, breaching the peace was a state, not federal, offense.[365] The defendants "had a right to arrest" Smith and "turn him over to the *proper state authorities*."[366] They refused to do so and instead sought "to protect him . . . and to take him before [the federal] Commissioner . . . , who had no jurisdiction to hear a complaint against him or to detain him."[367] By so clearly stepping out of the federal domain and attempting to thwart the corresponding state police power, Fletcher and Yat-taw lost the protection of federal law.[368]

C. Finding Federal Law Without a Federal Claim or Defense

Removal provisions were exercised in varying circumstances. Some courts determined that federal law existed because the cases clearly required a decision as to the meaning or validity of a federal statute or the Constitution.[369] Others reasoned more broadly that in certain circumstances, federal officers' actions are to be assessed only against the backdrop of federal law, with or without positive congressional enactment.[370] In some cases, the presence of a federal ingredient—and exactly what that federal ingredient was—was just not so clear.[371] But in almost all of these cases, either a federal court exercised jurisdiction over the suit, or a state court approved such federal jurisdiction, deeming them to be cases arising under federal law.[372]

1. Fields of Inherently Federal Activity

Recall that the Act relating to Habeas Corpus from 1863 provided for removal of "any suit or prosecution" brought "against any officer" for any acts done, or omitted, during the Civil War "by virtue or under color of any authority derived from or exercised by or under the President of the United States."[373] It also declared that "any [such] order of the President" constituted "a defence in all courts" for any such act or omission.[374] As discussed earlier, Representatives May and Wickliffe articulately denounced the "insert[ion]

364. *Fletcher*, 22 F. at 779.
365. *See id.*
366. *Id.*
367. *Id.*
368. *See id.*
369. *See infra* Part III.C.2 (discussing various reasons why such decisions might be necessary).
370. *See infra* Part III.C.1 (discussing fields of inherent federal authority).
371. *See infra* Part III.C.3 (discussing cases where the source of federal law was not clear).
372. *See infra* Part III.C.1–3 (providing examples of many types of cases).
373. Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756–57 (relating to habeas corpus).
374. *Id.* § 4, 12 Stat. at 756.

[of] the name of the President instead of the Constitution" as a legal basis for moving these cases into the federal courts.[375]

The Ohio Court of Common Pleas adopted similar reasoning in *Ohio v. Bliss*.[376] Unlike cases that were removed under the Force Act of 1833 or the 1815 Act, "[i]t is very clear that the *corpus delicti*" for suits within the act of 1863 "did not grow out of an attempt by a proper officer to carry into execution a *law* of the Congress of the States."[377] Rather, it "arose in the execution of a mere *order* of the President, authorized by no *law* of Congress, and which order came in direct conflict with the *Constitution* of the State of Ohio, and [State] *law*."[378] Congress had not sought to preempt state law through a rule of decision.[379] According to the court, Congress had also not provided a valid federal rule of defense.[380]

As for section 4's declaration that any presidential order constituted a "defence in all courts," it was "not to be presumed . . . that the legislature intended . . . to make the mere *private will* of the President, the simple volition of the *individual*, a law."[381] That left only state law and *ultra vires* federal executive prerogative in play.[382] The removal provision amounted then to no more than an "attempt to transfer the criminal jurisdiction of the State courts into that of the Federal tribunals."[383] However, state courts possessed *exclusive* jurisdiction over criminal prosecution "unless the wrongful act charged grows out of the execution of, or is connected at the time with some LAW of the United States."[384] In that case, "there exists a concurrent jurisdiction."[385] The court held the 1863 removal provision unconstitutional.[386] The *Bliss* court was in the minority though.

One year later, the question came before the state's supreme court.[387] The court first rejected the notion that the validity of section 5, which authorized removal, hinged on the validity of section 4, which provided the

375. CONG. GLOBE, 37th Cong., 3d Sess. 1103 (1863) (statement of Rep. Wickliffe); *see supra* notes 150–169 and accompanying text (detailing Rep. Wickliffe's statements).

376. Ohio v. Bliss, 3 Grant 427, 429 (Pa. 1863).

377. *Id.*

378. *Id.*

379. *See id.*

380. *See id.* at 429–30.

381. *Id.* at 430; Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756–57 (relating to habeas corpus).

382. *See Bliss*, 3 Grant at 429.

383. *Id.*

384. *Id.*

385. *Id.*; *see* Claflin v. Houseman, 93 U.S. 130, 136 (1876) ("[W]here jurisdiction may be conferred on the United States courts, it may be made exclusive . . . but, 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.").

386. *Bliss*, 3 Grant at 429.

