University of Dayton Law Review

Volume 7 | Number 2 Article 5

1981

State Court Jurisdiction over Claims Arising under Federal Law

Dennis L. Bailey
University of Dayton

COMMENTS

STATE COURT JURISDICTION OVER CLAIMS ARISING UNDER FEDERAL LAW

I. INTRODUCTION

The division of the American legal process into two complete and distinct judicial systems, state and federal, has the potential to lead and, indeed, has led to some problems and disputes between courts at the state and federal level. The recent tug-of-war between a Louisiana state judge and a United States District Judge over the custody and school for two school children in Louisiana was a much publicized case[1] of a jurisdictional dispute. Such disputes between state and federal courts over their proper jurisdiction typically do not generate the media coverage of this Louisiana dispute and involve issues of greater subtlety than it.

Some of the more typical issues or problems arise when a claim involves both a right created or protected by state law and one created or protected by federal law. In such an event, if the complaint is first brought in the federal court, the federal court can maintain jurisdiction over the state issue as well as the federal issue by asserting either its ancillary[2] or its pendent[3] jurisdiction. But an assertion of ancillary or pendent jurisdiction is discretionary.[4] An alternative, especially if the state claim is based on an unsettled issue in the state law, is for the federal court to abstain[5] until the state issue has been fully adjudicated.

---

1. *Louisiana's War of the Judges*, NEWSWEEK, 29 (Jan. 19, 1981).

2. *See* C. WRIGHT, THE LAW OF THE FEDERAL COURTS (3d ed. 1976) [hereinafter cited as WRIGHT]. Professor Wright describes "ancillary jurisdiction" as, "[b]y this concept it is held that a district court acquires jurisdiction of a case or controversy as an entirety, and may, as an incident to disposition of a matter properly before it, possess jurisdiction to decide other matters raised by the case of which it could not take cognizance were they independently presented." *Id.* at 21.

3. Ancillary jurisdiction involves competing claims, or counter claims, by the plaintiff and defendant, where one party's claim raises a federal issue and the other party's claim is based on a state issue. On the other hand, pendent jurisdiction involves a plaintiff with a claim or claims against a party that arise out of both federal and state issues. *Id.* at 23.

4. Moor v. County of Alameda, 411 U.S. 693 (1973).

5. The concept of "abstention" was developed in Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941), as a way for federal courts to avoid deciding a constitutional issue raised by a case when an underriding state issue might dispose of the matter.

Another source of problems has been the attempt to litigate a right created under one authority (either state or federal) in the court of the other authority's jurisdiction. Certainly the United States Constitution recognizes that federal courts will hear cases involving claims based on state law.[6] This diversity jurisdiction now requires that the federal court, in effect, act as if it were a state court by applying the law of the particular state in which it sits.[7]

The reverse of this situation is when a state court is asked to hear a case in which the claim is based upon federal law. As Professor Charles Alan Wright has said, "Unless it has made federal jurisdiction exclusive in terms, the state courts have concurrent jurisdiction with the federal courts. Thus a state court may entertain an action even though it is entirely based on a federal claim."[8] Yet state courts have sometimes attempted to avoid hearing a case or deciding an issue based upon federal law by claiming lack of jurisdiction.[9] Such attempts frequently involve rights created under controversial federal laws[10] or rights protected under regionally unpopular federal laws.[11]

State courts have based their attempts to deny their jurisdiction over federal issues on several theories. One theory argued that state courts were not obligated to enforce penal laws of a foreign government.[12] Another theory argued that Congress had no authority to grant jurisdiction to state courts since the state courts were entirely creatures of the state legislatures.[13] Each of these theories for the denial by a state court of its jurisdiction over a claim arising under federal law has been rejected by the United States Supreme Court.[14]

Recently, the Ohio Supreme Court asserted another basis for denying state court jurisdiction[15] over a claim arising under the Equal Employment Opportunity Act.[16] The court in *Fox v. Eaton Corp.* held,

---

6. U.S. CONST. art. III, § 2, cl. 5 & 6.

7. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

8. WRIGHT, *supra* note 2, at 193.

9. Hoxie v. New York, N.H. & H.R.R. Co., 82 Conn. 352, 73 A. 754 (1909).

10. Such attempted denials of jurisdiction by state courts include claims raised under The Bankruptcy Act of 1867, The Fair Labor Standards Act of 1938, and The Emergency Price Control Act of 1942.

11. The Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850).

12. *See* Robinson v. Norato, 71 R.I. 256, 43 A.2d 467 (1945).

13. Floyd v. Dubois Soap Co., 139 Ohio St. 520, 41 N.E.2d 393, *rev'd per curiam*, 317 U.S. 596 (1942).

14. In Claflin v. Houseman, 93 U.S. 130 (1876), the Supreme Court rejected the theory that federal laws could be regarded as foreign penal laws. In The Second Employers' Liability Cases, 223 U.S. 1 (1912), the Court rejected the theory that Congress lacked authority to affect state court jurisdiction as a basis for refusing jurisdiction.

