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Citation: 13 Cornell L. Q. 499 1927-1928



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# CORNELL LAW QUARTERLY

VOLUME XIII

JUNE, 1928

NUMBER 4

## DISTRIBUTION OF JUDICIAL POWER BETWEEN UNITED STATES AND STATE COURTS

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TO E. H. W.

A *Festschrift* is a fitting mode for honoring a scholar, for it is not so much a bestowal upon the celebrant, as an offering by his admirers to the gods of his intellectual fealty. One trembles to approach E. H. Woodruff's deities, though the impulse be ever so eager. Gold and silver I have not—neither golden speech nor silver silence. But—"we live by symbols." Perchance E. H. W. will transmute meagreness into the scale and significance worthy both of the theme and of him who inspired it. To E. H. W., law is neither narrow nor constrained. It is the governance of society, politics under guidance of reason. And beneath the dry and technical phrases of Federal Judiciary Acts lie those deep issues of statecraft that stir so lustily the rich stream of Woodruff's talk.

### I

One hundred and forty years ago there began a great debate concerning the functions of the national courts under the new Union. What should be the scope of their authority? What their relation to the state courts? Intermittently, that debate has continued throughout our history, and now, thanks to Senator Norris of Nebraska, Chairman of the Senate Judiciary Committee,<sup>1</sup> we are at the beginning of another important stage of the discussion. Nothing but good can come from a re-examination of the purposes to be served by the federal courts. Their historic contributions, above all their share in mould-

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<sup>1</sup>See Senator Norris' bill, S. 3151, reported out of the Senate Committee on the Judiciary on March 27, 1928, with Sen. Rep. No. 626, 70th Cong. 1st Sess., as amended by Senator Norris on May 8, 1928 (69 Cong. Rec. 8439 *et seq.*). For memorandum in opposition to this bill by the Committee on Jurisprudence and Law Reform of the American Bar Association, see the Congressional Record for May 8, 1928 (69 Cong. Rec. 8439 *et seq.*); for further comments and criticism on S. 3151, see 69 Cong. Rec. 7559 (April 26, 1928), 7637 (April 27, 1928).

ing the loosely knit states into a nation, have rooted the United States courts deeply into our national consciousness. They need not fear fair scrutiny.

It is proper to inquire into the appropriateness of the existing distribution of judicial power, just as the substance of law is revised from time to time in response to new needs. Whatever survives such an inquiry can only help to strengthen the judicial system. Especially is this true of the federal judiciary. Like all courts, the federal courts are instruments for securing justice through law. But unlike most courts, they also serve a far-reaching political function. They are a means, and an essential one, for achieving the adjustments upon which the life of a federated nation rests. The happy relation of states to nation—our abiding political problem—is in no small measure dependent on the wisdom with which the scope and limits of the federal courts are determined.

Thus, in providing for a federal judicial establishment, Congress is confronted with problems which trouble neither Parliament<sup>2</sup> nor state legislatures. Parliament in dealing with the High Court of Justice and legislatures in devising state judicial organizations, are concerned only with the effective distribution of their internal judicial power—the appropriate structure of their local courts, and how they shall function. These are largely technical questions, calling predominantly for the judgment of the legal profession. So, also, in the main it is for lawyers to say how judicial authority should be distributed within the federal system, and what procedure is most apt for its business. But in the series of Judiciary Acts, beginning with Senate Bill No. 1, of the very first session of the Senate, Congress has had to face a very different and more perplexing problem—that of the relation of the United States courts to the states. Here is a complication peculiar to a federated nation. Here is a conflict full of political explosives, because entangled in the complex of relations between states and nation. These are issues of the very stuff of American politics, to be settled or evaded by the compromises of one generation, only to reappear in the next. They are not technical issues, nor within the special province of lawyers. The formulation of the compro-

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<sup>2</sup>In legislating for the Judicial Committee of the Privy Council, however, Parliament deals with a tribunal which serves for the British Empire a purpose similar to that performed by the Supreme Court. See Viscount Haldane, *The Work for the Empire of the Judicial Committee of the Privy Council* (1922) 1 C.A.M.B. L. J. 143; 2 KEITH, *RESPONSIBLE GOVERNMENT IN THE DOMINIONS* (2d ed. 1928) pt. VI c. III; FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928) 307.

misses demand legal skill, and of a high order. But the bases of adjustment must be evolved by statesmen, and ought both to enlist and to satisfy public understanding.

In the original Act "to establish the Judicial Courts of the United States,"<sup>3</sup> Congress had to devise the internal structure of the federal judiciary and also to formulate its relations to the state judiciaries. Again, in the drastic but short-lived overhauling of the whole system by the Federalists, Congress dealt with both aspects of federal judiciary legislation.<sup>4</sup> The two problems, of course, interblend. For example, efforts at relief of congestion in the federal courts can hardly escape inquiry into the sources of their business, and that inevitably leads to scrutiny of the allotment of the common fund of litigation available for distribution between state and United States courts. But, on the whole, in the voluminous body of laws governing the United States courts scattered through the forty-six volumes of the Statutes at Large, Congress seldom deals with both problems at the same time. It either readjusts jurisdiction within the federal hierarchy or shifts the balance of authority as between state and federal courts. From time to time, interest or exigency throws the emphasis from concern over effective judicial administration by the United States courts, as an independent system, to reconsideration of the place of the national courts in the federal scheme. Thus, the Act of February 4, 1815,<sup>5</sup> the "Force Bill" of 1833,<sup>6</sup> the Civil War Removal Acts,<sup>7</sup> the "separable controversy" provision of 1866,<sup>8</sup> the Judiciary Acts of 1875<sup>9</sup> and 1887-88<sup>10</sup> involved, predominantly, redistribution of power between United States and state courts. On the other hand, the Act of March 3, 1837,<sup>11</sup> the Act of March 2, 1855,<sup>12</sup>

<sup>3</sup>Act of September 24, 1789, 1 Stat. 73. See Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV., 49; Friendly, *The Historic Basis of Diversity Jurisdiction* (1928) 41 HARV. L. REV. 483.

<sup>4</sup>Act of February 13, 1801, 2 Stat. 89. See FRANKFURTER AND LANDIS, *op. cit. supra* note 2, at 21 *et seq.*

<sup>5</sup>3 Stat. 195, (1815) U. S. Comp. Stat. (1916) § 118.

<sup>6</sup>Act of March 2, 1833, § 3, 4 Stat. 632.

<sup>7</sup>See *e.g.* Act of March 3, 1863, 12 Stat. 755 and see FRANKFURTER AND LANDIS, *op. cit. supra* note 2, at 61 *et seq.*

<sup>8</sup>Act of July 27, 1866, 14 Stat. 306, (1866) U. S. Comp. Stat. (1916) § 1018.

<sup>9</sup>Act of March 3, 1875, 18 Stat. 470, (1875) U. S. Comp. Stat. (1916) § 991 (1) *et seq.*

<sup>10</sup>Act of March 3, 1887, 24 Stat. 552, (1887) U. S. Comp. Stat. (1916) 991 (1), *et seq.* corrected by act of August 13, 1888, 25 Stat. 433, (1887) U. S. Comp. Stat. (1916) §§ 2954-58.

<sup>11</sup>5 Stat. 176 (1837).

<sup>12</sup>10 Stat. 631 (1855).

the Judiciary Act of 1869,<sup>13</sup> the Circuit Court of Appeals Act, 1891,<sup>14</sup> the Judicial Code, 1911,<sup>15</sup> the Act of September 14, 1922,<sup>16</sup> and the Judiciary Act of 1925,<sup>17</sup> were preoccupied with the internal administration of the federal judiciary.

Since the Civil War, five major revisions have been made in the internal economy of the United States courts. The new circuit judgeships of 1869,<sup>18</sup> the establishment in 1891 of nine intermediate appellate tribunals,<sup>19</sup> the cessation in 1912 of the historic circuit courts,<sup>20</sup> the addition, by the single Act of 1922,<sup>21</sup> of more judgeships than were included in the entire system established by the First Judiciary Act, the creation, by the same Act, of the conference of senior circuit judges,<sup>22</sup> and the recent drastic contraction of obligatory review by the Supreme Court,<sup>23</sup> have radically transformed the federal judiciary as Marshall and Taney and Chase knew it. Judicial reorganization had to respond to the pressure of forces which have made the United States a country very different from that which Jefferson and Jackson and Lincoln governed. No other people in the world has assumed the task of administering a single system of courts scattered over so vast an area as the United States. The series of piece-meal changes in the structure of the national judiciary and in its internal distribution of business, converge towards achieving a more articulated and workable system.

To mobilize adequately the resources of the judicial establishment, to simplify as much as possible the inevitable complexities of a system of courts spanning a continent, to secure a fair balance between the federal system and state judiciaries, to relieve the Supreme Court from all obstructions to the performance of its functions,—these have been the aims of legislation regulating the organization of the federal courts.

For forty years<sup>24</sup> there has been no organic reconsideration of the scope of business entrusted to the lower federal courts. Recently a

<sup>13</sup>Act of April 10, 1869, 16 Stat. 44.

<sup>14</sup>Act of March 3, 1891, 26 Stat. 826.

<sup>15</sup>Act of March 3, 1911, 36 Stat. 1087, (1911) U. S. Comp. Stat. (1916) § 968, *et seq.*

<sup>16</sup>42 Stat. 837, (1922) U. S. Comp. Stat. (Supp. 1923) § 1215a.

<sup>17</sup>Act of February 13, 1925, 43 Stat. 936.

<sup>18</sup>*Supra* note 13.

<sup>19</sup>*Supra* note 14.

<sup>20</sup>Act of March 3, 1911, § 289, 36 Stat. 1087, 1167, (1911) U. S. Comp. Stat. (1916), § 1266.