387. State *ex rel*. Tod v. The Court of Common Pleas of Fairfield Cty., 15 Ohio St. 377, 379, 384 (1864).

federal defense for presidential orders.[388] Second, it found no material difference between the 1863 removal provision and its predecessors.[389] "[I]f the act of 1863 is void, then is the act of 1833," and presumably, the court would add, that of 1815, "void also."[390]

As explained earlier, those statutes did differ in important respects,[391] but the court's reasoning did not seem to rest on statutory language at all; rather the court pointed to the Constitution.[392] In the context of a war, the court reasoned, the Constitution had vested the Congress and President with plenary authority, subject to further constraints only by "the laws of war."[393] In any case, then, "for an arrest, imprisonment, or seizure, made in time of war" by a federal officer, questions will *always* "arise, of the extent and lawfulness of the power exercised, and of the right to shield the subaltern acting under orders, and hold his superior alone responsible."[394] "And are not these *constitutional questions?*"[395] Because in times of war, "without any special legislation," all officers are "lawfully empowered by the constitution and laws of the United States to do whatever is necessary, and is sanctioned by the *laws of war*, to accomplish the lawful objects of [the President's] command," the court held that Congress may designate a federal tribunal to "draw the line" between permissible and impermissible actions.[396]

The Supreme Court of Indiana followed suit soon after.[397] Noting the broad powers vested in the Congress and President to "declare" and carry out war, the court echoed the view that by declaring war, Congress "puts in force the laws of war, and the war powers of the government," which exist "by virtue of the constitution."[398]

> After the declaration of war, every act done in carrying on the war, is an act done by virtue of the constitution . . . . Every measure of Congress, and every executive act performed by the President, intended and calculated to carry the war to a successful issue, are acts done under the constitution; . . . and the validity of such acts must be determined by the constitution. . . .
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> . . . When, therefore, it is sought to hold any officer, or person, liable for any act of war done under the order of the President, . . . it presents a

388. *Id.* at 384–85.
389. *Id.* at 387.
390. *Id.*
391. *See supra* Part II.B.2–3 (explaining how the statutes differ).
392. *Tod*, 15 Ohio St. at 388–89.
393. *Id.* at 389 (emphasis omitted).
394. *Id.*
395. *Id.*
396. *Id.* at 390–91.
397. McCormick v. Humphrey, 27 Ind. 144 (1866).
398. *Id.* at 153–54.

> question arising "under the constitution of the *United States;*" for the power to do the act must be sought in the constitution . . . .[399]

That alone supported federal jurisdiction.[400] When the court considered section 4's grant of a federal defense for presidential orders, the issue became all too easy.[401] "The case then presented by the [removal] petition, 'arising under the laws of the *United States*,' comes within the very language of the constitution . . . ."[402]

Thus the Ohio and Indiana courts provide one understanding of federal law in the context of wartime. First, every act done by a federal officer is governed solely by the laws of war.[403] Second, the war powers of the United States are provided for in the United States Constitution.[404] Therefore, third, all acts done by such officers under color of duty during wartime are assessed only against the backdrop of the Constitution.[405] Under that approach, every such case rests on a federal rule of decision.[406] Congress's gift of a statutory defense was merely gratuitous for jurisdictional purposes.[407] Note the similarly expansive formulation offered in *Hoskins*—that federal officers were akin to agents of a foreign sovereign, who enjoyed complete "exemption from the local jurisdiction"[408] but remained "still subject to the laws of [their] own country" so long as they acted as agents.[409]

Other courts reached the same outcome on less expansive rationales, relying on the statute's provision of a defense. Despite the incredible assertion of federal, and especially executive, authority within the 1863 Act,[410] this particular removal statute could be the easiest to place into the arising-under category. Whether or not it was ultimately valid, the defense proffered was derived expressly from the very same statute.[411] Ever since *Cohens v. Virginia*, it was clear that the assertion of federal law by way of

399. *Id.* at 154.

400. *See id.* at 152–54.

401. *See id.* at 148–49, 152.

402. *Id.* at 148–49 (emphasis omitted).

403. *See McCormick*, 27 Ind. at 154; State *ex rel*. Tod v. The Court of Common Pleas of Fairfield Cty., 15 Ohio St. 377, 390–91 (1864).

404. *See McCormick*, 27 Ind. at 153–54; *Tod*, 15 Ohio St. at 389.

405. *See McCormick*, 27 Ind. at 153–54; *Tod*, 15 Ohio St. at 389–91.

406. *McCormick*, 27 Ind. at 154 ("Every measure of Congress, and every executive act performed by the President, intended and calculated to carry the war to a successful issue, are acts done under the constitution; . . . and the validity of such acts must be determined by the constitution.").

407. *See id.* at 152–53.

408. State v. Hoskins, 77 N.C. 530, 540 (1877) (quoting WHEATON, *supra* note 334, at § 224, 299).

409. WHEATON, *supra* note 334, at § 224, 300.

410. *See, e.g.*, Jones v. Seward, 41 Barb. 269, 276 (N.Y. Gen. Term 1864) (Clerke, J., dissenting).

411. Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756–57 (relating to habeas corpus).

defense was no less a case arising under that federal law than one in which the law was invoked by the plaintiff or prosecution.[412]

Certainly, a privilege granted by federal law—*i.e.*, a statutory command to perform a certain act—both provides a potential defense to a claim and necessarily inserts a question as to the meaning and validity of the federal law into the case.[413] For instance, in *Dennistoun v. Draper*, the plaintiff sought a writ of replevin against a revenue officer for cotton held "wrongfully and in violation of [his] rights."[414] Whether the plaintiff was entitled to the writ depended on whether the defendant officer "h[e]ld the cotton as captured, abandoned, and confiscable" because the cotton was allegedly purchased in an attempt to run the blockade during the Civil War.[415] If so, then the officer was performing his duties by confiscating it.[416] If the cotton was not "captured, abandoned, and confiscable" under the statute, however, then the officer had neither duty nor right to confiscate it.[417] This action would be a trespass.[418] That question was governed by federal statute and regulations.[419]

