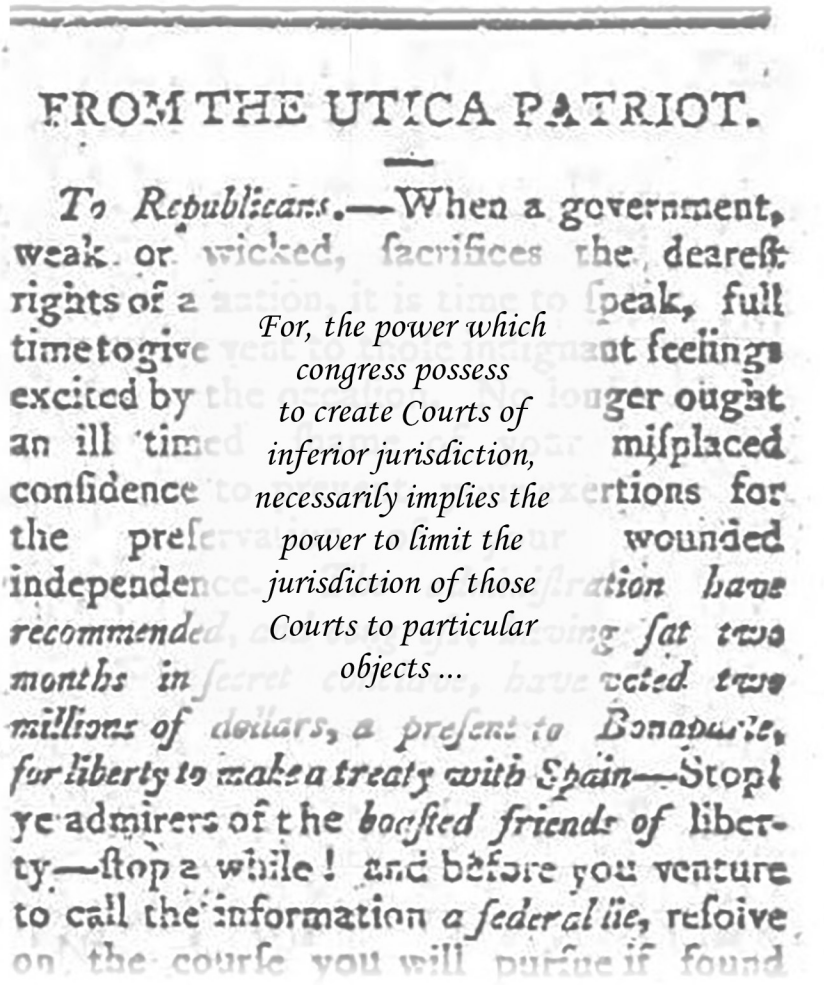
United States v. Hudson and Goodwin

1812



FROM THE UTICA PATRIOT.

To Republicans.—When a government, weak or wicked, ſacrifices the deareſt rights of a peak, full time to give nt feelings excited by ger ought an ill tim miſplaced confidence rtions for the preſ wounded independen ation have *recommended* g ſat two *months in* cted two *millions of dollars, a preſent to Bonaparte, for liberty to make a treaty with Spain*—Stop! ye admirers of the *boaſted friends of* liberty—ſtop a while! and before you venture to call the information *a federal lie*, reſolve on the courſe you will purſue if found

For, the power which congress possess to create Courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those Courts to particular objects ...

Federal Judicial Center
2020

Central Question

Did the federal courts have jurisdiction over crimes not defined by Congress?

Historical Context

The period from the 1790s to the 1810s was one of the most intensely partisan phases of American history. The Federalists, who supported George Washington's administration, believed in a strong national government run by elite members of society. They advocated for closer ties with the British and for Alexander Hamilton's economic policies aimed at developing a major commercial economy. Republicans, by contrast, were less elitist and had a more expansive view of democracy, as evidenced by their support for the French Revolution. While Federalists saw the nation's destiny lying in the growth of manufacturing and trade, Republicans favored westward expansion and increased agricultural production. Partisan conflict came to a head in 1798, when the United States stood on the brink of war with France.