15. Fox v. Eaton Corp., 48 Ohio St. 2d 236, 358 N.E.2d 536 (1976).

16. 42 U.S.C. §2000e-5(f)(1) (1976).

"State courts have no subject-matter jurisdiction of an action brought pursuant to a claimed violation of the federal Equal Employment Opportunity Act, which provides for exclusive jurisdiction in the courts of the United States."[17]

This holding raises in issue the long assumed doctrine that Congress must explicitly make jurisdiction over a particular claim arising under federal law exclusive with the federal courts for state courts to lack jurisdiction.[18] It also makes more problematic the assurance expressed by Professor Hart in his dialogue[19] that even if Congress restricts the jurisdiction of the federal courts, the state courts remain as a forum for the litigation of federal or constitutional issues, such as prayer in public schools. The lurking presence of Senate Bill 450[20] as a bill currently before Congress underscores this problem.

---

17. 48 Ohio St. 2d 236, 358 N.E.2d 536 (1976). In Ohio the syllabus headings for a case are the legal holdings in the case. Merrick v. Ditzler, 91 Ohio St. 256, 110 N.E. 493 (1915).

18. United States v. Bank of N.Y. & Trust Co., 296 U.S. 463 (1936). As Chief Justice Hughes declared, "But the grant of jurisdiction to the District Court in suits brought by the United States does not purport to confer exclusive jurisdiction. It is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive." *Id.* at 479. *See also* Reidelberger v. Bi-State Dev., 8 Ill. 2d 121, 133 N.E.2d 272 (1956); Adair v. The Traco Div., 192 Ga. 59, 14 S.E.2d 466 (1941); Schmoll, Inc. v. Federal Reserve Bank, 286 N.Y. 503, 37 N.E.2d 225 (1941); and People v. Welch, 141 N.Y. 266, 36 N.E. 328 (1899).

19. Hart, *Further Note on the Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 330, 360 (2d ed. 1973).

20. Senate Bill 450, introduced by Senator Helms, passed the Senate, April 9, 1979. Among other minor changes in the jurisdiction of federal courts, it amends the Supreme Court's appellate jurisdiction by adding § 1259 to 28 U.S.C.A., which removes from the Supreme Court's appellate jurisdiction any issue relating to a state statute allowing prayers in public schools. Section 1259 provides:

> (a) Notwithstanding the provision of sections 1253, 1254, and 1257 of this chapter the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State statute, ordinance, rule, regulation, or any part thereof, or arising out of any Act interpreting, applying, or enforcing a State statute, ordinance, rule, or regulation, which relates to voluntary prayers in public schools and public buildings.

In addition, this bill seeks to remove this same issue from the district court's jurisdiction through the addition of § 1364. Section 1364 provides: "Notwithstanding any other provisions of law, the district courts shall not have jurisdiction of any case or question which the Supreme Court does not have jurisdiction to review under section 1259 of this title." Thus, Senate Bill 450 seeks to eliminate from both the original and appellate jurisdictions of the federal courts an important constitutional issue regarding the separation of church and state. The various state courts would then have the entire responsibility of adjudicating claims relating to this issue. Although Justice Brennan has argued for the important role that state courts can and should play in guaranteeing constitutional rights, Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977), one wonders how effectively these rights would be protected if left solely to state court jurisdiction for enforcement.

II. JURISDICTION OVER CLAIMS ARISING UNDER FEDERAL LAW

As courts of limited jurisdiction, the federal courts require some specific grant of jurisdiction.[21] This grant of jurisdiction usually takes one of three forms. The first form is seen when Congress grants the federal courts exclusive jurisdiction over a case arising under that particular act.[22] With the second type, Congress grants concurrent jurisdiction to state and federal courts.[23] The third type is a general grant of jurisdiction.[24]

A. Exclusive Jurisdiction

Congress has granted exclusive jurisdiction to the federal courts over claims arising under several laws.[25] Yet even such a grant of exclusive jurisdiction can be unclear, as with the Securities Exchange Act.[26] Section 16(b) of the S.E.A. authorizes, "Suit to recover such profit [insider trading] may be instituted at law or in equity in any court of competent jurisdiction by the issuer. . . ."[27] The language, "in any court of competent jurisdiction," would normally be a general grant of jurisdiction to both federal and state courts. Yet Section 27 of the same act specifies that jurisdiction over any claim brought under this Act is exclusive with the federal courts.[28] Section 27 has been held to supersede the general language of Section 16(b) to establish exclusive jurisdiction of the federal courts over a claimed violation of the S.E.A.[29]

The federal courts have exclusive jurisdiction over any federal law that carries a criminal sanction or penalty.[30] Yet, as has been pointed out by some commentators,[31] even the federal courts' jurisdiction over the federal criminal law has been added. As Professor Warren pointed out,

---

21. WRIGHT, *supra* note 2, at 326.

22. *See* 15 U.S.C. §§ 15, 26 (regarding anti-trust actions); 15 U.S.C. § 78aa (regarding Securities Exchange Act violations).

23. 28 U.S.C. § 1352 (1976).

24. *Id.* § 1343.