However, it is important to distinguish a case like *Dennistoun*, in which the plaintiff sued the defendant for doing precisely what a federal statute instructed him to do, from a case in which the plaintiff sues the defendant for an act that, though not prescribed by the statute, may constitute a necessary byproduct of fulfilling one's statutory obligations.[420] The statutes which these removal provisions accompanied were generally not seen as providing a privilege or, in Justice Clifford's words, "immunity" for these related but

412. Cohens v. Virginia, 19 U.S. 264 (1821); McCormick v. Humphrey, 27 Ind. 144, 152 (1866) (citing Milton v. Wilgus, 17 F. Cas. 424 (C.C.D. Ky.) (No. 9622) (manuscript opinion; no date or publicly reported opinion)); *Jones*, 41 Barb. at 273 (opinion of Leonard, P.J.); *id.* at 275–76 (opinion of Sutherland, J.); *see also* Hodgson v. Millward, 3 Grant 412, 416–17 (Pa. 1863) (reasoning from the statute that "cases may arise under the laws of the United States by implication" because statutes provide the defense of privilege to those carrying them out).

413. *See, e.g.*, *Privilege*, BLACK'S LAW DICTIONARY (11th ed. 2019) (definition 2).

414. Dennistoun v. Draper, 7 F. Cas. 488, 489 (C.C.S.D.N.Y. 1866) (No. 3804).

415. *Id.* at 490.

416. *Id.*

417. *Id.*

418. *E.g.*, Ely v. Ehle, 3 N.Y. 506, 509 (1850).

419. *See* Act of Mar. 12, 1863, ch. 120, §§ 1, 4, 12 Stat. 820, 820–21 (providing for the collection of abandoned property) (giving the Secretary of Treasury authority to appoint officers "to receive and collect all abandoned or captured property" from areas "designated as in insurrection" or areas not in insurrection if the property was obtained by improper means); U.S. DEP'T TREASURY, RULES AND REGULATIONS CONCERNING COMMERCIAL INTERCOURSE WITH AND IN STATES AND PARTS OF STATES DECLARED IN INSURRECTION, THE COLLECTION, RECEIPT, AND DISPOSITION OF CAPTURED, ABANDONED, AND CONFISCABLE PROPERTY, AND THE EMPLOYMENT AND GENERAL WELFARE OF FREEDMEN 31, reg. III (1864) (defining captured, abandoned, and confiscable property).

420. *Compare Dennistoun*, 7 F. Cas. at 489 (noting that the defendant claimed his possession of cotton was directed by federal law), *with* Tennessee v. Davis, 100 U.S. 257, 260–61 (1879) (noting that the defendant's action was arguably necessary for self-defense while he attempted to carry out his statutory duties).

unprescribed actions.[421] Under the more expansive understandings of federal spheres of protection, though, these actions would likely come within arising-under jurisdiction.[422]

2. Federal Law as an Integral Ingredient

Many cases arose regarding the procedures mandated by the various removal provisions and what constituted an adequate petition for removal.[423] These issues were of significant importance and even led to a sharp battle over jurisdiction of a single case between a state supreme court and a federal circuit court sitting in the same state.[424] But these questions cannot support arising-under jurisdiction. Every one of these removal provisions are enacted by Congress.[425] If the mere interpretation of a statute's removal provision provided a sufficient federal ingredient, then there would *never* be an issue of whether any suit authorized to be in federal court arose under federal law.[426]

Other cases involved litigation as to whether the factual prerequisites of removal were met, *i.e.*, whether the defendant really was acting under color of his office.[427] While such factual disputes may be closely linked to certain defenses, namely privilege, they are not the same as a claim of privilege.[428]

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421. *Davis*, 100 U.S. at 281 (Clifford, J., dissenting); *see* Georgia v. O'Grady, 10 F. Cas. 245, 245–47 (C.C.N.D. Ga. 1876) (No. 5352) (instructing the jury that a United States soldier pleading self-defense to a murder charge "derive[d] no protection from the fact that he was a soldier" because "[i]t was a time of peace, and a soldier was as much bound as a citizen to respect the laws of the state").

422. *See* McCormick v. Humphrey, 27 Ind. 144, 148–50 (1866); State *ex rel.* Tod v. The Court of Common Pleas of Fairfield Cty., 15 Ohio St. 377, 379–80 (1864).

423. *See, e.g.*, Virginia v. Paul, 148 U.S. 107 (1893); Virginia v. Felts, 133 F. 85 (C.C.W.D. Va. 1904); Virginia v. Bingham, 88 F. 561 (C.C.W.D. Va. 1898); Georgia v. Bolton, 11 F. 217 (C.C.N.D. Ga. 1882); Georgia v. Port, 3 F. 117 (C.C.N.D. Ga. 1880); *Dennistoun*, 7 F. Cas. 488; Abranches v. Schell, 1 F. Cas. 40 (C.C.S.D.N.Y. 1859) (No. 21).

424. *Compare* State v. Sullivan, 14 S.E. 796, 799 (N.C. 1892) (holding that removal was not properly effected, leaving jurisdiction with the state court), *with* North Carolina v. Sullivan, 50 F. 593, 594–97 (C.C.W.D.N.C. 1892) (repudiating the North Carolina court's approach in the simultaneous proceedings and maintaining that jurisdiction was only proper in the federal court).