<sup>21</sup>*Supra* note 16.

<sup>22</sup>Act of September 14, 1922, § 238a, 42 Stat. 837 (1922) U. S. Comp. Stat. (Supp. 1923) § 1215a. See FRANKFURTER AND LANDIS, *op. cit. supra* note 2, c. VI.

<sup>23</sup>*Supra* note 17.

<sup>24</sup>Since the Judiciary Acts of 1887-88, *supra* note 10.

few isolated measures<sup>25</sup> have made some significant contraction of jurisdiction. There have been also some abortive efforts at major restriction.<sup>26</sup> But in truth, for more than fifty years there has been no comprehensive revision. For the Act of 1887-88<sup>27</sup> largely took for granted the jurisdictional assumption which underlay the Judiciary Act of 1875.<sup>28</sup>

A division of judicial labor among different courts, particularly between a dual system of federal and state courts, is especially subject to the shifting needs of time and circumstance. That the wisdom of 1875 is the exact measure of wisdom for today is most unlikely.

Within half a century the interplay of industrial and financial forces has greatly affected social habit and political sentiment. At different times and for different purposes the respective rôles of national and local authority have changed. Modern legal education is exerting considerable influence upon bench and bar. Surely these tendencies are not without relevance to the effective organization of the judicial systems of the United States, and a wise distribution of their activities. The indispensability of the federal judicial system to the maintenance of our federal scheme may be taken as a political postulate. But the details of jurisdiction are, after all, details. As such, their specific functions ought to submit to the judgment of appropriateness to the needs and sentiments of the time. Especially should they be saved from an excess of responsibility which may seriously impair their peculiar federal tasks.

Of these, the profoundest need is that the Supreme Court may be free to adjudicate great issues of government. "The most important function of the court," the present Chief Justice has told us, "is the construction and application of the Constitution of the United States."<sup>29</sup> All other purposes are subsidiary; all other litigation must be subordinated. To this end, Congress has translated into law the Court's own views upon the duties and powers appropriate to its functions.<sup>30</sup> The Judiciary Act of 1925, and the energetic labors of Chief Justice Taft and his Associates have enabled the Court to

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<sup>25</sup>E.g. Act of April 5, 1910, 36 Stat. 291 (1910) U. S. Comp. Stat. (1916) §§ 1010, 8662, 8665; Act of January 28, 1915, § 5, 38 Stat. 804, (1915) U. S. Comp. Stat. (1916) § 1233a; § 266 of the Judicial Code as amended by the Act of March 4, 1913, 38 Stat. 1013, 1014.

<sup>26</sup>See FRANKFURTER AND LANDIS, *op. cit. supra* note 2, at 89 *et seq.*, 136 *et seq.*

<sup>27</sup>*Supra* note 10.

<sup>28</sup>*Supra* note 9.

<sup>29</sup>Taft, *Attacks on the Courts and Legal Procedure* (1916) 5 Ky. L. J. No. 2, 3, 18. See also FRANKFURTER AND LANDIS, *op. cit. supra* note 2, c. VIII

<sup>30</sup>As to the part played by the Supreme Court in recent judiciary legislation, see FRANKFURTER AND LANDIS, *op. cit. supra* note 2, at 255 *et seq.*

remove arrears and to reach in regular course cases docketed this Term.

But the present equilibrium of Supreme Court litigation will not long be maintained. The volume of the Supreme Court's business will again increase as it has in the past increased after every measure for the relief of congestion. Moreover, it is not enough that the Supreme Court should keep abreast of its docket. The perplexities of the issues that come before it and the profound consequences of its decisions set the Supreme Court apart from other tribunals. Referring to an earlier period, the Chief Justice has given warning that if the Supreme Court's business "is to increase with the growth of the country, the work which it does will, because of haste, not be of the high quality that it ought to have. . ."<sup>31</sup> Even now, despite the great load lifted by the Act of February 13, 1925, the Court is working under too much pressure to afford the spacious reflection so indispensable for wise judgment.

Heretofore, increase in the Court's business has been met with decrease in its jurisdiction. But in future, relief can hardly come by narrowing the scope of obligatory review and making resort to the Court still further dependent upon grace in individual cases. The Act of 1925 has cut the Supreme Court's jurisdiction to the bone. The very limited categories of cases which now go to Washington as of right, imply precisely those issues for the disposition of which the Supreme Court exists. It is most improbable that they will be subjected to the discretionary writ of *certiorari*. Moreover, the volume of *certioraris* even under the present arrangement is in itself likely to present before long a drain of undue pressure on the Court's time and strength. During the 1925 Term there were 539 petitions for *certiorari*; 50 more during the 1926 Term and, according to present figures, this Term will register a further increase.

Modes of relief other than abandonment of obligatory review will have to be explored. In due course we shall again hear of the perennial plan to increase the membership of the Court and to have it sit in divisions. Even the American Bar Association sponsored this as late as 1921, only to encounter the opposition of the Court.<sup>32</sup> The folly of such schemes has been exposed every time they have been seriously urged. This way out is worse than futile; it is mischievous. A more serious inroad upon the Court's authority and its deliberative processes could hardly be devised. Greater parsimony in granting *certioraris* will offer itself as another means of curtailing business.

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<sup>31</sup>*Supra* note 29.

<sup>32</sup>See (1921) 46 A. B. A. REP. 384, 391.

This again is not a promising road to relief. The Court is now administering its discretionary powers with frugality. Out of 539 petitions for *certiorari* in the 1925 Term, 110 were granted; 119 out of 589 in the 1926 Term; 97, up to May 14, out of 567 in the 1927 Term.<sup>33</sup> While in individual instances, cases are taken in which issues of public importance are not apparent,<sup>34</sup> these are cancelled, at least, numerically, by denials of *certiorari* in cases presenting truly serious questions of public concern.<sup>35</sup> No doubt as *certioraris* multiply, the Court will be tempted to stiffen still more its rigor, but no hope of coping with the swelling stream of litigation can be found in damming more amply than it does at present the flow of *certioraris*.

Through other means must the Court be saved for its essential work; in other directions must restrictions be found upon the growth of its business. Mr. Justice Holmes' main remedy for every variety of evil "is for us to grow more civilized."<sup>36</sup> That prescription has practical application for the difficulties presented by the growing volume of Supreme Court litigation. A more select bar, better equipped professionally, more cultivated, with a heightened sense of professional *esprit* would make for more thorough knowledge of records, shorter and more pungent arguments, more compact briefs. Such a bar would imply also, learned and highly skilled judges of inferior courts, who would subject litigation to a thorough process of consideration before it reached the Supreme Bench. All this would help immensely the ability of the Supreme Court to dispatch its business with "high quality."

Most important of all, however, the stream of Supreme Court litigation is conditioned by its feeders. Interstate controversies, to be sure, are apt to raise not only grave issues, but involve a mass of intricate facts, thereby occasioning considerable inroad upon the Court's time. But such controversies are infrequent and other demands upon the Court's original jurisdiction are negligible. What matters is its appellate jurisdiction. With few exceptions, the cases

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<sup>33</sup>These are privately computed figures to which one must resort in the absence of detailed judicial statistics officially published.

<sup>34</sup>See e.g. a series of cases under the Federal Employers Liability Act at this Term of Court: *Atlantic Coast Line R.R. v. Southwell*, 275 U. S. 64, 48 Sup. Ct. 25 (1927); *Gulf Etc. Ry. v. Mosler*, 275 U. S. 133, 48 Sup. Ct. 48 (1927); *Gulf Etc. Ry. v. Wells*, 48 Sup. Ct. 151 (1928).

<sup>35</sup>Doubtless the Court had weighty reasons for denying *certiorari* in cases like *Lewis v. Red Jacket Consolidated Coal and Coke Co.*, 18 F. (2d) 839 (C. C. A. 4th, 1927); 48 Sup. Ct. 31 (1927); but surely important public issues were therein presented.

<sup>36</sup>OLIVER W. HOLMES, SPEECHES (1918) 102.



that come to the Supreme Court come from other courts. The volume of Supreme Court cases and the nature of their issues are largely predetermined by the volume and nature of the business of the feeding courts.

If diversion from the lower federal courts of controversies which state courts can settle adequately enough would help save the Supreme Court for its more essential labors, this would be a gain of moment. If maintenance of the present ambit of jurisdiction of the district courts involves inflation of its numbers which, by its own Gresham's law, results in a depreciation of the judicial currency and the consequent impairment of the prestige of the federal courts, surely we ought to restrict litigation in order to preserve their efficacy.

Since the volume and nature of litigation so largely conditions the character and competence of judicial tribunals, a dispassionate inquiry into the sources of present day federal litigation ought to be particularly welcome to those most attached to the federal courts. But the proper allocation of authority between United States and state courts is but part of the perennial concern over the wise distribution of power between the states and the nation. Back of litigation is the prolific energy of legislation. Just because modern economic forces make so strongly for centralization, there are no more challenging problems of statesmanship than to decide what tasks shall be assumed by the central government and by what instruments and methods it shall perform them. That there are limits, and very serious limits, to the effective exercise of federal authority needs no laboring today. What conduct shall be regulated by law and what shall be left to other forces of social control? What regulative authority shall be exercised by the central government and what left wholly to the states or to interstate regional adjustment? Shall national agencies alone vindicate national laws or shall the states share in their administration or shall the states alone enforce them? These are puzzles of American politics in the solution of which is entangled the welfare of the federal courts. They do not yield to settlement by formula. Nor are they moral issues to be tested by abiding truths, like the right to worship according to one's conscience or freely to pursue scientific inquiry. We are here in the domain of administrative effectiveness and precedural adaptations,—matters not of principle but of wise expediency.

## II

What powers shall be given to what courts can be determined neither on a *priori* reasoning, nor by unchanging political considerations. Equally unsafe guides are the prepossessions of the familiar.