25. *See* note 22 *supra*. *See also* 28 U.S.C. § 1351 (1976) (regarding foreign diplomats); *Id.* § 1355 (regarding federal penal laws); *Id.* § 1336(b) (regarding enforcement of an order of the Interstate Commerce Commission).

26. 15 U.S.C. §§ 78a-78jj (1976).

27. *Id.* § 78p(b).

28. *Id.* § 78aa.

29. American Distilling Co. v. Brown, 295 N.Y. 36, 64 N.E.2d 347 (1945).

30. 28 U.S.C. § 1355 (1976).

31. Eisenberg, *Congressional Authority to Restrict Lower Court Jurisdiction*, 83 YALE L.J. 498 (1974); Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925).

> In accordance with this viewpoint, Congress, in the first fifty years, left to the State Courts concurrent jurisdiction with the Federal Courts over certain offenses against the criminal and penal statutes of the United States, and trial in the State Courts of such violations of Federal criminal law was regarded by Congress as natural, feasible, and desirable. Later on, the doctrine became current, voiced by certain State Courts, Federal judges and text writers, that there was something inherently impossible in the trial by a State Court of a criminal offense against the United States.[32]

The extension of exclusive jurisdiction to federal courts over federal claims carrying a fine, penalty, or forfeiture has led to attempts by state courts to deny jurisdiction to some claims under federal laws granting damages greater than a plaintiff's demonstrated loss.[33]

B. Concurrent Jurisdiction

The concurrent jurisdiction of a state court over a federal claim or right can be found in two forms. Frequently, Congress will specify in the jurisdictional section of the statute that both state and federal trial courts have jurisdiction over a claim brought under that law.[34] Other times Congress will not specifically include state courts within the jurisdictional section, but also will not specifically exclude them.[35]

1. Specific Grants of Jurisdiction to State Courts

Congress has extended jurisdiction to state courts for particular claims. This extension of jurisdiction can specify the United States District Courts, then continue with a more general clause, such as "or in any Federal or State court of competent jurisdiction. . . ."[36] The phrase, "any other court of competent jurisdiction," has been held to include the state trial courts of general jurisdiction.[37] Other acts specif-

---

32. *See* Warren, note 31 *supra.*

33. The allowance, under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976), for the complaining party to receive double his demonstrated lost wages and lost over-time wages, in addition to his attorney's fees, led some courts to claim this doubled remedy was a penalty. Floyd v. Dubois Soap Co., 139 Ohio St. 520, 41 N.E.2d 393, *rev'd per curiam,* 317 U.S. 596 (1942). *But see* Huntington v. Attrill, 146 U.S. 657 (1892). In *Huntington,* the Supreme Court distinguished between a penalty and a private remedy by saying,

> The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act.

Id. at 673.

34. 28 U.S.C. § 1352 (1976).

35. *Id.* § 1343.

36. Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (1976).

37. *E.g.*, Harper v. Mid-Continent Petroleum Corp., 36 F. Supp. 233 (E.D. Okla. 1941). In

ically include state courts within the jurisdictional section.[38]

When the subject matter of the claim or right is welcomed or noncontroversial, state courts have shown little hesitancy in entertaining suits under them. But as the right or claim becomes controversial or unpopular in particular areas, state courts exhibit greater reluctance to be drawn into the controversy and have attempted to deny jurisdiction over claims based on particular acts.[39]

2. Implied Grants of Jurisdiction to State Courts

If Congress wants jurisdiction over claims arising under a particular law to be exclusive with the federal courts, then the jurisdiction section of that act must specifically make jurisdiction exclusive.[40] A general statement of jurisdiction will not exclude a state court from exercising jurisdiction.[41]

Hargrave the court pointed out, "The term 'any court of competent jurisdiction' is not limited to federal courts. State and federal courts have concurrent jurisdiction of suits of a civil nature arising under the laws of the United States except where jurisdiction has been restricted by Congress to the federal courts." *Id.* at 234. *See also* Miles v. Illinois Cent. R.R. Co., 315 U.S. 698 (1942). In *Miles*, the Supreme Court stated,

> Words were simultaneously adopted recognizing the jurisdiction of the state courts by providing that the federal jurisdiction should be concurrent. The venue of state court suits was left to the practice of the forum. The opportunity to present causes of action arising under the F.E.L.A. in the state courts came, however, not from the state law but from the federal. By virtue of the Constitution, the courts of the several states must remain open to such litigants on the same basis that they are open to litigants with causes of action springing from a different source.

Id. at 703.

38. The Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (1942).

39. *See* Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969). The court held that state courts did not have jurisdiction over a claim brought under 42 U.S.C. § 1983 (1976). *But see* Brody v. Leamy, 90 Misc.2d 1, 393 N.Y.S.2d 243 (1977); Clark v. Bond Stores, Inc., 41 A.D. 2d 620, 340 N.Y.S.2d 847 (1973); Judo, Inc. v. Peet, 68 Misc.2d 281, 326 N.Y.S.2d 441 (1971); Lakewood Homes, Inc. v. Board of Adjustment, 23 Ohio Misc. 211, 258 N.E.2d 470 (1970), *rev'd*, 25 Ohio App.2d 125, 267 N.E.2d 595 (1971) (on other grounds); Terry v. Kolski, 78 Wis. 2d 475, 254 N.W.2d 704 (1977); Vogt v. Nelson, 69 Wis. 2d 125, 230 N.W.2d 123 (1975).

40. Placquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898). In *Placquemines* the Court said,

> If it was intended to withdraw from the states authority to determine, by its courts, all cases and controversies to which the judicial power of the United States was extended, and of which jurisdiction was not given to the national courts exclusively, such a purpose would have been manifested by clear language. Nothing more was done by the Constitution than to extend the judicial power of the United States to specified cases and controversies; leaving to Congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise jurisdiction concurrent with the courts of the several states.

Id. at 517.

41. Missouri *ex rel.* St. Louis, Brownsville & Mexico Ry. Co. v. Taylor, 266 U.S. 200 (1924). The Court said,

> Congress created the right of action. It might have provided that the right shall be enforceable only in a federal court, or might have provided that state courts shall have concurrent

Some language in a few cases has suggested the concept that the federal and state governments are two completely separate and distinct systems.[42] This early concept of federalism is especially prominent in *Tarble's Case*.[43] In *Tarble* the Supreme Court denied a state court's jurisdiction to secure the release of a prisoner from federal custody through a writ of habeas corpus. The Court, in part, based its denial on a theory of federalism that sees the state and federal governments as two distinct and foreign systems. As the Court said,

> It is in the consideration of this distinct and independent character of the government of the United States, from that of the government of the several states, that the solution of the question presented in this case, and in similar cases, must be found. There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other.[44]

Such a theory of federalism that sees the state and federal governments as if they are governments foreign to each other underlies many variations of the theories that state courts have advanced in attempting to deny jurisdiction over federal claims.[45]

This theory of federalism is partly undercut by the historical development of the jurisdiction of the federal courts.[46] The federal courts originally had limited jurisdiction even over claims created by federal law,[47] with the resulting void necessarily being filled by state courts exercising original jurisdiction over some federal claims.[48] Similarly,

---

jurisdiction only of those cases which, by the applicable federal law, could, under the same circumstances have been commenced in a federal court for the particular state. But Congress did neither of these things. It dealt solely with the substantive law. As it made no provision concerning the remedy, the federal and state courts have concurrent jurisdiction. . . . The federal right is enforceable in a state court whenever its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws.

Id. at 208. *See also* Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace, 223 U.S. 481 (1912); Stewart v. Kahn, 78 U.S. (11 Wall.) 493 (1876).

42. *See* note 50 *infra*.

43. 80 U.S. (13 Wall.) 397 (1872).

44. *Id.* at 406.

45. This concept of federalism is especially prominent in the various attempts by state courts to deny their jurisdiction over federal claims on the theory that the federal claim is a foreign penal law.

46. *See* Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925); Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551 (1960).

47. *See* Warren, *supra* note 46, at 568.

48. *Id.*

the diversity jurisdiction of the federal courts, by intruding into the realm of claims based on state law, leads to a theory of federalism in which the state and federal systems exercise some distinct powers but also many overlapping ones.

The concurrent jurisdiction of state courts over federal questions has part of its historical basis in *Martin v. Hunter's Lessee*.[49] Although *Martin v. Hunter's Lessee* has been cited as an early case supporting the theory of federalism that posits two distinct systems,[50] Justice Story clearly saw that not all claims arising out of federal law need be heard exclusively in federal courts, when he said, "At all events, whether the one construction or the other prevails, it is manifest, that the judicial power of the United States is unavoidably, in some cases, exclusive of all state authority, and in all others, may be made so at the election of Congress."[51] Thus, in the second category of cases Congress may, but need not, make jurisdiction exclusive with the federal courts.

Congress's decision to make jurisdiction exclusive with the federal courts, however, will not be implied in a general statement of jurisdiction. Concurrent jurisdiction is the rule and exclusive jurisdiction is the exception. The Supreme Court reiterated this rule in *Charles Dowd Box Co., Inc. v. Courtney*[52] when it said, "We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule."[53]

III. STATE COURT ATTEMPTS TO DENY JURISDICTION

In spite of the historical tradition for state courts to recognize and exercise concurrent jurisdiction over claims arising under federal law, state courts have periodically sought to avoid this jurisdiction. Basically, state courts have offered three distinct theories for refusing juris-

---

49. 14 U.S. (1 Wheat.) 304 (1816).

50. Bowles v. Barde Steel Co., 177 Or. 421, 164 P.2d 692 (1945). In discussing the historical importance of *Martin v. Hunter's Lessee* to this theory of federalism, the court in *Bowles* said,

> Ever since the decision of *Martin v. Hunter's Lessee*, 1 Wheat. 304, 330, 4 L.Ed. 97, one argument has been reiterated in many decisions as the basis for an alleged general rule that a state court should not entertain cases in which a plaintiff seeks to enforce a right based on federal statutes, whether penal or not. In that case Justice Story said: 'Congress cannot vest any portion of the judicial power of the United States except in courts ordained and established by itself.' The minor premise is that state courts are not ordained and established by Congress.