425. *See* U.S. CONST. art. I, § 8, cl. 9, 18.

426. *Accord* Scott A. Rosenberg, Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933, 969 nn.177–78 (1982). This would go beyond even Wechsler's broader view of protective jurisdiction. *See* Wechsler, *supra* note 342, at 224–25. Wechsler would require that the removal statute be justified under an enumerated Article I power *other than* the power to regulate the jurisdiction of the federal courts. *Id.* (footnotes omitted) ("The power of the Congress to confer the federal judicial power . . . should extend, I think, . . . to all cases in which Congress has authority to make the rule to govern disposition of the controversy . . . . Where, for example, Congress by the commerce power can declare as federal law that contracts of a given kind are valid and enforceable, it must be free to take the lesser step of drawing suits upon such contracts to the district courts without displacement of the states as sources of the operative, substantive law.").

427. *See, e.g.*, Carico v. Wilmore, 51 F. 196 (W.D. Va. 1892); Illinois v. Fletcher, 22 F. 776 (C.C.N.D. Ill. 1884).

428. *See supra* note 413 and accompanying text (defining *privilege*).

Unlike privilege, which requires showing that one acted in accord with a legal obligation, "[c]olor is an apparent or *prima facie* right," which, though it "may have no substance," connotes "an appearance of right or authority."[429]

Further, even if the two coexist in a given case, such coexistence is coincidental, rather than causal, though one nineteenth-century court disagreed.[430] It is hardly surprising that a common defense for federal officers would be privilege—that was the type of case that triggered the need for these removal provisions in the first place.[431] And in *Salem & L.R. Co. v. Boston & L.R. Co.*, Justice Curtis, riding circuit, collapsed the distinction.[432] Noting that the statute nowhere called for it, the court held that petitions for removal must nevertheless "show that the acts complained of in the suit or prosecution were done, or are asserted to have been done, under a revenue law of the United States."[433] So far, this is nothing more than an additional pleading requirement, assuming that "*show*[*ing*] that the acts" were done "under a revenue law"[434] was different than the statutory command to "set[] forth the nature of [the] suit or prosecution, and, verify[] the said petition by affidavit."[435] From here, however, the court took a step further and equated "a case where the act complained of was done under or by color of the revenue laws," with a case "wherein there is a question to be tried whether a *justification* or *excuse* can be made out under those laws."[436] The *Salem* approach is similar to, though more restrictive than, the *Mesa* Court's general federal-defense imposition, and it might validate *Mesa*.[437] Yet, it was seldom cited in contemporary reported opinions and was certainly not a universal understanding, as other examples will show.[438]

Other defenses could be asserted, which may require questions of federal law depending on the facts of any given case. Take for example *Buttner v. Miller*, whose merits required considering federal law but did not implicate any defense of privilege.[439] The defendant was a customs collector who seized "certain casks of brandy and cases of claret wine" from the

429. Hodgson v. Millward, 3 Grant 412, 415 (Pa. 1863); Winter, *supra* note 235, at 355–56.

430. *See* Salem & L.R. Co. v. Boston & L.R. Co., 21 F. Cas. 229 (C.C.D. Mass. 1857) (No. 12,249).

431. *See supra* Part II.A (discussing the legislature's belief in the scope of its constitutional powers).

432. *Salem & L.R. Co.*, 21 F. Cas. 229.

433. *Id.* at 229.

434. *Id.* (emphasis added).

435. Force Act, ch. 57, § 3, 4 Stat. 632, 633–34 (1833) (providing for the collection of duties on imports).

436. *Salem & L.R. Co.*, 21 F. Cas. at 229 (emphasis added).

437. *See supra* notes 25–29 and accompanying text (discussing *Mesa*'s holding and reasoning).

438. *Cf.* People's U.S. Bank v. Goodwin, 162 F. 937, 945–46 (C.C.E.D. Mo. 1908) (internal quotations omitted) ("[T]o permit the removal of a cause under this [provision], the acts which constitute the cause of action must have some rational connection with official duties under a revenue law, and in some way affect the revenue of the government.").

439. Buttner v. Miller, 4 F. Cas. 926 (C.C.S.D. Ala. 1871) (No. 2254).

plaintiff who had violated the revenue laws.[440] Rather than sue the defendant for trespass, "the plaintiff who, together with his partner, was the importer of said goods," sought damages for slander—namely the verbal accusation of illegal dealing that accompanied the seizure.[441] Because the slanderous words were "an act done under the revenue laws of the United States," the case fell within the Force Act's removal provision.[442] To be sure, the defendant-collector's likely defense of truth would involve questions of federal law.[443] To decide whether the statements were truthful—absolving the collector of liability—the jury would need to decide what the revenue laws meant and whether the plaintiffs had violated them.[444] But in no event would the defendant officer be able to point to the revenue laws as "authoriz[ing] malicious slander" or otherwise compelling his accusations.[445] Removal was nevertheless proper.[446]

Lastly, consider how the *Mesa* Court described the facts in the landmark case of *Tennessee v. Davis*.[447] Davis, a revenue collector "attempting to enforce the revenue laws" by "seiz[ing]" equipment used in illicit distilleries, was "assaulted and fired upon by a number of armed men," and he fatally "returned the fire."[448] The State of Tennessee prosecuted him for murder, and Davis claimed that he had acted in self-defense.[449] Though self-defense was governed by Tennessee law, Davis could only benefit from the defense if he was indeed acting under federal authority when making the seizure; otherwise, he would have "merely been a thief attempting to steal his assailants' property" and "returning their fire would simply not have been an act of self-defense."[450] Therefore, the court would be faced with a question regarding the internal revenue laws in the course of entertaining the defense.[451]