In the course of its war with Britain, France had begun in 1796 to seize American ships to disrupt trade with its adversary. After failed negotiations with France to end its interference in American shipping, many Federalists, including President John Adams, believed war was inevitable. Republicans, who admired France's newly egalitarian society and did not wish to have closer ties with monarchical Britain, fervently opposed going to war. In response to harsh criticism from Republican politicians and newspapers, Adams accused his political opponents of disloyalty. To counter the alleged threat of internal subversion, the Federalists enacted the Sedition Act of 1798, which criminalized virtually any criticism of the government. Several prominent Republicans, including a member of Congress, were convicted under the Act.

The Republicans took power when Thomas Jefferson defeated John Adams in a presidential election dubbed "The Revolution of 1800," and the Sedition Act expired in 1801. Intense partisan conflict continued until the Federalists faded from the political scene following the War of 1812. Federalist newspapers published frequent attacks on Jefferson and his administration, including the broadside that resulted in the *Hudson and Goodwin* case. The Republicans, however, having a far more expansive view of the First Amendment than the Federalists had espoused, did not enact any new legislation addressing seditious speech.

Legal Debates Before *Hudson and Goodwin*

The *Hudson and Goodwin* case addressed the question of whether the federal courts had jurisdiction over common-law crimes, meaning crimes not identified by any federal statute. In the earliest years of the republic, some cases of this nature were heard in federal court.

Most of the justices of the Supreme Court—all of whom, until 1804, were Federalists—accepted such jurisdiction as proper when performing their circuit-riding duties. In 1790, for example, Chief Justice John Jay described criminal acts in broad terms when giving a grand jury charge in the U.S. Circuit Court for the District of New York, after which the grand jury returned indictments for piracy, a nonstatutory crime.

Three years later, in *Henfield's Case*, the defendant was tried in the U.S. Circuit Court for the District of Pennsylvania for serving on a French privateering vessel that was capturing British ships. Although no federal statute imposed a duty of neutrality on American citizens, Justices James Wilson and James Iredell and U.S. District Judge Richard Peters believed that the court had jurisdiction over the case. In his charge to the jury, Wilson explained that the case was governed by "the law of nations," as well as treaties between the United States and Britain, which pursuant to the Constitution were "the supreme law of the land." Henfield was acquitted, however.

Justice Samuel Chase was the only one of the Court's earliest members to express hostility to common-law criminal prosecutions in the federal courts. Although Chase was a Federalist, he had previously been an opponent of the ratification of the Constitution, and he believed strongly in states' rights. In *U.S. v. Worrall*, a 1798 prosecution in the U.S. circuit court in Pennsylvania for an attempt to bribe a federal official, prosecutor William Rawle admitted that the case was brought solely under the common law. After Worrall was convicted, his attorney moved to set aside the judgment on the grounds that the court lacked jurisdiction. Chase agreed that the case was not properly heard in federal court because the national government had no common law. "[T]he United States did not bring it with them from England; the constitution did not create it; and no act of Congress has assumed it," he explained. He nevertheless acquiesced in the mild sentence Judge Peters imposed.

Debates over the Sedition Act of 1798 brought to the forefront the issue of common-law jurisdiction in the federal courts. Uncertainty over common-law jurisdiction was part of the Federalists' motivation for enacting the statute, but in defending it, they claimed that federal prosecutions for seditious libel were already authorized under the common law. The Act, they asserted, would actually make the law fairer to defendants by allowing the use of truth as a defense. Republicans countered by arguing that common law was entirely a creature of the states, and that for federal courts to exercise common-law jurisdiction would effectively eliminate constitutional restrictions on federal power.