Id. at 443, 164 P.2d at 702.

51. 14 U.S. (1 Wheat.) at 336-37.

52. 368 U.S. 502 (1962).

53. *Id.* at 507-08.

diction to federal issues. First, state courts have attempted to argue that particular federal laws were penal in character and, consequently, were within the exclusive jurisdiction of the federal courts.[54] Second, some courts have argued that state courts are created by the state legislatures, therefore Congress has no authority to determine their jurisdiction.[55] Finally, as the Ohio Supreme Court recently pronounced in *Fox v. Eaton Corp.*[56] Congress did not grant jurisdiction specifically to the state courts, therefore jurisdiction is exclusive with the federal courts.

A. Penal Laws

State courts' attempts to refuse jurisdiction over federal claims, based on a theory of penal laws, actually include two versions of the argument. One argument is based on the section of the federal judicial code[57] which makes jurisdiction over the penal laws of the United States exclusive with the federal courts. The other argument is based upon the conflicts of law rule that a court of one sovereign will not enforce or recognize the penal laws of another sovereign.[58]

1. Federal Penal Laws

The Ohio Supreme Court entertained an early case[59] in which a party attempted to argue that the Bankruptcy Act of 1867[60] contained a penal liability. Since jurisdiction over federal penal laws was limited exclusively to federal courts, he argued that state courts had no jurisdiction over a claim arising out of the Act.

The Ohio Supreme Court found that jurisdiction did lie with state courts.[61] This holding had two bases. First, the jurisdictional section of the Bankruptcy Act provided "that suits, actions, and proceedings, against any association, under this act, may be held in any circuit, district, or territorial court of the United States, held within the district in which such association may be established; or in any state, county, or

54. Robinson v. Norato, 71 R.I. 256, 43 A.2d 467 (1945); Floyd v. Dubois Soap Co., 139 Ohio St. 520, 41 N.E.2d 393, *rev'd per curiam*, 317 U.S. 596 (1942); Coppv. v. Louisville & N. R.R. Co., 43 La.Ann. 511, 9 So. 441 (1891).

55. Hoxie v. New York, N.H. & H. R.R. Co., 82 Conn. 352, 73 A. 754 (1909). The court in Hoxie declared, "But if the Act of 1908 were to be construed as warranting an action in a state court, against a receiver appointed by a state court, it would set up a new rule of practice for that state, and attack the dignity of its judicial department." *Id.* at 363, 73 A. at 759.

56. 48 Ohio St. 2d 236, 358 N.E.2d 536 (1976).

57. 28 U.S.C. § 1355 (1976).

58. Floyd v. Dubois Soap Co., 139 Ohio St. 520, 41 N.E.2d 393, *rev'd per curiam*, 317 U.S. 596 (1942).

59. Hade v. McVay, Allison & Co., 31 Ohio St. 231 (1877).

60. Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (1867).

61. 31 Ohio St. 231, (1877).

municipal court in the county or city in which such association is located, having jurisdiction in similar cases."[62] Thus, the specific jurisdictional section of the Bankruptcy Act of 1867 took precedence over the general jurisdictional section of the judicial code.[63] Second, the United States Supreme Court had already held that state courts did have jurisdiction over claims arising under the same act.[64]

One state court[65] denied jurisdiction over a claim arising out of federal law[66] on the basis that Congress specified a remedy in the act. This specified remedy amounted to a penalty; so without a specific grant of concurrent jurisdiction in the act, Congress intended jurisdiction to be exclusive with federal courts.

Congress subsequently found an alternative route around this line of reasoning by specifically defining the remedy provided under certain Acts as "liquidated damages" rather than penalties.[67] This distinction formed the basis of the Tennessee Supreme Court's holding[68] that state courts have jurisdiction under the Fair Labor Standards Act of 1938[69] to award a party unpaid minimum wages, overtime pay, an equal amount as liquidated damages, and attorney's fees because such an award is not a penalty as defined in the Act.[70] Similarly, the Oregon Supreme Court[71] held that the authorization of "liquidated damages," as distinguished from a penalty, indicates an intent by Congress to except the Emergency Price Control Act of 1942[72] from the federal courts' exclusive jurisdiction over penal laws.

Thus, although the federal courts retain exclusive jurisdiction over federal penal laws, Congress has developed two alternatives that will allow it to extend jurisdiction to the state courts without repealing Section 1355.[73] First, Congress can specifically provide for state courts to have jurisdiction over claims brought under a particular act. Second, Congress can define a remedy included within an act as liquidated

62. Bankruptcy Act of 1867, ch. 176, § 57, 14 Stat. 517 (1867).

63. 31 Ohio St. 231 (1877). The court said, "These cases resolve the question of jurisdiction to enforce the forfeiture, against the plaintiff, and fully settle the right of the state tribunals to entertain the action to recover the penalty given by the act of Congress, if competent by their own constitution to hear and determine like questions or causes arising under state laws." *Id.* at 237.

64. Claflin v. Houseman, 93 U.S. 130 (1876).

65. Copp v. Louisville & Nashville R.R. Co., 43 La. Ann. 511, 9 So. 441 (1891).

66. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887).

