

1986

The Federal Common Law of Crime

Robert C. Palmer

Repository Citation

Palmer, Robert C., "The Federal Common Law of Crime" (1986). *Faculty Publications*. 900.
<https://scholarship.law.wm.edu/facpubs/900>

Copyright c 1986 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>

The Federal Common Law of Crime

Robert C. Palmer

I. Introduction

The United States Constitution established a federal system, not a national government. States continued necessarily and by design as active and important centers of governmental activity. States were institutions of inherent authority, while the federal government by original intent¹ and then explicitly by amendment,² was a government of only delegated powers. Since the federal government derived its power directly from the people and acted directly on individuals,³ it was decisively more powerful than the pre-Constitution Confederation.⁴ But the Bill of Rights⁵ itself is evidence of the continued worry, pervasive until modified by the Reconstruction Amendments,⁶ that the federal government might, but should not, overwhelm the states.⁷

The federal courts, as courts of a government of delegated powers, exercised specific jurisdictions.⁸ Even the unamended Constitution confined federal court jurisdiction, as with congressional powers,⁹ to certain areas.¹⁰

Robert C. Palmer is Adler Fellow and Associate Professor, Institute of Bill of Rights Law, Marshall-Wythe School of Law, The College of William and Mary. B.A. 1970, University of Oregon; M.A. 1971, Ph.D. 1977, University of Iowa.

I would like to acknowledge the helpful comments of Professor Stephen Presser of Northwestern Law School and the assistance of Cary Dier, my research assistant.

1. See Robert C. Palmer, 'Liberties as Constitutional Provisions, 1776-1791', (forthcoming) [hereinafter: Palmer, 'Liberties'].
2. U.S. Const. Amend X.
3. U.S. Const. Preface; James Madison, *Journal of the Federal Convention* E.H. Scott, ed., (Freeport, 1970) 74, 411, 415.
4. Merrill Jensen, *The Articles of Confederation: An Interpretation of the Social-constitutional History of the American Revolution 1776-1781* (Madison, 1940) 263-70.
5. U.S. Const., Amend. I-X.
6. U.S. Const., Amend. XIII-XV.
7. Palmer, 'Liberties', supra note 1.
8. U.S. Const. Art. III.
9. U.S. Const. Art. I, §8.
10. U.S. Const. Art. III.

A general jurisdiction over civil and criminal matters found no place there. Those jurisdictions allotted to the federal courts served a federal purpose.¹¹

Historians and lawyers nevertheless agree that both legislators and federal judges before 1800 consistently assumed that there was a federal common law of crime.¹² That notion, if so universally current among policy makers immediately after the adoption of the Constitution, would call into question the limited nature of the federal government. Since the Constitution had not delegated common law jurisdictions as such to the federal government, the first generation would thus have assumed that certain matters pertained to government, regardless of the constitutive document or the nature of the government. The result might well be still only a federal government, but it would be a federal government with powers quite difficult to define. The history of the supposed federal common law of crime focuses attention on the nature of the federal government and the federal system as originally conceived.

The historiography of the federal common law of crime raises an equally important although perhaps more parochial concern. Various modern perceptions and convictions have interacted to obscure the nature of the task of the historical investigation of legal and constitutional phenomena. The first of these is the perception, grown into an obsession, that judicial decision-making is not objective but is permeated by social policy biases. Judicial activity thus seems more like legislative activity. To some extent, of course, the insight is a self-fulfilling prophecy. If judicial activity is seen as indistinguishable from social policy legislation, then the judges' perception

11. Palmer, 'Liberties', *supra* note 1.

12. Randall Bridwell and Ralph U. Whitten, *The Constitution and the Common Law* (Lexington, 1977) 35-51; Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass., 1977) 9-11; Stephen B. Presser, 'A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence', 73 *Northwestern University Law Review* 26 (1978); Charles Warren, 'New Light on the History of the Federal Judiciary Act of 1789', 37 *Harvard Law Review* 49, 73 (1923); Leonard Levy, *Emergence of a Free Press* (New York, 1985) 275-79, 298; Leonard W. Levy, 'On the Origins of the Free Press Clause', 32 *University of California at Los Angeles Law Review* 177, 177-79, 208-11 (1984); Stewart Jay, 'Origins of Federal Common Law: Part One', 133 *University of Pennsylvania Law Review* 1111-113 [hereinafter: Jay, 'Origins of Federal Common Law']. There can be no dispute that there is, in a very limited sense, a federal common law of crime: traditions of interpretation of constitutional criminal rights. As used here, however, federal common law of crime refers to the existence of an inherent common law authority rather than an express constitutional mandate for either the jurisdictional grant or for the substantive law to be applied in criminal cases. Federal power within the District of Columbia, while it was considered to include common law authority, is distinct from other areas of the federal common law of crime. *United States v. Hammond*, 26 F. Cas. 96 (C.C.D.C. 1801)(No. 15,293); *United States v. Lindsay*, 26 F. Cas. 971 (C.C.D.C. 1805) (No. 15,602); *United States v. Herbert*, 26 F. Cas. 284 (C.C.D.C. 1836)(No. 15,354); *United States v. Crandell*, 25 F. Cas. 684 (C.C.D.C. 1836)(No. 14,885) [seditious libel for distribution and publication of anti-slavery pictures]. See George Lee Haskins and Herbert A. Johnson, *History of the Supreme Court of the United States, Volume II: Foundations of Powers: John Marshall, 1801-15* (New York, 1981) 643-44 [hereinafter: *Hist. S.C.*].

of their task alters and confirms the propriety of such judicial legislation. The insight remains valid, however, even without that effect. The problem it presents for historical investigation is that the emphasis on judicial discretion and law-making capacity makes it seem unlikely to the sophisticated researcher that in the individual case judges were simply applying the law: the precisely legal base of their activity then receives insufficient attention.

A second modern perception has devalued constitutional language. As the federal government has grown in the twentieth century, it has become increasingly difficult to relate governmental structures and powers to the original Constitution. Arguably, whether necessary or not, or desirable or not, the federal government is operating outside the bounds permitted by the Constitution.¹³ But lawyers, judges, and historians, each with their own interests, maintain the validity of the link to the eighteenth century Constitution, ultimately deriving authority from some textual basis. But the relationship is often tenuous. Explanations focus on the under-specificity of constitutional language.¹⁴ Constitutional language is often capable of varying constructions.¹⁵ But the way in which modern courts have redefined words to justify seemingly necessary powers has made the task of constitutional construction very difficult and the meaning of constitutional language problematic. The result for historical investigation is that historians talk about 'open-ended' provisions and decline to undertake analysis of early constitutional ideas in relationship to various constructions of constitutional textual meanings. We talk more about 'constitutional ideas' or 'jurisprudence'¹⁶ than we try to figure out how they derived their decisions from the text. But this reluctance is misleading, for from the beginning constitutional matters were decided formalistically.¹⁷

The third modern notion is the importance of relating legal and constitutional history with social and political history. Doctrinal analysis undertaken in isolation from the social and political context results not in history, but in anachronism. More to the point, however, legal history will not contribute to the general historical enterprise unless its specialists point out its relevance and in an idiom understandable to historians generally. That

13. The most striking instance is the extension of the interstate commerce power to the conditions of manufacturing. While the appropriate boundaries of commerce are hard to define, ordinary usage would never include everything now regulated as commerce.

14. For a convenient summary, see Frederick Schauer, 'An Essay on Constitutional Language', 29 *University of California at Los Angeles Law Review* 797 (1982).

15. See Robert C. Palmer, 'The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment', 1984 *University of Illinois Law Review* 739.

16. See Stephen B. Presser and Becky Bair Hurley, 'Saving God's Republic: the Jurisprudence of Samuel Chase', 1984 *University of Illinois Law Review* 771; Jay, 'Origins of Federal Common Law', *supra* note 12 at 1054-65.

17. See Morton J. Horwitz, *Transformation of American Law*, *supra* note 12 at 255-56.

necessity, seriously accepted by modern legal historians, de-emphasizes technical arguments and directs attention away from the precisely legal content of decisions and toward the social and political context. Legal and constitutional history increasingly tends to devolve into explicating how the law reflects various social movements.¹⁸ That tendency ignores the doctrinal side of the field which is the core of the intellectual and bureaucratic rigor that makes the law something of a semi-independent force in society.¹⁹

All three of these factors are valid and even pressing insights for the legal historical venture. But they reinforce each other too greatly. If the judicial enterprise is fundamentally legislative and bound to a judge's social policy biases, then legal cases are merely political and are illustrative of general political movements. If there is no set meaning to constitutional language, then the meaning the courts ascribe to the words are not actually a following of original intent, but the implementation of a political platform. And if one accepts the realist notion of judicial activity and the dubiousness of arriving at an 'objective' meaning of constitutional language, then the legal historian easily talks the idiom of the general historian. In proper measure, all this is not only acceptable but necessary.

The overemphasis on these insights has undercut historical creativity and accuracy. A general historian could put a legal case in its social and political context. The specific expertise of the legal historian should allow him to construct the intellectual framework of the judges in relationship to the law. The basic task is a rigorous analysis of the cases, attempting to understand the document on its own terms. Without care for the individual case, the relevant context cannot be ascertained. In constitutional areas, the imperative question then is whether the cases can fit coherently into some understanding of the Constitution. For the early period, the presumption should be that they can. Social policy biases might explain why a particular understanding of the language was more attractive. But personal convictions and ulterior motives need not undermine the rigor of the decisions. Social or political movements may indeed create a new context that will dictate an alteration in constitutional construction, but so can prior legal determinations that create a different dialectic within the law itself. It should not be a matter of dogma that changes are solely legal; neither should it be dogma that legal changes are purely social. Only a foolhardy historian would

18. See Lawrence M. Friedman, *A History of American Law* (New York, 1973) 10 ('This book treats American law, then, not as a kingdom unto itself, not as a set of rules and concepts, not as a province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society. This is the theme of every chapter and verse.') This extreme view, increasingly characteristic of American legal history, contrasts sharply with English legal history. See S.F.C. Milsom, *Historical Foundations of the Common Law* (Toronto, 2nd ed., 1981); Robert C. Palmer, 'The Feudal Framework of English Law', 79 *Michigan Law Review* 1130; Robert C. Palmer, *The County Courts of Medieval England, 1150-1350*, (Princeton, 1982) 174-262.

19. Robert C. Palmer, *The Whilton Dispute, 1264-1380: A Social-Legal Study of Dispute Settlement in Medieval England* (Princeton, 1984) 3-5, 210-20.

maintain that politics played no role in judicial decisions; it should seem similarly foolhardy to assume that doctrine played no role.

The historiography of the federal common law of crime presents just such a problem. The commentators on the subject are learned; they are also dedicated to searching out primary sources.²⁰ The defect is neither in scholarly attainment nor dedication. Absorption with extensive research has led to neglect of intensive documentary analysis and scant consideration of textual constitutional justification for early constitutional decisions. In a different way, the problem is even more simple and rests in the assumption that legal opinions are easily understood. The assumption, once stated, would always be rejected. But for a lawyer whose stock in trade is legal analysis or for an historian of the law who consumes his life in reading cases, mastery of the idiom produces an easy confidence in interpreting the individual case. That confidence can produce myopia as well as breadth, carelessness as well as originality.

This article is not an extensive study, but an intensive study that examines the evidence for an early federal common law of crime and reconstructs the constitutional basis of the early statutes and cases. The standard accounts of the subject underlie much of my understanding of the cases and have proven immensely helpful, but they remain deficient. The drafting of the Judiciary Act of 1789²¹ is normally taken to indicate that the first Congress believed that there was a federal common law of crime.²² Since seditious libel is a common law crime²³ and the First Congress likewise drafted the first amendment,²⁴ the implications of that historical belief would affect speech and press rights.²⁵ But the Judiciary Act demonstrates no such belief. Both the drafting of the Act and the accompanying congressional debate indicate that Congress mandated the federal courts jurisdiction over offenses under the law of nations without any congressional authorization.²⁶ This view coincides with a strict construction of the Constitution;²⁷ Congress directly

20. See Stephen B. Presser, 'Tale of Two Judges', *supra* note 12; Stewart Jay, 'Origins of Federal Common Law', *supra* note 12; and Julius Goebel, Jr., *History of the Supreme Court of the United States: Volume 1, Antecedents and Beginnings to 1801* (New York, 1971) 625-33 [hereinafter: Julius Goebel, Jr., *Hist. S.C.*].

21. Act of Sept. 24, 1789, ch. 20, 1 *United States Statutes at Large* 73-93 [hereinafter: *Stats*].

22. See *supra* note 12.

23. Leonard Levy, *Emergence of a Free Press*, *supra* note 12 at 17-18.

24. U.S. Const. Amend 1.

25. Levy, 'On the Origins of the Free Press Clause', *supra* note 12; David Anderson, 'The Origins of the Press Clause', 30 *University of California at Los Angeles Law Review* 455; William T. Mayton, 'Seditious Libel and the Lost Guarantee of a Freedom of Expression', 84 *Columbia Law Review* 91.

26. See text at notes 49-62 *infra*.

27. See text at notes 62-65 *infra*.

mandated state, not federal, common law.²⁸ The first Congress did not create, condone, or assume a federal common law of crime.

Like Congress, the federal courts did not assume the existence of a federal common law of crime. They did not hesitate to punish offenses against the law of nations not yet defined by Congress. In such matters, however, they derived jurisdiction from the Constitution and from statute; and the law they applied was state, not federal, common law.²⁹ Moreover, the federal judiciary was sensitive to the problem of judicial legislation and referred reflexively to state law—state constitutions and cases—in line with a strict understanding of the rules of decision clause of the Judiciary Act.³⁰ Only after Jay's term as chief justice did the problem of a federal common law of crime properly surface. And only with Marshall was the rules of decision clause narrowed to apply only in civil suits.³¹

The claim that there was a federal common law of crime, when it did arise, did not derive from the assumptions of 1789. Two cases altered the judiciary's approach to federal jurisdiction. *Wiscart v. Dauchy*³² made derivation of any jurisdiction for federal circuit or district courts from the Constitution suspect.³³ *Worrall*³⁴ questioned the advisability of relying on state law, focusing on the consequent inconsistency in federal court practice.³⁵ Given those two decisions, the judiciary could choose either to follow a properly federal common law or else insist on federal statutes to exercise those jurisdictions in which they had formerly relied on state law. They chose to rely on federal statutes, so that the propriety of a federal common law of crime, while not yet a dead-letter, was certainly dubious prior to *United States v. Hudson and Goodwin*.³⁶

The early history of Congress and of the Judiciary provide no basis for a federal common law of crime and thus no support for vast federal implied powers that negate the notion of a limited federal government. Congress dealt seriously with its constitutional mandate and was considerate of the demands of federalism. Federal courts accepted and worked under the mandates of the Judiciary Act and of the Constitution. The argument concerning the federal common law of crime was the result of new problems presented and old approaches ruled out.

The resolution was not in favor of common law, but rather an insistence

28. See text at notes 187-93 *infra*.

29. See text at notes 170-86, 204-215 *infra*.

30. Act of Sept. 24, 1789, ch. 20, §34; 1 *Stats.* 73, 93. See text at notes 187-200 *infra*.

31. See text at note 188 *infra*.

32. 3 U.S. (3 Dall.) 321 (1796).

33. See text at notes 253-67 *infra*.

34. *United States v. Worrall*, 29 F. Cas. 774.

35. See text at notes 317-18 *infra*.

36. 11 U.S. (7 Cranch) 32 (1812).

on statutory authority. The emphasis on statutes explains the passage of the Sedition Act,³⁷ itself unconstitutional:³⁸ there was agreement that a federal common law was improper. But that insistence on statutes, while perhaps jurisprudentially more satisfying, was not more constitutionally mandated than the early reliance on state common law.

II. The Judiciary Act of 1789

The Judiciary Act of 1789 established the federal court system. Since it was the work of the First Congress, the Act, together with the congressional debate surrounding its adoption, are the best post-ratification sources for original intent relative to a federal common law of crime. Neither source provides any evidence that Congress believed there was a federal common law of crime. The evidence does indicate a constitutionally justifiable grant over crimes under the law of nations not previously defined by statute. That jurisdiction, however, is not equivalent to the assumption of a federal common law of crime.

Sections 9 and 11 of the act are most relevant to common law criminal jurisdiction; they provide for the jurisdiction of the federal district and circuit courts. Section 9 states that 'the district courts shall have, exclusively of the several States, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas'.³⁹ Section 11 similarly gave circuit courts authority over crimes and offenses 'cognizable under the authority of the United States'.⁴⁰

The working draft differs from the Judiciary Act in the crimes and offenses subject to prosecution in the federal courts.⁴¹ The draft gave the federal courts a more limited jurisdiction. There, matters cognizable under the authority of the United States had also to have been defined by law. The appropriate portions of the draft read 'cognizable under the authority of the United States and defined by the laws of the same'.⁴² The limiting clause was removed during the process of legislative revision.

This alteration is indicative of intention, but such an historical deduction is dangerous. Warren asserted that the only reasonable deduction was that Congress disagreed with the original drafters and fully intended for the district and circuit courts 'to take jurisdiction over common law crimes'.⁴³

37. Act of July 14, 1798, ch. 74, 1 *Stats.* 596.

38. David Anderson, 'The Origins of the Press Clause', *supra* note 25 at 521-23.

39. Act of Sept. 24, 1789, ch. 20, §§9 & 11, 1 *Stats.* 73, 76-77, 78-79.

40. *Ibid.*

41. Charles Warren, 'New Light', *supra* note 12 at 49-51.

42. *Ibid.* at 73, 77.

43. *Ibid.* at 51, 73.

He assumed that intention to have included crimes both at common law and under the law of nations.⁴⁴ Bridwell and Whitten, although willing to challenge Warren's other deductions from the draft bill,⁴⁵ agree that Congress intended to give the courts jurisdiction over common law crimes and admiralty.⁴⁶ Goebel took an opposing position, supposing that Congress eliminated the limiting clause as redundant, since there was a bill⁴⁷ in progress to define crimes against the United States.⁴⁸ Nevertheless, the omission of the clause most easily relates to a jurisdictional grant of crimes not defined by Congress.

The conclusions drawn from the omission of the limiting clause in §9 and §11, however, are overbroad. The draft bill and the Judiciary Act were not drawn in a vacuum. The language certainly mandates a broad grant of undefined substantive law. One cannot conclude that Congress granted jurisdiction over common law crimes along with judicial authority in the law of nations.

The clause omitted in the final version of the act contained constitutional language. The Constitution gave Congress the power '[t]o define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations'.⁴⁹ This clause is the only constitutional power to 'define' and the only place at which the Constitution mentions 'offenses'. The Constitution, for instance, delegates to Congress the power '[t]o exercise exclusive Legislation in all Cases whatsoever' for the seat of the government,⁵⁰ '[t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies',⁵¹ and to 'make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States'.⁵² But Article I, §8, cl.10 is the only power 'to define'.