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440. *Id.* at 926.
441. *Id.* at 926–27.
442. *Id.* at 927.
443. Winter, *supra* note 235, at 357 n.157 (commenting on *Buttner*). *Buttner* occurred before the Supreme Court held that the First Amendment required moving falsity from an affirmative defense to the plaintiff's prima facie case. *See* McKee v. Cosby, 139 S. Ct. 675, 678–79 (2019) (Thomas, J., concurring in the denial of certiorari).
444. *See Buttner*, 4 F. Cas. at 927.
445. *Id.*
446. *Id.*
447. *See* Mesa v. California, 489 U.S. 121, 126 (1989); Tennessee v. Davis, 100 U.S. 257, 261 (1879).
448. *Davis*, 100 U.S. at 261.
449. *Id.* at 260.
450. *Mesa*, 489 U.S. at 127–28.
451. *See id.*

3. Obstacles to the Execution of a Federal Duty

Officers often justified what looked like torts against people and their property by asserting that they were carrying out a seizure mandated by the law.[452] Murder prosecutions against federal officers, too, would often stem from a confrontation, and liability depended on whether the officer was carrying out his official duties.[453] Therefore, while it would appear that in most cases some decision as to the meaning or validity of federal law would be integral to deciding the merits, this was not always so.

Take a brief roadside encounter that turned deadly after just a few words.[454] Deputy Marshal Joseph H. Carico was escorting a prisoner to jail in a nearby county.[455] He learned during the journey that "some men were selling liquor unlawfully in the neighborhood" and "that he would probably meet said men on the road."[456] Soon after, he met two brothers on the road, one of whom was carrying a keg.[457] Supposing these to be the men, Carico said he had heard that the men were selling liquor and that he wanted to see what was in the keg.[458] The man holding the keg told him they had "[a] little whisky," at which point his brother asked Carico, "Who the hell are you?"[459] Not a moment after Carico stated that he was a deputy marshal, the other man pulled a pistol on him; Carico was too quick and fatally shot the man in his own defense.[460]

This was not a case like *Davis*, in which the officer had first trespassed or physically interfered with the deceased, so as to potentially negate a claim of self-defense.[461] Carico had only spoken with the men on the road and provided reason to fear he might *subsequently* arrest them.[462] No interpretation of a federal statute was necessary to determine that he retained the right to defend himself from deadly harm.[463] Nevertheless, Carico's goal had been to determine if the brothers had violated the law, and the court recognized that federal law gave him both such investigatory power and the

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452. *See, e.g.*, Dennistoun v. Draper, 7 F. Cas. 488 (C.C.S.D.N.Y. 1866) (No. 3804).

453. *See supra* notes 447–451 and accompanying text (discussing the *Mesa* Court's explanation of the facts in *Davis*).

454. *See* Carico v. Wilmore, 51 F. 196, 197 (W.D. Va. 1892).

455. *Id.* at 198.

456. *Id.*

457. *See id.*

458. *See id.*

459. *Id.*

460. *See id.*

461. *See supra* notes 448–450 and accompanying text (discussing the facts of *Davis*).

462. *See Carico*, 51 F. at 199–200.

463. *Id.* at 200.

authority to arrest them if he so chose.[464] As "he was acting within the scope of his authority," he was entitled to remove the prosecution to federal court.[465]

Just a few years later, T.L. Felts, a United States deputy marshal stationed in Virginia, was informed that "two persons for whom he had warrants charging offenses against federal revenue statutes could probably be found" in the nearby town of Max Meadows.[466] So Felts "boarded a train . . . which would take him to Max Meadows, for the purpose of attempting to arrest" them.[467] Unfortunately, also on the train were two men who "had conspired to murder" Felts "on account of the previous acts" he had undertaken "in connection with his duties as deputy marshal."[468] The two "viciously attacked" Felts, "and in defending himself against the said assault [Felts] found it necessary to shoot and kill" one of the men "and to wound" the other.[469] He was then indicted on one count of murder and one count of wounding with intent to kill.[470] Felts successfully removed his case to federal court.[471] While the defendant's position as a federal deputy marshal would be a part of his narrative at trial, one would be hard-pressed to figure out to what extent it played any legal role in his claim of self-defense.[472]

The facts are similar to those in an earlier case before the Supreme Court: *Cunningham v. Neagle*, commonly referred to as *In re Neagle*.[473] United States Deputy Marshal David Neagle was tasked with accompanying and protecting Justice Stephen J. Field while the latter rode circuit.[474] While Neagle sat next to Field at breakfast one morning, "a murderous assault was made by [the decedent] on Judge Field," and Neagle killed the assailant in Field's defense.[475] Just like Felts, Neagle (and Field) was carrying out his federal duties, insofar as he and Field were en route by train from a courthouse in Los Angeles to one in San Francisco for a round of arguments.[476]

The *Neagle* Court appeared to unanimously agree that a private citizen in Neagle's shoes "would have been justified in what he did in defence of Mr. Justice Field's life, and possibly of his own" and that such an argument