67. The Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (1938) (current version at 29 U.S.C. §§ 201-219 (1976)).

68. Tapp v. Price-Bass Co., 177 Tenn. 189, 147 S.W.2d 107 (1941).

69. *Supra* note 67.

70. 29 U.S.C. § 216(b) (Supp. III 1979).

71. Bowles v. Barde Steel Co., 177 Or. 421, 164 P.2d 692 (1945).

72. 28 U.S.C. § 1355 (1976).

73. *Id.*

damages rather than a penalty.

2. Foreign Penal Laws

The second variation of the penal law theory to deny state court jurisdiction incorporates a theory of federalism similar to that developed in *Tarble's Case*.[74] This theory argued that federal laws enforcing a penalty could not support a claim in state court because a court of one government will not enforce the penal laws of a foreign power.[75] This theory even marshalled some United States Supreme Court decisions in its support.[76]

One problem with these decisions as support for this theory was that they were not as broadly stated as claimed. *Huntington*,[77] *Anglo-American*,[78] and *Kenney*[79] held that states are not required by the full faith and credit clause of the Constitution[80] to enforce judgments of the courts of other states based on claims arising out of penal statutes. On the other hand, *Pelican Insurance*[81] and *Massachusetts v. Missouri*[82] held that federal courts are not required to enforce state penal laws.

Another problem was that this issue of federal laws being unenforceable in state courts as foreign penal laws had already been squarely dealt with and answered by the United States Supreme Court in *Claflin v. Houseman*.[83] As the Court said,

> The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties,

---

74. 80 U.S. (13 Wall.) 397 (1872).

75. In *Floyd v. Dubois Soap Co.*, 139 Ohio St. 520, 41 N.E.2d 393, *rev'd per curiam*, 317 U.S. 596 (1942), the Ohio Supreme Court said, "In addition to Section 256 of the Judicial Code, it is an accepted principle of law that courts of one jurisdiction will not enforce the penal laws of another jurisdiction. . . . Therefore, the Congress may not confer jurisdiction upon the courts of this state for the recovery of penalties even though called by some other name." *Id.* at 522, 41 N.E.2d at 395. *See also* Robinson v. Norato, 71 R.I. 256, 43 A.2d 467 (1945); Testa v. Katt, 71 R.I. 472, 47 A.2d 312 (1946), *rev'd*, 330 U.S. 386 (1947).

76. Massachusetts v. Missouri, 308 U.S. 1 (1939); Kenney v. Supreme Lodge, 252 U.S. 411 (1920); Anglo-American Provision Co. v. Davis Provision Co., No. 1, 191 U.S. 373 (1903); Huntington v. Attrill, 146 U.S. 657 (1892); Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888). These cases were cited by the Rhode Island Supreme Court as authority for its denial of jurisdiction in *Robinson* and *Testa*, *supra* note 75.

77. Huntington v. Attrill, 146 U.S. 657, 688 (1892).

78. Anglo-American Provision Co. v. Davis Provision Co., No. 1, 191 U.S. 373, 374 (1903).

79. Kenney v. Supreme Lodge, 252 U.S. 411, 414 (1920).

80. U.S. CONST. art. IV, § 1.

81. Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 290 (1888).

82. Massachusetts v. Missouri, 308 U.S. 1, 19 (1939).

83. 93 U.S. 130 (1876).

> having concurrent jurisdiction in the State,—concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under State laws, may be prosecuted in the State courts, and also, if the parties reside in different States, in the Federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction.[84]

The Court went on to hold that the two court systems within the United States, state and federal, form a single system of jurisprudence that constitutes the law of the land for each state. These two court systems are not foreign to each other, but are courts of the same country "having jurisdiction partly different and partly concurrent."[85]

In spite of this clear rejection of a state court denying its jurisdiction over a federal claim based on the theory of the federal claim as a foreign penal law, some state supreme courts resurrected the theory to deny jurisdiction over various New Deal laws.[86] Other state courts accepted jurisdiction over these laws, recognizing the invalidity of the foreign penal law theory.[87] While the United States Supreme Court summarily reversed the Ohio Supreme Court's denial of jurisdiction in *Dubois Soap Co.*,[88] it met the Rhode Island Supreme Court's similar denial of jurisdiction in *Robinson v. Norato*[89] by granting certiorari to a second Rhode Island denial of jurisdiction based on *Robinson*.[90]

In *Testa v. Katt*,[91] Justice Black, writing for a unanimous court, declared in certain and clear terms that the theory of federal law as a

---

84. *Id.* at 136-37.

85. *Id.*

86. The Ohio Supreme Court attempted to deny state court jurisdiction over The Fair Labor Standards Act of 1938. Floyd v. Dubois Soap Co., 139 Ohio St. 520, 41 N.E.2d 393, *rev'd per curiam*, 317 U.S. 596 (1942). The Rhode Island Supreme Court attempted to deny state court jurisdiction over the Emergency Price Control Act of 1942. Robinson v. Norato, 71 R.I. 256, 43 A.2d 467 (1945).