Both tradition and empiricism have their claim, and both may receive illumination from the perspective of history. So continuous a process of legislative compromises as that which is expressed in the past enactments defining federal jurisdiction may yield wisdom for the present, at least in analyzing the nature of the issues and the relevant bases for judgment in distributing litigation between state and federal courts today.

In a summary of the business that has heretofore been given to the federal courts,<sup>37</sup> a sharp line must be drawn between cases arising under the Constitution, laws and treaties of the United States, and controversies deriving significance solely from the citizenship of the parties.<sup>37</sup> Different considerations<sup>38</sup> led to the deposit of power in the Constitution over these two broad groups of litigation; different considerations have evoked its exercise by Congress from time to time, in varying degrees and under varying circumstances.

#### A. Cases arising under the Constitution, laws and treaties of the United States

(1) As originally established, the vindication of these essentially federal claims was confided in the first instance to the state courts, reserving, however, through the famous twenty-fifth section of the First Judiciary Act,<sup>39</sup> review by the Supreme Court when a state court had denied a claim of federal right.

(2) By the Act of February 13, 1801, the Federalists exercised almost to the full the constitutional grant of judicial power. The federal courts were entrusted with all litigation "arising under the Constitution and laws of the United States, and treaties. . . and also of all. . . matters. . . cognizable by the judicial authority of the United States, under and by virtue of the Constitution thereof, where the matter in dispute shall amount to four hundred dollars."<sup>40</sup>

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<sup>37</sup>This is not an attempt to explore the full range of "the judicial power of the United States." The judicial area most actively in dispute between state and federal courts is my concern. Therefore, I put on one side the "federal specialties," admiralty, bankruptcy, the federal criminal law, Indian and land litigation, patents, etc. Nor need jurisdiction over diplomatic officers and aliens detain us. For references to the whole body of legislation defining the jurisdiction of the inferior federal courts from 1789 to 1924 see Frankfurter and Landis, *Power to Regulate Contempts* (1924) 37 HARV. L. REV. 1010, appendix I.

<sup>38</sup>See Warren, *supra* note 3; Friendly, *supra* note 3.

<sup>39</sup>Act of September 24, 1789, § 25, 1 Stat. 73, 85. See also *Cohens v. Virginia*, 6 Wheat. 264 (U. S. 1821); Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States* (1913) 47 AM. L. REV. 1; FRANKFURTER AND LANDIS, *op. cit. supra* note 2, at 189 *et seq.*

<sup>40</sup>2 Stat. 89, 92.

(3) As Macaulay's school boy knows, this vast power was withdrawn almost before it was asserted. On March 8, 1802, the law of the "midnight judges" was repealed.<sup>41</sup> Seventy-five years elapsed before the federal courts were again made the general depositories of claims of federal rights.<sup>42</sup>

(4) But exigencies from time to time led to specific and temporary protection of federal claims through the national courts. By way of illustration:

a. In answer to New England's resistance to the prosecution of the War of 1812, the Act of February 4, 1815, provided for the removal from the state courts of suits against federal officers enforcing the collection of war revenues.<sup>43</sup>

b. Again countering threats of nullification, this time by South Carolina, the "Force Bill" of 1833 authorized removal of all suits against officers of the United States on account of any acts done by them under the revenue laws.<sup>44</sup>

c. The Civil War occasioned a series of similar enactments, providing for the removal of cases from state courts into federal courts when the defendant asserted some federal immunity or was exposed to the hazards of local prejudice against the national authority.<sup>45</sup>

All this was *ad hoc* legislation—not abstract or systematic assertion of federal power, but measures governing restricted types of controversy, and directed towards demonstrated inadequacy of state agencies.

(5) By the Act of July 27, 1868, removal was permitted from the state courts in all suits against corporations other than banking, organized under a law of the United States, for any liability of such corporation where a defence was based on the Constitution, or any treaty or law of the United States.<sup>46</sup>

(6) By the Act of February 28, 1871, removal from state courts was permitted in suits or prosecutions growing out of prevention, under federal authority, of racial discrimination in voting.<sup>47</sup> This was repealed by the Act of February 8, 1894.<sup>48</sup>

(7) By the Act of March 3, 1875, the circuit courts were given "original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitu-

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<sup>41</sup>2 Stat. 132.

<sup>42</sup>*Supra* note 9.

<sup>43</sup>§ 8, 3 Stat. 195 (1815) U. S. Comp. Stat. (1916) § 1118.

<sup>44</sup>*Supra* note 6.

<sup>45</sup>*Supra* note 7.

<sup>46</sup>15 Stat. 227, (1868) U. S. Comp. Stat. (1916) § 1018.

<sup>47</sup>16 Stat. 433, 438.

<sup>48</sup>28 Stat. 36, (1894) U. S. Comp. Stat. (1916) § 1015.

tion or laws of the United States, or treaties made, or shall be made under their authority. . . ."<sup>49</sup>

By this Act, for the first time (barring the abortive Act of 1801) the federal courts became the primary and dominant instruments for vindicating rights given by the Constitution, laws and treaties of the United States. Thereafter, litigation asserting such rights could be initiated in the federal courts, and could be removed thereto when begun in the state courts. Latitudinarian construction of this Act by the Supreme Court opened still wider the sluices of Federal litigation. In the *Pacific Railroad Removal Cases*<sup>50</sup> the Supreme Court held that every case, irrespective of its nature, brought by or against a federally chartered corporation is a suit arising under the "laws of the United States." Tort claims against the Pacific railroads and like litigation crowded federal dockets, and stimulated strong local animosity against federal courts.<sup>51</sup> By successive stages, as we shall note, Congress cut off this fertile source of business until, in 1925, it was wholly eliminated.

(8) The effect of the Act of July 12, 1882,<sup>52</sup> was to prevent removal of suits by or against a national bank solely on the ground that it was incorporated under federal law. So far as access to the federal courts was concerned, national banks were assimilated to local banks in the states of their enterprise.

(9) The Judiciary Act of 1887,<sup>53</sup> as amended by the Act of 1888, made two further restrictions upon the jurisdiction initiated by the act of 1875.<sup>54</sup> the privilege of removal from state to federal courts was restricted to defendants,<sup>55</sup> and the necessary amount in dispute was raised from five hundred to two thousand dollars.<sup>56</sup> By the Judicial Code of 1911,<sup>57</sup> the jurisdictional sum was increased to three thousand dollars.

(10) The Federal Employers Liability Act, in 1908,<sup>58</sup> gave concurrent jurisdiction to state and federal courts of cases arising under it. But Congress very soon checked the heavy flow of federal employers liability litigation which came to the federal courts, by prohibiting removal of such cases from the state courts.<sup>59</sup>

<sup>49</sup>*Supra* note 9.

<sup>50</sup>115 U. S. 1, 5 Sup. Ct. 1113 (1885).

<sup>51</sup>3 WARREN, SUPREME COURT IN UNITED STATES HISTORY (1922) 407, 408.

<sup>52</sup>C. 290, § 4, 22 Stat. 163, (1882) U. S. Comp. Stat. (1916) § 9668.

<sup>53</sup>*Supra* note 10.

<sup>54</sup>*Supra* note 9.

<sup>55</sup>§ 2, *infra* note 85.

<sup>56</sup>§ 1, U. S. Comp. Stat., *supra* note 9, § 1010.

<sup>57</sup>*Supra* note 15, § 991 (1).

<sup>58</sup>Act of April 22, 1908, c 149, 35 Stat. 65 (1908) U. S. Comp. Stat. (1916) § 8657

*et seq.*

<sup>59</sup>Act of April 5, 1910, 36 Stat. 291 (1910) U. S. Comp. Stat. (1916) §§ 1010, 8662, 8665.

(11) After the Act of 1875, the lower federal courts were increasingly asked for injunctions to set aside state legislation and to restrain state administrative agencies. Enormous power over state affairs was thus lodged in single judges. To provide ampler safeguards against the exercise of this authority, Congress, in 1910, required three judges to hear prayers for interlocutory injunctions in such suits.<sup>60</sup> This device of numbers was first introduced by Congress in 1903<sup>61</sup> into the judicial system for proceedings by the United States arising under the Sherman Law or the Interstate Commerce Act, as a protection against improvident decrees by a single judge in suits of considerable political import, usually turning on complicated economic facts. A striking further limitation was in 1913 put upon the power of the district courts to restrain the enforcement of state laws and state boards administering such laws. The states were empowered to entrust their own courts in the first instance with litigation concerning the validity of state regulation:

"It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney-general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith."<sup>62</sup>

(12) By the Act of January 28, 1915,<sup>63</sup> Congress took out of the federal courts the litigation which the *Pacific Railroad Removal Cases* had brought there, by providing that

<sup>60</sup>Act of June 18, 1910, § 17, 36 Stat. 539, 557, (1910) U. S. Comp. Stat. (1916) § 1243 which was embodied in § 266 of the Judicial Code. This provision was explicitly made applicable to suits to enjoin the orders of a state commission by the Act of March 4, 1913, 37 Stat. 1013, (1913) U. S. Comp. Stat. (1916) § 8168, but, as a matter of construction, cannot be availed of in suits to restrain a municipal ordinance. See *e.g.* Cumberland Tel. & Tel. Co. v. Memphis, 198 Fed. 955 (W. D. Tenn. 1912). And see discussion of this provision in dissenting opinion of Mr. Justice Brandeis in *King Mfg. Co. v. City Council of Augusta*, 48 Sup. Ct. 000 (1928).

<sup>61</sup>Act of February 11, 1903, 32 Stat. 823, (1903) U. S. Comp. Stat. (1916) §§ 8824-25.