464. *Id.* at 199.
465. *Id.* at 200.
466. Virginia v. Felts, 133 F. 85, 86 (C.C.W.D. Va. 1904).
467. *Id.*
468. *Id.*
469. *Id.* at 86–87.
470. *Id.* at 86.
471. *Id.*
472. *See id.* at 85–87.
473. *See* Cunningham v. Neagle, 135 U.S. 1 (1890).
474. *Id.* at 5 (statement of the case).
475. *Id.* (statement of the case).
476. *Id.* at 52.

would be valid under California law.[477] And while the case was primarily about writs of habeas corpus, a necessary predicate to the outcome was the majority's holding that Neagle's defense of Field was "justif[ied]" and "imposed" by *federal law*.[478] This was the point of disagreement between the majority and the dissent,[479] as the latter refused to find a "duty to protect the justice" that was argued to "arise" implicitly "out of the Constitution and positive congressional enactments."[480]

In the *Felts* prosecution, however, there was no need to search for a congressional statute either explicitly or implicitly creating a right of self-defense.[481] The removal provision required that Virginia law was to govern the removed prosecution "in all [relevant] respects."[482] Again, one should question what about *Virginia's* law of self-defense presents an issue of interpreting federal law. Though Justice Lamar's dissenting view that Neagle's prosecution was purely a matter of California law did not win the day, in the context of a removed prosecution like *Felts*, where the removal statute calls for state law, it seems hard to dispute.[483]

Felts was not the only case with such a fact pattern.[484] One De Hart worked as a "posseman under a deputy collector of internal revenue."[485] He "assisted in destroying an illicit distillery belonging" to N.K. Thomas, testified against Thomas at a preliminary hearing, and was scheduled to testify again at Thomas's pending trial.[486] Between the dates of the preliminary hearing and the trial, De Hart was called to assist in an unrelated arrest.[487] On his way there, he "was set upon by said N.K. Thomas," who took a pistol from his pocket.[488] Thomas stated that he was going to kill De Hart "on account of his having reported said Thomas' still," his assistance in "cutting up and destr[oying]" the same, his testimony at the preliminary

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477. *Id.* at 53–54; *id.* at 80 (Lamar, J., dissenting) ("[W]e agree . . . that the personal protection of Mr. Justice Field, as a private citizen, even to the death of Terry, was not only the right, but was also the duty of Neagle and of any other bystander . . . [but] he is answerable to the courts of the State of California . . . ."); *see* CAL. PENAL CODE § 197 (1872).

478. *Neagle*, 135 U.S. at 68–69.

479. *Compare id.* at 76 (holding that Neagle "was acting under the authority of the law of the United States"), *with id.* at 80 (Lamar, J., dissenting) (arguing that Neagle "is answerable to" California courts under California law, and therefore "the courts of the United States have . . . no jurisdiction whatever").

480. *Id.* at 80–81 (Lamar, J., dissenting).

481. *See* Virginia v. Felts, 133 F. 85, 92 (C.C.W.D. Va. 1904).

482. *Id.*; *see* Tennessee v. Davis, 100 U.S. 257, 271 (1879).

483. *See Neagle*, 135 U.S. at 75; *Felts*, 133 F. at 86–87.

484. *See* Virginia v. De Hart, 119 F. 626 (C.C.W.D. Va. 1902).

485. *Id.* at 627. Recall that the removal statutes covered "any officer appointed under or acting by authority of any revenue law of the United States . . . or against any person acting under or by authority of any such officer." REV. STAT. § 643. This would cover a "posseman." *De Hart*, 119 F. at 628.

486. *De Hart*, 119 F. at 627.

487. *Id.*

488. *Id.*

hearing, "and to prevent such evidence being repeated" at trial.[489] De Hart "struck [Thomas] in self-defense" and was indicted for felonious assault.[490]

To the court, this was an easy case largely due to its broad understanding of what it meant to act "under color of" federal office.[491] "If a revenue official . . . while 'hot-foot' after a fleeing violator of a revenue law, is set upon by friends of the fugitive, who seek thus to prevent the arrest, and if, in resisting the assault, the officer kills one of the party," the court reasoned, the homicide "is certainly one done under color of office."[492] The reason is that the officer was faced with the choice "to repel the assault, or to abandon his pursuit."[493]

With that much settled, the court proceeded to stretch the hypothetical further: "Does it alter the case if we suppose that the person or persons who interfere with the officer's pursuit are actuated, not by a desire to prevent the arrest, but by a mere personal desire to injure the officer?"[494] Despite the different purpose, the result would be the same.[495] Again, "if the assault be not repelled, the officer cannot proceed with the execution of his official duty."[496] This too would be an act, "to say the least, done colorably in the line of official duty."[497] And there would be no use in "a distinction" between repelling an attack while the officer was "in actual pursuit" and while "the officer [was] merely on the way to make an arrest, or merely seeking an offender" as long as the officer had the "intent to arrest" *someone* on the journey.[498] In short, "[a]ny one who, while the officer is thus engaged, attacks him, is, in some measure, interfering with the performance of an official duty. And in repelling the attack the officer is at least colorably performing such duty."[499]