87. Tapp v. Price-Bass Co., 177 Tenn. 189, 147 S.W.2d 107 (1941); Regan v. Kroger Grocery & Baking Co., 386 Ill. 284, 54 N.E.2d 210 (1944); Kersting v. Hardgrove, 24 N.J.Misc. 243, 48 A.2d 309 (1946); Bowles v. Barde Steel Co., 177 Or. 421, 164 P.2d 692 (1945).

88. 317 U.S. 596 (1942).

89. 71 R.I. 256, 43 A.2d 467 (1945).

90. Testa v. Katt, 71 R.I. 472, 47 A.2d 312 (1946), *rev'd*, 330 U.S. 386 (1947).

91. 330 U.S. 386 (1947).

foreign law was not valid. In summarizing *Claflin*,[92] Justice Black said,

> The opinion of a unanimous court in that case was strongly buttressed by historic references and persuasive reasoning. It repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' It asserted that the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide.[93]

To the Rhode Island Supreme Court's assertion that the federal law in question[94] violated that state's public policy, Justice Black replied that Congress makes public policy for the entire nation which takes precedence over a particular state's policy by reason of the Supremacy Clause.[95]

B. Congress' Lack of Authority Over State Court Jurisdiction

Under the Constitution of the United States, Congress has authority to create various federal courts and vest them with original and appellate jurisdiction.[96] Similarly, state constitutions grant authority to state legislatures to create state courts and vest them with jurisdiction. State legislatures can not affect the jurisdiction of the federal courts, and Congress can not create state courts or affect their jurisdiction. These simple observations have led to another theory by which state courts have sought to deny their jurisdiction over federal claims.

This theory has some historical roots in *Martin v. Hunter's Lessee*.[97] Proponents of this theory ferretted out a sentence by Justice Story—"Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself. . . ."[98] This theme was resurrected during the controversy surrounding the Fugitive Slave Act.[99] In *Prigg v. Pennsylvania*[100] the United States Supreme Court declared, "The states cannot, therefore, be compelled to enforce them [federal laws]."[101] Similarly, in *Fox v.*

92. 93 U.S. 130 (1876).
93. 330 U.S. at 390-91.
94. The Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (1942).
95. U.S. CONST. art. VI, cl. 2.
96. U.S. CONST. art. III, § 1.
97. 14 U.S. (1 Wheat.) 304 (1816).
98. *Id.* at 330-31.
99. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850).
100. 41 U.S. (16 Pet.) 539 (1842).
101. *Id.* at 615.

Ohio[102] the Supreme Court stated, "It was too clear for argument that Congress could not impose such duties on the State Courts."[103] Thus, some courts were led to refuse jurisdiction over federal claims on the theory that Congress had no authority to grant jurisdiction to them, or that they were free to refuse the congressional invitation to take jurisdiction.

One problem with this theory is that its originators did not read *Martin v. Hunter's Lessee*[104] carefully enough. Justice Story clearly recognizes that state courts will hear federal claims when he says,

> But it is plain, that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that 'this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.' It is obvious that this obligation is imperative upon the state judges in their official, and not merely in their private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws, and treaties of the United States—'the supreme law of the land.'[105]

Thus, the Supremacy Clause of the Constitution makes the federal law as much a part of a state's laws to be enforced by the state's courts, unless jurisdiction has been reserved exclusively to the federal courts, as any law passed by the state legislature.

The Supreme Court squarely rejected this theory of Congress's lack of authority as the basis for a state court's denial of its jurisdiction in the *Second Employers Liability Cases*.[106] As the Court said,

---

102. 46 U.S. (5 How.) 410 (1847).

103. *Id.* at 438.

104. 14 U.S. (1 Wheat.) 304 (1816).

105. *Id.* at 340-41.

106. 223 U.S. 1 (1912). In *Mondou*, the Supreme Court clearly rejected the argument for state court rejection of jurisdiction based on the theory that the federal law violated state public policy. As the Court said,

> The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.

> Because of some general observations in the opinion of the Supreme Court of Errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of the state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is involved in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure.[107]

Thus, Congress does not alter the state courts' jurisdiction; Congress creates a right of action that is applicable to all Americans and which the state courts must hear because it has become the law of that state.

A state court's duty to hear a federal claim is not based on any theory that Congress created the state court or can vest it with jurisdiction that it did not already have. Congress cannot give a state appellate court jurisdiction to hear original cases under federal laws, nor can Congress grant similar jurisdiction to a state probate court.[108] But a state court vested by its legislature with original jurisdiction to hear state claims has a duty to hear federal claims within its general competency.[109]

C. *No Grant of Concurrent Jurisdiction*

The Ohio Supreme Court recently denied jurisdiction over a claim

---

Id. at 57.

107. *Id.* at 56-57.