The congressional committee probably consulted the Constitution in

44. Ibid. at 73, 77.

45. Randall Bridwell and Ralph Whitten, *The Constitution and the Common Law*, supra note 12 at 38.

46. Ibid. at 38.

47. See Act of April 15, 1790, ch. 9, 1 *Stats.* 112-19.

48. Julius Goebel, Jr. *Hist. S.C.*, supra note 20 at 496. Presser points out that the meaning of the word 'laws' in §34 of the Judiciary Act included statutory and common law and that the word 'laws' in the limiting clauses in the draft of §9 and §11 could logically carry the same meaning (although it need not), so that the draft bill itself might have carried the implication that there was a federal common law. Stephen B. Presser, 'Tale of Two Judges', supra note 12 at note 170. That hypothesis is unlikely, primarily because the limiting clause, referring to defining laws, seems more readily to refer to statutes. As Presser's hypothetical language seems to indicate, there is no reason why the word 'laws' would be used consistently in the Judiciary Act.

49. U.S. Const. Art. I, §8, cl. 10.

50. U.S. Const. Art. I, §8, cl. 17.

51. U.S. Const. Art. I, §8, cl. 4.

52. U.S. Const. Art. IV, §3, cl. 2.

drawing up the Judiciary Act. The First Congress in other matters felt bound by Constitutional language.⁵³ The clause ‘and defined by the Laws of the [United States]’ most easily relates to the similar constitutional provision. The wording of the clause in the draft bill suggests that the committee intended to exert its definitional power over piracy and the law of nations pursuant to Art. I §8, cl. 10. Its omission should perhaps indicate nothing further.

The omission of the limiting clause could reasonably relate only to piracy and the law of nations. Defining all offenses against the law of nations would have been imprudent. The First Congress had to provide for duties on imports (with their foreign policy implications) and for tonnage,⁵⁴ establishment of executive branch departments,⁵⁵ the collection of revenue and the sale of territorial lands,⁵⁶ compensation for governmental officials, including the president, the justices, and themselves,⁵⁷ and Indian treaties.⁵⁸ They also had to debate the location of the permanent seat of government,⁵⁹ and submit the Bill of Rights to the states.⁶⁰ That was a substantial burden, even without the establishment of the judiciary and its powers. The Senate did provide for various offenses against the United States, including piracy and those infractions of the law of nations incurred by offering violence to public ministers.⁶¹ While the definition of piracy was not onerous, a

53. Congress carefully debated the demands of constitutional language in establishing the executive department as a whole and the Department of Foreign Affairs. 1 *Annals* 368-83, 455-585. Moreover, proper constitutional construction was debated. *Ibid.* at 461, 467, 473, 486, 503, 514, 536, 573-74, 829. In the consideration of the Judiciary Act, the role of the state courts in enforcing the Constitution was the occasion for construing the Constitution. *Ibid.* at 813-18.

54. 1 *Annals* 102-21, 123-42, 144-70, 173-231, 234-47, 251-65, 271-318, 324-28, 330-66, 409-11, 416, 454-55, 585-91, 608-10, 615-19. (Approximately thirty-three working days.)

55. *Ibid.* at 368-97, 455-585, 590-608, 611-15, 619, 666-69. (Approximately fifteen working days.)

56. *Ibid.* at 367-68, 411-24, 450-53, 619-32, 665-66. (Approximately twenty-one working days.)

57. *Ibid.* at 232-3, 632-37, 643-58, 675-92, 785-86, 899-903. (Approximately twelve working days.)

58. *Ibid.* at 687-703, 763-66. (Approximately four working days.)

59. *Ibid.* at 786-92, 835-87, 892, 895-98, 905-12, 920-27. (Approximately ten working days.)

60. *Ibid.* at 248-51, 424-50, 660-65, 703-63, 766-78. (Approximately eleven working days.) Miscellaneous matters, such as consideration of amendments to several different bills, establishment of procedure, and various minor bills consumed approximately another 28 days.

61. *Ibid.* at 834. The bill finally became law in the second session of the First Congress. Act of April 30, 1790, ch. 9, 1 *Stats.* 112-19. In that act, §§25-28 concern matters under the law of nations, but the provisions speak about the law of nations as already subsisting, citing merely various violations against that law. Legislation likewise referred to the law of nations as a guide. Act of Sept. 24, 1789, ch. 20, §13, 1 *Stats.* at 80 (‘And shall have exclusively all such jurisdiction of suits or proceedings against

definition of all offenses against the law of nations would have been very time-consuming.

Allowing the judiciary to punish offenses against the law of nations without prior congressional definition was congruent with constitutional original intent.⁶² The different phrasing of Article I, §8, cl. 10,⁶³ indicated

ambassadors . . . as a court of law can have or exercise consistently with the law of nations.' Act of April 30, 1790, ch. 9, §28, 1 *Stats.* at 118 ('That if any person shall violate any safe-conduct or passport . . . or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister . . .') Act. of March 3, 1819, §5, 3 *Stats.* 513. See also *United States v. Howard*, 26 F. Cas. 390 (C.C.D. Pa. 1818)(No. 15,404); *United States v. Chapels*, 25 F. Cas. 399 (C.C.D. Va. 1819)(No. 14,782).

62. A Pennsylvania district attorney in 1806 argued this view, saying: 'The civil law being considered, therefore, as the law of the admiralty, remains under the general delegation of judicial power to the courts of the United States, unless it is expressly modified by statute'. *United States v. McGill*, 26 F. Cas. 1088, 1089 (C.C.D. Pa. 1806)(No. 15,676). Justice Washington followed on with a comment that may have wider implications but was properly concerned only with admiralty and offenses committed on the high seas.

The judicial act gives jurisdiction to the circuit court, of 'all crimes and offences, cognizable under the authority of the United States' . . . There are, undoubtedly, in my opinion, many crimes and offences against the authority of the United States, which have not been specially defined by law; for, I have often decided, that the federal courts have a common law jurisdiction [note: not necessarily a *complete* jurisdiction] in criminal cases; and in order to ascertain the authority of the United States, independent of acts of congress, against which crimes may be committed, we have been properly referred to the constitutional provision, that 'the judicial power shall extend to all cases of admiralty and maritime jurisdiction'. But still the question recurs, is this a case of admiralty and maritime jurisdiction, within the meaning of the constitution? The words of the constitution must be taken to refer to the admiralty and maritime jurisdiction of England . . . but no case, no authority, has been produced to show, that in England such a prosecution would be sustained . . . as a cause of admiralty and maritime jurisdiction . . . Upon the whole, therefore, I am of opinion that the present is a case omitted in the law, and that the indictment cannot be sustained. It is some relief to my mind, however, that I have no doubt of the power of congress to provide for such a case. It is true, that it would be inconsistent with common law notions to call it murder; but congress, exercising the constitutional power to define felonies on the high seas, may certainly provide, that a mortal stroke on the high seas, wherever the death may happen, shall be adjudged a felony.

Ibid. at 1090. Madison, writing during the ratification process of the Constitution, thought that the definition of piracies 'might perhaps without inconveniency, be left to the law of nations; though a legislative definition of them, is found in most municipal codes. A definition of felonies on the high seas is evidently requisite.' *The Federalist Papers by Alexander Hamilton, James Madison and John Jay* No. 42 (New York, 1982). Madison's mild concern here related to felonies, only one portion of the Article I §8, cl. 10 trilogy of piracies, felonies and offenses against the Law of Nations. See also *United States v. The La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822)(No. 15,551). See note 63 *infra*.

63. See text at notes 28-31 *supra*. Marshall's opinion was that the definitional power in regard to piracy did not concern the law of nations. He argued that there were two kinds of piracy. Piracy under the law of nations could neither be increased nor diminished by

that the Constitutional Convention had not considered the federal courts limited to operation by virtue of statutes.⁶⁴ The power to define was the power to adjust, a power properly exercised only occasionally and not always in advance of judicial action. The courts were possessed of admiralty jurisdiction, but Congress could define in its own way the various crimes if it felt the courts going awry. Apart from the wording, the First Congress was sensitive not only to federalism but also to separation of powers concerns.⁶⁵

an individual nation. But a nation could by legislative definition establish its own law of piracy. This latter kind of piracy was, in his opinion, the subject of Article I, §8, cl. 10. '[T]his clause of the Constitution cannot be considered, as affecting acts which are piracy under the law of nations.' 10 *Annals* 607. See also *ibid.* at 599. Marshall at this point was convinced of the constitutionality of the sedition laws. He reasoned that 'cases arising under the Constitution' must mean cases arising under the 'common or unwritten law', which protected all governmental officials from libel. Since the judicial power extended to that subject, he reasoned, Congress had the power to legislate to give effect to that power. John Marshall, *Address of the Minority in the Virginia Legislature to the people of that state, containing a vindication of the constitutionality of the Alien and Sedition laws* (1799) 12. The inference from a court jurisdiction to a congressional power is of course flawed. He also argued that the presence of the first amendment indicated such a governmental power (*ibid.*), that punishing licentious publications was not a restriction of the freedom of the press (*ibid.* at 13), and that 'the will of the majority must prevail, or the republican principle is abandoned, and the nation is destroyed'. *Ibid.* at 14. His reasoning on piracy is more respectable than his reasoning on the first amendment.

64. After several alterations to federal court jurisdiction, the provision was altered to 'that the jurisdiction shall extend to all cases arising under the national laws; and to such other questions as may involve the national peace and harmony'. Madison, *Journal*, *supra* note 3 at 79. The dichotomy there between cases arising under national laws and cases involving national peace and harmony indicate a non-statutory base for the latter. That provision was then altered, not affecting that dichotomy: 'Resolved, That the jurisdiction of the National Judiciary shall extend to cases arising under laws passed by the General Legislature; and to such other questions as involve the national peace and harmony.' *Ibid.* at 448. The report of the committee of detail, relating to the matters that became Article I, §8, cl. 10, suggested: 'To declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations.' *Ibid.* at 454. It is at least interesting that counterfeiting was here included with the law of nations provisions and likewise formed one of the early problems. The final form can be seen evolving later on. *Ibid.* at 705, 710, 759, 753.
65. For federalism, the most sensitive area was the role that the states would have in enforcing the U.S. Constitution. 1 *Annals* 215, 797-833. In questions of citizenship, state law was considered decisive. *Ibid.* at 404-08. Perhaps the most striking example of the sensitivity of the First Congress to the rights of states was the refusal of the Senate to concur in the proposed amendment to restrict states in the areas of religion, speech and press, and trial practice originally proposed by Madison. *Ibid.* at 435. The Judiciary Act as well as the succeeding provision for regulating the process of the federal courts mandated a certain adherence to state law and practice. Act of Sept. 24, 1789, ch. 20, §§29 & 34, 1 *Stats.* 73, 88, 92; Act of Sept. 29, 1789, ch. 21, §2, *Ibid.* at 93-94. See also Charles Warren, 'New Light', *supra* note 6, 53-63; Julius Goebel, Jr., *Hist. S.C.*, *supra* note 27 at 458, 471, 473. See *United States v. Coit*, 25 F. Cas. 489 (D.C.D. N.Y. 1812)(No. 14,829) ('He shewed, not only from the acts of congress particularly applicable to this subject, but from a view of the whole judiciary system of

Congress was thus reluctant to intrude on other branches of government or to shirk its own responsibilities. Congress did not debate the propriety of delegating a legislative power to the judicial branch. Such a debate would have been expected when considering the Judiciary Act §9 and §11 had the definitional power been considered a power necessarily exercised in advance of judicial action.

Federal jurisdiction over piracy and the law of nations was the least contentious jurisdiction of the inferior federal courts. Livermore stated that the only reason why inferior federal courts should be established was to enforce the law of nations. Even so he would have preferred the state courts to have functioned as the inferior federal courts.⁶⁶ Smith assumed agreement in Congress to the law of nations jurisdiction: 'But to what objects do the district courts extend? To admiralty causes and trials for piracy committed on the high seas. Gentlemen have conceded that the district courts shall have jurisdiction of these cases—to offences against the United States.'⁶⁷ Smith then extended such offenses to breaches of revenue laws and offenses committed on the high seas.⁶⁸ Congressman Jackson, in arguing that state courts could function as federal admiralty courts as they had prior to the Constitution by congressional mandate, did not dispute the necessity for having some kind of inferior court for such matters.⁶⁹ Thus, although Congress debated institutional structure, they agreed on the federal character of the law of nations.

Congress was unconcerned about federal court application of admiralty and maritime law not congressionally defined.⁷⁰ Immediately after the

the United States, that it was the intention of congress to conform the proceedings of the United States courts as nearly as possible to those of individual states respectively.' Ibid. at 490.) For separation of powers, see note 53 supra.

66. 1 *Annals*, 797, 821. Livermore's primary objection was to the establishment of federal inferior courts with jurisdiction other than admiralty/maritime/law-of-nations matters. There is a certain amount of ambiguity in Livermore's speech that is clarified by Smith's succeeding speech. Ibid. at 798, 800.

67. Ibid. at 799. Smith summarized Congress's position in a similar fashion:

But some gentlemen are of opinion that the district court should be altogether confined to admiralty causes; while others deem it expedient that it should be entrusted with a more enlarged jurisdiction; and should, in addition to admiralty causes, take cognizance of all causes of seizure on land, all breaches of impost laws, of offences committed on the high seas, and causes to which foreigners or citizens of other States are parties. The committee are now to decide between these two opinions.

68. Ibid. at 799-800.

69. Ibid. at 831.

70. The concern about prior congressional definition can be considered either a federalism or a separation of powers problem. Horwitz has noted the lack in the early days of a separation of powers argument against the common law of crimes. He found the federalism argument to be without foundation, citing James Sullivan. Horwitz's paraphrase of Sullivan is worth examining: 'James Sullivan of Massachusetts understood that the question of common law jurisdiction involved no special constitutional

passage of the Judiciary Act, Congress passed 'An Act to regulate Processes in the Courts of the United States', section 2 of which specified that 'the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the civil law'.⁷¹ To the extent that form dictates substance or result, the act displayed no reluctance to have the federal courts function like other admiralty courts. Furthermore, in 1792 the second Congress modified the previous act to allow for discretionary modifications by the inferior federal courts or regulations provided by the Supreme Court.⁷² Both the First and Second Congress were content to allow the federal courts to work in admiralty law without prior definition by Congress.

While Congress had no qualms about the law of nations, the same was not true in regard to the common law. Congressman Baldwin remarked in the second session of the First Congress that, although the several states had adopted the common law, 'we have not adopted the common law, and therefore are free from its restraints'.⁷³ He concluded that Congress was not affected by any common law rule excluding aliens from holding real estate.⁷⁴ Baldwin's remark about the common law is not at odds with the views of others in the First Congress.

Congressman Ames, however, made a remark about the common law that might easily be misconstrued:

The branches of the judicial power of the United States are the admiralty jurisdiction, the criminal jurisdiction, cognizance of certain common law cases, and of such as may be given by the statutes of Congress.⁷⁵

'Certain common law cases' nevertheless, in terms denies a *general* common law jurisdiction. Article III powers necessitate handling certain common law matters under diversity jurisdiction.⁷⁶ Ames perhaps included

difficulties, for all that it required was that federal common law jurisdiction be limited to those substantive crimes over which Congress had legislative power.' Sullivan made that statement in 1801. Morton J. Horwitz, *Transformation of American Law*, supra note 12 at 10. Sullivan's thought, however, was hardly that innocuous. In the same year he wrote that the federal judiciary properly had criminal jurisdiction over anything detrimental to the aims set forth in the Preface of the United States Constitution without any statutory definition. James Sullivan, *The History of Land Titles in Massachusetts* (New York, 1972, reprint of 1801 ed.) 344. Regardless of the thrust of Sullivan's thought, that portion of Horwitz's analysis derives from writers in and after the year 1800 and thus not in the decisive first five years of the federal judiciary.

71. Act of Sept. 29, 1789, ch. 21, §2, 1 *Stats.* 93-94.

72. Act of May 8, 1792, ch. 36, §2, 1 *Stats.* 276.

73. 1 *Annals* 1071. The debate at that point concerned whether or not an alien could hold real estate situated in the United States.

74. *Ibid.*

75. *Ibid.* at 807.

76. U.S. Const. Art. III, §2, cl. 1. Article III jurisdiction in diversity envisaged the application of state law. Little thought had yet been given to the differences among the common laws of the various states. It is thus wrong to say precisely that Congress

foreign consuls as proper subjects of common law adjudication in federal courts.⁷⁷ But neither Ames nor any other congressman said anything indicating a belief in a general federal common law.

The First Congress assumed the lack of a federal common law. James Madison, considering a contested election, argued that Congress should be guided by the laws and constitution of the relevant state so far as they would help, and only thereafter have recourse to general principles.⁷⁸ Richard Henry Lee agreed.⁷⁹ The debate on the Judiciary Act was extended by a controversy over whether the state courts would serve as adequate inferior federal courts.⁸⁰ Section 34 of the Judiciary Act directed the courts to follow state law in trials at common law except where otherwise dictated by the Constitution, treaties, or federal statutes.⁸¹ And in the immediately succeeding statute, the forms of writs and executions, with minor necessary exceptions, were directed to be made in suits at common law 'in each state respectively as are now used or allowed in the supreme courts of the same'.⁸² Just as reference to admiralty law or the law of nations seemed sufficiently explicit to avoid danger in the courts, so also did the direction to the federal courts to follow state law. No one in the First Congress said anything that would even contemplate the existence of a general federal common law.

A federal common law of crime is even less likely than a federal common law in civil matters. The immediate implication of a federal common law of crime would be seditious libel prosecutions. Leonard Levy in 1960 argued that first amendment freedom of speech and press was congruent with Blackstone's definition:⁸³ freedom from prior re-

mandated that federal courts apply state common law regardless of the inconsistency that would entail. But the accommodations continually made for the states, the legislative history of §34 of the Judiciary Act, and early practice indicate that application of state common law was the closest response to congressional intent possible. Charles Warren, 'New Light', *supra* note 12 at 86-88.

77. U.S. Const. Art. III, §2, cl. 1; text at notes 228-35 *infra*.

78.

I take it to be a clear point, that we are to be guided, in our decision, by the laws and constitution of South Carolina, so far as they can guide us; and where the laws do not expressly guide us, we must be guided by principles of a general nature, so far as they are applicable to the present case.

1 *Annals* 404.

79. 'If the laws of that State recognised him as [a citizen], the question was determined, because this House could not dispute a fact of that kind.' *Ibid.* at 403.

80. See text *supra* at notes 66-69 *supra*.

81. Act of Sept. 24, 1789, §34, 1 *Stats.* 92.

82. Act of Sept. 29, 1789, §2, 1 *Stats.* 94.

83.

The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.

straint.⁸⁴ Prosecutions for abuse of the freedom would thus have been acceptable under original intent. He has only altered his opinion marginally since then.⁸⁵ Both David Anderson⁸⁶ and William Mayton,⁸⁷ in different ways, have argued for a broader definition of the original intent that encompasses also the prohibition of subsequent punishment. Anderson's and Mayton's conclusions are nearer the truth in that federalism concerns made such prosecutions very worrisome.⁸⁸

Two incidents in the First Congress demonstrate congressional opposition to seditious libel prosecutions; they are indicative of the congressional stance on a federal common law of crime. The first incident was Congressman Jackson's opposition to a federal bill of rights. As a Georgian, he was concerned with federal assistance against the Indians.⁸⁹ He favored a strong federal government. Jackson spoke immediately after Madison submitted

William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford, 1765-69) iv, 151.

