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AMENDMENT BY DECISION—MORE ON THE ERIE CASE.

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The case of *Erie R. R. v. Tompkins*¹ wrought such a revolution in our jurisprudence that the tendency has been to accept it at face value without giving much thought to its fundamental tenet. The writer believes that despite the vast amount of literature devoted to the subject of the *Erie* case, its fundamental tenet has received far too scant, if any, attention. In view of the importance of the subject, it is believed it will not be unprofitable to reexamine the decision in the light of its basic thesis.

The Rules of Decision Act² provides that "except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, the laws of the several states shall be regarded as rules of decision in the trials at common law" in cases where they apply. In *Swift v. Tyson*,³ decided in 1842, the Supreme Court held that the Rules of Decision Act did not apply to matters of general commercial law, that in such matters the federal courts were not bound to follow the decisions of state courts, and that the Act compelled the federal courts to follow decisions of the state courts only in questions involving the interpretation of state statutes and constitutional provisions and in purely local state matters such as real property law. The theory of the court in *Swift v. Tyson* and the later cases was that court decisions are merely declaratory in character, that they do not

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¹ 304 U. S. 64 (1938).

² 28 U. S. C. A. § 725.

³ 16 Pet. 1.

make the law but merely discover or ferret it out, that they are frequently overruled and cannot therefore be said to establish the law of a particular jurisdiction, and that such being the case the federal courts are as competent to determine questions of state law, except in respect of statutes, constitutions and purely local matters, as the state courts themselves.

Erie R. R. v. Tompkins overruled *Swift v. Tyson* and its subsequent extensions, and completely abolished the century-old distinction between general and local law. It held that state court decisions establish the law of the state in the same manner that constitutions and statutes do.

The decision in the *Erie* case was due very largely to certain investigations and discoveries of Mr. Charles Warren⁴ who had unearthed in the Senate archives the original draft of the Rules of Decision Act. In that draft, it appeared the intention of the party who proposed it to compel the federal courts to follow the decisions of state courts both in matters of statutory and common law. Mr. Warren, therefore, concluded that by substituting in the final form of the Act as we now have it the generic term, "laws of the several states", for the particular terms, "statute law of the several states . . . and their unwritten or common law . . .", the first Congress had not intended to limit the application of the Act to written law and decisions on purely local questions but had, on the contrary, intended to compel the federal courts to follow the state law in all matters, whether determined by legislation or court decision. The Supreme Court adopted Mr. Warren's conclusion. The Court might therefore, have overruled *Swift v. Tyson* on purely statutory grounds and held that in 1842, without the benefit of the original draft of the Rules of Decision Act before them, the Court had misconstrued that Act and given to it a too limited application.

But the Court felt that it could not dispose of the *Erie* case on purely statutory grounds; for Congress had, for well-nigh a hundred years, acquiesced in the interpretation given to the Rules of Decision Act by *Swift v. Tyson* and had in fact re-enacted it into the Revised Statutes. The Court further felt that "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied

⁴*The History of the Federal Judiciary Act of 1789* (1923) 37 Harv. L. Rev. 49.

throughout nearly a century.”⁵ The court, therefore, proceeded to “hold” that the Rules of Decision Act was merely declaratory of the judicial power of the federal courts under Article III of the Constitution, that “Congress has no power to declare substantive rules of common law applicable in a state”,⁶ that “no clause in the Constitution purports to confer such a power upon the federal courts”,⁷ and that the federal courts cannot constitutionally, in matters of state law, reach different results from those reached by the highest courts of the states. The *Erie* case is clearly a constitutional decision.

If the researches of Mr. Warren disclosed the error of the Court in *Swift v. Tyson*, the Court could certainly have overthrown that doctrine despite its reluctance to abandon a rule of law so widely applied for so long a time and acquiesced in and apparently reenacted by Congress. The Court could have done this if it regarded the error of statutory interpretation as serious and if the practical consequences of the error necessitated a reversion to the true doctrine. But the Court preferred to rest its decision on constitutional grounds. To a certain extent, therefore, the decision is dictum, since the result could be explained on the basis of Mr. Warren’s discovery and since the case might have been disposed of on statutory grounds.⁸ It is the purpose of this article to reexamine the constitutional decision or dictum in the *Erie* case.

As the judicial power of the federal courts, whether independent of, or subordinate to, the state courts in matters of state law, stems from the Judiciary Article of the Constitution, the interpretation and significance of that Article are both the

⁵ 304 U. S. at 77.

⁶ 304 U. S. at 78.

⁷ *id.*

⁸ Mr. Warren, *op. cit. supra* note 4, pointed out that it was the intention of the first Congress to confer upon the federal courts jurisdiction of common law crimes. Mr. Warren suggests that in limiting their jurisdiction to statutory crimes the federal courts have erred as grievously as did the Supreme Court in *Swift v. Tyson* with respect to the Rules of Decision Act. It may be that the Court in the *Erie* case apprehended the inconsistency of adopting the discovery of Mr. Warren with reference to the Rules of Decision Act and rejecting his discovery with reference to jurisdiction over common law crimes. And it may be that the Court was unwilling to reconsider the question of jurisdiction over common law crimes. Hence, the Court may have felt compelled to reject the statutory ground as the basis for overruling *Swift v. Tyson* and may have felt it necessary to achieve that result by resort to a constitutional assault on that decision.

terminus a quo and the *terminus ad quem* of our reexamination of the *Erie* case. However, since the Supreme Court has recognized what is an otherwise demonstrable fact, that the members of the first Congress were thoroughly familiar with the import of the Constitution and that the Judiciary Act, passed by the first Congress, "is contemporaneous and weighty evidence of its true meaning";⁹ we may, for purposes of convenience, first consider the Judiciary Act of 1789 in order to ascertain the significance which the first Congress ascribed or imputed to the Judiciary Article of the Constitution.

The Rules of Decision section is an integral part of the first Judiciary Act as finally enacted by the first Congress. It was not a part of the draft bill which, when enacted, became the Judiciary Act.¹⁰ It was incorporated into the Act as the result of an amendment proposed from the floor after the draft bill had been submitted to the Senate for consideration. Its present and original position in the Act is Section 34. Its natural and intended position is between Sections 11 and 12 of the Act.¹¹ The thought, therefore, at once suggests itself that the Rules of Decision section was an afterthought. The necessity of incorporating it into the Act did not occur to the Senate committee responsible for drafting the Judiciary bill.

This suggestion is a two-edged sword with respect to our problem. It might be inferred that the Senate committee charged with the drafting of the bill deemed the substance of the Rules of Decision section already inherent in the Judiciary Article of the Constitution, that they thought the Constitution required the federal courts in matters of state law to follow the state courts, and that they did not consider it necessary to make a separate *declaratory* provision to that effect in the Judiciary Act. On the other hand, it might equally be inferred that the absence of such a provision in the Judiciary bill aroused the fears and suspicions of the anti-federalist and anti-constitutional members of the Senate, that they either believed the Judiciary Article conferred too extensive and independent powers on the federal court or they entertained some doubt on the matter, and that they insisted on imposing by means of Section 34 some

⁹ *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 297 (1888).

¹⁰ Warren, *op. cit.*, pp. 50, 85-87.

¹¹ *ibid.*

limitation on the power of the federal courts in questions of state law. It would seem, from a general knowledge of human psychology and a fair understanding of the legislative process, that the second interpretation is the more reasonable one. At any rate, a mass of evidence which we shall discuss appears to support this view and better to explain the absence of anything comparable to Section 34 in the draft bill and its proposal from the floor of the Senate as an amendment which was adopted and incorporated into the Act.

The Rules of Decision section furnishes several clues in support of the view that it is a limitation on, and not declaratory of, the judicial power of the federal courts under the Judiciary Article of the Constitution. The section provides that federal courts shall regard the laws of the several states as rules of decision "except where the Constitution, treaties or statutes of the United States shall otherwise require or provide". Of course, if the Constitution should "otherwise require or provide", there is no question but what the federal courts should not only be permitted, but should have, to disregard the laws of the several states; for the Constitution is both a delegation of power to the federal government and all its agencies and a limitation on the power of the states to the extent of that delegation. If the Constitution requires the federal courts to ignore state law in a particular matter (e.g., due process, equal protection, full faith and credit, privileges and immunities, intrastate commerce that affects interstate commerce, etc.), the federal courts would not have to follow the state law and, in fact, would be bound to disregard it.