108. In *Claflin v. Houseman,* the Supreme Court indicated the state court must have the competence to decide the general class of cases upon which the federal claim was raised, when it said, "[o]r in the state courts, competent to decide rights of the like character and class. . . ." 93 U.S. at 137. This idea was reiterated in Missouri ex rel. v. Taylor, 266 U.S. 200 (1924), when the Court said, "The federal right is enforceable in a State court whenever its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws." *Id.* at 208. The underlying incompetence of the state court to hear a federal claim was correctly established in Brownell v. Union & New Haven Trust Co., 143 Conn. 662, 124 A.2d 901 (1956). The *Brownell* case concerned an attempt to raise a claim, based on the Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917), as amended, 50 U.S.C. §§ 1-40 (Supp. 1956), against a decedent's estate in a state probate court. The court found that the probate court could make a proper determination of the distribution of the property since such a determination merely settled title to it. The federal claim against the property, under the Act, must then proceed in a proper trial court, whether state or federal, against the heirs as determined by the probate court.

109. Montgomery v. State, 55 Fla. 97, 45 So. 879 (1908); Bowles v. Heckman, 224 Ind. 46, 64 N.E.2d 660 (1946); Harrison v. Herzig Building & Supply Co., 290 Ky. 445, 161 S.W.2d 908 (1942); Vickers v. Home Fed. Savings & Loan Assn., 87 Misc. 2d 880, 386 N.Y.S.2d 291 (1976), *aff'd,* 56 A.D.2d 62, 390 N.Y.S.2d 747 (1977); Williams v. Gibson, 232 N.C. 133, 59 S.E.2d 602 (1950); Hade v. McVay, Allison & Co., 31 Ohio St. 231 (1877).

brought under the Equal Employment Opportunity Act.[110] This denial of state court jurisdiction was based on a theory that Congress had made jurisdiction under the act exclusive with the federal courts.[111] The jurisdictional section of the act proclaims, "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. . . ."[112] Whether this holding represents a newly developing theory by which state courts will again try to deny their jurisdiction to hear claims brought under locally unpopular federal laws or simply an ill-considered snap judgment is not clear. But, more importantly, it fails to consider the strong tradition that the exclusive jurisdiction of the federal courts over a claim cannot be implied from general jurisdictional language.[113]

The United States Supreme Court has clearly rejected any theory of implied exclusive jurisdiction for federal courts. In *Galveston, Harrisburg and San Antonio Railway Co. v. Wallace,*[114] it said,

> Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the Federal and the state Government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by Federal statute.[115]

This rejection by the Supreme Court of an implied exclusive federal jurisdiction is reiterated in *Grubb v. Public Utilities Comm.*[116] Similarly, the Wisconsin Supreme Court[117] accepted jurisdiction of a claim brought in state court under Section 1983.[118] It refused to deny the

---

110. Fox v. Eaton Corp., 48 Ohio St. 2d 236, 358 N.E.2d 536 (1976).
111. *Id.*
112. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(3) (1976).
113. *See* note 37 and accompanying text *supra.*
114. 223 U.S. 481 (1912).
115. *Id.* at 490.
116. 281 U.S. 470 (1930). As the Court said,

> This view of that clause [commerce clause] is quite inadmissible. It has no support in any quarter, is at variance with the actual practice in this class of litigation . . . and is in conflict with the doctrine often sustained by this Court that the state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts.

Id. at 475-76.
117. Terry v. Kolski, 78 Wis.2d 475, 254 N.W.2d 704 (1977).
118. 42 U.S.C. § 1983 (1976).

state trial court's jurisdiction and recognized, "The ordinary rule, therefore, mandated upon the states is that they and their courts shall enforce the laws of Congress. Only if the Congress has exclusively reserved jurisdiction to the federal courts are state courts without power to act."[119]

Thus, the Ohio Supreme Court's ruling in *Fox*[120] has failed to recognize the rule that jurisdiction under a federal right will not be exclusive with federal courts merely by implication. Congress must make the jurisdiction exclusive in specific language if it wants jurisdiction to be exclusive. But a general jurisdictional statement will include the state courts as well as the federal courts.

IV. CONCLUSION

Although the great weight of authority mandates that state courts exercise their concurrent jurisdiction over federal issues unless Congress has specifically limited jurisdiction over that particular issue exclusively to federal courts, some state courts have attempted to deny their jurisdiction over particular issues. State courts have a positive duty to enforce all rights of Americans, those rights granted under federal law as well as state law. This duty cannot be escaped by the court on a theory that the federal law is a foreign penal law not to be enforced by a state court. The federal government is not a foreign government to the state government. A law passed by Congress is a law affecting citizens of each state and giving rights and obligations to each of those citizens. Similarly, the state court cannot deny its jurisdiction over the federal claim on a theory that Congress did not create that state court and has no authority to vest it with jurisdiction. Congress does not affect the original jurisdiction of the state court; Congress simply creates a right of action that by virtue of the Supremacy Clause becomes as much a part of the state law as any law passed by the state legislature. In addition, a state court cannot deny its jurisdiction by claiming that Congress has not specifically extended jurisdiction to it in that particular federal law. A state court has jurisdiction over a federal right of action unless Congress specifically restricts the jurisdiction to the federal courts.

Dennis L. Bailey

119. 78 Wis. 2d at 484, 254 N.W.2d at 707.

120. 48 Ohio St. 2d 236, 358 N.E.2d 536 (1976).