84. Leonard Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge, Mass., 1960) 247-48.
85. Leonard Levy, *Emergence of a Free Press*, supra note 12 at 272-76, 281. In his revision, Levy altered his analysis of the Senate's revisions to the extent that he thinks now that the Senate did not want to limit the meaning of freedom of the press to its common law meaning. Ibid. at 262; Leonard Levy, 'On the Origins of the Free Press Clause', supra note 6 at 203n. Levy argues nevertheless that the meaning of 'freedom of the press' is Blackstonian, and that only the phrase 'Congress shall make no law' gives the first amendment a wider meaning. That wider meaning, however, is only a restriction against Congress; the judiciary would be free to operate under the common law of crime to prosecute seditious libellers. Levy, of course, would prefer that the judiciary leave that past behind. See David M. Rabban, 'The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History,' 37 *Stanford Law Review* 795 (1985).
86. David Anderson, 'The Origins of the Press Clause', supra note 25. Anderson's thesis leads to the conclusion that the press is by original intent a fourth branch of the governmental structure, such that it can have appendant rights. The validity of his argument depends on an identity of meaning between state and federal provisions for freedom of the press.
87. William T. Mayton, 'Seditious Libel and the Lost Guarantee of a Freedom of Expression', 84 *Columbia Law Review* 91. Mayton's thesis is that the first amendment was superfluous and damaging, since the Treason clause was adequate for the purpose of protecting expression. His argument rests on the dubious proposition that the protection against seditious libel, a misdemeanor, can be derived from the Treason clause, which concerns a felony. Levy has attacked that article, justifiably, but without recognizing the substantial contribution it made. Leonard Levy, 'The Legacy Reexamined', 37 *Stanford Law Review* 767 (1985).
88. See Robert C. Palmer, 'Liberties,' supra note 1.
89. Merrill Jensen, ed., *The Documentary History of the Ratification of the Constitution*, 14 vol. (Madison, 1978) iii, 287-89. Georgia's cooperation with the federal government did not last much longer than the first session of the First Congress. Ibid. at 285-90.

his proposed amendments.⁹⁰ Nevertheless, Levy, Anderson, and Mayton do not discuss his speech.⁹¹

Jackson argued against the proposed amendments. Since liberty of the press was not being threatened, he said, it needed no further protection. He noted that the press had attacked a congressman recently, but that Congress had not prosecuted the paper for the attack, even though the Constitution would have permitted it.⁹² The constitutional provision he referred to was the speech or debate clause,⁹³ which prior to the first amendment would have permitted prosecutions for breach of privilege in the nature of seditious libel, but only for libels against Congress, not the executive.⁹⁴ Jackson's

90. Madison submitted his proposed amendments on 8 June 1789. 1 *Annals* 431-442. Jackson, firm in his opposition to consuming time in making amendments to an as yet unproved Constitution, immediately opposed them. *Ibid.* at 442-44.

91. Leonard Levy, *Legacy of Suppression*, supra note 84; Leonard Levy, *Emergence of a Free Press*, supra note 12; Leonard Levy, 'On the Origins of Free Press Clause', supra note 12; David Anderson, 'The Origins of the Press Clause', supra note 25 [despite a passing mention in a footnote, p. 522]; William T. Mayton, 'Seditious Libel and the Lost Guarantee of a Freedom of Expression', supra note 25. The lack of discussion is even more perplexing in that the speech is also included in the standard collection of documents relating to the origins of the Bill of Rights. Bernard Schwartz, *The Bill of Rights: A Documentary History*, 2 vols. (New York, 1971) ii, 1034-36. Konvitz quoted a large portion of Jackson's speech, stopping before Jackson's reference to the Constitution, but did not analyze it. Milton R. Konvitz, *Fundamental Liberties of a Free People: Religion, Speech, Press, Assembly* (Westport, 1957) 352. Levy, at least, seems to assume that there is little left in the legislative history, since he relies heavily on the fact that no one in the last twenty-five years has found more than he had. Leonard Levy, 'On the Origins of the Free Press Clause,' supra note 12 at 203n. The appropriate place for him to have analyzed Jackson's speech omits the speech entirely. Leonard Levy, *Emergence of a Free Press*, supra note 12 at 258-60.

92. The gentleman endeavors to secure the liberty of the press; pray how is this in danger? There is no power given to Congress to regulate this subject as they can commerce, or peace, or war. Has any transaction taken place to make us suppose such an amendment necessary? An honorable gentleman, a member of this House, has been attacked in the public newspapers on account of sentiments delivered on this floor. Have Congress taken any notice of it? Have they ordered the writer before them, even for a breach of privilege, although the Constitution provides that a member shall not be questioned in any place for any speech or debate in the House? No, these things are offered to the public view, and held up to the inspection of the world . . . Where, then, is the necessity of taking measures to secure what neither is nor can be in danger?

1 *Annals* 442-43.

The regulation Jackson mentioned as outside congressional power would have been legislative action; congressional enforcement of the speech and debate clause would have been by breach of privilege prosecutions.

93. U.S. Const. Art. I §6, cl. 1. ' . . . and for any Speech or Debate in either House, they shall not be questioned in any other Place.'

94. In state constitutions somewhat similar language appears that is compatible with Jackson's construction of U.S. Const. Art I, §6, cl. 1. The Massachusetts Constitution of 1780, Art. 21 provided in its Declaration of Rights that:

argument supposed that liberty of the press required more than the absence of prior restraint: that subsequent punishment would likewise infringe the liberty of the press. Liberty of the press was clearly one of the major demands for amendment made during the ratification debates.⁹⁵ Jackson's unchallenged statements about liberty of the press are one indication of a broad understanding of freedom of the press in the First Congress.

A second incident similarly indicates a broad understanding of freedom of the press and a presumption against a common law of crime. Toward the end of the first session of the First Congress, Congressman Burke attempted to censure the press. He alleged that those who had been allowed to sit 'at the very foot of the Speaker's chair' to record the debate in the House had misrepresented, distorted, and partially suppressed whole arguments, thus reflecting 'upon the House a ridicule and absurdity highly injurious to its privileges and dignity'.⁹⁶ The resolution further noted that such reporting infringed freedom of debate, referring to the speech or debate clause.⁹⁷ He brought his resolution forward after the House had finished with the Bill of Rights, but before the states had ratified it.⁹⁸ In the succeeding short debate

The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

William Swindler, ed., *Sources and Documents of United States Constitutions*, 10 vols. (Dobbs Ferry, 1973-79) v, 95. The New Hampshire Constitution of 1784, Art. 30 is almost identical to that of Massachusetts, except that it omitted the word 'accusation'. Ibid. at ix, 347. Vermont, not confederated yet with the other states, adopted the Massachusetts provision verbatim, modifying the language only to accommodate its unicameral legislature. The provision appears in the 1786 Vermont Constitution, ch. I, Art. 16. Ibid. at ix, 499. The Georgia Constitution of 1789, Art. I, §14 provided somewhat different language: 'Nor shall any member be liable to answer for anything spoken in debate in either house, in any court or place whatsoever.' Ibid. at ii, 453. Georgia, it should be remembered, was Jackson's home state. No other state had an independent speech and debate clause; the Pennsylvania provision of 1790 Art. I, §17 ('questioned in any other place') was probably borrowed from the federal constitution. It seems at least arguable that inclusion of the word 'accusation' and the specification of 'any other place' in addition to courts would legitimate breach of privilege prosecutions. In states, the rationale would be clear. The primary liberty was a republican form of government, for which the representatives had to be free to express themselves. That same consideration explains why the provision appeared in declarations of rights, instead of in the structural sections of state constitutions. For a complete discussion of these problems, see Robert C. Palmer, 'Liberties', *supra* note 1.

95. David Anderson, 'The Origins of the Press Clause', *supra* note 25 at 467-75.

96. 1 *Annals* 917.

97. Ibid.; U.S. Const. Art. I, §6, cl. 1.

98. The House completed work on the Bill of Rights on September 24, two days before the question of the reporting came up. 1 *Annals* 913-14. The Senate did not complete consideration of the amendments until September 25. Ibid. at 87-88. The amendments were not sent to the states until October 2, 1789. Bernard Schwartz, *The Bill of Rights*, *supra* note 91 at ii, 1171.

the two remedies suggested were that the reporters be removed from their position at the Speaker's chair into the gallery, thus to parallel the British system,⁹⁹ or the passage of a motion that debate be reported accurately and impartially.¹⁰⁰ The remedies for the grievance were obviously mild, but were still not acceptable. Congressman Hartley objected to Burke's resolution as an attack on the liberty of the press.¹⁰¹ Lee, Madison, and White spoke against any motion that would approve the reporting of the debates, because the reports would then seem to be official publications and the reporters perhaps subject to congressional action.¹⁰² They preferred that the reporters continue to function with the tacit consent of Congress.¹⁰³ Everyone expressed approval for the dissemination of information; and in short order the debate terminated with the withdrawal of all motions.¹⁰⁴

The issue resurfaced the following session. The reporters had meekly responded to the criticism levelled at them previously by sitting in the gallery.¹⁰⁵ Congressman Page raised the issue, wanting to reassure the reporters that they were welcome and noted the possible repercussions if the House seemed to censure the reporters.¹⁰⁶ Other congressmen supported the reporters, although not wanting to give official sanction to the reporting. No one opposed the reporters resuming their position near the Speaker's chair.¹⁰⁷ Despite the hurt feelings aroused by misrepresentations, the opinion in Congress was that liberty of the press, shaped by federal concerns, dictated freedom both from prior restraint and from subsequent punishment. Even non-penal restraints seemed excessive.

The First Congress could hardly have meant to give the federal courts jurisdiction over the common law of crime. Congressman Baldwin asserted explicitly that the federal government had not adopted the common law.¹⁰⁸ Legislation consistently referred the courts to state statutory and common law, as rules of decision.¹⁰⁹ Moreover, Congress was even sensitive about breach of privilege powers granted by Article I, §6, cl. 1. The omission of

99. 1 *Annals*, 918.

100. *Ibid.* at 919.

101. 'Congressman Hartley wished a decision on the motion. He contemplated the question as involving in it an attack upon the liberty of the press.' *Ibid.*

102. *Ibid.* at 919-20.

103. *Ibid.*

104. *Ibid.* at 920.

105. *Ibid.* at 1059.

106. *Ibid.*

107. *Ibid.* at 1059-61.

108. 1 *Annals* 1071. For Madison's similar view, see his 1787 letter to George Washington reprinted in Joseph H. Smith, *Cases and Materials on the Development of Legal Institutions*, (St. Paul, 1965) 520.

109. See text at notes 81-82 *supra*.

the limiting clause in §9 and §11 of the Judiciary Act cannot indicate congressional intent to delegate to the courts criminal common law as well as the law of nations. The First Congress did not assume that there was a federal common law of crime.

III. Federal Practice Before Wiscart

The early federal judiciary, like Congress, did not espouse a federal common law of crime. Stephen Presser has often maintained that they did.¹¹⁰ Morton Horwitz presumes that the justices exercised federal common law jurisdiction in criminal matters.¹¹¹ Leonard Levy thought that that was the early understanding¹¹² even before he began to cite Presser as an authority.¹¹³ Stewart Jay only recently has similarly maintained that federal justices presumed a federal common law of crime.¹¹⁴ Early federal cases nevertheless demonstrate a decent regard for original intent. The federal courts willingly applied the law of nations powers delegated to them,¹¹⁵ but showed little inclination to expand that grant of power into a complete acceptance of the common law of crime. Offenses committed against the law of nations presented no special problems. Congress had given the federal courts jurisdiction over offenses against the law of nations without prior definition.¹¹⁶ Even if the justices were unfamiliar with the legislative history of the Judiciary Act, they could conclude as much from the act itself. And those matters mentioned in Article 1, §8 undoubtedly fell under the

110. Stephen B. Presser, *Studies in the History of the United States Courts of the Third Circuit* (Washington, 1982) 26-37; 'A Tale of Two Judges', supra note 12 at 26-109; Stephen B. Presser and Jamil S. Zainaldin, eds., *Law and American History: Cases and Materials* (St. Paul, 1980) 188-207; Stephen B. Presser and Becky Bair Hurley, 'Saving God's Republic: The Jurisprudence of Samuel Chase', 1984 *University of Illinois Law Review* 771, 796-97.

111. Morton J. Horwitz, *The Transformation of American Law, 1780-1860*, supra note 12 at 9-15.

112. Leonard Levy, *Legacy of Suppression*, supra note 84, 236-41. The origins of Levy's advocacy of this view might be found in Justice Frankfurter's concurring opinion in a case concerning mere advocacy of sedition. Frankfurter explained the first amendment by reference to early state prosecutions for seditious libel and state formulations of the speech and press rights. *Dennis v. United States* 341 U.S. 494, 519-23 (1950). Justice Brennan in 1957 reiterated the Frankfurter view of the original intent behind the first amendment in the context of an obscenity case. *Roth v. United States*; *Albert v. State of California*, 354 U.S. 476, 482-84. Levy received encouragement from Frankfurter in the course of his investigations. Leonard Levy, *Legacy of Suppression*, supra note 84 at xiii.

113. Leonard Levy, *Emergence of a Free Press*, supra note 12 at 275n.

114. Stewart Jay, 'Origins of Federal Common Law', supra note 12.

115. See text at notes 54-61 supra.

116. *Ibid.*

cognizance of the authority of the United States. Both piracy and offenses against the law of nations were thus cognizable.

The problem concerns the nature of the federal government. Had the federal and state governments been alike, the federal government would have been a government of inherent authority, capable of acting as required and of receiving or having by nature the common law. The acceptance of such a federal government would lead readily to the importation of an extensive list of crimes developed in a much more aristocratic society, including seditious libel. That result would be a departure from the assumptions on which the federal Constitution was built¹¹⁷ and a violation of the rule established explicitly in the tenth amendment.¹¹⁸ On the other hand, recognition of the federal government as a government of delegated powers allows exercise of all delegated powers to their fullest extent without contravention of original intent. The traditional line of cases cited in favor of the former position actually shows the latter.

A. Jay's Charge to the Grand Jury: 1790

The earliest indication that federal courts would apply the law of nations without specific congressional definition—no indication of a general federal common law—involved Chief Justice Jay in 1790. Jay charged the grand jury for the Eastern Circuit to present offenses against the United States.¹¹⁹ He wanted the grand jurors to consider the law of nations, federal statutes concerning revenue, and misconduct by federal officers. His remarks have been exaggerated to reveal a belief in a general federal common law.¹²⁰

Jay first spoke on the law of nations. He spoke broadly to instruct the jurors.¹²¹

117. William T. Mayton, 'Seditious Libel', *supra* note 25 at 117-19. Mayton asserts here that 'an understanding was reached at the convention and during the ratification process that the national government had no power over speech'. *Ibid.* at 118. The understanding reached was that the federal government ought to have no power over speech, but that as the Constitution stood it might have. Had everyone been content that the Constitution actually allowed no power over speech or press, the amendment would not have been necessary. Mayton does not treat the Article I, §6, cl. 1 problem. See text at notes 92-93 *supra*.

118. U.S. Const. Amend. X.

119. Henry P. Johnston, ed., *The Correspondence and Public Papers of John Jay*, 4 vols. (New York, 1971) iii, 387-95.

120. Presser, 'A Tale of Two Judges', *supra* note 12 at 48-51. This analysis is excerpted in Presser and Zainaldin, *Law and American History*, *supra* note 110 at 188-91.

121. Henry P. Johnston, *Public Papers*, *supra* note 119, at iii, 393. Presser's excerpt in his article omits the first sentence here, which mentions precisely the laws of the United States. Stephen B. Presser, 'A Tale of Two Judges', *supra* note 12 at 48. That omission might affect the analysis. Omitting the passage would be reasonable if 'laws of the United States' were taken to include statutory and common law. If one takes that phrase

The objects of your inquiry are all offences committed against the laws of the United States in this district, or on the high seas, by persons now in the district. You will recollect that the laws of nations make part of the laws of this, and of every other civilized nation. They consist of those rules for regulating the conduct of nations towards each other, which, resulting from right reason, receive their obligation from that principle and from general assent and practice.

Presser concluded that thus 'the jurors were to use their own common sense and their knowledge of world and national history . . . to search for criminal acts'.¹²² Stewart Jay noted that Jay's comments on the law of nations were the assertions that would later constitute 'the centerpiece of nonstatutory prosecutions'.¹²³ Both Presser and Stewart Jay thus consider that Jay gave the jury an unbounded, discretionary authority for indictment.

Jay's charge was much more reasonable. The law of nations was not strictly codified. Blackstone, however, had maintained that it consisted of three subjects: violations of safe-conducts, infringement on the rights of ambassadors, and piracy.¹²⁴ The inclusion of piracy as part of the law of nations was particularly important for Jay's charge, because two of the people to be indicted were arrested on suspicion of piracy.¹²⁵ Moreover, the law of nations had been the subject of sophisticated treatises already, including the treatises of Vattel¹²⁶ and Puffendorf,¹²⁷ both of which were cited by contemporary American lawyers.¹²⁸ Jay's charge hardly released the grand jury into the vast realms of world and national history and common sense.

The alleged pirates were convicted, but there is no report of the argument. Jay did proceed in the case, even though the Act for the Punishment of certain Crimes against the United States, being considered at the time, had not yet passed Congress.¹²⁹ That Jay allowed the conviction, however, indicates his belief in the court's authority under the law of nations. His

to include both statutory law and the Constitution, however, a completely different conclusion results.

122. Stephen B. Presser, 'A Tale of Two Judges', *supra* note 12 at 48.

123. Stewart Jay, 'Origins of Federal Common Law', *supra* note 12 at 1040. He has investigated likewise other justices' charges. Wilson and Iredell included citations to statutes in their charges, although Wilson accepted law of nations powers. Jay, however, presumes that all nonstatutory prosecutions are alike. He does not consider the difference that Article III admiralty powers together with Article I §8, cl. 10 law of nations authority would make.

124. William Blackstone, *Commentaries*, *supra* note 83 at 68.

125. Julius Goebel, Jr., *Hist. S.C.*, *supra* note 20 at 622-23.

126. Emmerich de Vattel, *The Law of Nations, or, Principles of the Law of Nature, applied to the conduct and affairs of Nations and Sovereigns* (Philadelphia, 1817). This volume was a translation of Vattel's posthumous 1773 edition. *Ibid.* at iii.

127. Samuel von Puffendorf, *Of the Law of Nature and Nations* (Oxford, 1703). This was an English translation.

128. *United States v. Henfield*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360) 1117.

129. Julius Goebel, Jr., *Hist. S.C.*, *supra* note 20 at 622.

ideas were probably similar to those used later in *Henfield*,¹³⁰ and irrelevant for a general federal common law.