<sup>62</sup>§ 266 of the Judicial Code, *supra* note 15, as amended by the Act of March 4, 1913, 37 Stat. 1013, 1014, (1913) U. S. Comp. Stat. (1916) § 1243. And see Pogue, *State Determination of State Law* (1928) 41 HARV. L. REV. 623.

<sup>63</sup>§ 5, 38 Stat. 804, (1915) U. S. Comp. Stat. (1916) § 1233a.

"no court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of Congress."

(13) The Merchants Marine Act, 1920,<sup>64</sup> in somewhat ambiguous language applies<sup>65</sup> to seamen's actions, for personal injuries as well as for death given by it, the provisions against removal in the Employers Liability Act.<sup>66</sup>

(14) Forty years after the *Pacific Railroad Removal Cases* the Supreme Court asked Congress to relieve the federal courts of the remaining burden of business due to that decision.<sup>67</sup> And so Congress, in the Judiciary Act of 1925, provided that

"no district court shall have jurisdiction of any action or suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress: provided, That this section shall not apply to any suit, action, or proceeding brought by or against a corporation incorporated by or under an Act of Congress wherein the Government of the United States is the owner of more than one-half of its capital stock."<sup>68</sup>

(15) Finally, Mr. Warren<sup>69</sup> has directed attention to the numerous instances, during the first fifty years, in which Congress gave to the state courts concurrent jurisdiction with the federal courts over violations of the federal criminal law. To this day enforcement may be had in the state courts of some penalties and forfeitures arising under federal statutes.

### B. Cases Depending upon the Citizenship of Parties

The legislative outlines of federal jurisdiction over controversies "between citizens of different States"<sup>70</sup> are briefly sketched. Judicial construction, responsive to the forces of corporate business development, utilized a few technical statutes, awkwardly expressed and often ambiguous, to divert to the federal courts an overwhelming mass of litigation which raised no federal questions.

<sup>64</sup>Act of June 5, 1920, 41 Stat. 988, (1920) U. S. Comp. Stat. (1923 Supp.) § 1946 *et seq.*

<sup>65</sup>See the opinions of Judge Learned Hand in *Beer v. Clyde Steamship Line*, 300 Fed. 561 (S. D. N. Y. 1923), and *Martin v. U. S. Shipping Board*, 1 F. (2d) 603 (S. D. N. Y. 1924).

<sup>66</sup>*Supra* notes 58 and 59.

<sup>67</sup>See FRANKFURTER AND LANDIS, *op. cit. supra* note 2, at 272, 273.

<sup>68</sup>*Supra* note 17, at § 12.

<sup>69</sup>Warren, *Federal Criminal Laws and the State Courts* (1925) 38 HARV. L. REV. 545.

<sup>70</sup>U. S. Const., Art. III, § 2.

(1) The First Judiciary Act allowed suits in the federal courts between a citizen of the state where the suit is brought and a citizen of another state, when the dispute exceeded five hundred dollars.<sup>71</sup> Such suits, when begun in state courts, could be removed by the defendant to the federal courts "at the time of entering his appearance in such state court."<sup>72</sup>

(2) The abortive Judiciary Act of 1801 left the scope of this phase of jurisdiction unchanged, except that the required *ad damnum* was reduced to four hundred dollars.<sup>73</sup> Upon the repeal of this Act the following year the minimum was again fixed at five hundred dollars.<sup>74</sup>

(3) As delineated by Congress, the scope of jurisdiction based on diversity of citizenship remained unchanged for eighty years. The Supreme Court in the early days of Marshall put one important limitation upon this source of business. In litigation by plural parties, a suit could not be taken to a federal court if there was identity of state citizenship between any one plaintiff and any one defendant.<sup>75</sup> The Separable Controversy Act of 1866 qualified this doctrine to the extent that a defendant in a state litigation, who is a citizen of another state, may

"if the suit is one in which there can be a final determination of the controversy, so far as it concerns him without the presence of the other defendants as parties in the cause, . . . at any time before the trial or final hearing of the cause" remove "the cause against him"

into the federal court, leaving the plaintiff to pursue his remedy against the other defendants in the state court.<sup>76</sup>

(4) By the Act of March 2, 1867, Congress enabled a nonresident litigant in a state court, whether plaintiff or defendant, to remove to the federal court a case otherwise within *Strawbridge v. Curtiss*, and not presenting a separable controversy, upon showing by affidavit

"that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court."<sup>77</sup>

(5) The Act of 1875 allowed controversies between citizens of different states to be brought in the federal court in any district in which the defendant "is an inhabitant or in which he shall be found at the time of serving" process, or to be removed thereto by either party.<sup>78</sup> As applied by the Supreme Court in *Ex parte Schollen-*

<sup>71</sup>§ 11, 1 Stat. 73 (1789).      <sup>72</sup>§ 12, 1 Stat. 73, (1789).

<sup>73</sup>§§ 11 and 13.      <sup>74</sup>Act of March 8, 1802, 2 Stat. 132.

<sup>75</sup>*Strawbridge v. Curtiss*, 3 Cranch. 267 (U. S. 1806).

<sup>76</sup>*Supra* note 8.      <sup>77</sup>14 Stat. 558 (1867).

<sup>78</sup>§ 2, 14 Stat. 470, (1875) U. S. Comp Stat. (1916) § 1010.

berger,<sup>79</sup> these provisions opened the door of the federal courts to a corporate litigant in every state in which a corporation transacted business through an agent.

(6) The First Judiciary Act guarded against misuse of jurisdiction founded on diversity of citizenship through colorable assignments of choses in action by forbidding an assignee (other than an holder of foreign bills of exchange) to sue in the federal courts unless suit therein could have been brought by his assignor.<sup>80</sup> The Act of 1875 allowed holders of "promissory notes negotiable by the law merchant" to sue in the federal courts regardless of the capacity of his assignor to maintain a federal suit.<sup>81</sup> Having thus expanded the ambit of jurisdiction, the Act of 1875 also provided against its abuse:

"if in any suit commenced. . . or removed. . . from a state court . . . it shall appear. . . that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of such circuit court, or that the parties to such suits have been improperly or collusively made or joined either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, such circuit court shall proceed no further therein."<sup>82</sup>

(7) The Judiciary Act of 1887-88 placed four new restrictions on diverse-citizenship litigation: (a) the threshold amount was made two thousand dollars; (b) suit could no longer be brought in a district in which the defendant "shall be found," but only where the defendant was "an inhabitant." A corporation, the Supreme Court held, was an "inhabitant" within the meaning of this Act only in the state of its incorporation; (c) the right of removal to a federal court was withdrawn from the plaintiff who initiated litigation in a state court. Only a nonresident defendant could remove; (d) suits upon assigned claims were further restricted by denying jurisdiction after assignment unless it existed before, excepting suits on foreign bills of exchange and corporate bearer notes.<sup>83</sup>

While the Act of 1887-88 thus shut doors to the federal courts, it widened one source of access to them. In introducing removal of "separable controversies," the Act of 1866 allowed a defendant to remove "the cause as against him."<sup>84</sup> According to the 1887-88 legislation, where a separable controversy was contained in a suit, the affected defendant was authorized to "remove said suit."<sup>85</sup> This, the

<sup>79</sup>96 U. S. 369 (1878).

<sup>80</sup>§ 11, *supra* note 71.

<sup>81</sup>§ 1, 18 Stat. 470.

<sup>82</sup>§ 5, 18 Stat. 470, (1875) U. S. Comp. Stat. (1916) § 1019.

<sup>83</sup>§§ 1 and 3, 24 Stat. 552, (1887) U. S. Comp. Stat. (1916) §§ 991 (1), 991 (2), 1010, 1011, 1012, 1033, 1048.

<sup>84</sup>14 Stat. 306-07 (1866).

<sup>85</sup>§ 2, 24 Stat. 552 (1887).



Supreme Court held,<sup>86</sup> carried the entire litigation to the federal court, irrespective of the residence of the plaintiffs and other defendants.

(8) In 1911, the Judicial Code again lifted the money level of diversity jurisdiction, this time to its present requirement of three thousand dollars.<sup>87</sup>

This short resumé of legislation plainly reveals the operation of an empiric process. The constitutional grant of judicial power has never implied a duty by Congress to employ it. Policy has always determined when and how and to what extent judicial power should be exercised. Story's doctrinaire federalism, that "if it was proper in the Constitution to provide for" judicial authority, "it is wholly irreconcilable with the sound policy or interests of the Government to suffer it to slumber,"<sup>88</sup> is refuted by the history of the federal judiciary. The theory and wisdom which have guided action were penetratingly expressed very early by Mr. Justice Chase:

"The notion has frequently been entertained, that the federal courts derived their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we possess it, not otherwise: and if congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal Courts to every subject, in every form, which the constitution might warrant."<sup>89</sup>

Not inherent reasons, then, but practical justifications explain the past judiciary acts and must vindicate existing jurisdiction. The force and dangers of parochial attachments, the effectiveness and limitations of a centralized judiciary administering law over a continent, the dependability of state courts, the convenience of suitors, shifting economic and political sentiments,—such influences, with varying incidence, have shaped the accommodations of authority distributed between the national judiciary and the state courts. The present jurisdiction cannot rely on tradition. Always have the accommodations been temporary. The only enduring tradition represented by the voluminous body of congressional enactments governing

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<sup>86</sup>*Barney v. Latham*, 103 U. S. 205 (1880).

<sup>87</sup>§§ 24 and 28, 36 Stat. 1091, (1911) U. S. Comp. Stat. (1916) § 991 (1).

<sup>88</sup>STORY, *LIFE AND LETTERS OF JOSEPH STORY* (1851) 293. See also *Martin v. Hunter's Lessee*, 1 Wheat. 304, 328 (U. S. 1816); *White v. Fenner*, Fed. Cas. No. 17 547 (C. C. R. I. 1818).