The most enlightening part of *De Hart*, however, may be its expansive dictum on what Congress *could have* brought within the officer-removal statutes.[500] Of course, dictum is not a holding and is not solid ground on which to make a conclusion as to what these statutes actually meant. But even if dictum is no more than a judge's musings, those musings may shed light on contemporary understanding and thinking. The *De Hart* court set aside the wrinkle that "the assault made by Thomas" was for the purpose of avenging the "prior actions" of De Hart "while acting under the deputy revenue

489. *Id.*
490. *Id.*
491. *Id.* at 628.
492. *Id.*
493. *Id.*
494. *Id.*
495. *Id.*
496. *Id.*
497. *Id.*
498. *Id.*
499. *Id.* at 629.
500. *Id.*

collector."[501] After all, imagine that Thomas had sought this same vengeance "years after a revenue collector ha[d] left the government service" and the former collector similarly killed his assailant in self-defense.[502] The killing would not be "under color of" the internal revenue statutes.[503] It would be a simple matter of the inherent right to self-defense.[504] Instead, suppose Thomas assaulted De Hart while the latter still "[held] a commission, but while quietly at his home, . . . not engaged in any official duty."[505] Again, imagine that De Hart, in self-defense, killed Thomas.[506] According to the court, this, too, would not be "under color of office or of any revenue law."[507]

The reason that these cases would not be removable, however, was purely a matter of statutory interpretation; "[w]hile congress might well have extended the right of removal to cover such a case, the language employed in [the statute] may not be quite sufficient to do so."[508] According to *De Hart*, the purpose of removal was not maintaining the supremacy of federal law, but "afford[ing] . . . protection from local prejudice against federal revenue laws and revenue officials."[509] Thus, the difference between whether a revenue officer could or could not remove a prosecution for "set[ting] fire to a neighbor's dwelling" was not whether his official duty provided him with "sufficient justification" for the fire; it was whether he was "seeking to arrest" his neighbor, "who [was] fortified in his dwelling" at the time, for a violation of the revenue law.[510]

IV. MODERN HESITANCY TO ANSWER THE ARTICLE III QUESTION AND WHY IT MATTERS

Recall Wechsler's and Mishkin's theories of protective jurisdiction discussed earlier.[511] Despite the fact that protective jurisdiction would provide guiding principles and limits to the vague federal-ingredient test offered in *Osborn v. Bank of the United States*, it simultaneously would legitimize incredibly expansive grants of jurisdiction with no clear substantive federal law in sight.[512] Indeed, this seems to be how members of

501. *Id.* at 627.
502. *Id.*
503. *Id.*
504. *See id.*
505. *Id.* at 627–28.
506. *See id.* at 628.
507. *Id.* at 628.
508. *Id.*
509. *Id.* at 629.
510. *Id.*
511. *See supra* notes 344–353 and accompanying text (discussing their theories regarding the limiting principle in relation to arising-under jurisdiction).
512. *See* James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CALIF. L. REV. 1423, 1427–28 (2007) ("Recognizing that the [*Osborn*] test could result in the

the Supreme Court have viewed the theories.[513] The Court is well aware of the protective-jurisdiction rumblings but has so far staved off facing the issue.[514]

It first dodged the matter in *Textile Workers Union of America v. Lincoln Mills of Alabama* by resolving the case on statutory grounds.[515] The Court held that the Taft-Hartley Act's grant of original jurisdiction to district courts over "[s]uits for violation of contracts between an employer and a labor organization"[516] called for federal common law as the rule of decision.[517] Justices Burton, Harlan, and Frankfurter, however, were not willing to read a creation of federal common law in to the Taft-Hartley Act and had to confront the Article III question head on.[518] Burton and Harlan merely noted their agreement with a lower-court opinion that the Act could "be upheld as a congressional grant . . . of what has been called 'protective jurisdiction.'"[519]

Only Frankfurter dove into the matter and he squarely rejected protective jurisdiction in all its forms.[520] In response to Wechsler's theory that power to regulate a field includes the power to provide a tribunal, Frankfurter doubted "the truly technical restrictions of Article III"—the careful result of drawn-out political debates and compromises—were "met or respected by a beguiling phrase that the greater power here must necessarily include the lesser."[521] And though Mishkin's theory, requiring an articulated federal regulatory scheme, "ha[d] the dubious advantage of limiting incursions on state judicial power to situations in which the State's feelings may have been tempered by early substantive federal invasions," it was, in relevant parts, "quite similar" to Wechsler's approach.[522] Since *Lincoln Mills*, the Court has not appeared more welcoming to the theory than Frankfurter was.[523]

The Court again avoided the issue through statutory interpretation in *Verlinden B.V. v. Central Bank of Nigeria*, which presented the question "whether the Foreign Sovereign Immunities Act of 1976 [FSIA], by

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transfer of state law matters to federal court on the basis of relatively remote federal questions, scholars began to explore more general theories of federal jurisdiction that better explained the scope of congressional power.").

513. *Id.* at 1424.

514. *Id.*

515. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448 (1957).

516. 29 U.S.C. § 185(a) (2018).

517. *Lincoln Mills*, 353 U.S. at 456–57.

518. *Id.* at 460 (Burton, J., joined by Harlan, J., concurring in result); *id.* at 469–70 (Frankfurter, J., dissenting).

519. *Id.* at 460 (Burton, J., joined by Harlan, J., concurring in result) (citing Int'l Bhd. of Teamsters v. W.L. Mead, Inc., 230 F.2d 576 (1st Cir. 1956)).