The second area of concern for the grand jury was federal statutes. Jay thus charged the jury that:

The penal statutes of the United States are few and principally respect the revenue. The right ordering and management of this important business is very essential to the credit, character, and prosperity of our country. On the citizens at large is placed the burthen of providing for public exigencies. Whoever therefore fraudulently withdraws his shoulder from the common burthen necessarily leaves his portion of the weight to be born by the others, and thereby does injustice not only to the government, but to them.¹³¹

Presser asserts that Jay emphasized the shirking, thus expanding the jury's consideration from only the revenue statutes to any offense resulting from an individual shirking his duties.¹³² Jay's comments are again unobjectionable. He referred to the revenue statutes and then exhorted the jury to indict for their contravention. A jury might have needed some exhortation to indict a fellow state citizen for a federal offense: reminding them of the additional burden such offenses put on everyone else was an appropriate exhortation. Moreover, this interpretation of Jay's charge in 1790 corresponds nicely to Jay's charge written in 1793 for the grand jury in Richmond, Virginia.¹³³ There he stated that 'The Constitution, the statutes of Congress, the laws of nations, and treaties constitutionally made compose the laws of the United States'.¹³⁴ He then mentioned the revenue statutes and went on to explain why infractions of the statutes should be presented, explaining the necessity for preserving good public credit.¹³⁵

In both form and substance, Jay was merely doing his duty. Propriety allowed a judge to exhort a grand jury to indict wrongdoers fearlessly, fully, and honestly.¹³⁶ Moreover, Jay's remarks in substance were no more

130. See note 62 *supra*; text at notes 170-93 *infra*. John Marshall, arguing in Congress in 1800, maintained not only that piracy, as part of the law of nations, was necessarily under the admiralty and maritime jurisdiction of Article III, but also that the federal courts could properly have taken cognizance of such cases absent a statutory mandate. 10 *Annals* 614. Marshall perceived the law of nations as having something of an independent standing. *Ibid.* at 607.

131. Henry P. Johnston, *Public Papers*, *supra* note 119 at iii, 394.

132. Stephen B. Presser, 'A Tale of Two Judges', *supra* note 12 at 49.

133. Henry P. Johnston, *Public Papers*, *supra* note 119 at iii, 478-85. A different charge to the same grand jury has survived. 11 F. Cas. 1099, *supra* note 128 at 1099-105. That charge is prefaced to the *Henfield* case. Goebel believed that the latter charge was the one actually delivered to the grand jury. Julius Goebel, Jr., *Hist. S.C.*, *supra* note 20 at 623n. The former charge is here used because the charge as actually delivered reversed the order of consideration, so that Jay, apologizing for the length of his charge, merely mentioned but did not comment on the revenue statutes.

134. Henry P. Johnston, *Public Papers*, *supra* note 119 at iii, 479.

135. *Ibid.* at 479-80.

136. Julius Goebel, Jr., *Hist. S.C.*, *supra* note 20 at 620-21.

offensive than Madison's remarks in the First Congress: 'A man who wounds the honor of his country by a baseness in defrauding the revenue, only exposes his neighbors to further and greater impositions.'¹³⁷ Neither Jay nor Madison need to be construed as exhorting action outside the areas in which the courts had statutory definitions.

The final segment of Jay's charge to the 1790 jury concerned the misdeeds of federal officers. The jurors were to 'direct your attention also to the conduct of the national officers, and let not any corruptions, frauds, extortions or criminal negligences, with which you may find any of them justly chargeable, pass unnoticed'.¹³⁸ Presser asserts that Jay thus allowed the jury to indict for 'virtually any examples of wrongdoing against the government or the public'.¹³⁹ Since this part of the charge obviously concerned only governmental officials, Presser backed away marginally in a later version by bracketing in the comment 'at least as committed by government officials'.¹⁴⁰ But the charge concerned *only* governmental officials. Even the revised commentary stretched to make a point. Jay's charge is no indication of a general federal common law of crime.¹⁴¹ That Presser was unable to find any contemporary criticism of Jay's charge is hardly surprising.¹⁴²

Jay had not referred to statutory authority for prosecutions of official misconduct.¹⁴³ Presser finds in that an indication of a belief in common law authority. But a justice, in the opening exhortation to the grand jury, need not recite statutes: that would be the prosecutor's job.¹⁴⁴ Had there been no statutes under which to prosecute governmental officials, a justice's encouragement to prosecute would be a problem. But some statutes did provide penalties for official misconduct.¹⁴⁵ In regard to the law of nations, of

137. 1 *Annals* 199.

138. Henry P. Johnston, *Public Papers*, *supra* note 119 at iii, 394.

139. Stephen B. Presser, 'A Tale of Two Judges', *supra* note 12 at 49.

140. Stephen B. Presser and Jamil S. Zainaldin, *Law and American History*, *supra* note 110 at 189.

141. Presser goes rather beyond Goebel in evaluating Jay's charge. Goebel merely noted that Jay did not advance any specific argument for law of nations offences. Julius Goebel, Jr., *Hist. S.C.*, *supra* note 20 at 622-23.

142. Stephen B. Presser, 'A Tale of Two Judges', *supra* note 12 at 48n.

143. *Ibid.* at 49.

144. But see Stewart Jay's examination of the practice of other justices. See text at notes 204-15 *infra*.

145. The 'Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States' provided for collectors, naval officers, and surveyors. Act of July 31, 1789, ch. 5, 1 *Stats.* 29. An oath was prescribed, with a forfeiture of \$200 for 'failure herein', the failure being either the failure to take the oath or the failure to perform duties faithfully. *Ibid.* at §8. The collectors were required to enter into a substantial bond, ranging from \$50,000 to \$1,000. Any breach of the conditions entailed forfeiture. *Ibid.*

course, Jay would not have been worried about the lack of a statute.¹⁴⁶ In his charge, it is possible to argue that Jay only performed his proper functions. If it seems that the charge as to officials was somewhat broader than the statutory base, belief in a federal common law of crime is not the necessary deduction. The justices were cognizant of popular concern about federal tyranny. A sermon decrying federal official corruption would serve a political purpose, even if it resulted in indictments that failed for lack of legal authority. However that portion of Jay's charge is to be characterized, it does not coincide with the conclusions of Presser and Stewart Jay. Jay's charge to the grand jury in 1790 is irrelevant to the proposition that early federal justices believed in a federal common law of crimes, except concerning the law of nations.¹⁴⁷

B. Henfield's Trial

In May 1793 Gideon Henfield, an American citizen, acting as prize master on a French ship took possession of a British ship captured on the high seas. He brought the British ship as a prize to Philadelphia.¹⁴⁸ At the time Britain and France were at war. The United States was determined to stay neutral,

at §28. Criminal conviction may have been proof of breach, but may have entailed no further punishment. The various officers were likewise required to set up openly a table of fees and duties, failure to do which resulted in a forfeiture of \$100. *Ibid.* at §29. A demand for excessive fees or other rewards resulted in a forfeiture of \$200, although solely to the use of the party aggrieved. *Ibid.* at §29. Query if such a failure would result in forfeiture of the bond. Such officers who received a bribe or connived at a false entry forfeited not less than \$200 nor more than \$2000 for each offence and entailed disablement from office. *Ibid.* at §35. See also William Blackstone, *Commentaries*, *supra* note 83 at iv, 303-07. The 'Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes' provided similar penalties, but without an informer provision, for making false registry, taking excessive fees, rendering false descriptions of vessels, or mere neglect of duty. Act of Sept. 1, 1789, ch. 11, §34, 1 *Stats.* 55, 64-65. The act that established the Treasury Department prohibited treasury officers from self-interested or conflicting obligations, contravention of which was a high misdemeanor punishable by fine, removal from office, and disablement of office, with informers, if any, receiving half the forfeiture. Act of Sept. 2, 1789, ch. 12, §8, 1 *Stats.* 65, 67.

146. See text at notes 129-30 *supra*.

147. A constitutional construction that allowed prosecution under the law of nations without a statutory base proves nothing about ordinary common law crimes. The doctrine that dictated that jurisdiction could not be exercised without a statute further defining the crime and the penalty began later. See text at notes 276-80 *infra*. The result of that later conclusion was the possibility of a grant of jurisdiction that could not be exercised: not necessarily a desirable situation.

148. *Henfield*, 11 F. Cas. at 1116. Leonard Levy's discussion of *Henfield* is superficial. Leonard Levy, *Emergence of a Free Press*, *supra* note 12 at 276. Stewart Jay's discussion of *Henfield* is mostly contextual, as if the surrounding politics provided the meaning of the case. Stewart Jay, 'Origins of the Federal Common Law', *supra* note 12 at 1042-53. His discussion adds nothing to Presser's treatment.

despite strong domestic feelings in favor of France because of the perceived similarity at that time between the American Revolution and the French Revolution.¹⁴⁹ *Henfield* was indicted in federal court for offenses against the law of nations and under United States treaties. *Henfield* is the earliest case normally cited as proof of the early judiciary's belief in a federal common law of crime.¹⁵⁰

Henfield was a criminal prosecution at common law, although not at federal common law. Justice Wilson, in his charge to the grand jury, talked about the common law, 'as now received in America'.¹⁵¹ Since the common law associated other laws to it, the common law incorporated the law of nations. The law of nations regulated the relations of nations, and thus indispensably to a certain degree the conduct of a nation's citizens. A citizen who took it upon himself to wage war was in violation of the law of nations and thus in violation of the common law.¹⁵² Wilson did not talk about 'United States common law' as distinct from state common law: his language, from our perspective, was vague, as if referring to a single system of law. He was confident that no statute was necessary to prosecute *Henfield*.

Henfield's prosecutors were Attorney General Randolph and District

149. Julius Goebel, Jr., *Hist. S.C.*, supra note 20, 624-25.

150. Ibid. at 623; Leonard Levy, *Emergence of a Free Press*, supra note 12 at 276. Leonard Levy's earlier citation of a counterfeiting case rested on a misdated case, the date of which was revised only later by Goebel. Leonard Levy, *Legacy of Suppression*, supra note 84 at 239-40; text at note 282 infra. Presser, of course, finds a substantial problem with Jay's 1790 charge to the grand jury. See text at notes 119-47 infra.

151. 11 F. Cas. at 1106. The statement is not equivalent to an assertion that the federal government has received the common law.

152. Ibid. at 1107-108. Wilson was unlikely to derive a jurisdiction directly from the common law. In December 1787, at the convention in Pennsylvania to ratify the federal constitution, Wilson got into an argument about federal prosecution of libels, the focal point for jurisdiction in strictly criminal common law areas. The argument there centered on what would happen if Congress made a statute to prosecute libels; Wilson first argued that Congress had no such power. Then, to answer the question directly, he maintained that, 'even if it had the power to make laws on this subject', the accused was no worse off than under the state government. Merrill Jensen, ed., *Documentary History*, supra note 89 at ii, 454-55. That argument would be perplexing if they were arguing about a disputed power in Congress to do what everyone thought the federal courts could do anyway. The natural conclusion is that both Wilson and the anti-federalists were here assuming that the courts had no jurisdiction derived strictly from common law, but might receive specific powers from congressional legislation. See David Anderson, 'Origins of the Press Clause', supra note 25 at 504; William T. Mayton, 'Seditious Libel', supra note 25 at 180n. Leonard Levy, rejecting the analysis of both Anderson and Mayton indicating that Wilson was speaking hypothetically, simply cannot have re-read the whole passage. Levy first says that Wilson assumed the existence of federal court power to prosecute seditious libel, then, in the same paragraph, talks about his assertion of the same proposition. Leonard Levy, *Emergence of a Free Press*, supra note 25 at 240-41. Wilson's argument neither assumed nor asserted that proposition, except in relation to state governments.

Attorney William Rawle.¹⁵³ Randolph thought the common law was involved. In his official capacity he advised the Secretary of State that Henfield could be prosecuted. Henfield had violated United States treaties that were legally binding on citizens; but he was also indictable at common law, because his actions disrupted the peace of the United States.¹⁵⁴ Like Jay, Randolph was not specific about whose common law would be used.

Randolph had examined the common law in 1790, reporting to Congress on the Judiciary Act. He believed then that the United States had adopted the common law to the extent of using it to explain terminology in state and federal statutes and to handle cases that arose within a particular state.¹⁵⁵ He considered any further relationship to the common law unsure and thought that the ambiguity should be resolved by adopting the common law as the rule of decisions insofar as it was not discordant with the Constitution, federal statutes, or the laws of the several states.¹⁵⁶ Even in his suggested scheme, however, state law would be the rule of decisions on the merits, in matters of evidence, or limitations of time occasionally even in criminal matters.¹⁵⁷ If he had not changed his perspective on the subject, *Henfield* could have been an instance in which state law would be the rule of decisions.

Randolph had written an opinion in 1792 that stated both that the United States had not, by constitution or municipal act, adopted the law of nations and that nonetheless the law of nations was part of the law of the land.¹⁵⁸ Perhaps Randolph thought that that was the consequence of the Judiciary Act. Or perhaps he thought the federal government was completely possessed of common law authority, both as a source of jurisdiction and as a means of executing that jurisdiction, although the sources thus far cited do not quite establish that as his position. Whatever his opinion, however, the indictments Randolph and Rawle produced in *Henfield* were rather mild.¹⁵⁹

153. *Ibid.* at 1116.

154. William Winslow Crosskey, *Politics and the Constitution in the History of the United States*, 3 vols. (Chicago, 1953) i, 629-30.

155. *Report of the Attorney General Read in the House of Representatives Dec. 31, 1790* (1791) 10.

156. *Ibid.* at 10, 28.

157. *Ibid.* at 33. William Winslow Crosskey, *Politics and the American Constitution*, *supra* note 154 at i, 626-30. Goebel's remarks on Randolph seem rather better than Crosskey's, particularly in reference to the way in which the report was relegated without action by the Congress. Julius Goebel, Jr., *Hist. S.C.*, *supra* note 20 at 541-42. Congress apparently considered the ambiguity Randolph found a proper and unambiguous omission.

158. *Official Opinions of the Attorneys General of the United States*, 30 vols. (Washington, 1852-1919) i, 27 [hereinafter: *Off. Opinions A.G.*].

159. Whether Randolph or Rawle had the greater responsibility for the indictments is unclear. There has survived in print a draft indictment written by Randolph with marginal notations apparently by Hamilton. 11 F. Cas. 1115-16n. Nevertheless, the

All twelve counts cited treaties; only six referred to the law of nations; none were based directly on common law.¹⁶⁰

William Rawle was similarly circumspect. He followed Wilson's general argument, agreeing that the law of nations was part of the law of the land and that an individual waging war was in violation of the law of nations and thus indictable.¹⁶¹ He once mentioned English 'national common law'.¹⁶² His point then, however, was in regard to the law of nations. He did not maintain that the federal government had adopted English common law. Both Randolph and Rawle worked in this case on a relatively restricted argument, regardless of the powers that they might otherwise have felt inhered in the federal government.

Du Ponceau, Ingersoll, and Sergeant argued for the defence.¹⁶³ They made two arguments relevant here, preserved only in outline. The first was that 'the indictment did not include an offence at common law'.¹⁶⁴ Their concern with the common law probably derived from the shared assumption that the law of nations was part of the common law. That the law of nations, not the common law as such, was central, appears from the prosecution's care to refute a law of nations argument on the right of a freeman to enlist in a foreign government's military service.¹⁶⁵ Moreover, the defense certainly argued the law of nations.¹⁶⁶ The second relevant argument made

report makes it seem that Rawle carried the argument: 'Mr. Rawle, district attorney, with whom was Mr. Randolph, attorney general.' 11 F. Cas. 1116. Rawle's influence appeared also in the application of Pennsylvania law. See text at notes 146-60 *infra*. The importance of Pennsylvania law might indicate that Rawle had a hand in the indictments also.

160. Julius Goebel, Jr., *Hist. S.C.*, *supra* note 20 at 625. Goebel mentions that the common law disturbance of the peace of the United States allegation only appeared in the inclusion of the words 'against the peace and dignity of the United States' and that those words were treated as mere surplusage. *Ibid.* The reason for the inclusion of those words, however, is even less indicative than he thought of an idea of a general federal common law. See text at notes 172-73 *infra*.

161.

The law of nations is part of the law of the land. 4 Bl. Comm. 66; [*Respublica v. De Longchamps*] 1 Dall. [1 U.S.] 111; C. L. 11b. This is an offence against the laws of nations. It is punishable by indictment on information as such. [*Respublica v. De Longchamps*] 1 Dall. [1 U.S.] 114, &c.; 3 Burrows, 1480.

11 F. Cas. at 1117.

162. *Ibid.* ('Nor are these only the speculations of the closet. We see them carried into effect in England in affirmation of national common law, i.e. the law of nations.')

163. *Ibid.* at 1119. Du Ponceau decades later made some comments on the case. See text at note 196 *infra*.

164. 11 F. Cas. at 1119.

165. *Ibid.* at 1118.

166. *Ibid.* at 1119 ('On the question under the laws of nations were cited, 6 Hume, *Hist. Eng.* 433; 1 Hutch. *Hist. Mass. Bay*, 251; 3 Vatt. *LawNat.* 15; Bynk[ershoek] 22d, c.;

for Henfield was that since 'there was no statute giving jurisdiction, the court could take no cognizance of the offence'.¹⁶⁷ That argument should have, but did not elicit a response referring to the Judiciary Act, §11.¹⁶⁸ The closest counterpart to this was the prosecution's careful response to an alleged lack of precedent.¹⁶⁹ Whatever the detailed arguments for Henfield were, no one seems to have raised the problem of exercising a constitutionally permissible jurisdiction without statutory definition of the crime.

The prosecution expected to apply Pennsylvania law. The argument in the case dealt at length with the incorporation of the law of nations into the common law, so that the case was a case at common law. The reason for insisting on that nexus between the law of nations and the common law was to establish the applicable law. The Judiciary Act §34 specified that at trials at common law the applicable law was the law of the state, unless federal law dictated otherwise.¹⁷⁰ By linking the law of nations to the common law, the prosecutors brought the suit under the Judiciary Act, thus providing a rule of decision.

Various references indicate that the prosecutors were following Pennsylvania law. At decisive points the prosecution cited *Respublica v. De Longchamps*,¹⁷¹ a Pennsylvania state court case decided in 1784, well before the Constitution. De Longchamps had assaulted Marbois, the French Consul General, Consul for the state of Pennsylvania, and secretary of the French Legation 'in violation of the laws of nations, against the peace and dignity of the United States and of the commonwealth of Pennsylvania'.¹⁷² This state court case, not Randolph's theories,¹⁷³ dictated the form of the indictment. McKean, C.J., ruled that the law of nations was part of the law of Pennsylvania and that the law for the case would be derived from treatises.¹⁷⁴ Moreover, the *De Longchamps* indictment, regardless of any

Syn. Gal. Rep. 94.') Du Ponceau later (1810), published a translation of Bynkershoek's *Treatise on the Law of War*.

167. 11 F. Cas. at 1119. The other arguments recorded related to the presidential proclamation of neutrality and to the proper inferences that could be derived from the construction of treaties, neither of which is relevant to the federal common law of crimes.

168. See text at notes 39-48 *supra*.

169. 11 F. Cas. 1117.

170. Act of September 24, 1789, §34. A federal judge explicitly adopted this construction of the provision in 1807, the same year in which Marshall ruled to the contrary. Leonard Levy, *Emergence of a Free Press*, *supra* note 12 at 345.

171. See note 161 *supra*.

172. 1 U.S. (1 Dall.) 111.