<sup>89</sup>*Turner v. Bank of America*, 4 Dall. 8, 10 (U. S. 1799).

the federal judiciary is the tradition of questioning and compromise, of contemporary adequacy and timely fitness.

### III

The content of federal jurisdiction has been temporary; the need of a system of federal courts has not been questioned since 1789. Nor has the federal judiciary, as part of our political system, ever had deeper acceptance in the public mind than today. It is not essential to a federal government to have federal courts. No other English speaking union has such a system.<sup>90</sup> Thus, the Australian Commonwealth, although its organic act was closely modelled upon the American Constitution, has not exercised the power vested in its Parliament to establish "other federal courts"<sup>91</sup> than the High Court<sup>92</sup> provided for by its constitution. We may take it for granted, however, that our distinctively federal law will in the main be enforced through federal courts. Federal "specialties" are extending their domain and require a common system of federal tribunals. National sentiment also regards federal tribunals as the appropriate guardians of federal rights. But it is a practical sentiment. There are limits to the effective enforcement of national law. Wise distribution of judicial power also depends upon the nature of issues. Some federal rights are readily adapted to enforcement by state tribunals; others are clearly meant for the federal courts. Some federal rights involve no lively local interests; others are heavily enmeshed in conflicts between state and national authority. Civilized law rests on discrimination. No less must distinctions be taken in devising modes for the administration of law.

A powerful judiciary implies a relatively small number of judges. Honorific motives of distinction have drawn even to the lower federal bench lawyers of the highest quality and thereby built up a public confidence comparable to the feelings of Englishmen for their judges. Signs are not wanting that an enlargement of the federal judiciary does not make for maintenance of its great traditions. In 1884 there were only 66 federal judges; they had increased to 115 in

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<sup>90</sup>Mr. Charles Morse, K. C. the learned editor of the *CANADIAN BAR REVIEW*, has kindly called my attention to two specialized Dominion tribunals in addition to its Supreme Court which, in 1875, was vested with criminal and civil appellate jurisdiction over the provincial courts. 38 Vict. c. 11 (Can. 1875). (See 6 CAN. B. REV. 240, 241).

<sup>91</sup>See (1900) 63 and 64 Vict. c. 12, § 71.

<sup>92</sup>The High Court of Australia was organized under the Judiciary Act of 1903. See (1903) Comm. Acts No. 6.

1907; there are about 170 today; the pressure for more is steady. It is idle to ratio the number of judges to changes in the wealth or population of the country. Subtle considerations of psychology and prestige play havoc with the mechanical notion that increase in the business of the federal courts can be met by increasing the number of judges.

Some business must be stopped at its legislative source. Almost every interest of the country is against federal legislation in the abstract, but ready to invoke such legislation for its own protection. Every new federal offence means a new burden upon the federal courts. Criminal cases involve a particularly heavy drain on the court's time and, as a rule, they are the least attractive to those most qualified for the bench. Proposals to add to the federal penal code should therefore be rigorously scrutinized. Federal power should not be abused by exerting it for the punishment of essentially local crimes. Federal courts throughout the country, and particularly in centers like New York, are occupied in trials, frequently lasting weeks, for what are prosecutions of essentially local frauds, brought to the federal courts on the tenuous thread, perchance, of a single use of the mails. Undoubtedly frauds are thus punished, but at the sacrifice of interests more peculiarly in the keeping of the federal courts. The question is not whether conduct should be outlawed, but what tribunal shall deal with it. Penal laws against drug addicts, interstate automobile thefts, proposals to deal with "fences," all are attempted short cuts in the effort to prevent and punish crime. I am mindful of the difficulties of American criminal justice due to state boundaries. But the resources of the states for better methods of crime prevention and detection and of interstate cooperation<sup>33</sup> in the prosecution of crime have hardly begun to be tapped. These resources should be explored to the full, instead of charging the federal courts with tasks which in their real significance are state matters.

But even as to federal offences, pressure upon the federal courts may be partly relieved by freer utilization of enforcement through state tribunals. There is historic warrant for allowing the states to share with the federal government in the administration of its criminal law.<sup>34</sup> Not only will this relieve the federal courts; it will help to enlist local sentiment in support of national legislation, and

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<sup>33</sup>See Frankfurter and Landis, *The Compact Clause of the Constitution* (1925)

34 YALE L. J. 685, 698.

<sup>34</sup>Warren, *Federal Criminal Laws and the State Courts* (1925) 38 HARV. L. REV. 574.

thus save the federal criminal law from being weakened by asserting the distant authority of a centralized government.

Congress has already greatly relieved the dockets of the federal courts by vesting in the state courts the prolific litigation arising under the Federal Employers Liability and the Jones Acts, and preventing removal thereof to the federal courts. This is another type of practical devolution of the central authority, which eases the movement of the federal machinery. Jurisdiction ought thus to be given to the state courts, whenever federal rights arise out of transactions which are dominantly local and readily lend themselves to state remedies. The national interest in the uniform interpretation of a federal law is amply protected by the reviewing power of the Supreme Court through *certiorari*.<sup>95</sup>

The states, in turn, could save for their own courts litigation which now heavily burdens the federal courts. Modern business regulation and taxation give rise to the most perplexing cases. These controversies turn largely on voluminous facts, deriving significance from judgment on social and economic policy. Suits to restrain such state action comprise the most contentious phase of the work of federal courts. Such cases engender strong feeling and easily become the stuff of politics.

Inadequacy of legal remedy is the basis of equitable intervention by the federal courts.<sup>96</sup> They are compelled to entertain jurisdiction in these suits because the states do not provide adequate legal remedies through their own courts. The legal procedure of the states has not sufficiently accommodated itself to the consequences of their regulatory legislation, so that the validity of new legislation or the application of old cannot be questioned in the state courts without encountering serious risks. Irreparable damage as, for instance, the failure of state laws to provide for the recovery of interest on taxes unconstitutionally levied,<sup>97</sup> the harassment of multiplicity of suits under a questionable statute,<sup>98</sup> or the threat of oppressive penalties for disobedience of a challenged order of a state commission,<sup>99</sup> all

<sup>95</sup>See *e.g.*, *Gulf C. & S. F. Ry. v. Mosler*, 275 U. S. 133, 48 Sup. Ct. 48 (1927).

<sup>96</sup>Judicial Code, § 267; U. S. C., § 384. See unpublished paper of Lockwood, Maw and Rosenberry, *Federal Injunctions and Unconstitutional State Action*.

<sup>97</sup>See *e.g.*, *Proctor Gamble Distributing Co. v. Sherman*, 2 F. (2d) 165 (C. C. A. 2d, 1924). See also *Hopkins v. So. Calif. Tel. Co.*, 13 F. (2d) 814 (C. C. A. 9th, 1926); 48 Sup. Ct. 180 (1928).

<sup>98</sup>See *e.g.*, *Chicago, G. W. Ry. v. Kendall*, 266 U. S. 94, 45 Sup. Ct. 55 (1924).

<sup>99</sup>See *e.g.*, *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441 (1908); *Okla. Operating Co. v. Love*, 252 U. S. 331, 40 Sup. Ct. 338 (1920).

present forms of inadequacy of legal remedy in the state courts leading to heavy litigation in United States courts. The states could readily prevent interference with their tax collection through suits in the federal courts, by removing the possibility of the claim that there is no adequate remedy at law in the state courts, if the tax is paid. So, also, by appropriate changes in the criminal administration of the states, the excuse could be obviated for seeking injunctions in the federal courts on claims of irreparable damages and multiplicity of suits and oppressive penalties before final adjudication in the state courts of the validity of contested state action.

Congress has already given the states a lead in this direction, but they have not followed it. As we have seen, under the proviso to section 266 of the Judicial Code,<sup>100</sup> federal suits to restrain state laws or orders can be stayed, if, before final hearing, an appropriate action is brought in a state court "to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court." From 1913 through the 1926 Term, 108 cases came to the Supreme Court from the district courts in suits praying for preliminary injunctions against the enforcement of state legislation and state administrative orders.<sup>101</sup> If the states had had a state procedure sufficiently effective to acquire jurisdiction, and state officers alert enough to exercise it, each of these cases could and should first have been considered by state courts. The states' failure to put into operation their power to subject state legislation to the sifting process of the state courts has needlessly swollen the business of the federal courts and cast upon the Supreme Court some of its most burdensome labor.

For many of these controversies, though raising constitutional claims, rest upon a construction of state law or the proper application of a state constitution to state law. Moreover, in about one-fifth of these cases relief was based wholly on state issues, apart from any claims asserted under the United States Constitution.<sup>102</sup> Yet in only two of these cases<sup>103</sup> had the federal courts any light upon these local matters from prior decisions of the state courts. To give meaning to isolated and frequently obscure expressions of state policy, behind which may lie unexpressed assumptions familiar to the state judges, raises perplexities and invites conflicts which are not lessened

<sup>100</sup>*Supra* note 62.  
note 62, at 628.

<sup>101</sup>See Pogue, *State Determination of State Law*, *supra*  
<sup>102</sup>*Ibid.* at 632.

<sup>103</sup>*Ibid.*

by the pressure of federal litigation.<sup>104</sup> The Supreme Court is showing increasing reluctance to find its way through the quicksands of state legislation without the guidance of state courts.<sup>105</sup> All these difficulties would be avoided if the road to the protection of constitutional rights lay to the Supreme Court from the state courts. Coming thus, all state matters would be concluded, and the special local facts upon which constitutional questions now so frequently turn<sup>106</sup> would, in the first instance, be canvassed by judges presumably most familiar with them.