The debate over federal common-law jurisdiction was one part of a larger argument between Federalists and Republicans over the scope of federal judicial power. After being defeated in the elections of 1800 but before leaving office, the Federalist majority enacted the Judiciary Act of 1801, arguably aimed at entrenching Federalist appointees in the

courts and expanding judicial authority. The Act created sixteen new circuit judgeships, most of which Adams filled in his final days as President. Perhaps more significant was the Act's grant to the federal courts of jurisdiction over all cases arising under the Constitution, federal statutes, and treaties, otherwise known as general federal-question jurisdiction. Although the incoming Republican congressional majority repealed the Act in 1802, the Supreme Court decided *Marbury v. Madison* the following year, establishing judicial review and further inflaming Republican fears of judicial tyranny.

The Case

On May 7, 1806, Barzillai Hudson and George Goodwin, Federalists and editors of the *Connecticut Courant* newspaper, reprinted an article that had appeared in a Utica, New York, newspaper a few days earlier. According to the article, President Thomas Jefferson had convinced Congress in secret to appropriate two million dollars to be paid to French ruler Napoleon Bonaparte. The object of the alleged payment was to obtain the aid of France in convincing Spain to sell Florida to the United States. The article recalled the sacrifices of those who had fought in the Revolutionary War, asking rhetorically if they had been made so "[t]hat your chosen rulers should become tax-gatherers of an insatiable, savage, blood thirsty tyrant[.]"

A few months earlier, Jefferson had appointed Pierpont Edwards to be the judge of the U.S. District Court for the District of Connecticut. As district judge, Edwards also presided over the U.S. circuit court for the district along with a justice of the Supreme Court riding circuit. A Jefferson loyalist, Judge Edwards presided over a grand jury, which returned indictments against Hudson and Goodwin for seditious libel in September 1806. Because the Sedition Act of 1798 had expired in 1801, there was no statutory basis for the charge, so it was based only on common law. In Judge Edwards's charge to a previous grand jury, he had described publications meriting criminal punishment as those "unfounded in truth, or principle, [and] calculated to create distrust and jealousy, to excite hatred against the government, and those who are intrusted with the management of it, and to bring any or all of them into contempt."

The editors' trial was originally set for April 1807, but was postponed several times, in part because Judge Edwards had agreed to wait until a new circuit justice had arrived (William Paterson, the justice allotted to the Second Circuit, died in September 1806). Paterson's successor, Henry Brockholst Livingston, was appointed to the Supreme Court in November 1806, but was not assigned to the Second Circuit until March 1808. When Livingston finally arrived at the circuit court in Connecticut in the fall, he and Edwards disagreed as to whether the court had jurisdiction over a criminal case based on common

law rather than statute. As a result, they certified the question of the circuit court's jurisdiction to the Supreme Court.

The Supreme Court's Ruling

Although the Supreme Court received the case in 1809, various delays prevented a resolution of the matter until 1812. Between the 1806 indictments of Hudson and Goodwin and the 1812 Supreme Court ruling, the composition of the Court had changed from a majority of justices appointed by Presidents Washington and Adams to a majority appointed by Presidents Jefferson and Madison. The switch to a Republican-appointed majority might help to explain the Court's ruling in *Hudson and Goodwin*.

In a short opinion that cited no precedent, Justice William Johnson, a Jefferson appointee, framed the question as "whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases." Although the case at hand involved seditious libel, Johnson asserted that the same principles would apply to any other case involving a crime not defined by statute. Acknowledging that the Supreme Court had never before addressed the question presented, Johnson asserted that it was "long since settled in public opinion … in favor of the negative of the proposition." His claim was perhaps corroborated by the fact that both Attorney General William Pinkney and defense attorney Samuel Dana declined to present oral arguments to the justices.

Johnson referred to principles of federalism in explaining his conclusion that the federal courts lacked jurisdiction over common-law crimes. "The powers of the general Government," he wrote, "are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve." The lower federal courts, which did not derive their jurisdiction directly from the Constitution, had no powers other than those granted to them by Congress. In conferring jurisdiction on the courts, Congress was limited to exercising those powers that had been conceded to the federal government by the states. "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence," Johnson concluded.