In the case of treaties, the independence of federal courts of the state law is less clear but none the less equally convincing. Only the federal government can make treaties with foreign powers. The states are expressly denied authority over foreign affairs.

Now, let us suppose that the United States should enter into a treaty with a foreign government which concerned and vitally affected the purely local laws of a particular state or states. The treaty might provide that all questions involving the domestic relations of accredited representatives of the particular foreign power should be determined in the federal courts and

not be submitted to the jurisdiction of the courts of a sovereignty with which the foreign government had no relations. Or a treaty might provide that in matters involving tort, contract and property rights of foreign government representatives such as ambassadors and consuls, all questions of substantive law when once submitted to the jurisdiction of the federal courts shall be determined by those courts in accordance with certain general or particular legal principles, without reference to the laws of a state, even though those laws were otherwise applicable. A treaty might provide that administration should be taken out for the property and estate of a non-resident alien in the county of the state where he happened to die while on a sojourn in this country. Or it might provide that such administration should be taken out in another county where the alien left property of some sort or where he did not leave property, or where the consul of his government resided.

All such treaty provisions—and numerous others might be conceived—would be directly contrary to our present notions of jurisdiction, judicial propriety and governing law. But we are concerned with the judicial *power* of the federal courts under the Constitution and, therefore, need not consider whether the executive, by and with the advice and consent of the Senate, would for those reasons not negotiate and make such treaties. His power to do so is ample. The President, with the concurrence of the Senate, may “make treaties”. The scope of treaties is not, as in the case of statutes under the “necessary and proper” clause or under the “supreme law of the land” clause, limited to treaties which carry “into execution the foregoing (expressly delegated) powers”¹² or “which shall be made in pursuance (of the Constitution)”¹³. The scope of treaties may go beyond expressly delegated powers and even conflict with the otherwise reserved powers of the states. In respect to such matters, the scope of treaties is unlimited and depends solely upon questions of policy and, of course, the action of the President and the concurrence of the Senate. Treaties are the “Supreme Law of the Land” if made “under the authority of the United States”,¹⁴ that is, by the President with the con-

¹² U. S. Const., Art. I, Sec. 8 (18).

¹³ U. S. Const., Art. VI (2).

¹⁴ *ibid.*

currence of the Senate. When so made and executed, they are binding not only upon "the Judges in every State" but likewise upon all agencies and departments of the federal government, including, of course, the federal courts.

By the express terms of the Rules of Decision section ("except where the Constitution (or) treaties . . . of the United States shall otherwise require or provide"), both the federal and state courts are bound by the provisions of treaties duly made, regardless of how absurd they may seem as a question of policy. Hence, if treaties were made containing any of the foregoing suggested provisions, state courts would, in matters of probate and administration, have to disregard fundamental tenets of testamentary jurisdiction;¹⁵ federal courts would have to assume a limited jurisdiction over domestic relations;¹⁶ and

¹⁵ *Bucyrus Steel Casting Co. v. Farkas*, 15 O. N. P. (N. S.) 609 (Ohio C. P., 1914); *In re Stingacs*, 12 O. N. P. (N. S.) 107 (Ohio C. P., 1911).

¹⁶ *In State of Ohio ex rel. Popovici v. Agler*, 280 U. S. 379 (1930), the Court held that the federal courts have no jurisdiction over cases involving the domestic relations of accredited representatives of foreign governments (The case involved a suit for divorce brought against the vice-consul of the Rumanian government; but the decision is applicable to ambassadors as well and likewise to all questions of domestic relations). As a question of statutory construction (that is, whether the enabling sections of the judicial code vest exclusive jurisdiction over such matters in the federal courts), the decision may or may not be right. But, the decision is a constitutional one. The Court said that the Constitution must be interpreted in the light of its setting and that since in 1789 domestic relations were deemed the concern of the several states, the judiciary provisions of the Constitution must have left them in the states where they then reposed. As a constitutional decision, the case must be regarded as patently unsound. It reads into the Judiciary Article an historical limitation or exception ("It has been understood that the whole subject of domestic relations . . . belongs to the laws of the states, and not to the laws of the United States," 280 U. S. 379, 383) which is non-existent. It does violence to the plain language of Article III which provides that the judicial power shall extend to *all* cases affecting ambassadors and that the Supreme Court shall have original jurisdiction in all cases affecting ambassadors (a plainly self-executing provision). And divorce is such a case. Cf. *Haddock v. Haddock*, 201 U. S. 562 (1906). Hence, there should be jurisdiction of such cases in the Supreme Court even in the absence of an enabling statute.

The Judiciary Article also extends the judicial power to all cases arising under treaties made under the authority of the United States. A treaty so made might well require that the federal courts shall exercise jurisdiction over divorce cases involving accredited representatives of the foreign government. If an enabling act were required to warrant the Supreme Court's exercise of its constitutional jurisdiction over ambassadors, a treaty so made would constitute such an enabling act. And if the Court held that it could not act even under such a treaty provision, it would be tantamount to holding the treaty

federal courts would have to follow the exception rather than the direction of the Rules of Decision section in some matters of purely local state law. The duties imposed upon the federal courts in such instances would, of course, be impossible if the Judiciary Article of the Constitution contained any inherent limitations on the power of the federal courts in matters of state law.

We shall subsequently consider whether the Judiciary Article in and of itself contains such inherent limitations. For present purposes, it is sufficient to observe that the members of the first Congress did not think it did. They expressly excepted from the operation of the Rules of Decision section all requirements and provisions of treaties. If they had intended to free federal courts from dependence on state law only in the case of treaties which did not interfere with the reserved powers of the states, they could well have said so.¹⁷

The provision in the Rules of Decision section which dis-
unconstitutional to that extent, which would be a rather anomalous manner of dealing with the plenary treaty making power which is vested in the national government (see note 15, *supra*).

If the various provisions of the Judicial Code which distribute the judicial power respecting ambassadors between the Supreme Court and the district courts are valid and deprive the Supreme Court of its plainly conferred jurisdiction, and if those provisions did not vest the district courts with divorce jurisdiction, the district courts would nevertheless have to assume it under such a treaty provision—at least, with respect to the ambassadors of the particular foreign government; for such a treaty would be the necessary enabling act if any were required. As a constitutional decision, the Popovici case is, therefore, plainly wrong.

There is at the end of the opinion a cryptic remark which may indicate that the Court felt it was treading on extremely tenuous ground. "In the absence of any provision in the Constitution or laws of the United States, it is for the state to decide how far it will go", 280 U. S. 379, 384. If this means that the Constitution, laws or treaties could *expressly* deprive the states of jurisdiction over such matters and at the same time entrust them to the federal judicial power, it accords with what we have pointed out the Constitution already provides, except that the Judiciary Article while vesting the federal courts with such jurisdiction does not expressly deprive the state courts of their jurisdiction. If the statement does not bear this interpretation, its significance will not readily be apprehended.

¹⁷ See note 19, *infra*. If the exception had been phrased in this manner, a subsequent treaty, approved only by the Senate without the concurrence of the House, might not be sufficient to render the exception inapplicable to the provisions of the treaty and, therefore, the exception might be invalid as interfering with a treaty made "under the authority of the United States". And query, whether such an exception would be valid as to a treaty already in existence: Should Congress thus unilaterally be permitted to abrogate a treaty?

charges federal courts of its mandate "where the . . . statutes of the United States otherwise require or provide" is less clear even than the exception with respect to treaties. Whether a federal statute could constitutionally require the federal courts to disregard the laws of the several states in purely local state matters cannot, of course, be resolved until we determine the scope and significance of the Judiciary Article itself. But this much is clear at this point. The members of the first Congress were familiar with the meaning and intent of the Judiciary Article. In the Rules of Decision section, they merely excepted from its operation the provisions or requirements of statutes of the United States. They did not except the provisions and requirements of only those statutes which were otherwise constitutionally valid or which, in other words, "shall be made in pursuance (of the Constitution)" or "which shall be necessary and proper for carrying into execution the foregoing (expressly delegated) powers", as the Constitution itself, apart from the Judiciary Article and Article I, Sec. 8, cl. 9,¹⁸ contemplates the scope of statutory enactments. Had the members of the first Congress apprehended what the Supreme Court asserted in the *Erie* case was a constitutional limitation on the judicial power of the federal courts, they could well have limited the scope of the exception with respect to statutes in the Rules of Decision section. The fact that they did not do so furnishes additional evidence that they did not regard that section as merely declaratory but as a limitation on the Judiciary Article of the Constitution.¹⁹

The Rules of Decision section applies only "in the trials at common law". It does not apply to equity, to admiralty or to crimes. With respect to crimes, it could certainly be contended—and this is, in fact, the accepted view—that since Congress alone had jurisdiction over crimes against the nation and did not have jurisdiction over common law crimes²⁰ or crimes

¹⁸ "To constitute tribunals inferior to the Supreme Court."

