

Sec. 2—Judicial Power and Jurisdiction

Cl. 1—Cases and Controversies

courts provided for removal of such cases by either party, subject only to the jurisdictional amount limitation.⁷⁷⁸ The present statute provides for the removal by a defendant of any civil action which could have been brought originally in a federal district court, with no diversity of citizenship required in “federal question” cases.⁷⁷⁹ A special civil rights removal statute permits removal of any civil or criminal action by a defendant who is denied or cannot enforce in the state court a right under any law providing for equal civil rights of persons or who is being proceeded against for any act under color of authority derived from any law providing for equal rights.⁷⁸⁰

The constitutionality of removal statutes was challenged and readily sustained. Justice Story analogized removal to a form of exercise of appellate jurisdiction,⁷⁸¹ and a later Court saw it as an indirect mode of exercising original jurisdiction and upheld its constitutionality.⁷⁸² In *Tennessee v. Davis*,⁷⁸³ which involved a state attempt to prosecute a federal internal revenue agent who had killed a man while seeking to seize an illicit distilling apparatus, the Court invoked the right of the national government to defend itself against state harassment and restraint. The power to provide for removal was discerned in the Necessary and Proper Clause authorization to Congress to pass laws to carry into execution the powers vested in any other department or officer, here the judiciary.⁷⁸⁴ The judicial power of the United States, said the Court, embraces alike civil and criminal cases arising under the Constitution and laws and the power asserted in civil cases may be asserted in criminal cases. A case arising under the Constitution and laws “is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the

⁷⁷⁸ Act of March 3, 1875, § 2, 18 Stat. 471. The present pattern of removal jurisdiction was established by the Act of March 3, 1887, 24 Stat. 552, as amended, 25 Stat. 433.

⁷⁷⁹ 28 U.S.C. § 1441.

⁷⁸⁰ 28 U.S.C. § 1443.

⁷⁸¹ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347–351 (1816). Story was not here concerned with the constitutionality of removal but with the constitutionality of Supreme Court review of state judgments.

⁷⁸² *Chicago & N.W. Ry. v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270 (1872). Removal here was based on diversity of citizenship. See also *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 429–430 (1867); *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247 (1868).

⁷⁸³ 100 U.S. 257 (1880).

⁷⁸⁴ 100 U.S. at 263–64.