Although Johnson described his opinion as being that "of the majority of the Court," none of the justices wrote a dissenting opinion, and the votes were not recorded. Scholars have expressed the belief that Chief Justice John Marshall and Associate Justices Joseph Story and Bushrod Washington—all strong nationalists—most likely dissented from a ruling sharply limiting the power of the federal courts. The lack of dissenting opinions, according to one scholar, was probably the product of Marshall's preference to have only a single opinion in each case in order to build the institutional strength of the Court.

Aftermath and Legacy

Justice Story vehemently disagreed with the result in *Hudson and Goodwin*, and tried to rectify it a year later when he heard *U.S. v. Coolidge* in the U.S. Circuit Court for the District of Massachusetts. In that case, Story held the federal court to have jurisdiction over the illegal seizure of a ship on the high seas despite the lack of a federal statute encompassing the crime. Despite Story's attempt to distinguish *Hudson* on the basis that the federal courts had exclusive jurisdiction over admiralty cases, the Supreme Court reversed his decision and reaffirmed the validity of the *Hudson* ruling.

Although *Hudson and Goodwin* remained valid law, it eventually became less influential, as the nationalist view expressed by its opponents prevailed and nearly all crimes became cognizable in federal court. After the Civil War, Congress began to expand federal criminal jurisdiction significantly, enacting laws for the first time that covered conduct already criminalized under state law. The trend toward federalization of criminal law accelerated in the twentieth century, particularly following the dual federal-state enforcement scheme of Prohibition. By the end of the twentieth century, approximately 40% of the federal criminal statutes enacted since the Civil War had been enacted after 1970. In the last few decades, scholars, activists, judges, lawyers, and elected officials have frequently debated whether the federalization of criminal law has exceeded constitutional guidelines, caused unfairness to criminal defendants, or placed an undue burden on the federal judiciary.

Discussion Questions

- What role should the federal government play in criminal law enforcement? Should the states have a more significant role than the federal government?
- Does it make sense for courts to enforce criminal laws that are not in any statutory code? Would your answer be different in 1812 than it would be today? Why or why not?
- What were the positions of the Federalists and the Republicans on federal enforcement of common-law crimes? What explains their differing views?
- Was the law of "seditious libel" consistent with the First Amendment? Why or why not?

Documents

Anonymous Editorial, *The Connecticut Courant*, May 7, 1806

In 1806, the editors of the Connecticut Courant *(now the* Hartford Courant*), a Federalist newspaper, republished an editorial from a newspaper in Utica, New York. Its author angrily claimed that the Jefferson Administration had, with the secret approval of Congress, paid French ruler Napoleon Bonaparte two million dollars in exchange for his assistance in securing the purchase of Florida from Spain. As a result of its republication, the editorial became the basis for charges of seditious libel against the* Courant*'s editors, Barzillai Hudson and George Goodwin.*

From the Utica Patriot.

To Republicans.—When a government, weak or wicked, sacrifices the dearest rights of a nation, it is time to speak, full time to give vent to those indignant feelings excited by the occasion. No longer ought an ill timed shame of your misplaced confidence to prevent your exertions for the preservation of your wounded independence. *The administration have recommended, and congress, having sat two months in secret conclave, have voted two millions of dollars, a present to Bonaparte, for liberty to make a treaty with Spain*—Stop! ye admirers of the *boasted friends* of liberty—stop a while! and before you venture to call the information a *federal lie*, resolve on the course you will pursue if found substantially correct. It is all that is desired: I know if you possess a particle of virtue, you must blush for your country. The degraded vassals of a foreign tyrant.

America, when weak and inefficient, without a bond of union, save what a common interest afforded, sustained an eight years war against a powerful nation, and for what? Sooner than pay an illegal impost of three pence a pound on tea, to be collected for the use of her acknowledged sovereign.