¹⁹ Speaking of the lack of power of federal courts in patent cases, Livingston, J., said in *Livingston v. Van Ingen*, 1 Paine 45, 51 (C. C. N. Y. 1181): "It cannot be believed that, in a law drawn with so much care, and embracing such a variety of provisions, so important an omission was casual. It must have been the result of much reflection, and shows their sense at least, that Congress were not bound to clothe the courts which they might create with all the powers which by the Constitution they had the right to confer."

²⁰ See note 8, *supra*.

against a particular state, the federal courts in dealing with national crimes were subject only to the pertinent enactments of Congress or were thrust upon their own resources in evolving the appropriate governing principles.²¹ Similarly, it could perhaps be claimed that admiralty is a matter of national jurisdiction and, therefore, that the federal courts were in such matters independent of state law.²²

But what about equity? No argument could be made that equity is peculiarly a matter of national cognizance. The contrary has been repeatedly held. And although the Supreme Court has declared, both before and after the *Erie* case, that despite the failure of the Rules of Decision section to cover suits in equity the federal courts should nevertheless in such matters follow the applicable state law,²³ the fact remains that there is no mandate to that effect in the section itself. It covers only trials at common law. Can this failure to provide for suits in equity have been an oversight or the result of negligence or careless draftsmanship? A study of the history of the first Judiciary Act and an examination of its contents does not

²¹ *Funk v. United States*, 290 U. S. 371 (1933); cf. *O'Brien v. Western Union Telegraph Co.*, 113 F. (2d) 539 (C. C. A. 1st, 1940).

²² The Judicial Code, Section 256, amended (28 U. S. C. A., Section 371), provides that the federal courts shall have exclusive jurisdiction in all civil causes of admiralty and maritime jurisdiction. The Judiciary Article extends the judicial power to all cases of admiralty and maritime jurisdiction. The debates of the Constitutional Convention and the debates on the first Judiciary Act show that even those who objected to the creation of inferior federal courts or who objected to giving such courts the extensive constitutional jurisdiction they now possess were willing to subscribe to the creation of a special national court for admiralty and maritime matters. But that the extension of the judicial power to all admiralty cases was not in itself deemed sufficient to confer an exclusive admiralty jurisdiction on the federal courts is clear from the fact that the state courts were invested with admiralty jurisdiction for three years after the adoption of the Constitution. See note 56, *infra*. Mr. Justice Johnson, speaking for the Court in *Manro v. Joseph Almeida*, 10 Wheat. 473, 490 (1825), said: "We had then (i.e., in 1792 when the Process Act was enacted) been sixteen years an independent people, and had administered the admiralty jurisdiction, as well in admiralty courts of the states as in those of the general government; . . . during the three years (i.e., 1789 to 1792) that the admiralty courts of these states were referred to the practice of the civil law . . . there could have been no question that this process was legalized." Admiralty was thus primarily but not inherently a matter of national concern. Similarly, it was not exclusively subject to the federal judicial power until Congress deprived the state courts of admiralty jurisdiction.

²³ *Russell v. Todd*, 309 U. S. 280 (1940); *Ruhlin v. New York L. Ins. Co.*, 304 U. S. 202 (1938); *Mason v. United States*, 260 U. S. 545 (1923).

disclose such carelessness or poor draftsmanship in other respects.²⁴ On the contrary, such a study discloses the extreme precision with which the draftsmen approached their task and likewise the vigilance of members on the floor of the two houses to deal with and correct any defects, inaccuracies, or objectionable provisions. The bill, as enacted, was the result of extensive and meticulous deliberation and became law only after an abundance of compromise. Not a provision, not an omission escaped the attention of both those who sympathized with, and those who were hostile to, the first Judiciary Act.

Why then did Congress fail to make the Rules of Decision section applicable to suits in equity? The answer would seem obvious to anyone unfettered by the lore of judicial tradition. They did not deem that section declaratory of the Judiciary Article! They did not feel that the federal courts were or should be bound by the laws of the several states in suits in equity! We shall later discuss the diversity of citizenship clause in the Judiciary Article and shall again have occasion to refer to this failure of Congress to make the Rules of Decision section applicable to suits in equity. But certainly, at this point, the failure to so provide would seem to be eloquent evidence of the scope and significance which the first Congress ascribed to the Judiciary Article and the judicial power of the federal courts thereunder. Clearly Congress must have thought that the federal courts should be subservient to the laws of the several states only "in the trials at common law".

Let us assume, however, for the moment, that the Rules of Decision section is merely declaratory of the judicial power of the federal courts under the Constitution. Assume that it is declaratory with respect to trials at common law or suits in equity or both. Then a rather startling fact appears. It is the only section in the first Judiciary Act which, both as originally proposed and as finally enacted, that is declaratory! Not a single other section in the first Judiciary Act, both as originally proposed and as finally enacted, is declaratory of the Judiciary Article. All others are either enabling sections or are limitational in nature and restrict the powers of the federal courts which they would otherwise concededly possess.²⁵ Only

²⁴ See note 19, *supra*.

²⁵ See note 19, *supra*. Also see Ellsworth, C. J., in *Turner v. Bank*, 4 Dall. 8 (1799), to the effect that the federal courts have

the Rules of Decision section is declaratory of the Judiciary Article!

But it may be said that Section 16 of the Act is also declaratory. It provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law". In a negative way, this section confers upon courts of equity in the federal system the same powers which they possessed at common law, prior to the adoption of the Constitution. It is, therefore, clearly declaratory, not necessarily of the Judiciary Article, but of the inherent powers of equity courts at common law. Nevertheless, in so far as the Constitution, in speaking of the judicial power of federal courts in equity cases, may be deemed to have incorporated into its fabric preexisting principles of jurisprudence, it may be said that the Equity section of the Judiciary Act, as finally enacted, is declaratory of the Judiciary Article.

As originally proposed, however, in the draft bill, the Equity section of the Act was declaratory of neither the Judiciary Article nor the inherent powers of equity courts at common law. It provided "that suits in equity shall not be sustained in either of the courts of the United States in any case where a remedy may be had at law".²⁶ If the remedy at law were not plain, or were not adequate, or were not complete, federal equity courts would have no jurisdiction if any remedy at law existed. It was not necessary, under the section as it appeared in the draft bill, that the remedy at law should be plain, adequate and complete. It sufficed, to deprive federal courts of equity jurisdiction, that some legal remedy existed, no matter how uncertain, inadequate or incomplete.

"cognizance, not of cases generally, but of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace". See also Washington, J., in *Ex parte Cabrera*, 1 Wash, 232, 237 (C. C. 1805): "Whether it would have been wise in Congress to have vested in the National Courts, the power of deciding, in some way or other, every national question, authorized by the Constitution is another point. I am one of those, I confess, who have always thought it would have been better, if the Legislature of the Union, in allotting to the several Courts the jurisdiction they were to exercise, had occupied the whole ground marked out by the Constitution;"

²⁶ Warren, *op. cit.*, 96. Warren points out that amendments to the draft of the section were proposed several times by adding one of the words, "plain, adequate and complete", in each proposed amendment, until the draft section was given its present form.