Probably no type of litigation gives rise to more conflict between state authorities and the federal courts than the tendency of lower federal courts to enjoin state regulation of local utilities. No controversies are charged with more intrinsic complexity. Almost always do they involve the interpretation of local law and local contracts, not within the special competence of federal judges.<sup>107</sup> Moreover, these suits raise very complicated and lengthy issues, demand for the elucidation of the legal problems a vast exploration of fact, with the consequent drain upon the time of the federal judiciary. Congress has already recognized the sensitiveness of the states against initial interference by the federal courts by requiring a tribunal of three judges,<sup>108</sup> instead of a single judge, for the granting of injunctions in

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<sup>104</sup>What the Supreme Court has said as to cases arising under Spanish law is applicable in considerable measure to the views of outsiders on the legislation of the individual states: "This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. . . . This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books." *Diaz v. Gonzales*, 261 U. S. 102, 105-06, 43 Sup. Ct. 286 (1923), per Holmes, J.

<sup>105</sup>"Many of the objections made raise questions as to the meaning and effect of recent statutes of the State which have not yet been construed by its courts; and we are reluctant to pass upon these questions." *Southern Ry. Co. v. Watts*, 260 U. S. 519, 522, 43 Sup. Ct. 192 (1923).

<sup>106</sup>See *e.g.*, *Euclid Village v. Ambler Realty Co.*, 272 U. S. 365, 395, 47 Sup. Ct. 114 (1926); *Hammond v. Schappi Bus Line*, 275 U. S. 164, 170 (1927); *Miller v. Schoene*, 48 Sup. Ct. 246 (1928).

<sup>107</sup>Mr. Justice Holmes has aptly called the courts of a state the "authorized interpreter" of its laws and its constitution. See his dissent in *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 41, 28 Sup. Ct. 7 (1907).

<sup>108</sup>*Supra* note 60.

these cases. The time and energy of three judges, therefore, are absorbed in these controversies. Deep reasons of regard for state action in matters primarily within state concern<sup>109</sup> suggest that this field of jurisdiction be entrusted to the state courts in the first instance, leaving the protection of constitutional rights to the ample reviewing power of the Supreme Court. An important source of federal litigation would be thereby diverted, purely state issues would be withdrawn from federal cognizance, and an unhealthy friction between the state and federal courts avoided.

#### IV

Thus far we have been considering the rôle state courts may play in the disposition of federal rights. What of the converse—state litigation in the federal courts? The availability of federal tribunals for controversies concerning matters which, in themselves, are outside the domain of federal power and exclusively within state authority, is the essence of diverse citizenship jurisdiction. It is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias. Thanks to recent scholarship, we now know a good deal about the historic basis of this grant of jurisdiction<sup>110</sup> and of its first exercise in 1789.<sup>111</sup> Plainly enough, this phase of the "judicial power of the United States" did not grow out of any serious defects of the Confederacy nor did it anticipate glaring evils. Even so strong a nationalist as Marshall gave it only tepid support.<sup>112</sup> The available records disclose no particular grievance against state tribunals for discrimination against litigants from without.<sup>113</sup> The real fear was of state legislatures,<sup>114</sup> not of state courts. Such distrust as there was of local courts derived, not from any fear of their partiality to resident litigants, but of their general inadequacy for the interests of the business community. "There was a vague feeling," writes Mr. Friendly, "that the new courts would be strong courts, creditors' courts, business men's courts."<sup>115</sup> Not born of a deeply-felt national

<sup>109</sup>See the remarks of Senator Wagner of New York in introducing S. 4491, 70th Cong. 1st Sess., 69 CONG. REC. 9397 (May 18, 1928).

<sup>110</sup>Friendly, *The Historic Basis of Diversity Jurisdiction*, *supra* note 3.

<sup>111</sup>Warren, *New Light on the History of the Federal Judiciary Act of 1789*, *supra* note 3.

<sup>112</sup>See 2 ELLIOTT, *DEBATES ON THE FEDERAL CONSTITUTION* (1828) 391 cited by Friendly, *supra* note 3, at 487.

<sup>113</sup>Friendly, *supra* note 3, at 493 *et seq.*

<sup>114</sup>See Corwin, *The Progress of Constitutional Theory* (1925) 30 AM. HIST. REV.

514.

<sup>115</sup>Friendly, *supra* note 3, at 498.

need, diversity jurisdiction began under formidable opposition which, with fluctuating intensity, has asserted itself throughout our history. This jurisdiction, particularly in its modern manifestations through corporate litigation, has aroused strong division of opinion, both judicial and professional, and repeated Congressional attempts at curtailment.<sup>116</sup> With a view to circumventing this use of jurisdiction by foreign corporations, states have resorted to every variety of legislation, frequently frustrated by the Supreme Court.<sup>117</sup> Altogether, diversity jurisdiction has deeply weakened attachment to the federal courts over a wide area and has unhappily given rise to measures calculated to impair their usefulness.

According to Marshall's classic justification for diversity jurisdiction, the Constitution entertained "apprehensions" lest distant suitors be subjected to local bias in state courts, or, at least, it viewed with "indulgence" "the possible fears and apprehensions" of such suitors.<sup>118</sup> Whatever may have been true in the early days of the Union, when men felt the strong local patriotism of the politically *nouveaux riches*, has not the time come now to reconsider how justifiable the apprehensions, how valid the fears? The Civil War, the Spanish War, and the World War have profoundly altered national feeling, and the mobility of modern life has greatly weakened state attachments. Local prejudice has ever so much less to thrive on than it did when diversity jurisdiction was written into the Constitution.

But it is urged that eastern investments in the west and south are exposed in state tribunals to the risks of unfairness toward non-resident capital. This is an old claim, and has the momentum of constant repetition. But, surely, the argument is theoretical. Bankers, and still less investors, do not contemplate litigation for default when they make loans. What rate they get depends mainly on the money market and the credit of borrowers. Moreover, diversity jurisdiction is sought to be retained as eagerly for the federal courts in

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<sup>116</sup>See e.g., FRANKFURTER AND LANDIS, *op. cit. supra* note 2, at 89 *et seq.*, 136 *et seq.*

<sup>117</sup>See e.g., HENDERSON, POSITION OF FOREIGN CORPORATION IN AMERICAN CONSTITUTIONAL LAW (1918) c. VIII; *Terral v. Burke Const. Co.*, 257 U. S. 529, 42 Sup. Ct. 188 (1922).

<sup>118</sup>"However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states." *Bank of the United States v. Deveaux*, 5 Cranch. 61, 87 (U. S. 1809).



New York as for those in the west and in the south. The traditional argument leaves wholly out of account our economic transformation. Wide diffusion of securities throughout the country, customer ownership of utility stock, employee holdings in large corporations, are new phenomena of significant dimensions. Indeed, to Professor Carver they spell an economic revolution in the United States.<sup>119</sup> Statistics on these matters are lacking, but there can be no question of increase in the financing of western and southern development by local capital. Some utilities themselves dispose of their securities; bond houses now distribute large issues in these sections; a number of important eastern investment bankers have western and southern branches; local stock exchanges have been established, dealing mainly with local securities. These are changes which affect men's minds. They transform the sentiment of the community. They determine the attitude of jurors. Such considerations no longer allow the easy assumption that in the west and in the south state jurors and judges are economic Ishmaelites.

Madison believed that Congress would return to the state courts judicial power entrusted to the federal courts "when they find the tribunals of the states established on a good footing."<sup>120</sup> A nation wide effort is afoot to raise the standards of the bar, to modernize procedure, to organize the judiciary. University law schools, bar associations, judicial councils, the American Law Institute, are aiming at a substantial improvement of the administration of law. Can the state tribunals not yet be trusted to mete out justice to non-resident litigants? In any event, is it wise to withdraw from the impulses to reform of state tribunals influential litigants who, in diversity litigation, now avoid state courts? Such litigants and their counsel ought to have every incentive to make state tribunals worthy, and their administration fair and impartial. Moreover, it is politically highly unwise to permit the federal courts to be used as an escape from state tribunals and thus to associate the federal court in the public mind as the resort of powerful litigants. Congress has shown its confidence in state courts in actions in which juries are assumed to be specially biased against corporate defendants, by prohibiting removal to the federal courts in Federal Employers Liability cases.<sup>121</sup> A practice of eighteen years has vindicated this dispensation. Is there not ample basis for re-examining the present deposit of jurisdiction in the federal

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<sup>119</sup>CARVER, THE PRESENT ECONOMIC REVOLUTION IN THE UNITED STATES (1926) *passim*.

<sup>120</sup>Quoted by Warren, *New Light on the History of the Federal Judiciary Act of 1789*, *supra* note 3, at 66.

<sup>121</sup>*Supra* note 59.

courts in cases where there is not even the warrant of enforcing a federal right?

Certainly the obvious abuses of diversity jurisdiction should be promptly removed by legislation—on plain grounds of policy, and to relieve the over-burdened federal dockets. In the absence of an adequate system of federal judicial statistics, we are without an exact basis for analyzing the scope and nature of federal court business. That the diversity cases represent one of its heaviest items is common knowledge. According to the usual estimate, they constitute one-third of the business of the district courts. An examination of ten recent volumes of the Federal Reporter<sup>122</sup> shows that out of 3618 full opinions, 959, or 27 per cent, were written in cases arising solely out of diversity of citizenship. In 716 of these cases, or 80 per cent, a corporation was a party.<sup>123</sup> Corporate litigation then, is the key to diversity problems. For legal metaphysics about corporate "citizenship" has produced a brood of incoherent legal fictions concerning the status of a corporation, defeated the domestic policies of states, and heavily encumbered the federal courts with controversies which, in any fair distribution of political power between the central government and the states, do not belong to the national courts.