Ye men of seventy six! I mean not imported patriots, nor yet the assuming young men who then had not seen the day, but ye laborers in that trying conflict.—For what did you walk barefoot and bleeding over the frozen hills of New-Jersey; For what did your blood flow at Brandywine and Monmouth? That your chosen rules should become the tax-gatherers of an insatiable, savage, blood thirsty tyrant?—Grant one cent out of fear, 'tis a pledge for all you have, or can ever earn.—What enemy ever wanted pretences for demanding, while a poltroon foe had any thing to give?—Carthage assured Rome of her friendship—Rome desired a multitude of hostages. The sons of all the principal citizens were sent.—She required the shipping. The shipping was given up. She then demanded her arms, and Carthage, in the cowardly spirit of an abject slave, surrendered them.—The [size?] of the tragedy corresponded with its progress. Carthage was demolished,

annihilated;—her inhabitants dispersed and forbidden to return upon pain of death.—It will be similar with you my countrymen, if you tolerate the beginning of subjection.

Are you friends of personal freedom? avow it, by a decided opposition to rules who invite others to trample on your rights. Tell them, they were not elected to barter away your privileges. That you did not grant them a revenue to be expended on the spies or courtesans of Paris. Let the world know you are not so degraded, but divided. That though vicious rulers, for a while may steal your confidence, you will not subscribe to the contract of infamy.

Measures of firmness, not violence, are recommended; by your suffrages you can signify your resolution. If christians, support not the friends of infidelity. If virtuous, reject the vicious. If Americans, discard promoters of foreign influence. If lovers of independence, frown on the supporters of that administration which would link your fate with Holland; Switzerland and Spain, to the chariot wheels of an usurper.

Document Source: "From the Utica Patriot," *Connecticut Courant*, May 7, 1806, p. 1.

Supreme Court of the United States, Opinion in *United States v. Hudson and Goodwin*, February 13, 1812

In his opinion for the Supreme Court, William Johnson, the first justice appointed by Thomas Jefferson, asserted that it had "been long since settled in public opinion" that federal courts could not take cognizance of common-law crimes. Although Jefferson was the party allegedly libeled in Hudson and Goodwin*, Republicans generally opposed common-law criminal jurisdiction, fearing that it would grant far too much power to the federal courts and infringe on the prerogatives of state judiciaries.*

The only question which this case presents is, whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases. We state it thus broadly because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those Courts by statute.

Although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted, and the general acquiescence of legal men shews the prevalence of opinion in favor of the negative of the proposition.

The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly

reserve. The judicial power of the United States is a constituent part of those concessions—that power is to be exercised by Courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the Courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer.

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

And such is the opinion of the majority of this Court: For, the power which congress possess to create Courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those Courts to particular objects, and when a Court is created, and its operations confined to certain specific objects, with what propriety can it assume to itself a jurisdiction—much more extended—in its nature very indefinite—applicable to a great variety of subjects—varying in every state in the Union—and with regard to which there exists no definite criterion of distribution between the district and Circuit Courts of the same district?

The only ground on which it has ever been contended that this jurisdiction could be maintained is, that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it.…

But if admitted as applicable to the state of things in this country, the consequence would not result from it which is here contended for. If it may communicate certain implied powers to the general Government, it would not follow that the Courts of that Government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.

Document Source: *U.S. v. Hudson and Goodwin*, 11 U.S. 32, 32–34 (1812).