The section, therefore, as originally proposed was clearly limitational. It imposed considerable restrictions on the federal courts in their exercise of equity jurisdiction and contracted that jurisdiction as it existed at common law and may be said to have been incorporated into the texture of the Constitution. Why the section should have aroused such a storm of protest is not readily apparent except perhaps that some of the irreconcilable anti-constitutionalists in Congress may have thought that equity jurisdiction should be abolished altogether, and jury trial employed in all cases. At any rate, the protest and criticism were insistent and something had to be done about the section.

This could be accomplished in either of two ways. Paterson of New Jersey, a member of the Judiciary Committee of the Senate which drafted the bill, moved to "dele" the whole section.²⁷ He obviously reasoned that even without the section federal equity courts would, under the Judiciary Article, possess the same equity powers which they possessēd at common law, that is, they would have jurisdiction when a plain, adequate and complete remedy at law was not available. It was, therefore, unnecessary to make provision in the Judiciary Act for the equity powers of federal courts. They would inherently possess these powers. And Paterson apparently did not believe in doing the supererogatory thing of amending the section and thereby conferring upon the federal courts equity powers that they would possess even in the absence of such provisions. In other words, he apparently did not believe in enacting a declaratory section.

Paterson, however, did not prevail. The majority of the Senate apparently felt that amendment would be the simpler process and that it would not upset the arrangement of sections in the Act as a deletion would. So the section was amended and thus became declaratory of the powers of equity courts at common law and, indirectly, their power under the Judiciary Article. The history of the Equity section thus makes it abundantly clear how and why the section happens to be declaratory.

The history of the Rules of Decision section is quite different. If it is declaratory now, it was declaratory as

²⁷ Warren, *op. cit.*, 96.

originally proposed. The only change or amendment which it suffered in the course of the debate on the Act was the substitution of the generic term "laws of the several states" for the particular terms "Statute law of the several states . . . and their unwritten or common law".²⁸ It was thus either declaratory or a limitation on the Judiciary Article both as originally proposed and as finally enacted.

The query naturally poses itself, why should the first Congress have proposed and adopted this single, declaratory section in the whole Judiciary Act? The declaratory character of the Equity section has already been explained. The Rules of Decision section would stand alone as evidence of the effort of the first Congress to do a vain thing and to confer upon or restrict the federal courts in the exercise of powers which they already possessed or which they could not exercise under the Constitution. This fact, when taken together with the further fact that the Rules of Decision section does not appear in the draft bill but was first proposed from the floor of the Senate indicates, it would seem, not only that the Senate Judiciary Committee did not see fit to make the federal courts in state matters subservient to state law and that they did not deem such subservience inherent in the provisions of the Judiciary Article, but also that Congress did not regard the Rules of Decision section as declaratory but as a limitation on the Judiciary Article.

Whether it was wise, as a question of policy, to impose this limitation on the Judiciary Article and thus to confine or restrict the judicial power of the federal courts is beside the point. The first Congress were thoroughly familiar with the meaning and intent of the Constitution and the Judiciary Article. Many of its members had a large share in the drafting of the Constitution. Half of the ten members of the Judiciary Committee of the Senate, which drafted the Judiciary Act, had been members of the Constitutional Convention. Hence, when the first Congress by means of the Rules of Decision section limited the powers of the federal courts and directed them, except in certain instances to follow the laws of the several

²⁸ *id.* 86-87. If the *Erie* case is right, the change was one of form and not of substance. If *Swift v. Tyson* was right, the change was one of substance but it still would not affect the declaratory nature of the section both as originally proposed and as finally enacted.

states, it may be said that they did so consciously, deliberately and with full awareness that they were enacting a limitation rather than a declaratory section.

Up to this point, an attempt has been made to demonstrate that the Rules of Decision section is, both, on the surface and, as a result of the compelling disclosures of certain internal evidence, a limitation on the powers of the federal judiciary and not a mere declaration of those powers. Each argument and each bit of evidence is cumulative. All tally up to the conclusion that the *Erie* case is unsound as a constitutional decision. In reaching this conclusion on the basis of a study of the Rules of Decision section, we have relied entirely on that section. If the Judiciary Article expressly limited the powers of the federal courts so as to confer upon them independence of decision only in matters within the scope of concretely delegated powers of the national government and to compel them to follow the state law in other matters, all the foregoing arguments would collapse; and the intent and meaning which we have found the first Congress ascribed to the Judiciary Article would prove to be a mere figment of the imagination. In order, therefore, to pursue the inquiry further and save ourselves from this dilemma, it becomes necessary to consider the Judiciary Article itself.

The first section of the Article vests the "judicial power" of the United States in one Supreme Court and in such inferior courts as Congress may establish from time to time. The second section provides that the "judicial power" shall extend to certain enumerated cases and controversies.²⁹ In three instances (cases arising under the Constitution, statutes and treaties; cases affecting ambassadors, etc.; and cases of admiralty and maritime jurisdiction), the federal judicial power is made inclusive. It extends to all cases pertaining to such matters. In the remaining instances, the judicial power is not expressly made to extend to *all* the enumerated controversies. It merely extends to the enumerated controversies. In such controversies, the federal judicial power may perhaps be shared by other judiciaries.

The Article thus does not confer jurisdiction upon the

²⁹ A distinction has occasionally been drawn between the terms "case" and "controversy". So far as the federal judicial power is concerned, however, their significance is identical.

federal courts. It vests in them *judicial power* and extends the *judicial power* of the United States to the enumerated cases and controversies. Jurisdiction, in common legal parlance, is the power of a court to act upon a particular subject matter, such as equity, admiralty, a certain sum of money, and the like. Judicial power is a more comprehensive term. It includes jurisdiction or the power to act. But it goes beyond that. It includes the power which is inherent in all courts to decide and completely dispose of all matters to which their jurisdiction has once attached,³⁰ subject only to correction by a tribunal of ultimate review. Judicial power is the germinating fluid, the *fons vitae* of a court, the power that gives it independence and vitality and distinguishes it from all other governmental agencies. It is the power to decide, to pronounce law and to resolve all controversies that come within its jurisdiction. A court may have and exercise jurisdiction without possessing judicial power. In the *Erie* case, the court held that federal courts possess jurisdiction in diversity of citizenship cases; but it also held that they do not have the judicial power to determine, decide and resolve the controversy, but must merely apply the decisions of the state courts. On the other hand, a court cannot possess or exercise judicial power without having first assumed jurisdiction. Judicial power is comprehensive, jurisdiction is particularistic.

It is no accident that the Judiciary Article invests the federal courts with judicial power rather than the more limited jurisdiction. All of the original drafts, except one, of the Judiciary Article in the various plans for a constitution which were proposed to the Convention contained a grant of "jurisdiction" rather than "judicial power" to the federal courts and extended their "jurisdiction" to certain subject matters.³¹

³⁰ Warren, *The Making of the Constitution* (1928) 331-332.

³¹ Journal of The Debates, U. S. Constitutional Convention 1787 (Hunt ed. 1908): Randolph plan, 17, 131; Pinckney plan, 29; Report of Committee of Whole on Randolph plan, 136; Hamilton plan, 163, 171; see also remarks of Mr. Wilson contrasting the Randolph and Paterson plans, 147. The exception was the Paterson plan which provided that the "judiciary so established shall have authority to hear and determine" The Paterson plan was anti-national. Paterson's choice of words, "hear and determine" is therefore significant. He apparently intended to confer upon the federal courts both jurisdiction ("hear") and judicial power ("determine") in the few matters entrusted to their "authority".

Members of the Convention continued to speak of the jurisdiction of the federal courts from the beginning of the Convention until late in August. The term, "jurisdiction", remained in the Judiciary Articles of the various plans for a Constitution until August 27, 1789, and subsequently, when the term, "judicial power", was substituted for "jurisdiction" in the various parts of the Judiciary Article where it was employed.³² This was a conscious and deliberate effort of the Convention to employ not only a more elegant term but likewise a more comprehensive one. The Convention thus sought to invest the federal courts with complete independence and with full power to decide and resolve in their own way all cases and controversies to which their jurisdiction attached.