173. See text at notes 155-60 *supra*.

174. 1 U.S. at 114 ('It must be determined on the principles of the laws of nations, which form a part of the municipal law of Pennsylvania'), and 116 ('The first crime in the indictment is an infraction of the law of nations. This law, in its full extent, is part of

seeming absurdity,¹⁷⁵ provided the authority for the use in federal court of state law to punish an offense against the United States. In 1799 Randolph maintained that he had probably been doing exactly that in *Henfield*.¹⁷⁶ The citation of *De Longchamps* is thus good evidence that the prosecutors indicted under the law of nations through common law in order to apply Pennsylvania state law under the Judiciary Act, §34.

A parallel use of Pennsylvania law confirms the legal theory of Henfield's indictment. Henfield argued that he was a French citizen; he had made that claim a month after his incarceration in Philadelphia.¹⁷⁷ The argument was based on the right to emigrate, a right 'natural to freemen'.¹⁷⁸ The prosecution did not deny the right, but only sought to show that it did not apply when the accused had still claimed U.S. citizenship at his arrest.¹⁷⁹ In argument, the defense asserted that: 'The bill of rights declares, emigration shall not be prohibited.'¹⁸⁰ The federal Bill of Rights¹⁸¹ says nothing about emigration. The Pennsylvania Constitution, however, did. The first Consti-

the law of this state, and is to be collected from the practice of different nations, and the authority of writers.'))

175. William Winslow Crosskey, *Politics and the Constitution*, supra note 154 at i, 631n. Crosskey worried that in the case of an offence strictly against the United States there would be no applicable state law.

176. In 1799 Randolph explained to Madison what, at that distance, he thought he must have been doing in *Henfield*.

5. This must have been the idea, if I meant to say that he was triable at common law in the federal court; that the treaties, by stipulating for peace with the U. S., in substance prohibited the citizens of the U. S. from engaging in a war against the nations with whom the treaties subsisted: that treaties being the supreme law, and the judicial act having provided that the laws of the States should be the rule of decision, that they should apply: the laws of Pennsylvania, within whose boundaries the offence was committed, comprehending the common law, would aid the treaty, which had specified no penalty for Henfield's crime, by one of its general principles, namely, that when a statute forbids a thing to be done, without annexing a penalty, the common law makes it indictable and punishable, as a misdemeanor. This, I believe, was the doctrine which I urged at the trial.

6. This opinion does not bring up the common law as the law of the U.S. . . . common law, as the law of the U.S., would create offences.

Moncure Daniel Conway, *Omitted Chapters of History Disclosed in the Life and Papers of Edmund Randolph* (New York, 1888) 185.

Crosskey belittled Randolph's recollection and asserted that there was no record of any such argument at the Henfield trial, without bothering to look into the sources cited in the case. William Winslow Crosskey, *Politics and the Constitution*, supra note 154 at i, 630-31.

177. 11 F. Cas. at 1116.

178. *Ibid.* at 1118.

179. *Ibid.* at 1116.

180. *Ibid.* at 1118.

181. U.S. Const. Amend. I-X.

tution of Pennsylvania referred to emigration as a 'natural inherent right',¹⁸² perhaps the source of part of the language in the case.¹⁸³ The Constitution of Pennsylvania of 1790, Art. IX, §25, provided 'that emigration from the State shall not be prohibited'.¹⁸⁴ Although the lawyers disagreed about applicability, both sides considered the provision binding: Pennsylvania state law applied in this prosecution for a strictly federal offense.

Justice Wilson would favor such arguments. He had assisted the Pennsylvania attorney general in *De Longchamps*.¹⁸⁵ He thus knew that Pennsylvania had accepted the law of nations into its state law. Moreover, as a Pennsylvanian himself and the chief architect of the 1790 Pennsylvania constitution, he would be amenable to applying Pennsylvania law.¹⁸⁶ The citation of the leading Pennsylvania case, the acceptance of Pennsylvania constitutional provisions as binding, and the familiarity of Justice Wilson with Pennsylvania law make it clear that the court was applying the law of Pennsylvania as the rule of decision.

The Judiciary Act §34 dictated that result.¹⁸⁷ Although Marshall in dicta later indicated a preference to apply §34 only to civil cases,¹⁸⁸ his reading

182. William Swindler, *Sources and Documents*, supra note 94 at viii, 279.

183. See text at note 178 supra.

184. William Swindler, *Sources and Documents*, supra note 94 at viii, 293. The use of the words 'law of the land' is less significant. The phrase was derived from Magna Carta. Magna Carta (1215), ch. 39 (to become ch. 29 in later revisions); Bernard Schwartz, *The Bill of Rights*, supra note 91 at i, 12. That provision was the distant antecedent of the fifth amendment provision against the taking of 'life, liberty, or property, without due process of law'. U.S. Const. Amend. V. The U.S. Constitution, of course, does not use the words 'law of the land'. But the corresponding provision in the Pennsylvania Constitution of 1790 did. Constitution of Pennsylvania of 1790, Art. IX, §9, William Swindler, *Sources and Documents*, supra note 94 at 292. It is thus conceivable that the 'law of the land' language in *Henfield* likewise demonstrates use of Pennsylvania law, although the words were common enough in legal parlance to have been drawn from many other sources.

185. *De Longchamps*, 1 U.S. (1 Dall.) 111 at 113.

186. *Dictionary of American Biography*, 11 vols. (New York, 1936) x, 329.

187. 'Sec. 34. And be it further enacted, That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. 'Act of Sept. 24, 1789, 1 *Stats.* at 92. Reference to state criminal law would not be unheard of, since the federal courts in the District of Columbia applied the criminal law of the states of Maryland and Virginia, albeit in an unusual jurisdiction. *United States v. Heinegan*, 26 F. Cas. 253 (C.C.D.C. 1802)(No. 15,340). *United States v. Winslow*, 28 F. Cas. 737 (C.C.D.C. 1812)(No. 16,741). *United States v. Gassaway*, 25 F. Cas. 1263 (C.C.D.C. 1844)(No. 15,190).

188. After quoting the Judiciary Act, §34, Marshall went on to describe its effect:

It might certainly be well doubted whether this section, (if it should be construed to extend to all the proceedings in a case where a reference can be made to the state laws for a rule of decision at the trial) can comprehend a case where, at the trial in chief, no such reference can be made. Now in criminal cases the laws of the

is unwarranted. Both Randolph¹⁸⁹ and Du Ponceau¹⁹⁰ came to the opposite conclusion. Moreover, §33 and §35¹⁹¹ relate to criminal matters, so that context would not restrict §34 to civil matters.¹⁹² Nothing in the wording of §34 would indicate that it did not apply to criminal matters. Other constitutional considerations make such an application of §34 to criminal matters necessary.¹⁹³ The rules of decision section of the Judiciary Act properly applied both to civil and criminal cases at common law, as was done in *Henfield*.

United States constitute the sole rule of decision; and no man can be condemned or prosecuted in the federal courts on a state law. The laws of the several states therefore cannot be regarded as rules of decision in trials for offences against the United States. It would seem to me too that the technical term, 'trials at common law', used in the section, is not correctly applicable to prosecutions for crimes. I have always conceived them to be, in this section, applied to civil suits, as contradistinguished from those which come before the court sitting as a court of equity or admiralty.

David Robertson, ed., *Reports of the Trials of Colonel Aaron Burr In the Circuit Court of the United States*, 2 vols., (New York, 1807) ii, 482. Marshall's tentative opinion is not indicative of practice. In 1800, a federal court looked into Pennsylvania law as to summoning congressmen as witnesses in a libel trial. Justice Peters asserted personal knowledge of the Pennsylvania practice, but Justice Chase preferred to follow an independent course. *United States v. Cooper*, 25 F. Cas. 626 (C.C.D. Pa. 1800)(No. 14,861). In the same year, counsel for the accused expressly cited §34 as authority for using the English practice of jury authority in criminal authority, since Virginia law had adopted English common law; Justice Chase rejected the implications of the argument. *United States v. Callender*, 25 F. Cas. 239 (C.C.D. Va. 1800)(No. 14,709). In *United States v. Moore*, the court inquired into Pennsylvania practice in regard to compulsory process for witnesses prior to an indictment, but found that there had been no adjudications on the normal practice. 26 F. Cas. 1208 (C.C.D. Pa. 1801)(No. 15,805). The prosecution in *United States v. Smith* asserted that state law governed practices relating to tendering expenses with service of a subpoena. 27 F. Cas. 1192 (C.C.D. N.Y. 1806)(No. 16,342). As late as 1818 counsel alleged in *United States v. Hare* that state law, because of §34, applied to the problems of mail robbers who merely stood mute and refused to plead. The court ruled that if the laws of the United States were insufficient, Maryland law sufficed as the rule of decision. 26 F. Cas. 149, 150-157 (C.C.D. Md. 1818)(No. 15,304). Bridwell and Whitten cited Marshall's determination here as an early decision, and then went on to show how any inclusion of criminal suits at common law for §34 was clearly mistaken. Randall Bridwell and Ralph U. Whitten, *The Constitution and the Common Law*, supra note 12 at 36-37. Johnson dismissed the relevance of §34 to criminal law by reference to Marshall's opinion and *Commonwealth v. Schaffer*. George Lee Haskins and Herbert A. Johnson, *Hist. S.C.*, supra note 12 at 634-35. *Schaffer* was a case in the mayor's court of Philadelphia in which the argument concerning §34 was made but was then rejected by the court. 4 U.S. (4 Dall.) xxvi, xxviii, xxxi, Appendix.

189. See note 176 supra.

190. Peter S. Du Ponceau, *A Dissertation on the Nature and Extent of the Courts of the United States* (Philadelphia, 1824) 36-37.

191. Act of Sept. 24, 1789, 1 *Stats.* 92-93.

192. Peter S. Du Ponceau, *Dissertation*, supra note 190 at 37-38.

193. See text at notes 216-43 infra.

Peter Du Ponceau made that argument in a treatise in 1824,¹⁹⁴ but not in regard to *Henfield*. He explained the difference between the common law as a source of jurisdiction and the common law as a means of exercising a jurisdiction granted by Constitution or statute.¹⁹⁵ Du Ponceau treated *Henfield* only in a note.¹⁹⁶ He objected to Wilson's emphasis on the common law, since the offense was against the law of nations, which stood on an independent basis.¹⁹⁷ Du Ponceau did not integrate *Henfield* into his analysis. On the basis of the clause 'where they apply' in the Judiciary Act, §34, he maintained that offenses solely against the United States had no appropriate state law.¹⁹⁸ *Henfield* was such a case, so §34 did not apply. He did not consider the way in which cases like *De Longchamps* made state law applicable to federal offenses. Du Ponceau, in all this, professed to have come to a new understanding of the law only recently.¹⁹⁹ He displayed no realization that the emphasis on the common law allowed application of the rules of decision clause and no recollection that they had used Pennsylvania law. Developments in the succeeding years explain his feeling of novelty.²⁰⁰

Wilson in *Henfield* applied Pennsylvania law according to the Judiciary Act, §34. Pennsylvania had applicable law from the time prior to the Constitution when the states justifiably prosecuted crimes against the confederacy. He demonstrated no belief in a general federal common law of crime or in a federal government of inherent authority rather than one of delegated powers. Since state law was available as the rule of decision, Congress only had to grant the jurisdiction and did not have to define the crimes or the penalties.²⁰¹ The controversy occasioned by *Henfield* had much more to do with popular feelings in favor of republican France than

194. Ibid. For other early treatises that cover the cases, see Thomas Serjeant, *Constitutional Law. Being a View of the Practice and Jurisdiction of the Courts of the United States and of Constitutional Points Decided* (Philadelphia, 1830) 272-74, and William Rawle, *A View of the Constitution of the United States of America*, (New York, 2nd ed., 1970) 258-73.

195. Peter S. Du Ponceau, *Dissertation*, supra note 190 at xiii, xxviii, 17-20. The argument was not novel. Justice Washington seems to have been employing the same distinction in *United States v. McGill*, quoted supra note 62.

196. Peter S. Du Ponceau, *Dissertation*, supra note 190 at 3-4.

197. Ibid.

198. Ibid. at 41-42. See text at note 175 supra.

199.

I did not, any more than others, escape the general contagion. It was not until after repeated discussions of these questions in the law academy, that I began to perceive that the words 'common law jurisdiction', had no definite meaning, and was led to enter into this investigation of the subject.

Peter S. Du Ponceau, *Dissertation*, supra note 190 at 6n.

200. See text at notes 253-67 infra.

201.

I shall endeavor to prove to you, that it is not true as a general principle, that the judiciary whether in criminal or civil cases, have not jurisdiction of the common

with the legal analysis.²⁰² Although the jury acquitted Henfield, Wilson, like Jay, had performed his duty. *Henfield*, like Jay's 1790 charge, is irrelevant to the existence of a federal common law of crime.²⁰³

C. The Views of Iredell and Paterson

The views of Justices Iredell and Paterson around the time of *Henfield* confirm that the decision does not approve the notion of a federal common law of crimes. Stewart Jay has recently isolated James Iredell as a prominent exception to what he sees as Justice Jay's advocacy of federal common law authority, but an exception that fell by the wayside.²⁰⁴ Iredell did initially read the Article I §8, cl. 1 definitional power as necessarily exercised in advance of court action.²⁰⁵ Iredell re-evaluated his stand in 1794, in his charges to the grand juries of North and South Carolina.²⁰⁶ This re-evaluation was hardly the affirmation, as Stewart Jay assumes, of a federal common law of crime. Iredell's views in 1794 mirror the views expressed in *Henfield* that the common law being applied was state, not federal common law.

law, or cannot take cognisance of common law offences; that, on the contrary, whenever jurisdiction is completely vested in them from either of the sources above mentioned, they have cognisance of the law, whatever it may be, that is necessary to give effect to that jurisdiction, and they are not in all cases to wait until Congress have legislated upon the subject.

Peter S. Du Ponceau, *Dissertation*, supra note 190 at 32.

Bridwell and Whitten discard the distinction between 'jurisdiction of' and 'jurisdiction from' the common law. They note that Story approved of the former, but not the latter. They also note, however, that the distinction is useless.

[f]or the fundamental objection to the exercise of such power is the same in both cases. The objection is that criminal law results peculiarly from an exercise of the sovereign lawmaking authority, which in our system was originally confided to the legislative branch of government.

Randall Bridwell and Ralph Whitten, *The Constitution and the Common Law*, supra note 12 at 46. Story, of course, was familiar with that conception of criminal law, so their casual rejection of the distinction and of Story's authority can be easily questioned. They note that common law in civil matters derives from community behavior, a factor that makes it distinctly different from criminal law. *Ibid.* But the law of nations derives, in eighteenth century literature, from the community behavior of nations.

202. Stephen B. Presser, 'A Tale of Two Judges', supra note 12 at 53-56.

203. See text at notes 128-30 supra.

204. Stewart Jay, 'Origins of Federal Common Law', supra note 12 at 1040.

205. *Ibid.* Stewart Jay cites Iredell's South Carolina charge of 12 May 1794. Stewart Jay, 'Origins of Federal Common Law', supra note 12 at 1041. He does not mention the North Carolina charge of 2 June 1794, which seems to coincide closely with the South Carolina charge of the previous month.

206. James Iredell, 'Charge delivered to the grand jury for the District of North Carolina in the Circuit court of the United States, June 2, 1794', in Joseph H. Smith, *Cases and Materials*, supra note 108, 524-26.

Iredell's North Carolina charge was a minor treatise.²⁰⁷ The first section treats English law; it begins by mentioning English common law and ends with a comment on an act of Parliament. Iredell in this section established first that English common law recognized the principles of the law of nations. Then he noted that no nation ought to legislate contrary to those principles, but that such legislation, if passed, would be binding. Finally, he argued that common law recognition of the law of nations entailed enforcement of law of nations' prohibitions on a country's own citizens. An individual's contravention of a law of nations obligation would constitute 'a contempt of his duty to the community';²⁰⁸ the courts could proceed against him under that theory. The first section concerned only English common law, although the hearers would have inferred from the mere mentions of 'the common law' an application to the United States.

The second section applied English principles to the North American context. English common law had applied in colonial North Carolina. The only exceptions were provided by special colonial circumstances or statute. The principles of the law of nations fell under neither exception. Thus, at the time of the Revolution, the law of nations portion of the English common law was accepted in North Carolina: 'this part of the common law subsisted in full force in this State previous to the Revolution'.²⁰⁹ The application he was making was not to the United States government, but to the state government of North Carolina.

The third section dealt with the consequences of the Revolution. Principles of the common law in force in the colonies were abolished only when 'absolutely inconsistent'²¹⁰ with the change in situation or when altered by the people or the legislature. Iredell denied that such changes relating to the law of nations had been made. The English common law recognition of the law of nations, by its application in the colony, now applied within the state of North Carolina. Whereas *Henfield* had built on a specific case, Iredell replicated the *Henfield* result on the basis of the general structure of state common law.

The fourth section of Iredell's charge considered possible modifications of state law by the Articles of Confederation or the Constitution. Under the Articles of Confederation state law was not altered, because any law of nations prosecution would take place in a 'competent State court, acting under the laws of the State and the control of their public duty'.²¹¹ Nor did the Constitution alter state law. The Constitution only allowed Congress two relevant powers: the power to establish federal courts for such cases and the power to make any alterations necessary in the law. Iredell then cited the

207. James Iredell, 'Charge', *supra* note 206.

208. *Ibid.* at 525.

209. *Ibid.*

210. *Ibid.*

211. *Ibid.* at 526.

rules of decision section of the Judiciary Act to show that Congress had considered the relevant state law in force.²¹² The congressional act for punishing offenses against the United States only modified that law; where United States law was silent, state common law applied.

Iredell's jurisprudence does not sustain any argument for a federal common law of crime. He believed that the federal courts could prosecute nonstatutory crimes. But just as nonstatutory prosecutions are not all similar, resorts to 'common law' are not all the same. Federal jurisdiction derived both from the Constitution and from the Judiciary Act. The law that would apply in such cases, as mandated by federal statute, was not federal law, but state common law.

Stewart Jay has located an opinion by Justice Paterson which, contrary to Jay's interpretation, is best viewed in the same way as Iredell's charge.²¹³ Paterson stated that a violator, in Henfield's situation, could be prosecuted. He explicitly drew the law of nations then into the common law. 'This is an offence. —How? By the law of nations, or, in other words, by the common law, which comprehends the law of nations.'²¹⁴ He did not expound on whose common law, but the association, made both by Iredell and in *Henfield*, was undoubtedly made to establish state common law as the rule of decision. More interestingly for the contrast with post-*Wiscart* cases, is Paterson's specification that such a case arose 'under the constitution, as distinct from an offence arising under the law of the United States'.²¹⁵ The case arose under the Constitution because of the grant of admiralty jurisdiction in Article III and the congressional power to define offenses in Article I §8, cl. 10, with jurisdiction under the Judiciary Act.