The late Gerard C. Henderson<sup>124</sup> gave a classic account of the twists and turns by which it was finally established that a corporation (leaving out the necessary qualifications), for purposes of diversity jurisdiction, could enter the federal courts in every state outside the state of its incorporation,<sup>125</sup> but could not be brought into a federal court anywhere, except by a non-resident in the state of its incorporation.<sup>126</sup> The opportunities for confusion and mischief were elaborated by the device of multiple incorporation, with its variations of incorporation by "adoption" by one state of the corporation of another,<sup>127</sup> and of simultaneous incorporation in several states.<sup>128</sup> Happily, the law seldom presents so discordant a medley of decisions and opinions as those which determine the "citizenship" of a corporation as the basis of suit in the federal courts. All these difficulties arose through the innocent presumption of simple days that all the stockholders of a

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<sup>122</sup>13-22 F. (2d) (1926-1927).

<sup>123</sup>I am indebted for these figures to the investigation of two of my students, Messrs. N. Jacobs and A. H. Feller, embodied in an unpublished paper entitled, *Proposed Limitations on the Diversity Jurisdiction of the Federal Courts*.

<sup>124</sup>*Supra* note 117.

<sup>125</sup>*Ex parte* Schollenberger, 96 U. S. 369 (1877).

<sup>126</sup>*Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935 (1891).

<sup>127</sup>See *St. Louis & San Francisco Ry. v. James*, 161 U. S. 545, 16 Sup. Co. 621 (1896).

<sup>128</sup>*Patch v. Wabash Railroad Co.*, 207 U. S. 277, 28 Sup. Ct. 80 (1907).

corporation are citizens of the chartering state.<sup>129</sup> The Australian High Court, confronted with similar difficulties, avoided our pitfalls. Called upon to construe the provision of its Constitution, giving the High Court jurisdiction in cases "between residents of different States"<sup>130</sup> of Australia, it held the clause applicable only to natural persons and not to corporations.<sup>131</sup> The phrasing of the two Constitutions varies. But the real difference between our doctrines and the Australian decision is a difference of 100 years. The underlying assumption in Australia is that an Australian corporation, no matter where registered, can obtain justice in every state court.<sup>132</sup>

At best, diverse-citizenship jurisdiction has elements of unfairness. A resident of a state when suing another resident of the same state is compelled to sue in the state court; a non-resident suing the same defendant has a choice of two courts. The situation is aggravated by the freedom of the federal courts to make local law in accordance with their notions of "general jurisprudence," in complete disregard of the declared law of the state.<sup>133</sup> The unfairness is increased in the various situations in which federal courts are not even bound to follow state court decisions on a state statute or a state constitution.<sup>134</sup> When these doctrines are applied in suits between citizens of a state and a corporation which does all or part of its business in that state, the unfairness to residents who are thus made litigants in the federal court, as well as to resident parties in similar actions, is unmitigated.

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<sup>129</sup>*Bank of United States v. Deveaux*, 5 Cranch. 61 (U. S. 1809). This presumption, it is familiar knowledge, became hardened into a fixed rule of law in *Louisville Rail-road Company v. Letson*, 2 How. 497 (U. S. 1844). The consequences of this decision have been pungently stated by Mr. Charles Warren: "This malignant decision has resulted in allowing a corporation sued in the State in which it actually does business, to remove the suit into a Federal Court on the ground of diverse citizenship, simply because it happens to be chartered in another State. No single factor has given rise to more friction and jealousy between State and Federal Courts, or to more State legislation conflicting with and repugnant to Federal jurisdiction than has the doctrine of citizenship for corporations. And this diverse citizenship jurisdiction created by the Constitution and intended to allay friction and to afford equal and identical law to citizen and non-citizen in a State, has resulted in putting foreign corporations in a more favorable situation than domestic corporations, sued in a State." Warren, *supra* note 3, at 90.

<sup>130</sup>§ 75 of the Australian Constitution (1900) (63 and 64 Vict. c. 12).

<sup>131</sup>*Australasian Temperance and General Mutual Life Ass. Soc., Ltd. v. Howe*, 31 C. L. R. 290 (Austr. 1922).

<sup>132</sup>See Higgins, J., *ibid* at 330.

<sup>133</sup>*Swift v. Tyson*, 16 Pet. 1 (U. S. 1842) and its developments.

<sup>134</sup>See *Gelpcke v. Dubuque*, 1 Wall. 175 (U. S. 1864); *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10 (1882); *Kuhn v. Fairmount Coal Co.*, 215 U. S. 349, 30 Sup. Ct. 140 (1910) and the variations and refinements upon their holdings. For a discussion of some of these problems see note in (1926) 40 HARV. L. REV. 310.

Public as well as private interests are sacrificed. The system leads to evasion of state legislation embodying legitimate state policies. Thus, foreign corporations which do business in a state without complying with constitutional conditions imposed by the state, bar themselves from enforcing rights in the state courts, but they may sue in the federal courts of that state.<sup>135</sup>

The temptations for abuse of the doctrine of "indisputable citizenship"<sup>136</sup> were too obvious; needless to say, they have been richly exploited. A very large part of the business of corporations is done in states other than that of their incorporation. To a considerable extent, corporations do all of their business in such other states. They enjoy the privileges and advantages of the laws of these states and the benefits of business relations with their citizens. Yet, without the corporate consent, a non-chartering state has not the power to adjudicate through its own courts disputes between these corporations and its own citizens, although such disputes arise wholly from the activities of the corporation within the state and in no wise impinge upon matters of federal concern. This jurisdiction has been consciously abused. Men incorporate in a foreign state solely to avoid subjection to the laws of the state in which they carry on business and to obtain the advantages of federal jurisdiction.<sup>137</sup>

The operation of a double system of conflicting laws in the same state is plainly hostile to the reign of law. Janus was not a god of justice. Litigation in the federal courts is apt to be more expensive and otherwise more burdensome than in the state courts. The justification, if any, for these evils and burdens in suits between citizens of different states, disappears when the suit is between a citizen of a state and a corporation which does business within that state.

The various types of diversity litigation call for concrete scrutiny in the light of present-day conditions and the demands upon federal courts by peculiarly federal litigation. The right to remove to the federal court a litigation between two non-residents in a state court<sup>138</sup>

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<sup>135</sup>*David Lupton's Sons Co. v. Automobile Club of America*, 225 U. S. 489, 32 Sup. Ct. 711 (1911).

<sup>136</sup>*St. Louis & San Francisco Ry. v. James*, *supra* note 127, at 563.

<sup>137</sup>*Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 48 Sup. Ct. 404 (1928).

<sup>138</sup>See *Lee v. Chesapeake & Ohio Railing Co.*, 260 U. S. 653, 43 Sup. Ct. 230 (1923). As to removals generally, the jurisdiction of the federal courts ought not to be open to the reproach which the late Judge Rose justly expressed: "Whether a case is or is not removable, often depends upon incidental or accidental circumstances having little discoverable bearing upon anything of real moment." ROSE, *FEDERAL JURISDICTION* (3 ed. 1926) § 378, p. 352.

will not survive analysis. "Separable controversy" is also an anomalous source of federal litigation. By bringing the whole controversy to the federal courts,<sup>139</sup> it imposes burdens outside of any federal justification. It is unfair to other defendants as well as to plaintiffs who are content to litigate in the state courts. Moreover, the apprehension of bias against non-residents, as a basis for diversity jurisdiction, is here wholly unfounded, since the presence of resident co-defendants serves as an antidote. A much more troublesome problem is presented by receiverships based on diverse-citizenship jurisdiction.<sup>140</sup> Recent extension of federal receiverships is an obvious source of concern to the federal bench. The administration of large enterprises, sometimes for years, makes enormous inroads upon the time of federal judges, embroils them in political controversies, and involves a distasteful exercise of patronage. The Supreme Court has called a rigorous halt to the abuse of "friendly receiverships,"<sup>141</sup> which were greatly stimulated by *Re Metropolitan Railway Receivership*.<sup>142</sup> A sharper exercise of discretionary power on the part of the judges may in practice further limit federal receiverships. But the essential ground of jurisdiction remains, and must be removed by legislation. Certainly, local utilities ought to be left to local administration in case of difficulties. And it is hard to justify any retention of federal receivership except as to interstate enterprises.

Whatever is to remain of diversity jurisdiction,<sup>143</sup> the law to be administered by the federal courts is the law of the states. Whenever that law is authoritatively declared by the state, either by legislation or by adjudication, state law ought to govern in state litigation, whether the forum of application is a state or a federal court. *Swift v. Tyson*,<sup>144</sup> with all its offspring, is mischievous in its consequences, baffling in its application, untenable in theory, and, as Mr. Charles Warren recently proved,<sup>145</sup> a perversion of the purposes of the framers of the First Judiciary Act. It results in two independent law-makers within the same state emitting conflicting rules concerning the

<sup>139</sup>*City of Gainesville v. Brown-Crummer Investment Co.*, decided May 14, 1928. (No. 433 October Term 1927).

<sup>140</sup>See Report of Special Committee on Equity Receivership, Bar Assoc. City of N. Y. Year Book 1927, at 299.

<sup>141</sup>*Harkin v. Brundage*, 48 Sup. Ct. 268 (1928). And see *Pussey & Jones Co. v. Hanssen*, 261 U. S. 491, 43 Sup. Ct. 454 (1923); *Lion Bonding Co. v. Karatz*, 262 U. S. 77, 43 Sup. Ct. 480 (1923). <sup>142</sup>208 U. S. 90, 28 Sup. Ct. 219 (1908).

<sup>143</sup>In any event, the jurisdictional amount ought to be raised to about \$10,000. This is not to make the federal court a rich man's court, but to save poorer litigants the expense of being taken to the federal courts.

<sup>144</sup>16 Pet. 1 (U. S. 1842).