It should not, however, be inferred that the scope and significance of the Judiciary Article would have been any more limited if it had contained the term, "jurisdiction", and had invested the federal courts merely with jurisdiction rather than judicial power.³³ There is enough internal and external evidence in the Constitution itself and in the Debates of the Convention and other contemporary literature to disclose that it was the intent of the Convention to confer "judicial power" and complete independence on the federal courts in the enumerated situations, regardless of the term actually employed to express that intent. In other words, the result would be the same even if the Convention had invested the courts with jurisdiction. Thus, for example, in discussing the Judiciary Article in *The Federalist*,³⁴ Hamilton employs the term, "jurisdiction", in its broader sense of judicial power. He defines the word etymologically as "a speaking and pronouncing of the law", from the Latin words, *jus* and *dictio*.

³² 2 Records of Federal Convention (Ed. Farrand 1937) 425; see also remarks of Madison and Governor Morris, *id.* 431.

³³ Madison, for example, proposed that the "jurisdiction shall extend to all cases arising under the National laws; and to such other questions as may involve the National peace and harmony" *Journal of The Debates*, 389. Madison no doubt assumed that the courts were given full independent judicial power in cases arising under the national laws. And his proposal to extend the federal jurisdiction in the same terms to the other matters involving the national peace and harmony and subsequently expressly incorporated into the Judiciary Article indicates that he assumed the federal courts would act upon those matters in the same manner, that is, with the exercise of a complete, independent judicial power.

³⁴ No. LXXXIII (Lodge ed. 1923) 519.

Such a "speaking and pronouncing of the law", of course, signifies the complete independence and power of the court to apply the law as it has determined it to any controversy over which it has assumed jurisdiction. And, in another of those papers,³⁵ he speaks of the judiciary's power of "*determining*" various causes. He does not say that the court may, in reliance upon some other tribunal, act upon or entertain jurisdiction over the various causes. He takes it for granted that the judiciary, under the grant of the Constitution, may *determine*, that is, decide, resolve and completely dispose of those causes.

Now, the theory of the Court in the *Erie* case appears to be that the federal courts merely possess this judicial power to decide controversies involving or pertaining to the delegated powers of Congress; that every delegated power (e.g., bankruptcy, naturalization, coinage, commerce, etc.) is expressly conferred upon the national government; and that there is no express or implied delegation of powers to or in respect of the federal courts either in the Judiciary Article or in any other provision of the Constitution. If these assumptions were correct, the constitutional decision in the *Erie* case would be unassailable. But, is such the fact? We have just seen that these assumptions are irreconcilable with the grant of "judicial power" in the Judiciary Article. Further study of that Article supports this conclusion.

The Judiciary Article invests the federal courts with judicial power over certain causes. In some causes, the judicial power is expressly comprehensive or inclusive; in the remainder, it is at best only inferentially so; or perhaps it is distributive, concurrent or partial.³⁶ But in respect of all the various causes, the *grant of judicial power* is identical. The judicial power is made to extend to "*all* Cases, in Law and Equity (under the Constitution, treaties and Laws of the United States);—to *all* cases affecting Ambassadors, other public Ministers and Consuls;—to *all* cases of admiralty and maritime Jurisdiction (n.b.);—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—(to Controversies) between a State and Citizens of another State;—(to Controversies) between Citizens of different States;—(to Con-

³⁵ No. LXXX (Lodge ed.) 496.

³⁶ That is to say, it extends to *some* of the enumerated controversies.

troversies) between Citizens of the same State claiming lands under grants of different States, and (to Controversies) between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”

The same “judicial power” which is extended to *all* federal questions and all cases affecting ambassadors and all questions of maritime and admiralty jurisdiction likewise extends to controversies between citizens of different states, controversies between states, controversies to which the United States is a party, controversies involving land grants of different states, controversies between a state and citizens of another state, and controversies between a state or its citizens and foreign states, their citizens or subjects. Hence, without any reference to the relation of the exercise of judicial power to expressly delegated legislative power, it would seem that if the federal courts are independent and have complete judicial power to determine and dispose of all federal questions, by virtue of the same grant of judicial power they should possess the same independence and full power of disposition with respect to the remaining enumerated controversies over which they have judicial power.³⁷ Does the fact that certain expressly delegated powers confine the scope of activity by Congress also limit the judicial power of the federal courts under Article III?

The answer must be in the negative. If express delegation to Congress alone were the key to the scope of the judicial power, then the extension of judicial power to non-federal diversity of citizenship cases in Article III would be unconstitutional! At least, it would be in direct conflict with the other delegating provisions of the Constitution and, if valid, would to that extent have to be deemed an affirmative grant or delegation. Similarly, if the exercise of complete judicial power depended upon a collateral delegation of powers to Congress, the federal courts would not possess such powers in matters beyond the scope of congressional action. Thus, Congress has

³⁷The thought will at once occur that this independent power of decision and absolute supremacy of the federal courts in federal questions derives from the fact that federal questions arise under the Constitution, treaties and statutes which are the supreme law of the land, and that the judicial determination of these questions must likewise be the supreme law of the land. As will subsequently appear, this explanation does not account for other federal judicial phenomena and must be laid aside as unsatisfactory.

no affirmative or implied power over the states. Congress has no affirmative or implied power over matters of admiralty and maritime jurisdiction; for the Commerce Clause confers no such power any more than it does with respect to non-maritime matters involving interstate and foreign commerce. Congress has no power over matters between a state and citizens of another state,³⁸ over matters involving land grants of different states to citizens of the same state, or over matters between a state or its citizens and a foreign state, its citizens or subjects. And it may be queried whether Congress has any affirmative or implied power over a controversy just because the United States happens to be a party, even though it may not involve or pertain to the assertion or enforcement of a delegated power.

Nevertheless, in many, if not all, of these matters, the federal courts have exercised and undoubtedly possess the judicial power completely to determine and dispose of the controversy before them, without reference to or reliance upon any other tribunal or system of laws. Thus, two states, A and B, may be involved in certain difficulties of tort, contract or property law. According to the fundamental and somewhat recently reiterated law of sovereignty,³⁹ State A could not sue State B in the courts of B; and it could not obtain jurisdiction over B in its own courts. The natural forum, of necessity, is, therefore, the Supreme Court of the United States. What law should the court apply in disposing of the controversy? What law must the court constitutionally apply, if under the *Erie* case the federal courts are bound by the non-federal law and merely have jurisdiction and not judicial power over the controversy?

If the relations between sovereigns were governed by the same principles as the relations between individuals (they are

³⁸This provision was nullified by the eleventh amendment. In *Monaco v. Mississippi*, 292 U. S. 313 (1934), which in effect overruled *Chisholm v. Georgia*, 2 Dall. 419 (1795), the Court held that a state was not amenable to suit by an individual or foreign state without its consent. The Court, therefore, in effect, construed the provision to permit such suit when the state's consent has been given. If the consent were given and the Court entertained jurisdiction, then the Court would proceed to exercise its judicial power in the same manner as in other controversies subject to the judicial power. If, in deciding the case, the Court deferred to the decisions of the state, the consent of the state would be tantamount to a direction to the Court to act as the supreme court of the consenting state, in other words, to abdicate its judicial power.

³⁹See review of the subject in *Monaco v. Mississippi*, 292 U. S. 313 (1934), note 38, *supra*.

not necessarily so),⁴⁰ the Supreme Court might find some precedent to rely upon in the law of the state which was applicable to the particular relationship, as for example the law of State B, if the contract were executed or to be performed there. But in disposing of such matters the Court has never considered itself bound by such local law.⁴¹ The Court has always disposed of such cases under general legal principles as if it had complete judicial power to decide the question, independently of the local law. This cannot have been due to an oversight of the Court. Or, was it? Is not the better explanation this: There is no local law which can apply. State A cannot obtain jurisdiction over State B in the courts of A and, therefore, cannot apply the law of A. Moreover, by hypothesis, the contract was consummated in B whose law would, under general principles of contract law, apply. But B cannot be sued in its own courts without its consent, which is only sparingly given. In other words, the courts of B have no jurisdiction. Without jurisdiction, they cannot possess the judicial power to dispose of the controversy. Hence, there is no local law which is applicable. The local law is suspended in vacuo. *Ex necessitate*, the Supreme Court must take over the controversy and dispose of it in accordance with its own principles of law.

The further fact that the Supreme Court has original jurisdiction in such matters and that there can be no review of its decision lends added support to the view that the Supreme Court must dispose of the matter independently of any other tribunal or system of law. Courts of simultaneous original and final jurisdiction are complete entities in themselves and are not subordinate to other courts or legal systems whether for constitutional or any other reasons.