In 1794 Jay, Wilson, Iredell, and Paterson can, therefore, be identified as supporting limited constitutional jurisdiction over nonstatutory offenses. The sources for that jurisdiction were simply irrelevant to seditious libel prosecutions. The common law that they applied was not federal, but state common law. The way in which they handled the law of nations but did not extend their jurisdiction to seditious libel and other merely common law crimes accorded both with the Constitution and the debates and statutes of the First Congress. In 1794 the Supreme Court had no doubt that the federal government was different from state governments and that the demands of federalism, as dictated by statute, mandated reliance on state law.

D. United States v. Ravara

Joseph Ravara was a Genoese consul prosecuted in 1793-94 for sending threatening letters to extort money from Mr. Hammond, the British

212. Ibid.

213. Stewart Jay, 'Origins of Federal Common Law', *supra* note 12 at 1052, n. 243.

214. Ibid.

215. Ibid. See text at notes 282-330 *infra*.

Minister.²¹⁶ His defense argued that the allegation did not constitute a statutory or common law crime, that the law of nations required immunity for consuls, and that the evidence was too circumstantial.²¹⁷ Ravara was convicted without reference to statutory authority.²¹⁸ Since the case did not rest on the law of nations, it presents a different issue in the history of the supposed federal common law of crimes.

Rawle's argument was convincing, although only briefly reported. Ravara claimed the status of a public minister, although he was only a consul. Defense cited only Vattel for the protection due a consul.²¹⁹ Rawle denied that consular status implied immunity. His denial can be explained by three arguments. Article III specifies federal jurisdiction over certain persons, including 'Ambassadors, other public Ministers and Consuls'.²²⁰ That wording implies that consuls are not public ministers. The Judiciary Act §13 makes the same distinction: 'jurisdiction of suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party'.²²¹ Similarly, the treaties in force at the time of Ravara did not give consuls immunity.²²² Finally, only Vattel considered consuls public ministers; other writers excluded consuls from immunity.²²³ Even Vattel thought protection only proper, not required.²²⁴ Ravara had no convincing claim to immunity.

A different defense was the alleged lack of a statutory or common law basis for the suit. Julius Goebel dismissed the defense's argument about the

216. United States v. Ravara, 27 F. Cas. 713 (C.C.D. Pa. 1793)(No. 16,122). Leonard Levy barely mentions *Ravara*. Leonard Levy, *Emergence of a Free Press*, supra note 12 at 276.

217. United States v. Ravara, 27 F. Cas. 714 (C.C.D. Pa. 1794)(No. 16,122a). The issue in this preliminary stage had to do with whether the original jurisdiction over consuls (U.S. Const., Art. III, §2, cl. 1) intended an exclusive jurisdiction, such that the grant of 'exclusive' jurisdiction to the circuit courts (Judiciary Act, §11) was void. Although the argument properly failed there, the issue as to whether statute could narrow federal court jurisdiction came to be vital. See text at notes 255-61 infra.

218. Ibid. at 715.

219. Ibid.

220. U.S. Const. Art. III, §2, cl. 1.

221. Act of Sept. 24, 1789, 1 *Stats.* 80-81. Prior to the trial of Ravara and in an unrelated case, William Bradford, Attorney General, gave his opinion based on the constitutional language and on the Judiciary Act that a consul is not a public minister and not entitled to the immunity due public ministers. *Off. Opinions of the A. G.*, supra note 158 at i, 42. The worries here about the place of trial conflicting with original criminal jurisdiction of the Supreme Court is obviated by the decision in *Ravara*. See note 217 supra.

222. Commonwealth v. Kosloff, 5 Serg. & Rawle 544, 545-46 (Pennsylvania, 1819). Tilghman, C.J. here analyzed *Ravara*.

223. Ibid. at 545.

224. Ibid.; Vattel, *Law of Nations*, supra note 126 at 147-49 (Bk. 2, ch. 2, §34).

lack of a statutory basis as nonsense,²²⁵ because section 28 of the Act for the Punishment of certain Crimes declared the punishment for offering personal violence to a public minister.²²⁶ Nevertheless, Rawle insisted that 'the offense was indictable at common law'.²²⁷ The indictment could have had a statutory basis, even though the prosecution preferred to use the common law.

Ignoring the statute, the court relied on the common law. The defense had denied a common law foundation, citing Blackstone²²⁸ to the effect that a bare menace of bodily hurt without any consequent inconvenience, such as damage to one's business affairs, was no injury public or private.²²⁹ English common law, however, was not necessarily the law of Pennsylvania. And Justices Jay and Peters were concerned with Pennsylvania law. *Respublica v. Teischer*²³⁰ and *Respublica v. Sweers*,²³¹ both cited by Rawle,²³² showed sufficiently that Ravara was indictable under Pennsylvania law. Du Ponceau maintained later that Ravara had been tried under Pennsylvania common law.²³³ Moreover, since Ravara's intended victim was a public minister, even though Ravara himself was not, the protection given the minister was necessarily rigorous. Rawle could have cited Vattel, IV.81-82, had the

225.

United States v. Ravara is badly reported. The defense is represented to have taken the ground that the acts charged were not crimes by the common law or by any positive law of the United States. This was, of course, nonsense because by Section 27 of the Act for the Punishment of certain Crimes, offering personal violence to a public minister was made punishable. It was also argued by defense that a criminal proceeding ought not to be sustained against an individual of defendant's official character.

Julius Goebel, Jr., *Hist. S.C.*, supra note 20 at 627. The citation to Section 27 should be Section 28.

226. Act of April 30, 1790, 1 *Stats.* 112, 118.

227. See text at notes 220-24 supra.

228. William Blackstone, *Commentaries*, supra note 83 at iii, 120.

229. *Ravara*, 11 F. Cas. at 714.

230. 1 U.S. (1 Dall.) 335 (Pennsylvania, 1788). McKean, C.J., set down the general principle for indictments in Pennsylvania as not founded on precedent.

It is true, that on the examination of the cases we have not found the line accurately drawn but, it seems to be agreed, that whatever amounts to a public wrong may be made the subject of an indictment. The poisoning of chickens; cheating with false dice; fraudulently tearing a promissory note, and many other offenses of a similar description, have heretofore been indicted in Pennsylvania.

Ibid. at 338.

231. 1 U.S. (1 Dall.) 41 (Pennsylvania, 1779).

232. *Ravara*, 11 F. Cas. at 715.

233. Peter S. Du Ponceau, *Dissertation*, supra note 190 at 35-36. Justice Washington felt that a violation of the Act of April 30, 1790, §28 produced 'an offence at common law'. *United States v. Liddle*, 26 F. Cas. 936, 938 (C.C.D. Pa. 1808)(No. 15,598).

support of the law of nations been necessary.²³⁴ And the law of nations was part of the law of Pennsylvania.²³⁵

A circular instruction issued by Secretary of State Thomas Jefferson to district attorneys, including the District Attorney of Pennsylvania, is conclusive on the relevance of Pennsylvania law. The letter responded to French complaints about the treatment of their consuls. Jefferson asked that those consuls be notified that, as Goebel paraphrases the letter, 'the federal government would put into effect all the means of protection which the state laws provided'.²³⁶ The easiest reading of such language is that the federal courts would apply state law to render justice to those classes of persons, including consuls, over whom the federal courts had jurisdiction.

Ravara was thus not a prosecution under federal common law. The federal courts had exclusive jurisdiction over all cases concerning consuls.²³⁷ The Judiciary Act gave the circuit courts concurrent jurisdiction with the Supreme Court over consuls.²³⁸ Pennsylvania common law then dictated that *Ravara* could be indicted in state court. The deduction from these propositions was that the case take place in federal court, but under state law. *Ravara* was not a sinister precursor of seditious libel prosecutions. The case caused no uproar,²³⁹ but likewise violated no constitutional principle.

Article III personal jurisdictions²⁴⁰ do not carry with them plenary congressional legislative authority, only federal court jurisdiction over the designated persons. Consuls were not public ministers and were subject to the law of the country of residence. Nevertheless, since federal courts were to have sole jurisdiction over consuls,²⁴¹ violations of state health, safety, and morals regulations, normally tried as misdemeanors, had to be tried in federal courts. These matters were violations of state substantive law, over which Congress had no direct authority.²⁴² The federal courts had an

234. Vattel, *Law of Nations*, supra note 126 at 464-66 (Bk. IV, ch.7, §§81-82).

235. See text at note 174 supra.

236. Julius Goebel, Jr., *Hist. S.C.*, supra note 20 at 629 (citing Charles Jenkins, ed.,) *Jefferson's Germantown Letters* (Philadelphia, 1906) 126.

237. U.S. Const. Art. III, §2, cl. 1. For the proposition that the word 'suit' in the Judiciary Act can refer to both criminal and civil actions, see *U.S. v. Mann*, 26 F. Cas. 1153 (C.C.D. N.H. 1812)(No. 15,718).

238. Act of September 24, 1789, ch. 20, §11, 1 *Stats.* at 78-79.

239. Stephen B. Presser, 'A Tale of Two Judges', supra note 12 at 56-58.

240. U.S. Const., Art. III, §2, cl. 1 ('The judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls').

241. U.S. Const., Art. III, §2, cl. 1; Act of Sept. 24, 1789, ch. 20, §§9, 11, 1 *Stats.* 76-79.

242. The federal government has such authority only in the seat of government and in those areas purchased by the federal government with the consent of the state legislature. U.S. Const., Art. I, §8, cl. 17.

exclusive jurisdiction but could not apply federal substantive law. State law was the appropriate rule of decision.²⁴³

E. U.S. v. Greenleaf

In 1795 and soon after the conviction of Ravara, the government initiated prosecution against Greenleaf, editor of the *New-York Journal*, for libel of Hammond, the same British Minister that Ravara had threatened.²⁴⁴ As with the previous cases, *U.S. v. Greenleaf* does not indicate the existence of a federal common law of crime.

In September 1794 Hammond had complained to the United States Secretary of State about a defamatory article by Greenleaf in the *New York Journal*. The U.S. Attorney General thought it prima facie libellous and observed, in accord with but not citing Vattel,²⁴⁵ that the law of nations required that public ministers be preserved 'not only from violence but also from insult'.²⁴⁶ Goebel thought the jurisdiction might be established by Article III, Section 2,²⁴⁷ but that no attention was paid to the problem of common law criminal matters when the Secretary of State forwarded the case along for prosecution to the U.S. attorney in New York directing him 'to proceed upon it as the law directs'.²⁴⁸

Federal court utilization of state law will satisfy Goebel's worries about common law crimes. First amendment²⁴⁹ concerns would not arise for precisely that reason. The first amendment in terms forbids Congress from making laws abridging the freedom of the press. Without the assistance of the fourteenth amendment,²⁵⁰ the first amendment did not prevent the federal courts from applying state law restricting the press in those jurisdictions granted by the Constitution which nevertheless lie outside congressional legislative authority: cases under diversity jurisdiction and

243. Peter S. Du Ponceau, *Dissertation*, supra note 190 at 34. See also the criticism of Justice Chase for refusing (to use Virginia law in *United States v. Callendar*). Julius Goebel, Jr., *Hist. S.C.*, supra note 20 at 651.

244. Julius Goebel, Jr., *Hist. S.C.*, supra note 20 at 629. Neither Levy nor Jay analyzes *Greenleaf*. Leonard Levy, *Emergence of a Free Press*, supra note 12 at 276; Stewart Jay 'Origins of Federal Common Law', supra note 12.

245. Vattel, *Law of Nations*, supra note 126 at 464-65 (Bk. IV, ch.7, §§81-82).

246. *Off. Opinions A.G.* supra note 158 at i, 52-53. Goebel's quotation of the opinion is erroneous, but not in a way to affect his analysis. Julius Goebel, Jr., *Hist. S.C.*, supra note 20 at 629.

247. U.S. Const. Art. III, §2, cl. 1.

248. Julius Goebel, Jr., *Hist. S.C.*, supra note 20 at 629.

249. U.S. Const. Amend. I.

250. U.S. Const. Amend. XIV. See Robert C. Palmer, 'The Parameters of Constitutional Reconstruction', supra note 15 at 739.

positive regulations of consuls not related to foreign affairs.²⁵¹ The case is also completely appropriate and justifiable under the Constitution, the Judiciary Act §11 and §34, and under the circular instruction in 1793 from the Secretary of State.²⁵² Prior to *Wiscart*, then, the federal judiciary had shown no belief in a *federal* common law of crime.

IV. *Wiscart v. Dauchy*

Wiscart v. Dauchy,²⁵³ decided in 1796, produced a substantial change in prosecutions of crimes and offenses against the United States. *Wiscart* involved not a crime or offense, but rather the extent to which the Constitution could be self-executing. Prior to *Wiscart* in the law of nations cases, Article III, §2's vesting of admiralty cases (followed by the Judiciary Act) reinforced by Article III, §2's vesting of jurisdiction over cases arising under the Constitution and Article I, §8, cl. 10's mention of the law of nations, provided a firm basis for prosecution. That conceptualization produced an acceptable result if state law was the rule of decision. After *Wiscart* prosecutors and justices based prosecutions on cases arising under the laws (not the Constitution) of the United States, but in a much more tenuous way. The change involved in arguing from laws instead of from the Constitution was substantial. The cases following *Wiscart* are problematic; the cases before *Wiscart* are not.

Wiscart v. Dauchy arose on the equity side of the circuit court in the Virginia district. *Wiscart* had fraudulently attempted to prevent a recovery of the amount of a prior decree by conveying away all his real and personal property. The circuit court found the conveyances fraudulent and awarded enforcement of the prior judgment for the defrauded party. *Wiscart* then obtained a writ of error to the Supreme Court. The issue was whether the determination of fact by the circuit court was binding. The Supreme Court held that it was binding.²⁵⁴

The decision turned on the difference between an appeal and a writ of error. The decision construed the constitutional provision: 'In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.'²⁵⁵ That language could have mandated and by itself conveyed to the court a proper appellate procedure to permit the Supreme

251. Peter S. Du Ponceau, *Dissertation*, supra note 190 at 33-35.

252. See text at note 236 supra.

253. 3 U.S. (3 Dall.) 321 (1796). The case normally cited for the necessity of statutes to exercise jurisdiction is *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8. *Turner* is a better citation for the proposition, even though the doctrine began with the judicial understanding of *Wiscart*.

254. *Ibid*.

255. U.S. Const. Art. III §2, cl. 2.

Court here to have reviewed both factual and legal determinations of the circuit court. The Judiciary Act, however, had specified that on final judgments in civil suits and cases in equity a writ of error would lie.²⁵⁶ A writ of error was different from an appeal: in error only the law could be reviewed.²⁵⁷

Even though *Wiscart* was an equity case, the court wished to establish a general principle about the appellate jurisdiction.²⁵⁸ The issue was whether the Judiciary Act had altered, or could alter, appellate procedure to the Supreme Court. Justice Wilson distinguished admiralty and maritime suits from suits in equity for the purposes of review. He argued that the Judiciary Act §22 used 'civil' in opposition to maritime and admiralty instead of in opposition to criminal. Thus error would lie for review in the Supreme Court in equity: for civil (that is, not maritime or admiralty) suits. The Judiciary Act thus did not provide for appellate jurisdiction in admiralty and maritime suits. Admiralty appellate procedure was set in the Constitution. Since Congress had not provided exceptions or regulations, the appeal process normal in maritime and admiralty law remained untouched.²⁵⁹ Wilson argued that the constitutional provision would even have controlled an express congressional limitation of the appellate structure.²⁶⁰ Apparently, he considered that Congress could except certain classes of cases from review; but if review was desirable, it had to be properly appellate. Wilson considered that portion of Article III self-executing.²⁶¹

256. Act of September 24, 1789, §22, 1 *Stats.* 73 at 84-85.

257. 3 U.S. (3 Dall.) at 327.

258. *Idid.* at 324:

If causes of equity or admiralty jurisdiction are removed hither, accompanied with a statement of facts, but without the evidence, it is well; and the statement is conclusive as to all the facts, which it contains. This is unanimously the opinion of the court.

If such causes are removed with a statement of the facts, and also with the evidence;—still the statement is conclusive, as to all the facts contained in it. This is the opinion of the court; but not unanimously.

259. *Ibid.* at 324-27.

260. 'Even, indeed, if a positive restriction existed by law, it would, in my judgment, be superseded by the superior authority of the constitutional provision.' *Ibid.* at 325.

261. Self-executing is, of course, different from controlling. Self-executing means that a provision takes effect without statutory authorization; controlling means that a provision takes effect despite a statutory mandate to the contrary. The belief that there was self-executing jurisdiction or procedure has some support. Elbridge Gerry in the First Congress expounded on federal court jurisdiction.

We are to administer this Constitution, and therefore we are bound to establish these courts, let what will be the consequence. Gentlemen say they are willing to establish Courts of Admiralty; but what is to become of the other cases to which

The rest of the justices, except perhaps Paterson,²⁶² disagreed. They thought that the pertinent section of the Judiciary Act used 'civil actions' as opposed to criminal actions, so that admiralty and maritime cases of a civil nature would receive review only by writ of error and not by full appeal.²⁶³ Ellsworth read the provision not as a specification of a procedure but as a directive that appellate jurisdiction could only be exercised 'conformably to such regulations as are made by the Congress'. As long as Congress specified some procedure, the courts were bound to follow it only.²⁶⁴

the Continental jurisdiction is extended by the Constitution? When we have established the courts as they propose, have fixed the salaries, and the Supreme Executive has appointed the Judges, they will be independent, and no power can remove them; they will be beyond the reach of the Executive or Legislative powers of this Government; they will be unassailable by the State legislatures; nothing can affect them but the united voice of America, and that only by a change of Government. They will, in this elevated and independent situation, attend to their duty—their honor and every sacred tie oblige them. Will they not attend to the Constitution as well as your laws? The Constitution will undoubtedly be their first rule; and so far as your laws conform to that, they will attend to them, but no further. Would they then be confined by your laws within a less jurisdiction than they were authorized to take by the Constitution? You must admit them to be inferior courts; and the Constitution positively says, that the Judicial powers of the United States shall be so vested. They would then inquire what were the judicial powers of the Union, and undertake the exercise thereof, notwithstanding any Legislative declaration to the contrary; consequently their system would be a nullity, at least, which attempted to restrict the jurisdiction of the inferior courts.

1 *Annals* 829.

One line of constitutional argument could dictate mandatory judicial review of any statute that allocated federal court jurisdiction as a whole at less than that mandated by the Constitution, such that the court itself would allocate the jurisdictions subject to such subsequent regulations and exceptions of appellate jurisdictions as Congress would make.

262. Paterson later indicated that he had concurred at least in part with Ellsworth. *Jennings v. The Brig, Perseverance*, 3 U.S. (3 Dall.) 336, 337; Julius Goebel, Jr., *Hist. S.C.*, supra note 20 at 700n. See also text supra 280. Paterson was, at least later, unwilling to abide by a completely common law criminal prosecution, while at the same time agreeing to an inherent authority by the principles of the common law to punish contempts. *United States v. Smith*, 27 F. Cas. 1192, 1224. Paterson's exception for contempts, however, was followed by Justice Johnson in *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 34. The assumption that the federal courts fall heir to the full power to hold common law contempt proceedings is unquestioned. It might well be that the contempt powers of a court in a government of delegated powers ought to be viewed restrictively.

263. *Wiscart*, 3 U.S. (3 Dall.) at 327-28.