Justice Joseph Story, U.S. Circuit Court for the District of Massachusetts, Opinion in *U.S. v. Coolidge*, 1813

Shortly after the Supreme Court issued its decision in Hudson and Goodwin*, Justice Joseph Story, an ardent nationalist, used his circuit court opinion in* U.S. v. Coolidge *to urge the Court to reconsider its ruling. The Court reversed Story's decision in a single paragraph, however, affirming its prior decision that federal courts lacked jurisdiction over common-law crimes.*

Whether the common law of England, in its broadest sense, including equity and admiralty, as well as legal doctrines, be the common law of the United States or not, it can hardly be doubted, that the constitution and laws of the United States are predicated upon the existence of the common law. This has not, as I recollect, been denied by any person, who has maturely weighed the subject, and will abundantly appear upon the slightest examination. The constitution of the United States, for instance, provides that "the trial of crimes, except in cases of impeachment, shall be by jury." I suppose that no person can doubt, that for the explanation of these terms, and for the mode of conducting trials by jury, recourse must be had to the common law. So the clause, that "the judicial power shall extend to all cases in law and equity arising under the constitution," & c. is inexplicable, without reference to the common law; and the extent of this power must be measured by the powers of courts of law and equity, as exercised and established by that system. Innumerable instances of a like nature may be adduced.…

There can be no doubt, that congress may, under the constitution, confide to the circuit court jurisdiction of all offences against the United States. Has it so done? The judicial act of 24th of September, 1789, c. 20, § 11, provides, that the circuit court "shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where that act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein." … The jurisdiction is not, as has sometimes been supposed in argument, over all crimes and offences specially created and defined by statute. It is of all crimes and offences "cognizable under the authority of the United States," that is, of all crimes and offences, to which by the constitution of the United States, the judicial power extends. The jurisdiction could not, therefore, have been given in more broad and comprehensive terms.… .

I would ask then, what are crimes and offences against the United States, under the construction of its limited sovereignty, by the rules of the common law? Without pretending to enumerate them in detail, I will venture to assert generally, that all offences against the sovereignty, the public rights, the public justice, the public peace, the public trade and the public police of the United States, are crimes and offences against the United States.…

Upon these principles and independent of any statute, I presume that treasons, and conspiracies to commit treason, embezzlement of the public records, bribery and resistance of the judicial process, riots and misdemeanors on the high seas, frauds and obstructions of the public laws of trade, and robbery and embezzlement of the mail of the United States, would be offences against the United States. At common law, these are clearly public offences, and when directed against the United States, they must upon principle be deemed offences against the United States. If then it be true, that these are offences against the United States, and the circuit court have cognizance thereof, does it not unavoidably follow, that the court must have a right to punish them? …

I have considered the point, as one open to be discussed, notwithstanding the decision in U.S. v. Hudson (February term, 1812), which certainly is entitled to the most respectful consideration; but having been made without argument, and by a majority only of the court, I hope that it is not an improper course to bring the subject again in review for a more solemn decision, as it is not a question of mere ordinary import, but vitally affects the jurisdiction of the courts of the United States; a jurisdiction which they cannot lawfully enlarge or diminish. I shall submit, with the utmost cheerfulness, to the judgment of my brethren, and if I have hazarded a rash opinion, I have the consolation to know, that their superior learning and ability will save the public from an injury by my error.

Document Source: *U.S. v. Coolidge*, 25 F. Cas. 619, 619–21 (C.C. D. Mass. 1813).

Gary D. Rowe, *Yale Law Journal*, 1992

Law professor Gary Rowe argued that the Supreme Court's summary dismissal of federal common-law criminal jurisdiction in Hudson and Goodwin *obscured the fact that courts in the early republic had exercised such jurisdiction on several occasions. The decision was consistent, however, with the judicial philosophy of the Republican majority under Thomas Jefferson. Jeffersonian resistance to the concept of common-law federal crimes was rooted largely in the Sedition Act of 1798, the constitutionality of which the Federalists had defended by claiming that it had merely codified the common-law doctrine of seditious libel. By undermining the case for common-law criminal jurisdiction, the Jeffersonians eroded the basis for laws such as the Sedition Act and placed an important check on federal judicial power.*

Few major controversies have ended with as slight a whimper as the battle over federal common law crimes that raged in the first two decades of the American republic. In the 1812 case *United States v. Hudson & Goodwin*, the Marshall Court dispensed in just eight paragraphs with what Thomas Jefferson had regarded thirteen years earlier as

"the most formidable" of doctrines that had "ever been broached by the federal government." Through a "course of reasoning" it boldly characterized as "simple, obvious, and admit[ting] of but little illustration," the *Hudson* Court held that before one can suffer a federal conviction, the "legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."