Again, suppose that State A, through its duly constituted representatives, committed a trespass to the real property of State B in that state. B adheres to the rule of *Livingston v. Jefferson*.⁴² The action is, according to the common law and the law of B (as between individuals), local in nature. This rule of law is a matter of substance. No recovery can be had unless suit be brought in the courts of B. But B cannot there obtain jurisdiction over A. Nevertheless, B may file suit for the

⁴⁰ Cf. *Connecticut v. Massachusetts*, 282 U. S. 660, 670 (1931).

⁴¹ *Id.*

⁴² 1 Brack. 203, Fed. Cas. No. 8411 (1811).

trespass in the Supreme Court. What law shall that court apply? If bound by the comparable state law in similar circumstances, it cannot entertain jurisdiction, for the common law rule affects the substantive rights of the two states; and in fact, for this reason, the Court might perhaps decline jurisdiction.⁴³ It is extremely doubtful, however, that the Court would take such a view and leave the state without any remedy.

In any situation involving the rule of *Livingston v. Jefferson*, the practical effect is to deprive the victim of a remedy for the trespass; and yet courts of states other than the state where the trespass was committed decline jurisdiction. But theoretically, the plaintiff may be able to obtain service on the trespasser in the state of the trespass at some future time. This can never be had between states. Hence, the Supreme Court would be unwarranted in declining the jurisdiction which it had, and would undoubtedly take jurisdiction of the matter and apply its own law, evolved on the basis of common sense and general legal principles.

The Supreme Court has original jurisdiction in all cases affecting ambassadors. The constitutional provision means exactly what it says. No other court can share that jurisdiction; for if it did, it would either be a Supreme Court in that instance from which there could be no review, or if there were review, the Supreme Court would necessarily exercise appellate jurisdiction in the matter, in direct disregard of the Judiciary Article. Suppose an ambassador, as an individual, committed a tort or consummated a contract or had certain property rights in State A. He may assert those rights and they may be asserted against him in the Supreme Court exercising its original jurisdiction.⁴⁴ If he were an ordinary individual, the

⁴³ In *Massachusetts v. Missouri*, 308 U. S. 1 (1939), the Court declined to exercise jurisdiction in a controversy between states. The opinion indicates that the Court believed it had jurisdiction or perhaps that the Court would decide it had jurisdiction if it felt compelled to do so. However, the Court also intimated that the District Court would probably have jurisdiction of the controversy. Hence, if the Supreme Court declined jurisdiction, the petitioner would not be without that or some other available remedy.

⁴⁴ The Judiciary Article extends the judicial power to *all* cases affecting ambassadors (Section 2(1)). It provides that in *all* cases affecting ambassadors, the Supreme Court shall have original jurisdiction (Section (2)). As we are concerned with the plain meaning of language and not with an incrustation of judicial lore or legislative enactments which have been heaped upon such crystal clear language,

law of A would govern his legal rights; and no doubt, apart from treaty rights, the Supreme Court in disposing of the controversy would be strongly tempted to apply the law of A to the cause.⁴⁵ But need it constitutionally do so?

The Supreme Court has original jurisdiction over the cause. There is no review of its decision. A court which thus simultaneously exercises original and final jurisdiction is *ex necessitate* independent of other courts and legal systems. No other court can take jurisdiction of the matter. Hence, the answer to the question would seem to be that the Supreme Court need not apply the governing local law. Then, if the Court need not apply the law of A, should it do so? The answer here should likewise be in the negative, even though the Court on independent grounds might be tempted to reach the same result as other courts would in dealing with ordinary individuals.

Representatives of foreign governments have a particular claim to the consideration of their legal relations by the national courts. This claim is based upon the delicacy of the relations of sovereign governments. And the claim is not only that the national courts should assume jurisdiction of such matters, but that they should give the question their full, independent consideration, unfettered by the less exalted legal system of an inferior sovereignty within the larger federal government. A foreign nation would certainly not be satisfied to have the legal relations of its accredited representative determined by the courts of a government with which it had no relations and to which its representatives were not accredited. A foreign government would just as leave have its ambassador to this country submit his grievances to or have his liability determined by the courts of Mexico as by the courts of one of the states of this Union.

it would seem obvious that the Judiciary Article contemplates the assertion of such rights in the Supreme Court and not elsewhere; in other words, that the provisions respecting the original jurisdiction of the Supreme Court are self-executing, cannot be interfered with by Act of Congress and that no other court can be entrusted with the disposition of such causes. If Congress or the Supreme Court has held otherwise, it would seem a clear violation of the unambiguous language of the Constitution. See note 16, *supra*.

⁴⁵That is, the Court might apply the decisions of the courts of A without considering their soundness; or, it might defer to and reach the same results as the courts of A in the same manner that it would consider and appraise and perhaps follow the decisions of other courts.

This extreme sensitiveness and perhaps pomposity of foreign governments may seem somewhat absurd to us at this late day. But it seemed very real and a proper subject for caution to the members of the Constitutional Convention.⁴⁶ Hamilton⁴⁷ even went so far as to suggest that if a foreign government regarded the judgment of a state court against one of its citizens (not necessarily a diplomatic representative) as erroneous, it might be deemed "an aggression upon (the foreigner's) sovereign, as well as one which violated the stipulations of a treaty or the general law of nations". A judgment of a state court in a case involving a foreign subject might be a *casus belli*! Hence such causes were, by the Judiciary Article, committed to the national courts; and they must decide such causes in accordance with their own legal principles and not in subordinacy to the courts of another sovereignty.

We come next to cases of admiralty and maritime jurisdiction. A collision between vessels may occur in navigable waters of the United States which happen to be within the jurisdiction of a state. In such a case, should the federal courts, exercising admiralty jurisdiction, apply the law of negligence, contributory negligence, intent, etc. which obtains in the state in whose waters the collision occurred?⁴⁸ Or should the federal courts apply their own admiralty law, irrespective of the law of the state? The question has not often been dealt with, because from the very existence of exclusive admiralty

⁴⁶ In the *Popovici* case, note 16, *supra*, the Court said (28 U. S. at 384): "It is true that there may be objections of policy to one of our states intermeddling with the domestic relations of an official and subject of a foreign power that conceivably might regard jurisdiction as determined by nationality and not by domicile."

⁴⁷ *The Federalist*, No. LXXX (Lodge ed.) 496. Mr. Hu Williamson was of the opinion that in certain cases (e.g. fraudulent tender in payment of debts) "the Courts of the offending State would probably decide according to its own laws. The foreigner would complain and the nation might be involved in war for the support of such dishonest measures. Is it not better to have a Court of Appeals in which the Judges can only be determined by the laws of the Nation?" See Warren, 37 Harv. L. Rev. 49, 82, fn. 78; see also note 81, *infra*.

⁴⁸ A similar collision, for example, between two canoes on a non-navigable stream, would be governed by the law of the state and would not be subject to admiralty jurisdiction. If the federal court of admiralty failed to apply the state law, parties identically situated would fare differently according to the jurisdictional forum in which they could adjust their rights.

jurisdiction in the federal courts⁴⁹ it has been assumed that the federal courts alone are competent to decide such admiralty questions and in doing so need not refer to the law of any state. It is submitted that this assumption is correct. It accords with the Judiciary Article's grant of judicial power in such cases. It finds its warrant in no other provision of the Constitution.

The Commerce Clause confers upon Congress certain powers with respect to navigable waters. It likewise confers upon Congress the same powers with respect to non-maritime and non-navigable means of transportation in foreign and interstate commerce. But even as Congress does not possess legislative power over the substantive legal rights of parties engaged in non-maritime and non-admiralty interstate and foreign commerce, so it has no power over the substantive legal rights of parties employing navigable and maritime means of transportation in interstate and foreign commerce. Nevertheless, the federal courts do apply their own law in admiralty cases, and the applicable state law in non-admiralty commerce cases.