<sup>145</sup>Warren, *supra* note 3. at 84 *et seq.*

same transactions. The fortuitous circumstance of residence of one of the parties at the time of suit determines what rule is to prevail in a particular litigation. Such residence is frequently a designed circumstance. First applied in matters of "commercial law" and then extended to questions falling within the catch-all phrase "general jurisprudence," almost all questions may be within its scope. Its extreme limit has just been reached. An important public policy of Kentucky concerning use of land in Kentucky, which had been settled for more than thirty-five years, was allowed to be defeated by a family that had owned a Kentucky corporation but procured its dissolution in Kentucky and re-incorporation in Tennessee solely for the purpose of evading Kentucky law and Kentucky policy by creating the basis of diversity jurisdiction, with the consequent freedom of the federal court sitting in Kentucky to disregard the long-established course of Kentucky decisions.<sup>146</sup>

The doctrine has always met with judicial dissent. "Uncertainty and vascillation"<sup>147</sup> have characterized the theory upon which it has proceeded. And now, eighty-six years after its enunciation, it is rejected on the weightiest grounds of theory, as well as of judicial usurpation, by three Justices of the Supreme Court. In view of Mr. Justice Holmes' opinion, the doctrine can no longer repose on tradition:

"... in my opinion the prevailing doctrine has been accepted upon a subtle fallacy that never has been analyzed. If I am right the fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct. Therefore I think it proper to state what I think the fallacy is.—The often repeated proposition of this and the lower Courts is that the parties are entitled to an independent judgment on matters of general law. By that phrase is meant matters that are not governed by any law of the United States or by any statute of the State—matters that in States other than Louisiana are governed in most respects by what is called the common law. It is through this phrase that what I think the fallacy comes in.

Books written about any branch of the common law treat it as a unit . . . It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and

<sup>146</sup>*Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, *supra* note 137.

<sup>147</sup>*Kuhn v. Fairmount Coal Co.*, 215 U. S. 349, 30 Sup. Ct. 140 (1911).

illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. It may be adopted by statute in place of another system previously in force. *Boquillas Cattle Co. v. Curtis*, 213 U. S. 339, 345. But a general adoption of it does not prevent the State Courts from refusing to follow the English decisions upon a matter where the local conditions are different. *Wear v. Kansas*, 245 U. S. 154, 156, 157. It may be changed by statute, *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368, 378, as is done every day. It may be departed from deliberately by judicial decisions, as with regard to water rights, in States where the common law generally prevails. Louisiana is a living proof that it need not be adopted at all. (I do not know whether under the prevailing doctrine we should regard ourselves as authorities upon the general law of Louisiana superior to those trained in the system.) Whether and how far and in what sense a rule shall be adopted whether called common law or Kentucky law is for the State alone to decide. . . The Supreme Court of a State does something more than make a scientific inquiry into a fact outside of and independent of it. It says with an authority that no one denies except when a citizen of another State is able to invoke an exceptional jurisdiction that thus the law is and shall be. Whether it be said to make or to declare the law, it deals with the law of the State with equal authority however its function may be described."<sup>148</sup>

The doctrine, it is urged, makes for uniformity of law. So far as uniformity is needed or desirable, it should be a conscious and systematic process and not depend upon discrete and accidental cases happening into the federal courts. The governing rules ought to be formulated by the law-making agency most continuously concerned with particular problems of law. On the whole, the instances which come for judgment to the federal courts under *Swift v. Tyson* are far less numerous than those which are ruled by state decisions. But *Swift v. Tyson* does not make for uniformity. Forty years ago, Judge Holt enumerated about twenty-five divergences in doctrine between the federal and the state courts.<sup>149</sup> These differences have not lessened. Evidence is wanting that the state courts yield their own

<sup>148</sup>*Supra* note 137, at 409.

<sup>149</sup>HOLT, CONCURRENT JURISDICTION OF THE FEDERAL AND STATE COURTS (1888) 162 *et seq.*

law.<sup>150</sup> Deeper probably than any rationalization of *Swift v. Tyson*, is the temptation of judges to make law according to their own views when untrammelled by authority. Such intellectual energy must certainly have moved Story;<sup>151</sup> without doubt it influences judges to-day. But whether the roots of the doctrine be in rational theory or

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<sup>150</sup>*Swift v. Tyson* was not followed in New York. *Per contra*, it was expressly disapproved. *Stalker v. McDonald*, 6 Hill 93 (N. Y. 1843); see also *McBride v. Farmers' Bank of Salem*, 26 N. Y. 450, 454 (1863); *Cary v. White*, 52 N. Y. 138, 145 (1873). In the following cases, state courts presented with a choice between the federal doctrine and that of the courts of New York as to the effect of antecedent consideration, expressly refused to follow *Swift v. Tyson* and adopted the New York rule for their own law: *Arkansas*: *Bertrand v. Backman*, 13 Ark. 150 (1852); *Connecticut*: *Webster & Co. v. Howe Machine Co.*, 54 Conn. 394, 8 Atl. 482 (1887); *Maine*: *Bramhall v. Becket*, 31 Me. 205 (1850); *Minnesota*: *Becker v. Sandsuky City Bank*, 1 Minn. 311 (1854); *Missouri*: *Goodman v. Simonds*, 19 Mo. 106 (1853); *Ohio*: *Roxborough v. Messick et al.*, 6 Ohio St. 448 (1856); *Wisconsin*: *Cook et al. v. Helms & Vandercook*, 5 Wis. 107 (1856).

In *Oates v. First National Bank*, 100 U. S. 239 (1879), which came up from the federal court in Alabama, the Supreme Court refused to follow *Fenouille v. Hamilton*, 35 Ala. 319 (1859) on a question of commercial law. The Alabama courts continued to follow their own decisions. See *Thompson v. Maddux*, 117 Ala. 468, 477, 23 So. 157 (1897); *First National Bank of Decatur v. Johnson*, 97 Ala. 655, 661, 11 So. 690 (1893); *Marks v. First National Bank*, 79 Ala. 550, 558 (1885); *Miller & Co. v. Boykin*, 70 Ala. 469 (1881).

In *Lockwood v. Railroad Co.*, 17 Wall. 357 (U. S. 1873), a case coming from the federal court in New York, the Supreme Court refused to follow the New York decisions relative to contracts by common carriers against liability for negligence. The New York Courts subsequently persisted in their holdings. See *Johnston v. Fargo*, 184 N. Y. 379, 77 N. E. 388 (1906); *Brewer v. N. Y., L. E., & W. R.*, 124 N. Y. 59, 62, 26 N. E. 324 (1891); *Maynard v. Syracuse, B. & N. Y. R.*, 71 N. Y. 180, 185 (1877).

*Groves v. Slaughter*, 15 Pet. 449 (U. S. 1841), coming from the federal court of Mississippi was not followed by the Mississippi courts. See *Brien v. Williamson*, 7 How. 14 (U. S. 1843). *Gelpcke v. Dubuque*, 1 Wall. 175 (U. S. 1864), applying Iowa law, was repudiated by the Iowa courts. See *McClure v. Owen*, 26 Ia. 243 (1868); *Ex parte Holman*, 28 Ia. 88 (1869). Compare also *United Zinc & Chemical Co. v. Britt*, 258 U. S. 268, 42 Sup. Ct. 299 (1922) with *Serviss v. Cloud*, 121 Kan. 251, 246 Pac. 509 (1926).

See also *Cotton v. Brien*, 6 Rob. 115 (La. 1843); *Forepaugh v. Railroad Co.*, 128 Pa. 217, 18 Atl. 503 (1889) which, in applying the law of another state, followed the decisions of the state courts and expressly refused to follow the contrary decisions of the federal courts as to the law of that state. See, too, *Limerick National Bank v. Howard*, 71 N. H. 13, 19, 51 Atl. 641 (1901).

<sup>151</sup>The share played by the personality of the author of the doctrine of *Swift v. Tyson* is thus analyzed by John Chipman Gray: "Among the causes which led to the decision in *Swift v. Tyson*, the chief seems to have been the character and position of Judge Story. He was then by far the oldest judge in commission on the bench; he was a man of great learning, and of reputation for learning greater



obscure impulse, it is now too strongly imbedded in our law for judicial self-correction. Legislation should remove this doctrine, which, though derived from diverse-citizenship jurisdiction, denies its basis.<sup>152</sup> For non-resident litigants were given a federal tribunal to secure a fair administration of state law, not the administration of independent law.

Whatever our preferences, the complexities and interdependence of modern society are bound to throw upon the federal courts increasing burdens of litigation affecting federal rights. The scope of federal authority has steadily extended during the last twenty years. Circumstances have been more compelling than differences in the temperaments of our Presidents and in the prevailing political views of Congress. Whether national responsibility or state rights were the accent in speech, the administrations of Roosevelt, Taft, Wilson, Harding and Coolidge alike have contributed heavily to the growth of federal authority. This has had its reflex in federal litigation. The process will not stop. Future controversies in the federal courts, perhaps even yet more than in the past, will demand wide discernment, capacious mastery of facts, shrewd insight into the ways of government. Men who inspire the widest confidence, cultivated and highly trained lawyers, with a touch of statesmanship, should be drawn into the service of the federal bench. That they may discharge their great functions, the federal courts should be given only such powers as are appropriate to a national judiciary under a federal system, so limited as to be capable of disposition by a relatively small number of distinguished judges.

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even than the learning itself; he was occupied at the time in writing a book on bills of exchange, which would, of itself, lead him to dogmatize on the subject; he had had great success in extending the jurisdiction of the Admiralty; he was fond of glittering generalities; and he was possessed by a restless vanity. All these things conspired to produce the result." GRAY, *NATURE AND SOURCES OF THE LAW* (2d ed. 1921) 253.

<sup>152</sup>See bill introduced on May 3, 1928, by Senator Walsh of Montana, S. 4333, 70th Cong. 1st Sess. (69 Cong. Rec. 7989).