Hudson's apparent unwillingness to treat the issue of federal common law criminal jurisdiction as worthy of serious contemplation has led courts and commentators to assume erroneously that *Hudson* merely restated what had always been, that "[t]here were no common-law punishments in the federal system." Indeed, precisely because we take the *Hudson* doctrine as such a tired truth today—"Federal crimes, of course," the Supreme Court recently yawned, citing *Hudson*, "'are solely creatures of statute'"—we often fail to see just what a considerable revision of the early republic's practice it represents. For without acknowledging it, the *Hudson* Court disapproved at least eight circuit court cases, brushed off the views of all but one Justice who sat on the Court prior to 1804, and departed from what was arguably the original understanding of those who framed the Constitution and penned the Judiciary Act of 1789.…

A reading of *Hudson* immediately presents a paradox: the opinion's reasoning is as loose and brief as its holding is broad. It cites no precedent, yet it seems unwilling to accept the possibility that there could be a view to the contrary.

A ready solution to the paradox would view the case as mere politics—as a "bald assertion," a successful partisan attempt to obscure the complex controversy concerning common law crimes.…

I suggest, by contrast, that we regard *Hudson*'s broad sweep and its summary nature as entirely complementary, rather than at odds. By 1812, common law criminal jurisdiction was effectively dead. The Court consequently needed only to elaborate the new understanding of the separation of powers and federalism that had already triumphed with the Jeffersonian ascendancy. Reading *Hudson* as a constitutional declaration of this sort accounts for both its brevity and its breadth, and finds in it lasting meaning without anachronism.…

Unfortunately for [Justice Joseph] Story, his argument for federal common law crimes fundamentally contradicted the constitutional principles that the Jeffersonians had been expounding for more than fifteen years. Inspired by the War of 1812, Story saw common law criminal jurisdiction as necessary to protect the national government's integrity. His logic, however powerful, clashed fundamentally with the historical experience of the Jeffersonian party in battling the Sedition Act of 1798. Both Story's conclusion in Coolidge (that all offenses against the sovereignty of the United States are punishable, whether or not Congress has enumerated them) and his premise (that a federal common law serves as

a necessary background to legislation in criminal matters, as well as to the Constitution itself) were precisely what the Jeffersonian ascendancy had repudiated decisively. *Hudson* formally incorporated this Jeffersonian understanding into constitutional law so that, although the opinion was short and sketchy, it was built on bedrock.…

The Jeffersonian understanding of the Constitution, which Justice Johnson summarily articulated in *Hudson*, was forged in the furnace of the Sedition Act.

In assessing just what was so wrong with the Sedition Act, the Jeffersonians faced a profound ideological difficulty: the Federalists seemed to have an impenetrable argument.…

In sharp contrast to the common law, the Sedition Act permitted the accused to offer truth as an affirmative defense. Indeed, one of the Act's objects, as Congressman Robert Harper explained, was "to mitigate the rigor of the common law, and to give opportunity for the person charged to clear himself by proving the truth of his assertion." Thus, Federalist representatives, effectively mocking Jeffersonian opposition to the Act, asked the House to extend it after Jefferson's election to the Presidency, claiming that the Federalists would be able to criticize the new Administration more freely with the Sedition Act than without it. In a 1799 committee report answering petitions of disaffected countrymen, Federalist congressmen similarly demolished the Republican challenges. "[T]he act in question cannot be unconstitutional," the report argued, "because it makes nothing penal that was not penal before, and gives no new powers to the court, but is merely declaratory of the common law, and useful for rendering that law more generally known and more easily understood." Except for making the defense of truth admissible in court and limiting the fine and imprisonment that followed conviction, the Sedition Act made no innovation in the law.