Thus, where two steamers collide in Chesapeake Bay, admiralty law is applied. Where two interstate trains collide in State A, the law of A is applied. The reason for this difference is that there is no provision of the Constitution (except the Judiciary Article) which gives the federal government, either through Congress or the courts, power over the substantive legal rights of parties in commerce whether of an admiralty or a non-admiralty nature. The Judiciary Article, however, gives the courts *judicial power* over all admiralty causes but does not confer such power with respect to non-admiralty commerce. It is not, therefore, by virtue of a power expressly delegated to Congress that federal courts exercise full judicial power and complete independence in causes to which their jurisdiction attaches. It is solely by virtue of the grant of judicial power in the Judiciary Article. This is as much an express delegation of complete power to the federal courts as the bankruptcy, commerce or any other power is expressly delegated to Congress. And for the same reason, federal courts exercise complete independence in all matters

⁴⁹ Judicial Code, Section 256, amended, 28 U. S. C. A., § 371. But see note 22, *supra*.

involving federal questions. To them is delegated the judicial power in all cases involving the Constitution, laws and treaties.

Now, in the same way that we have discussed the Judiciary Article's grant of judicial power in cases involving accredited representatives of foreign governments, in admiralty and maritime cases, and in controversies between states, we might proceed to discuss every instance of the grant of judicial power in the Judiciary Article. Such a discussion, however, would merely be cumulative and to no purpose. A sufficient number of specific instances enables one to generalize as to all similar instances. This brings us to the only reasonable conclusion with respect to the scope and significance of the Judiciary Article.

In that Article, the identical terms are employed to extend the federal judicial power to all the cases and controversies which it is made to cover as are employed to extend the judicial power to federal matters, to cases of admiralty and maritime jurisdiction, and to cases affecting ambassadors, etc. Therefore, by a parity of reasoning, the grant of judicial power which enables federal courts in the latter instances to exercise complete independence of every other judicial system and to completely decide and dispose of every matter within their jurisdiction without resort or deference to any other tribunal likewise enables the federal courts in all the other matters to which the judicial power extends to exercise the same independence and the same power of decision and disposition of the cause.⁵⁰

It has been pointed out that, despite the above statement and the fact that the grant of judicial power is the same in all the cases mentioned in Article III, there is in fact this difference: In the first three cases (federal matters, ambassadors, etc., admiralty), the judicial power extends to *all* cases, whereas in the remaining cases, it extends only to *cases*, that is, perhaps merely to *some* cases (or "Controversies", the term

⁵⁰ See argument of Mr. Hu Williamson, notes 47, *supra*, and 81, *infra*. He pointed out that just as federal courts were necessary in order to guard against a violation of the national laws by the state courts because the judges in the federal courts "can only be determined by the laws of the Nation", so federal courts were "equally to be desired by the citizens of different states"—obviously because the judges in those courts would be "determined by the laws of the Nation" and not bound by the law of a particular state.

employed in the Article). Should this difference affect the foregoing conclusion? The answer must be in the negative.

It is not the fact that the judicial power extends to *all* of certain cases that gives the federal courts complete independence in such matters. It is the fact that the courts have *judicial power* over such causes. We have already seen that the judicial power does not extend to all controversies between states. It extends only to controversies between states. Nevertheless, the Supreme Court, exercising original and at the same time final jurisdiction over such controversies, is independent of every other tribunal and has power to dispose of the controversies without resort or deference to their decisions. It cannot, therefore, be that the independence and complete judicial power of the federal courts depend upon the express extension of the judicial power to *all* cases of the enumerated matters.

The extension of the judicial power to all of certain cases renders the federal courts the repository of the judicial power in all of those cases. They need not exercise it. They need not even assume jurisdiction over all of the cases over which the judicial power is conferred upon them; and they cannot exercise the judicial power without first assuming jurisdiction. The notable example is in respect of federal questions. The national courts share their jurisdiction in these matters with the state courts. To the extent that the latter share such jurisdiction, they must exercise the federal judicial power to dispose of the controversies. They exercise this power, not as state courts, or as branches of a separate system of courts, but as federal courts, as units in the federal judiciary. They are merely lower courts in the federal system in the same manner that the federal district courts and circuit courts of appeals are. They are subject to direct review by the United States Supreme Court. They exercise the full federal judicial power in the same manner that, acting as state courts on state questions, they exercise the full state judicial power. They need not conform their decisions to those of the lower federal courts, for they perform the same function as the latter. If they err on a federal question, they are reversed and corrected by the Supreme Court just as the Circuit Court of Appeals or District Court is. Their decisions need not be reviewed by the Supreme Court and often are not reviewed, with the result that on a

federal question the judgment of a Supreme Court of a state may be as important and persuasive an authority as the judgment of a Circuit Court of Appeals on the same question. In the same manner, the state courts would exercise the federal judicial power in cases of admiralty, ambassadors, etc., if they were permitted to entertain jurisdiction over such causes. It is the grant of judicial power and not its extension to all the cases of a certain type that establishes the federal courts as complete independent entities that need look to no other court or judicial system for their course of decision.

Moreover, the grant of judicial power in Article III is not comprehensive in some cases and expressly or impliedly limited in others. It does not merely cover *some* controversies between states, *some* controversies between citizens of different states, etc. It extends to *controversies* in those and the other instances. It covers all such controversies because it is not limited in any respect and no controversies are excluded from its operation. There would be no question of this if the Article did not expressly extend the judicial power to *all* cases of three classes (ambassadors, admiralty and federal questions). How, then, should the difference in terminology be explained?

It may perhaps be explained as an effort to avoid the constant repetition of "all" before the various controversies enumerated. It is to be observed that this explanation is probably applicable also to the failure to repeat "controversies" before the remaining enumerated causes. But reliance should not be placed entirely on such an explanation. The explanation is rather cumulative and should be considered in connection with and in support of an explanation that rests upon a firmer foundation.

Such an explanation is to be found in the desire of the Constitutional Convention to repose the decision of causes of purely national concern in the federal courts and to leave other matters, even though also pertaining in part to the national interest and general welfare, to be disposed of as the courts and Congress should see fit. In the latter matters, the Convention was not primarily interested, except to provide that the federal judicial power should cover them. In the former, the Convention was primarily interested and sought by all means possible to avoid their being submitted to the state courts, which

the Convention distrusted and suspected.⁵¹ The fact that Congress may not have shared this distrust and has actually permitted the state courts to pass upon federal questions and could permit them to pass upon admiralty matters and causes affecting ambassadors should not detract from the very evident purpose of the Convention to remove these matters entirely from the jurisdiction of the state courts and likewise from their judicial power even though in dealing with such causes they function as federal courts. Pursuant to this purpose, the Convention made the judicial power expressly inclusive and comprehensive as to three matters which were thought to be of purely national concern⁵² and only impliedly so, or perhaps even distributive and limited, as to all other matters, even though they partook largely of the nature of the national interest.

If neither of these explanations is correct (and it may be that both of them fail to satisfy the student completely), then we search in vain for a true explanation. This much, however, is certain. The grant of judicial power to the federal courts in Article III is not coextensive with, but is broader than, the grant of legislative powers to the Congress and the delegation of other powers to the executive. In admiralty and maritime cases, the judicial power is plenary and authorizes the courts completely to decide, resolve and dispose of all such causes. This is an express delegation to the federal courts that finds warrant in the Judiciary Article alone, and without reference to or support from powers granted either to Congress or the executive. The same is true with respect to the judicial power in controversies between states, even though Article III does not expressly extend that power to *all* controversies between states, but merely to "controversies between states". And the same is undoubtedly true with respect to cases involving ambassadors and other public ministers, even though the Supreme Court may have held that there is no federal jurisdiction over some causes affecting ambassadors,⁵³ and even though the Court might be disposed to hold that in purely local or state questions affecting ambassadors there is only jurisdiction and not judicial power to deal with such cases. Article III is

⁵¹ See note 63, *infra*.

⁵² As to whether admiralty was deemed a matter of purely national concern, see notes 22, *supra*, 56, 57, 78, *infra*.

⁵³ See note 16, *supra*.

explicit in this respect and grants the federal courts plenary power to decide and dispose of cases affecting ambassadors without reliance upon or deference to any other judicial system. This is a delegation of power to the courts which goes beyond any delegation to either the legislative or executive branch of the government.