264.

It is observed, that a writ of error is a process more limited in its effects than an appeal; but, whatever may be the operation, if an appellate jurisdiction can only be exercised by this court conformably to such regulations as are made by the Congress, and if Congress has prescribed a writ of error, and no other mode, by which it can be exercised, still, I say, we are bound to pursue that mode, and can neither make, nor adopt another. The law may, indeed, be improper and

The impact of *Wiscart* need not have been great. Wilson considered the Constitution self-executing and superior to congressional stipulations. Ellsworth was somewhat more deferential to Congress. But the disagreement focused on different readings of the Constitution. The pertinent clause was not obviously self-executing: it expressly posited congressional action.²⁶⁵ The court could easily have maintained, contrary to Wilson, that in matters touching this portion of the Constitution, it needed a statute before acting, without formulating a general principle that constitutional provisions concerning jurisdiction are not self-executing. In fact, no such principle is enunciated in *Wiscart* nor would such a general principle be appropriate.²⁶⁶ The Bill of Rights, various other amendments, constitutional restrictions on the states, and much of the rest of the Constitution have always been considered self-executing. The amendment procedure required no statute, nor was any statute necessary to enforce age requirements for congressional or executive office-holders. Public perception of a case, however, is often much more important than the actual holding.²⁶⁷ And in this situation the public perception of a general principle was closely related to the holding. The argument here concerned admiralty jurisdiction and had considered self-executing provisions in relation to admiralty. Admiralty jurisdiction, however, had been the route by which the lower federal courts had constitutional, as distinct from statutory, authority over the law of nations. *Wiscart* could easily be made to apply to the law of nations cases.

inconvenient; but it is of more importance, for a judicial determination, to ascertain what the law is, than to speculate upon what it ought to be.

Ibid. at 328.

265. *Ibid.*

266. The question put by Ellsworth was whether an exception or regulation by Congress could swallow the rule in the Constitution; the various possibilities of language demand careful reading.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const. Art. III, §2, cl. 2.

Federal jurisdiction is usually considered a reserve that Congress can choose to implement if it wants, that is, that the Constitution specifies the limit of judicial power but not the necessary extent. Elbridge Gerry saw the separation of powers problem here. See note 262 *supra*. And congressional discretion to limit the jurisdiction of the federal courts (a question distinct from distribution of the jurisdiction among different federal courts and regulation of procedures) makes the courts dependent on Congress. No intrinsic reason would demand that the courts not consider the constitutional specification of jurisdiction binding law and an inviolable grant. U.S. Const. Art. VI, §2.

267. See Robert C. Palmer, 'Parameters of Constitutional Reconstruction', *supra* note 15.

V. Federal Practice After Wiscart

A. Cases Arising Under Laws

Early in 1797 the jurisdiction of the federal courts over law of nations offenses remained intact. William Jones, a Spanish citizen and inhabitant of the United States, together with several American citizens, had entered Florida to recapture his slaves. Upon the complaint of the minister of Spain, Charles Lee, as the Attorney General, gave his opinion about the legality of a prosecution.²⁶⁸ He noted that Congress had been given the power to legislate on the matter of violations of territorial rights, because such violations fell under the law of nations. Congress, however, had not yet passed such an act. Therefore, he thought, the United States could prosecute Jones in federal court at common law and inflict a fine and imprisonment for the misdemeanor, presumably under state law.²⁶⁹ Writing from Philadelphia, he noted that the law of nations had been made a part of the law of the land.²⁷⁰ Lee had not yet changed his notions about federal jurisdiction over law of nations offenses against the United States not authorized by statute.

Within a year after *Wiscart*, however, attitudes changed. William Cobbett, the editor of *Porcupine's Gazette*, printed several letters libelling the minister plenipotentiary of Spain. Charles Lee, the Attorney General, again rendered his opinion on the law.²⁷¹ Although Lee was a Virginian, he knew Pennsylvania law because he had studied in Philadelphia.²⁷² His opinion was that Cobbett could be prosecuted in the district court of Pennsylvania for libel. He then defined freedom of the press, following Blackstone and citing Lord Mansfield, although noting that until then 'With respect to national concerns among ourselves, as well as with respect to

268. *Off. Opinions A. G.*, supra note 158 at i, 68.

269. The opinion gives no indication what the rule of decision would be. Determinative of this question would be the way in which Lee read *Henfield*. If Lee read the case as indicating a federal common law, he would probably not envisage application of state law. That conclusion is possible in early 1797, but not likely.

The constitution gives to Congress, in express words, the power of passing a law for punishing a violation of territorial rights, it being an offence against the law of nations, and of a nature very serious in its consequences. That the peace of mankind may be preserved, it is the interest as well as the duty of every government to punish with becoming severity all the individuals of the State who commit this offence. Congress has passed no act yet upon the subject, and Jones and his associates are only liable to be prosecuted in our courts at common law for the misdemeanor; and if convicted, to be fined and imprisoned. The common law has adopted the law of nations in its fullest extent, and made it a part of the law of the land.

Ibid. at 69.

270. *Ibid.*

271. 1 *Off. Opinions A. G.* supra note 158 at i, 71.

272. *Attorneys General of the United States, 1789-1979*, (Washington, 1980) 6.

foreign nations, our presses have been unlimited and unrestrained'.²⁷³ He noted the role of the press in forming public opinion and thought that ambassadors should be protected from such affronts. The Pennsylvania version of freedom of the press was at this time completely in accord with the English version.²⁷⁴ Thus far Lee's opinion was acceptable, if he was indeed expounding Pennsylvania law.²⁷⁵

Lee then considered whether the case could be brought directly into the Supreme Court by virtue of its original jurisdiction.²⁷⁶ He quoted both the Constitutional provision and the Judiciary Act. The Constitution specified that the Supreme Court's original jurisdiction included all cases affecting such ministers,²⁷⁷ whereas the Judiciary Act gave the Supreme Court exclusive original jurisdiction over such public ministers in cases brought against them, and original but not exclusive jurisdiction in cases brought by them.²⁷⁸ The Constitution was thus broader than the statute, since a criminal libel prosecution of this kind would affect the ambassador (as the person libelled), but would not involve him as a party. Lee concluded that the Constitution gave the Supreme Court the 'capacity to hold criminal jurisdiction in all cases affecting ambassadors, which expressions comprehend a libel of an ambassador' but that that capacity had not been utilized.²⁷⁹

273. 1 *Off. Opinions A. G.*, supra note 158 at i, 72.

274. 'The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.' Pennsylvania Constitution of 1790, Art. IX, §7, William Swinder, *Sources and Documents*, supra note 94 at viii, 292.

275. See Francis Wharton, *State Trials of the United States* (New York, 1849) 322-29 for state prosecutions of Cobbett.

276. 1 *Off. Opinions A. G.*, supra note 158 at i, 73.

277. 'The judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls.' U.S. Const. Art. III, §2, cl. 1.

278.

The Supreme Court . . . shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice-consul, shall be a party.

Act of Sept. 24, 1789, ch. 20, §13, 1 *Stats.*, at 80-81.

279. 1 *Off. Opinions A. G.*, supra note 158 at i, 73-74. William Bradford, Attorney General, in 1794 rendered a superficially similar opinion concerning a riot in front of the house of a foreign consul. *Ibid.* at i, 41-43. Bradford handled the difference between 'affecting' and the words of the Judiciary Act as a matter of construction, not as a matter of narrowing the constitutional mandate. Bradford found the construction of the Judiciary Act proper because of the further constitutional requirement that crimes be tried in the state where the crime occurred, an improbability if the Supreme Court were to have original jurisdiction in such criminal cases. U.S. Const. Art III, §3, cl. 3. A similar necessity for statutory actions prior to assumption of jurisdiction was evidenced in congressional argument, but denied by Marshall, in 1800. 10 *Annals* 614.

He then referred to *Wiscart*: 'At the August term, (1796) after mature consideration, it was determined by four judges of the Supreme Court, that, with regard to the judicial power of the United States granted by the constitution, it remains inactive and unexercisable until by law it is drawn into action'.²⁸⁰

Lee's summary of *Wiscart* was overly broad. The Supreme Court's appellate jurisdiction could be read to require congressional regulations, but its original jurisdiction is unambiguous. Moreover, the total jurisdiction of the federal courts possible by the Constitution, regardless of the distribution, could legitimately have been considered necessarily mandated.²⁸¹ Nonetheless, jurisdictional arguments based solely on Constitutional provisions would now seem suspect: exercise of Article III jurisdiction required some mediation by statute.

B. The Counterfeiting Cases

In 1797²⁸² and just prior to Lee's opinion, the government prosecuted four counterfeiting cases that occupy a crucial place in the history of the common law of crime. The cases came before Ellsworth, C.J., in the circuit court for the Massachusetts district. Pardon Smith was indicted for counterfeiting bills of the Bank of the United States.²⁸³ Congress had passed a statute relating to counterfeiting securities of the Bank of the United States,²⁸⁴ but none concerning bills. The case therefore was prosecuted absent a specific

280. 1 *Off. Opinions A. G.*, supra note 158 at 1, 74. Lee's reference to the decision by four justices confirms that he was referring to *Wiscart*.

281. See Gerry's comment at note 261 supra. Had Congress followed the option provided in U.S. Const. Art. II § 2, cl. 2 and allowed the Supreme Court to appoint the justices of lower federal courts, that requirement of assuming the complete jurisdiction would seem more compelling.

282. The traditional date for the counterfeiting cases is 1792. *United States v. Smith*, 27 F. Cas. 1147 (C.C.D. Mass. 1792)(No. 16,323). Goebel found the records for the cases, and the actual date is 1797. Julius Goebel, Jr., *Hist. S.C.*, supra note 20 at 630n.

283. 27 F. Cas. at 1147.

284. Act of April 30, 1790, ch. 9, §14, 1 *Stats.* 112, 115. The statute covered the counterfeiting of 'any certificate, indent, or other public security of the United States'. The prosecution's assumption was that a bank note was different from a security; a bank note was certainly different from coin. Had they identified bank notes as securities, the appropriate penalty would have been death. *Ibid.* The decision to differentiate between the two was thus advantageous to the defendant. For the difference between bank notes and coin, see *U.S. v. Bowen*, 24 F. Cas. (C.C.D.C. 1817)(No. 14,628). Goebel recognized the difference between securities and bank notes. Julius Goebel, Jr., *Hist. S.C.*, supra note 20 at 630. Johnson, however, summarized the statute as providing against counterfeiting 'federal notes and currency', certainly an incorrect rendition. George Lee Haskins and Herbert A. Johnson, *Hist. S.C.*, supra note 12 at 635.

statutory delegation of the crime²⁸⁵ and determination of punishment. The conceptualization of Smith's offense was derived from *Wiscart*.

U.S. v. Smith was inconsistent with the law of nations cases in that it was conceived as a case 'arising under . . . the Laws of the United States'.²⁸⁶ The Bank of the United States had been established constitutionally by law. Problems related to the bank only arose because of that legislation, so that counterfeiting the bank's bills could be considered within the category of 'Cases arising under . . . the Laws of the United States' to which the judicial power of the United States extended.²⁸⁷ Counterfeiting bills of the Bank of the United States was accordingly contempt of and a misdemeanor against the United States. And the Judiciary Act §11 appropriated the case for the circuit court.²⁸⁸

The circuit court applied state law, conformable to the Judiciary Act §34.²⁸⁹ The abridged report mentions state law: 'the same offense might be punished as a common law cheat in the state court'.²⁹⁰ Blackstone's punishment of a common law cheat was fine, imprisonment, and pillory.²⁹¹ Smith was fined and imprisoned. Massachusetts, furthermore, had laws on the subject. A 1784 statute punished counterfeiting bills of the Massachusetts Bank by seven years hard labor.²⁹² That statute might not apply, because it concerned offenses against the Massachusetts Bank; offenses against the Bank of the United States were not yet possible.²⁹³ A Massachusetts statute of 1785, however, prohibited forgery, including forgery of 'any promissory note, . . . warrant, order or request for the payment of money . . . or any assurance of money or other property whatsoever'.²⁹⁴ The penalties included the pillory, cropping of ears, whipping, imprisoning,

285. The Judiciary Act, §11 could have served as a general delegation of the crime, although without any specification as to punishment.

286. U.S. Const., Art. III, §2, cl. 1. Law of nations cases fall easily under the admiralty specification of Art. III, §2, cl. 1 or under law of nations clause in Art. I, §8. Counterfeiting might seem to fall easily under Art. I, §8, cl. 6, but that clause refers only to counterfeiting securities and coin. Extending that clause to cover bank notes might not work successfully.

287. U.S. Const. Art. III, §2, cl. 1. A similar argument was made in the same year in the Philadelphia Mayor's Court. *Commonwealth v. Schaffer*, 4 U.S. (4 Dall.) at xxix Appendix.

288. 27 F. Cas. at 1147.

289. See text at notes 187-291 supra.

290. 27 F. Cas. at 1147.

291. William Blackstone, *Commentaries*, supra note 83 at iv, 158.

292. *The First Laws of the Commonwealth of Massachusetts*, 190 (Wilmington, 1981).

293. This situation is different from that in *Henfield*, in which state precedent was used. In *Henfield*, the state had prosecuted for an offense against Pennsylvania and the United States. In this situation there was no such joint precedent. See text at note 172 supra.

294. *The First Laws of the Commonwealth of Massachusetts*, supra note 292 at 226.

and fining.²⁹⁵ This statute could apply to counterfeiting bills of the Bank of the United States. If the statute was in affirmance of or in modification to the common law, the wording of the report is explicable. The desire to have it as a trial at common law derived from the Judiciary Act, which only applied to trials 'at common law' in federal courts.²⁹⁶

The counterfeiting cases produce two conclusions. The courts were still using state law as the rule of decision in accord with the Judiciary Act §34. *Wiscart*, however, had changed the jurisdictional basis. Law of nations cases like *Henfield* had rested in part on Article III admiralty jurisdiction, and more remotely under the clause 'cases . . . arising under this Constitution'.²⁹⁷ *Smith* was based on the provision concerning 'cases . . . arising under . . . the Laws of the United States'. In the former situation, the jurisdiction vested because the power was explicitly in the Constitution. In the latter cases, the link was more tenuous: the court only had jurisdiction because the offense would not have occurred but for the existence of an institution constitutionally established by federal law. Although jurisdiction was attenuated, the court still adhered to state law and had not yet opted for a federal common law, either as a source of jurisdiction or as a means of executing a delegated jurisdiction. *Wiscart*, however, emphasized the statutory basis of jurisdictions.

C. Worrall

In 1797 Robert Worrall attempted to bribe Tench Coxe, the Commissioner of the Revenue of the United States, to obtain a contract to build the Cape Hatteras light house. Coxe arranged for Worrall to be apprehended, whereupon Worrall was indicted, tried and convicted.²⁹⁸ Dallas, for the defense, moved in arrest of judgment that the federal court did not have jurisdiction.²⁹⁹ The argument in *Worrall* mirrored that in *Smith*; the conjunction of the *Smith* argument and the *Wiscart* doctrine produced a federal common law of crime.

Dallas argued against the circuit court's jurisdiction on the basis of the tenth amendment,³⁰⁰ but distinguished previous cases. In a government of

295. Ibid.

296. See text *supra* at note 187.

297. U.S. Const., Art. III, §2, cl. 1. The Philadelphia's mayor's court in 1797 recognized the difference between the two styles of reasoning and thus distinguished both *Henfield* and *Ravara*. *Commonwealth v. Schaffer*, 4 U.S. (4 Dall.) at xxxi Appendix.

298. *United States v. Worrall*, 28 F. Cas. 774, 775-76 (1798).

299. Ibid. at 776.

300.

It may be urged, that though the offence is not specified in the constitution, nor defined in any act of congress; yet, that it is an offence at common law; and that the common law is the law of the United States, in cases that arise under their authority. The nature of our federal compact will not, however, tolerate this

delegated powers, he argued, all powers must arise by a positive grant. Thus Congress could punish counterfeiting, offenses against the law of nations and other offenses under the necessary and proper clause.³⁰¹ Then, accepting *Wiscart*, he maintained that even powers granted expressly 'cannot take effect until they are exercised through the medium of a law'.³⁰² He characterized *Henfield*³⁰³ as a prosecution for treaty violations, and noted that in *Ravara*³⁰⁴ the accused's consular status required federal jurisdiction.³⁰⁵

Rawle, as prosecutor, effectively refuted Dallas's arguments. He maintained that *Henfield* also concerned the law of nations. Moreover, neither the treaties nor Congress had defined the punishment for infractions of the treaty.³⁰⁶ Nor could *Ravara* be distinguished so easily, since Rawle thought Congress had not defined the offense nor apportioned the punishment.³⁰⁷ Rawle thus demonstrated that Dallas could not distinguish previous cases sufficiently to require prior congressional definition of crimes and punishments.

Rawle based the prosecution on federal common law. Since Congress had established the office of Commissioner of the Revenue, attempted corruption of that officer justified prosecution, even without prior congressional definition. Since Worrall could not have attempted the bribe had Congress not created the office, such an attempt was a case arising under the laws of the United States. Prosecution would proceed under the principles of the common law or else the attempt could not be punished at all.³⁰⁸ In a strict

doctrine. The twelfth article of the amendment stipulates, that 'the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people'. In relation to crimes and punishments the objects of the delegated power of the United States are enumerated and fixed [T]he very powers that are granted cannot take effect until they are exercised through the medium of a law.

Ibid. at 777.

The reference to the tenth amendment as the twelfth article of the amendments derives from the fact that twelve amendments were submitted to the states, the first two of which were rejected. The tenth amendment was thus the twelfth provision in the list submitted to the states for ratification.

301. *Ibid.* at 776-77.

302. See note 301 *supra*.

303. See text at note 170 *supra*.

304. See text at notes 216-19 *supra*.

305. 28 F. Cas. at 778.

306. *Ibid.*

307. *Ibid.*

308.

[T]he offence was strictly within the very terms of the constitution, arising under the laws of the United States. If no such office had been created by the laws of the United States, no attempt to corrupt such an officer could have been made; and it is unreasonable to insist, that merely because a law has not prescribed an express

sense, that is probably true. State courts could not prosecute for attempted bribery of United States officials as such, although they could prosecute under a different definition of the same act. Rawle's main point, however, was that, if Coxe would have been liable for accepting the bribe, then the party offering the bribe must be similarly liable.³⁰⁹ The logic is not obvious. Coxe was a federal officer,³¹⁰ but Worrall had undertaken no obligation to the federal government. Nevertheless, even after Justice Chase's query, Rawle based the indictment only on the common law, deriving jurisdiction for the case as one arising under United States law.³¹¹

Chase ruled immediately that an indictment solely at common law was not sustainable. The exercise of federal jurisdiction required Congress to define both the crime and the punishment. He denied the existence of a federal common law of crime,³¹² but did not express an opinion on the law of

and appropriate punishment for the offence, therefore, the offence, when committed, shall not be punished by the circuit court, upon the principles of common law punishment

Ibid. at 778.

District Judge Kane gives a later and different view of the situation.