And so the Jeffersonians discovered that the ground upon which they trod daily had become an abyss. The law as they had always known it was now stunningly ill-adapted to political reality. This was their dilemma: although it challenged their very existence as an opposition party, the Sedition Act nonetheless was, as the historian Leonard Levy cleverly put it, "[T]he true embodiment of everything excellent. It was, that is, the very epitome of libertarian thought.…" Simple libertarian arguments against the Act were consequently particularly unlikely to succeed.…

What the Jeffersonians needed to break the Federalists was not, then, simply a civil liberties argument, but a structural one. For at the core of the often rancorous debates that ensued between the Jeffersonians and the Federalists lay the brooding question of whether a federal common law operated in the United States. The Federalists insisted that the common law served as the necessary backdrop and adjunct to the Constitution.… The common law gave meaning to the concept of national sovereignty by defining the scope of the government's inherent powers.… Behind the Federalist argument, in short, lurked the

idea that the United States, infused with the common law, was a State vested from its inception with indefeasible sovereignty. The Jeffersonians thus found themselves in need of nothing less than a way to reconceptualize constitutional government—a way that viewed Constitution and common law as incompatible, and federal authority as strictly limited to specific grants of power.…

During the course of the Sedition Act crisis, the Jeffersonians developed such a rejoinder, striking at the root of the Federalist conception of the Constitution. In 1798, they took their appeal outside of the capital. The Virginia and Kentucky legislatures led the movement, passing resolutions Jefferson and Madison drafted that described the Sedition Act as unconstitutional and the common law as having no force in the United States.…

In January 1800, the Virginia legislature issued a report, written by James Madison, that brought the Jeffersonian argument to maturity. Madison skillfully brought out the implications of the Constitution, arguing that it changed the practice of American government not just interstitially, but fundamentally. The report attacked the Sedition Act by undermining the claim that the common law was a part of federal law. The Constitution, Madison argued, could not have incorporated the common law, because the two were logically incompatible. To give the federal government powers as "vast and multifarious" as those in the common law would invariably "overspread the entire field of legislation" and "sap the foundation of the Constitution as a system of limited and specified powers."

From the fact that American institutions were fundamentally different from their British equivalents, it followed that English legal concepts and constructs could not be blindly incorporated into the American system of government.… If the common law were truly a part of the American Constitution, then, that unwritten law was unalterable by ordinary statute; any law passed in derogation of the common law … was unconstitutional and void. Were one to reject this strong interpretation of the relationship between common law and Constitution, Madison held out another, equally unpalatable possibility. If the common law were to form a part of the Constitution in a weaker sense, then the legislature could always codify or modify it. Thus, the report explained, the very existence of a federal common law would give Congress powers "coextensive" with it. A general federal common law would, therefore, enable Congress to evade Article I's limitations on its power. The national legislature would be "authorized to legislate," Madison wrote in perhaps the most haunting language available to him, "in all cases whatsoever." If, on the other hand, the common law were not the law of the land, congressional legislation would be limited to specific Article I ends. And the control of sedition was, of course, not among them.…

[T]he Jeffersonians demolished the Federalist claim that the Sedition Act "cannot be unconstitutional, because it makes nothing penal that was not penal before" and erected

in its place a model of government centered around explicit constitutional limitations on judicial common law and congressional legislative power.

Document Source: Gary D. Rowe, "The Sound of Silence: *United States v. Hudson & Goodwin*, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes," *Yale Law Journal* 101, no. 4 (January 1992): 919–21, 924–25, 935–42 (footnotes omitted).

Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of "the judicial power," remedies, judicial review, the relationship between federal judicial power and states' rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn's Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter's Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCardle* (1869). Could Congress remove a pending appeal from the Supreme Court's jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States. v. Allocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?