520. *Id.* at 474 (Frankfurter, J., dissenting).

521. *Id.*

522. *Id.* at 476.

523. Pfander, *supra* note 512, at 1432 ("[Frankfurter's] insistence on enforcing the constitutional limits of Article III appears to have nicely anticipated the Court's current approach.").

authorizing a foreign plaintiff to sue a foreign state in a United States district court on a nonfederal cause of action, violates Article III of the Constitution.'"[524] The Court, though, found federal law. The FSIA codified and modified the law of nations' rules of foreign sovereign immunity in addition to granting jurisdiction.[525] No case can proceed against a foreign state without a determination, or assumption, that immunity does not bar the suit.[526] Therefore, the Court held, every suit requires an application of the FSIA's sovereign-immunity rules and "necessarily raises questions of substantive federal law at the very outset."[527] And in *Mesa*, the Court inferred a federal-defense requirement from the removal statute to avoid the question yet again.[528]

Justices Brennan and Marshall observed in *Mesa* that "[i]t is not at all inconceivable . . . that Congress' concern about local hostility to federal authority could come into play in some circumstances where the federal officer is unable to present any 'federal defense.'"[529] They urged the Court and Congress not to forget "[t]he days of widespread resistance by state and local governmental authorities to Acts of Congress and to decisions of th[e] Court in the areas of school desegregation and voting rights."[530] As the evolution of the officer-removal statutes shows, though, concerns that a federal forum was necessary to protect against "the possibility of harassment of federal agents by local law enforcement" and others long predated the Civil Rights era.[531]

Those concerns are not behind us either. Consider a small sampling of scenarios in which states and local governments use their authority to obstruct or oppose federal regulations: authorizing private businesses to sell

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524. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 482 (1983); *see* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

525. *See* Foreign Sovereign Immunities Act of 1976, § 4(a), Pub. L. No. 94–583, 90 Stat. 2891, 2891–98.

526. *Verlinden,* 461 U.S. at 493–94.

527. *Id.* at 493; *but see* Seinfeld, *supra* note 21, at 1423–25 (arguing that the Court's articulation of the mandatory sovereign-immunity question "simply isn't true" and cannot therefore support the arguments the Court provided for arising-under jurisdiction).

528. Mesa v. California, 489 U.S. 121, 137 (1989). Additionally, in *Gutierrez de Martinez v. Lamagno*, the majority's interpretation of the Westfall Act raised serious questions as to whether some cases might end up in federal court without presenting any federal question. *See* Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 437–38 (1995) (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 440–43 (Souter, J., dissenting). A four-person plurality found such concerns unwarranted and dropped a footnote stating that such cases "arise[] under federal law . . . independent of any protective jurisdiction theory." *Id.* at 436 n.11 (plurality opinion) (quoting Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 549 (1983)). None of the other five justices delved into the theory. *Id.* at 437 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 441 (Souter, J., joined by Rehnquist, C.J., and Scalia & Thomas, JJ., dissenting).

529. *Mesa*, 489 U.S. at 140 (Brennan, J., joined by Marshall, J., concurring).

530. *Id.*

531. *Id.*

federally prohibited controlled substances,[532] circumventing federal relaxation of immigration enforcement,[533] and making more difficult federal reinvigoration of immigration enforcement,[534] just to name a few. Should a future Congress look to the federal courts to provide a more favorable forum, it may consider enacting provisions like the earlier federal removal statutes that, as explained above, often did not require averment of a federal defense.[535] Such an instance would provide a new opportunity to face the constitutional question that the *Mesa* Court avoided.[536] Even without such legislative action, the history of officer-removal statutes may offer new insight into the debate over protective jurisdiction and exactly what it means for a case to arise under federal law.[537]

532. *See, e.g.*, COLO. CONST. art. XVIII, § 16(5)(a); 3 ALASKA ADMIN. CODE tit. 3, ch. 306 (LEXIS through Register 233); ME. STAT. tit. 28-B (Westlaw through ch. 767 of the 2019 2d Reg. Sess. of the 129th Leg.); WASH. ADMIN. CODE ch. 314–55 (LEXIS through the 20–05 Washington State Register).

533. *See* Arizona v. United States, 567 U.S. 387, 402 (2012) ("Were [the state statute] to come into force, the State would have the power to bring criminal charges . . . where federal officials . . . determine that prosecution would frustrate federal policies."); Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1686–90 (2011); *cf.* Texas v. United States, 809 F.3d 134, 153–54 (5th Cir. 2015) (explaining potential injuries to states from relaxed federal law-enforcement policies).

534. *See, e.g.*, CAL. GOV'T CODE §§ 7282.5, 7283.1–.2, 7284.6 (Westlaw through ch. 3 of 2020 Reg. Sess.); CHI., ILL., MUN. CODE ch. 2-173 (2007); *see generally* SARAH HERMAN PECK, CONG. RESEARCH SERV., R44795, "SANCTUARY" JURISDICTIONS: FEDERAL, STATE, AND LOCAL POLICIES AND RELATED LITIGATION 10–38 (2019).

535. *See supra* Part II (providing a background for removal statutes).

536. Mesa v. California, 489 U.S. 121, 137 (1989).

537. *See, e.g.*, Seinfeld, *supra* note 21, at 1443–49 (discussing Weschler and Mishkin's theories of protective jurisdiction).