The jurisdiction of offences which are cognizable at common law resides in the state courts alone, even though the general government may be the party immediately aggrieved by the misdeed complained of. Until the year 1840 the congress of the United States seem to have been, in general, content with the protection, which the laws of the several states gave to the public property within their limits. The integrity of subordinates, who were not themselves entrusted with public money . . . was guarded of course by the common law and the local statutes, as administered by the state courts.

United States v. Hutchinson, 26 F. Cas. 452, 453 (D.C.E.D. Pa. 1848)(No. 15,432).

309.

The true point of view for considering the case, may be ascertained, by an inquiry whether, if Mr. Coxe had accepted the bribe, and betrayed his trust, he would not have been indictable in the courts of the United States? If he would be so indictable, upon the strongest principles of analogy, the offence of the person who tempted him, must be equally the subject of animadversion before the same judicial authority.

28 F. Cas. at 778.

310. *Ibid.* at 775.

311.

CHASE, Circuit Justice. Do you mean, Mr. Attorney, to support this indictment solely at common law? If you do, I have no difficulty upon the subject. The indictment cannot be maintained in this court.

Mr. Rawle, answering in the affirmative, CHASE, Circuit Justice, stopped Mr. Levy, who was about to reply, in support of the motion in arrest of judgment.

Ibid. at 778.

312. *Ibid.* at 779. '[I]n my opinion, the United States, as a federal government, have no common law.'

nations.³¹³ Chase indicated that even a congressionally defined offense that omitted fixing the penalty would be insufficient.³¹⁴ Chase's radical opinion elicited a similarly radical response from Justice Peters. Peters made the classic argument for common law crimes: that every government has the power to protect itself from subversion.³¹⁵ He thought the federal government possessed the common law power to punish misdemeanors. The necessary independence of the federal government made reliance on state courts to punish offenders inappropriate. His argument was faulty, because such reliance on the states was one appropriate option under the Constitution.³¹⁶

Chase and Peters were dealing explicitly with a federal common law of crime: a new issue. Prior to *Worrall* judges had used the common law, with easy reference to state law as the rule of decision.³¹⁷ Chase explicated the differences between various states' common laws,³¹⁸ concluding that any federal resort to common law would thus have to be to English common law as such, then altered for United States conditions.³¹⁹ Chase demanded statutory definition; he rejected state law as the rule of decision and the inconsistent federal law that entailed. But his analysis created tenth amendment³²⁰ problems. Peters disagreed, similarly rejecting state law but accepting a federal common law. Analysis before *Wiscart* could have

313. Ibid.

314. 28 F. Cas. at 779.

315.

Whenever a government has been established, I have always supposed, that a power to preserve itself, was a necessary and an inseparable concomitant.

Ibid.

316. Robert C. Palmer, 'Liberties', supra note 1.

317. See text at notes 171-87 supra.

318.

[H]e who shall travel through the different states, will soon discover, that the whole of the common law of England has been nowhere introduced; that some states have rejected what others have adopted; and that there is, in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application.

Ibid. at 779.

The observation is one which would derive experientially for a federal justice accustomed to riding circuit. The nature of the observation, however, was still somewhat novel. Morton J. Horwitz, *Transformation*, supra note 12 at 11-14; William E. Nelson, 'The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws', in *Law in Colonial Massachusetts* (Boston, 1984) 432, 451-54.

319. 28 F. Cas. at 779. Dallas later carefully followed Chase's argument. 8 *Annals* 2264-265 (1797).

320. U.S. Const. Amend X. The problems concern jurisdictions like that over consuls, who were not public ministers. Exercising that constitutional jurisdiction without aid of the common law, federal or state, required legislation. But Congress had no legislative authority in that sphere. Chase's analysis thus logically implied the congressional exercise of undelegated legislative powers.

allowed prosecutions under the law of nations but condemned the counterfeiting and corruption prosecutions. *Wiscart*, in concentrating attention on federal statutes for carrying jurisdiction into effect, excluded resort to state law as the rule of decision in federal criminal cases.

The court wanted this new issue put into a form suitable for final resolution before the Supreme Court.³²¹ Defense counsel, however, were unwilling: they 'did not think themselves authorized to enter into a compromise of that nature'.³²² They did not specify the nature of the compromise. Perhaps that resolution would have required an agreed upon statement of facts, and Worrall preferred conviction to an admission of guilt. But 'compromise' would then have been a strange word to have used. Perhaps the compromise did not involve the accused, but the law. Dallas had justified *Henfield* and *Ravara*. For resolution by the Supreme Court, he would have to discard his legal stance. Either he or Worrall may have preferred losing to what might happen in the Supreme Court. Chase's decision to concur with Peters sufficiently to impose the common law penalty on Worrall is thus explicable.³²³ From Chase's point of view, altered by *Wiscart*, acknowledging *Henfield* would legitimize the *Worrall* prosecution. Chase merely left Worrall to his preferred fate.

Worrall is identified as a watershed for Chase.³²⁴ In 1799 Chase presided over a counterfeiting trial: *United States v. Sylvester*.³²⁵ The case is unreported, but is said to have been a common law prosecution for counterfeiting resulting in the common law penalties of imprisonment and fine.³²⁶ Chase's acquiescence to common law convictions in *Worrall* and *Sylvester* might indicate acceptance of a federal common law of crime.³²⁷ As already shown, however, *Worrall* need not indicate that.³²⁸ And *Sylvester* can be explained in other ways. If the prosecution relied on *Greenleaf*,³²⁹

321. 28 F. Cas. at 780.

322. *Ibid.*

323. The traditional explanation is that Chase conferred with his fellow Supreme Court justices and found they agreed with Peters. Chase then changed his mind. *Ibid.* at 780n.; Stephen B. Presser, 'Tale of Two Judges', *supra* note 12 at 68-69. That explanation, however, does not account for the 'compromise' into which the lawyers were unwilling to enter.

324. Stephen B. Presser, 'A Tale of Two Judges', *supra* note 12 at 69. Note, however, that Johnson does not assume that Chase's views had altered at all. George Lee Haskins and Herbert A. Johnson, *Hist. S.C.*, *supra* note 12 at 639.

325. See Leonard Levy, *Freedom of Speech and Press in Early American History: Legacy of Suppression* (New York, 1963) xv-xvi.

326. *Ibid.*

327. Stephen B. Presser, 'A Tale of Two Judges', *supra* note 12 at 69; Leonard Levy, *Emergence of a Free Press*, *supra* note 12 at 278.

328. See text at notes 321-23 *supra*.

329. See text at notes 244-52 *supra*.

Chase still would not have believed in a merely inherent federal common law of crime. Procedure according to *Greenleaf* was founded on an extrapolation from a statute. The extrapolation was tenuous, but the prosecution was not based solely on inherent common law authority. Peters's view did not prevail, even in the short term.³³⁰

D. Turner

In 1799 Ellsworth and Chase reiterated *Wiscart* doctrine: statutes were needed to exercise constitutionally allowed jurisdictions.³³¹ *Turner v. Bank of North America*³³² concerned diversity jurisdiction over an action on an endorsed promissory note. The issue was whether an endorsement to a citizen of another state would yield diversity, when the citizenship of the original parties to the note would not.³³³ The Constitution indicated that diversity might result.³³⁴ The Judiciary Act specified that it did not.³³⁵ Rawle argued the self-executing nature of the Constitution. Since the Constitution granted the judicial power

Congress can no more limit, than enlarge, the constitutional grant. In the second section of the third article, the constitution contemplates the parties to the controversy, as alone raising the question of jurisdiction; and if the existing controversy is 'between the citizens of different states', the judicial power of the United States expressly extends to it.³³⁶

For Rawle, the Article III §2 specification that the judicial power 'shall extend' to various matters was effective.

330. Historical opinion would have indicated that Peters's view did prevail. Stephen B. Presser, 'A Tale of Two Judges', supra note 12 at 68-70; Leonard Levy, *Emergence of a Free Press*, supra note 12 at 278. In *United States v. Williams*, Ellsworth did comment that 'the common law of this country remains the same as it was before the Revolution'. 29 F. Cas. 130 (C.C.D. Conn. 1799)(No. 17,708). *Williams*, however, was similar to *Henfield*, except that the accused had officially, but without U.S. consent, become a French citizen prior to engaging in warfare. *Williams* also raised his expatriation as a defense, so that the use of a common law standard is rather different here from using the common law as a source of jurisdiction. Leonard Levy cites *Williams* as if it were relevant to seditious libel. Leonard Levy, *Emergence of a Free Press*, supra note 12 at 277.

331. See text at notes 282-85 supra.

332. 4 U.S. (4 Dall.) 8 (1799). *Turner*, not *Wiscart*, is normally cited as the origin of the doctrine. *Sheldon v. Sill*, 49 U.S. (8 How.) 439, 449 (1850).

333. *Turner*, 4 U.S. at 11.

334. Controversies 'between Citizens of different States' would on its face include controversies between an original party and an endorsee of a different state. U.S. Const. Art. III, §2, cl. 1.

335. Act. of Sept. 24, 1789, ch. 20, §11.

336. 4 U.S. at 10.

Ellsworth preferred prior statutory authorization, and queried Rawle on the impact of his argument.³³⁷ Chase was even more explicit.

Chase, Justice. The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this court, we possess it, not otherwise; and if Congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, Congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant.³³⁸

Neither Ellsworth nor Chase advocated a federal common law. They both showed much more deference to the legislative branch.³³⁹

E. The Alien and Sedition Acts

In 1798, after two seditious libel prosecutions had been initiated at common law, Congress passed the Alien and Sedition Acts.³⁴⁰ Creating distrust of the federal government thus became a criminal offense. The Federalists used the Sedition Act to attack congressmen and newspapers in Republican states.³⁴¹ Both the Republicans³⁴² and some states³⁴³ protested.

337. 'How far is it meant to carry this argument? Will it be affirmed, that in every case, to which the judicial power of the United States extends, the federal courts may exercise a jurisdiction, without the intervention of the Legislature, to distribute, and regulate, the power?' 4 U.S. at 10n. The problem Ellsworth raises is real, but so likewise is the problem that Gerry raised. See note 261 *supra*. It could easily be argued that the independence of the judiciary and its balancing function demanded that all the jurisdiction possible via the Constitution be located in some federal court, and that that principle would supersede the separation of powers concerns. Congress could, of course, then regulate if it was dissatisfied.

338. 4 U.S. at 10n.

339. Ellsworth was one of the principal drafters of the Judiciary Act. Clark Warren, 'New Light', *supra* note 12 at 50. It is completely possible that the original version of §§9 and 11, including the limiting clause 'and defined by the laws of the same' was his work, but defeated in passage. As justice he would then be seen as insisting on the prior action of Congress once more. Paterson, however, was also one of the principal drafters. *Ibid*. He had sided with Wilson in *Wiscart*, so that one would expect that he was not as deferential to the legislative branch. See text at note 262 *supra*.

340. Act of July 14, 1798, ch. 74, 1 *Stats.* 596.

341. George Lee Haskins and Herbert A. Johnson, *Hist. S.C.*, *supra* note 12 at 638-39.

342. Leonard Levy, *Emergence of a Free Press*, *supra* note 12 at 280; James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca, 1956).

343. 'Instructions from the General Assembly of Virginia to the Senators from that State in Congress, January 11th, 1800', reprinted in Peter S. Du Ponceau, *Dissertation*, *supra* note 190 at 225-26.

The prosecutions created widespread distrust of the Federalists and were a significant factor in Jefferson's election.³⁴⁴ The public response to governmental suppression of criticism made it difficult to argue later in favor of a federal common law of crime.³⁴⁵

The common law prosecutions for seditious libel that preceded the Sedition Act are obscure. Neither prosecution resulted in a trial. Benjamin Franklin Bache, editor of the *Aurora*, died; Burke, editor of the *Time Piece*, fled the country.³⁴⁶ Peters's well-known comments in *Worrall* make it likely that the prosecutions were founded on a federal common law of crime.³⁴⁷ The prosecution of Bache at least might have succeeded, since Peters would have been the judge.³⁴⁸

Congress was dissatisfied with such common law prosecutions. They passed the Sedition Act not simply to alter common law rules,³⁴⁹ but to satisfy the justices with a statute. *Wiscart* doctrine determined that proper common law jurisdiction would not find favor with most of the Supreme Court. Ellsworth and Chase were still certainly of that opinion in August of 1799, when they queried Rawle in *Turner*.³⁵⁰ The emphasis on basing jurisdiction on laws of the United States, thus on statutory authority, had reached Congress; Marshall argued against such ideas in Congress.³⁵¹ The statute was necessary not just to modify the role of the jury and add truth as a defense, but to prosecute successfully. The prosecutions of Bache and Burke may, indeed, have only been harassment, useful until the statute was passed.³⁵²

The passage of the statute allayed the court's legal qualms. They found first amendment freedom of speech and press no problem. The alterations of state constitutions³⁵³ and the consistency of state practice provided a model that many found attractive.³⁵⁴ Moreover, *Worrall* had involved the

344. Stephen B. Presser, 'A Tale of Two Judges', *supra* note 12 at 97, 104-105.

345. George Lee Haskins and Herbert A. Johnson, *Hist. S.C.*, *supra* note 12 at 638-41.

346. Leonard Levy, *Emergence of a Free Press*, *supra* note 12 at 277.

347. Julius Goebel, Jr., *Hist. S.C.*, *supra* note 20 at 632-33.

348. *Ibid.* at 632; Leonard Levy, 'On the Origins of the Press Clause', *supra* note 12 at 205, 217.

349. *Ibid.* at 634-35. Leonard Levy remains perplexed by the felt need for a statute, thinking the common law would suffice. Leonard Levy, *Emergence of a Free Press*, *supra* note 12 at 298.

350. *Turner v. Bank of America*, 4 U.S. (4 Dall.) at 10n.

351. 10 *Annals* 614 (1799).

352. A similar situation seems to have arisen under Jefferson: Leonard Levy, *Emergence of a Free Press*, *supra* note 12 at 343-46.

353. See text at note 274 *supra*.

354. Leonard Levy, *Emergence of a Free Press*, *supra* note 12 at 304-305.

need of a statute.³⁵⁵ Regardless of the Judiciary Act and its deference to state law,³⁵⁶ theory now emphasized the independence of the federal government and the desirability of uniform federal practice. Both concerns indicated a preference for federal instead of state law, and *Wiscart* demanded statutory instead of common law jurisdictions.³⁵⁷

*United States v. Hudson and Goodwin*³⁵⁸ in 1812 carried these demands to their natural conclusion: there was no federal common law of crime. The court formulated the rule in the broadest possible language. *Hudson* was a seditious libel prosecution. Against Justice Story's continued objections, the court thereafter applied the rule also in admiralty and maritime jurisdictions.³⁵⁹ Story's argument was overly expansive, since he would have included all offenses against the sovereign and against public rights, justice, peace, trade and police,³⁶⁰ without considering first amendment implications. But as to the main point, he was correct. The Judiciary Act had not delegated jurisdiction only over specifically defined offenses.³⁶¹ Moreover, the language of Article I, §8, cl. 10 indicated what Marshall had argued in 1799:³⁶² that Congress could modify the law of nations, but need not legislate it entirely before court enforcement.

355. See text at notes 312-20 *supra*.

356. See text note 62 *supra*.

357. See text at notes 253-67 *supra*.

358. 11 U.S. (7 Cranch) 32.

359. Story already was involved between 1812 and 1816 with federal common law. In *United States v. Clark* he felt bound by but protested the decision in *Hudson*, ruling that that case precluded a federal common law relative to perjury. 25 F. Cas. 441 (C.C.D. Mass. 1813)(No. 14,804). In *United States v. Coolidge* he argued from the Judiciary Act §11, as would Charles Warren ('New Light', *supra* note 12 at 73), that Congress had not restricted the courts to specifically defined offences. 25 F. Cas. 619 (C.C.D. Mass. 1813)(No. 14,857). He argued there that admiralty matters presented the strongest case for a federal common law. *Ibid.* at 620. He was correct at least in that. Story's opinion there was reversed by the Supreme Court without argument although the court was divided; the government declined to argue the case and no counsel appeared for the defendant. 14 U.S. (1 Wheaton) 415, 416. In 1812 Story voiced his opinion (following Tilghman in *United States v. Conyngham*: 25 F. Cas. 599 (C.C.D. Pa. 1801)(No. 14,850)) concerning §34 in non-criminal matters. *United States v. Wonson*, 28 F. Cas. 745 (C.C.D. Mass. 1812)(No. 16,750). Story was, even for himself, abnormally prescient in *Wonson*, since the report has him citing, in 1812, his 1842 decision in *Swift v. Tyson* (41 U.S. (16 Pet.) 1 (1842)). *Ibid.* at 749. Modern justices have prudently abstained from this practice. Story reiterated his opinion at length then in *United States v. Hoar*. 26 F. Cas. 329 (C.C.D. Mass. 1821)(No. 15,373).

360. *Coolidge*, 25 F. Cas. at 620.

361. See note 359 *supra* and text at notes 49-61 *supra*.

362. See note 64 *supra*.

VII. Conclusion

Historical opinion has held that Congress and the first generation of justices believed in a federal common law of crime. The most typical expression of the common law of crime was seditious libel. Such an acceptance of common law authority dictated that expansive notions of first amendment freedoms of speech and press could not rest on original intent, because the First Congress as the body that drafted the first amendment and the first judges approved by that Congress must be presumed to have acted and thought in line with the measures they proposed. That scholarly tradition has obscured the early consensus on the limited nature of the federal government.

Careful examination of the Judiciary Act and the early cases yields a different picture. The Judiciary Act did not envisage a general federal common law of crime. Although not explicit, the Judiciary Act had delegated to the federal courts a jurisdiction over offenses under admiralty and maritime law according to the law of nations. The justices had no problem perceiving that intent and applied state law as the rule of decision in such criminal cases except when otherwise mandated by Constitution, statute, or treaty. No evidence survives of an expansive notion of common law jurisdiction among the justices prior to *Wiscart*.

Wiscart called into question early ideas of a self-executing jurisdiction. Except perhaps for the original jurisdiction of the Supreme Court, jurisdiction must be established by statute. An independent federal common law was thus problematic. In *Worrall*, Justice Chase posed the additional problem squarely as to the precise rules to be adopted. As between state and federal common law, consistency dictated the latter; but *Wiscart* doctrine rejected that possibility. Application of state criminal common law in the *Worrall* situation would have been inappropriate anyway, since it was outside the admiralty and maritime subject matter: §9 and §11 of the Judiciary Act were an insufficient foundation. But the *Wiscart* emphasis on statutes necessitated the passage of the Sedition Act instead of permitting common law prosecutions. *Hudson* was thus a foregone conclusion; *Coolidge*, relating to admiralty law, was not.

Within the first decade after ratification of the Constitution, some legislators and some justices believed in federal jurisdiction over offenses not previously defined by statute. Few of those, however, advocated a general federal common law of crime. Even Peters's remarks came after *Wiscart* and do not indicate the views of legislators or justices before 1796. Analysis of first amendment speech and press can proceed without the vexation of the supposed initial acceptance of a federal common law of crime. Moreover, this perception of early legislative and judicial views confirms that at least at the beginning there was a strong consensus in the government that the federal government was different in kind from state governments and had a more limited mandate.