This leads to a cardinal conclusion which the Court appears to have overlooked in the *Erie* case. The federal government is a government of strictly limited, delegated powers. But that government consists of three separate and distinct branches, the legislative, executive, and judicial. To each branch, certain powers are expressly and others impliedly delegated. In some respects, these separate powers and delegated authority are parallel. In others, they overlap. In still others, they are unrelated, incommensurable, or simply additional. Such an additional or unrelated or perhaps even incommensurable power is delegated to the federal courts by the Judiciary Article and by that alone. The federal courts derive their authority from, and the scope of their power must be determined by reference to, that Article and not by reference to other delegations of power to the Executive or Legislative Departments. The Judiciary Article is a separate grant or delegation of power to the third branch of the federal government, which branch is a complete entity in itself, parallel and not subordinate to any other branch of that government.

The reasoning of the court in the *Erie* case is, therefore, unsound. The court argued that Congress could not pass a law applicable to the affairs of a particular state. Ergo, the federal courts cannot decide questions of state law independently of the state courts. The premise of the Court, with respect to legislation by Congress, may or may not be right.⁵⁴ But the conclusion of the Court is a non sequitur for the reason that it makes the scope and exercise of the judicial power coextensive with and dependent upon the *legislative* authority, whereas, in

⁵⁴ During the writing of this article, there appeared an article which takes issue with the premise of the Court in the *Erie* case and reaches the same conclusion as this article. Walter F. Dodd, *The Decreasing Importance of State Lines* (1941) 27 (No. 2) A. B. A. J. 78, 83. The author there says: ". . . but, in spite of the language of the opinion, Congress has power to determine what law is applicable in the federal courts" No authority is cited for this statement.

fact, the judicial power is entirely distinct and derives from a separate grant.⁵⁵ And, once the fact is grasped that the Judiciary Article is itself a grant or delegation of power, then it is readily discerned that the judicial power is dependent upon neither the legislative nor executive powers but is entirely independent thereof. It depends upon, or is commensurate with, those powers only to the extent that it is one of the many grants in the Constitution and is useful or necessary in giving full expression to those other grants. Beyond that, the judicial power delegated to the courts by the Judiciary Article furnishes its own *raison d'être*.

Since that is the nature of the Judiciary Article, it would seem, both under the "necessary and proper clause" and the "supreme law of the land clause", that Congress possesses the power to legislate on matters within the judicial power of the federal courts which are not otherwise within the express or implied delegations of legislative power. Thus, since the courts have the judicial power to determine controversies between states, it would appear that Congress could legislate on the substantive questions involved in such controversies. And since the courts have the judicial power to determine matters of admiralty and maritime jurisdiction, it would seem that Congress could legislate on the substantive relations of parties in such controversies. And the same would appear true as to the other cases and controversies committed to the judicial power of the federal courts.

But let us retrace our steps! We have seen that the Judiciary Article extends the judicial power expressly to all of three classes of cases and merely by implication to all of the balance of the cases and controversies. If the latter observation and explanation of the Judiciary Article is not correct, the result would nevertheless be the same. That is to say, even if the Article extended the judicial power to only *some* of the remaining classes of controversies covered by the Article, the

⁵⁵ That the judicial power is not merely coextensive with the legislative power appears from the fact that it is certainly coextensive with the executive power. See, e.g., *Myers v. United States*, 272 U. S. 52 (1926); *Humphrey's Executor v. United States*, 295 U. S. 602 (1935); *United States v. Smith*, 286 U. S. 6 (1932). In other words, the judicial power is coextensive with the whole ambit of constitutional power. And the judicial power is a constitutional power, that is, the judicial power is coextensive with itself.

power of the federal courts in dealing with those controversies would be identical to what it is in the first three classes of cases. The crux of the interpretation of the Article is in the fact that the Article makes the judicial power extend to all of the various matters in the identical language, even though *all* of some of these matters are expressly designated and by implication only *some* of the remaining controversies were brought within the scope of the judicial power. Thus, the courts are vested with judicial powers in diversity of citizenship, in land grant and in other cases in the same way and in the identical language that they are vested with judicial power over federal questions, admiralty, and cases affecting ambassadors.

Now, in federal questions, admiralty and cases affecting ambassadors, the courts have complete judicial power, not because of other delegations of substantive power to the legislature but by reason of the Judiciary Article alone. For, if the judicial power depended upon other grants of substantive power to the legislature, then several things would follow. One: The exercise of complete judicial power in matters in which the federal courts are concededly independent of all other courts and judicial systems (federal questions) would not depend upon and, in fact, would be unrelated to the express extension of the judicial power to *all* of those questions. It might just as well be made to extend to only some of those questions. Two: Apart from the Judiciary Article, the Constitution contains no grant of power over substantive questions involved in admiralty and maritime causes; and yet the federal courts exercise this power, first by right, and second by necessity, since state courts do not exercise admiralty jurisdiction. Third: Apart from the Judiciary Article, the Constitution contains no grant over substantive questions involved in controversies between states. Here again the federal courts exercise this power, first by right, and, second by necessity.

On the other hand, if the exercise of complete judicial power depended upon the express extension of that power to *all* of certain cases, the federal courts would possess the power in cases affecting ambassadors but would not possess it in controversies between states. This would be anomalous, even apart from the question of the delicacy of international relations. The state courts could act competently in the former matters,

and might well be entrusted with their decision; but the state courts are hopelessly unable to cope with the latter causes without the express consent of a defendant state.

Furthermore, the history of admiralty jurisdiction in this country renders such an explanation untenable. We know, for example, that for at least three years after the adoption of the Constitution, some state courts exercised admiralty jurisdiction.⁵⁶ And we may assume, from the absence of any evidence to the contrary, that they likewise possessed and exercised full judicial power in such matters. Certainly, there is no evidence that during this period the federal courts deemed it inconsistent with their authority that the state courts should decide admiralty matters in accordance with their own admiralty law, whether derived from the Civil Law, the Admiralty Law of Great Britain or simply evolved by themselves in the course of decision. And Hamilton took it for granted that state courts of admiralty were entirely independent of the federal courts in such causes.⁵⁷ As the Supreme Court clearly indicated in the *Manro* case,⁵⁸ it was an act of Congress and not the Constitution which deprived the states of this jurisdiction in admiralty and consequently their judicial power or independence of the federal courts in such matters.

Hence, it is not the extension of the judicial power to *all* admiralty cases that gives the federal courts complete judicial power to dispose of admiralty questions within their jurisdiction. It is the fact that the *judicial power* is made to extend to *admiralty* (not *all* admiralty) cases that gives the federal courts

⁵⁶ *Manro v. Joseph Almeida*, 10 Wheat. 473, 490 (1825); see note 22, *supra*.

⁵⁷ The *Federalist*, No. LXXXIII (Lodge ed.) 524-525. In his discussion of the pre-existing (i.e., prior to the Constitution) relation of state and national admiralty courts, Hamilton assumes that the same relationship will continue under the Constitution, and that neither the Judiciary Article nor any other provision of the Constitution will affect or necessitate a change in this relationship. Thus, he takes it for granted that in Pennsylvania, Delaware, Maryland, New York, Virginia and the Carolinas there will continue to be admiralty courts, side by side with those of the national government; whereas in New Jersey and Connecticut and perhaps in Georgia, admiralty will be administered by the states in their common law courts. He assumes that after the adoption of the Constitution, admiralty causes will be tried to the federal courts no matter where they sit and likewise in states, like New York, having separate admiralty courts the cause will be tried to the court; but in states like Connecticut and New Jersey, the cause will be tried by jury.

⁵⁸ See notes 56 and 22, *supra*.

their independence in such matters. So far as the Constitution and the Judiciary Article are concerned, this power may be shared by or reposed equally in other judicial systems. It requires an act of Congress to restrict the exercise of that power to the federal courts. And it is only this latter power of restriction or attenuation that can be ascribed to or derived from the grant of judicial power in *all* admiralty cases.

Thus, the independence of the federal courts of all other judicial systems in completely deciding and disposing of cases within their jurisdiction depends upon and derives from the grant of judicial power in the Judiciary Article. It does not derive from any other delegated power in the Constitution; and it does not derive from the extension of the judicial power to *all* of the cases subject to that power. The Judiciary Article is itself a delegation or grant of power; and under it the federal courts exercise their power. Since that power is made to extend in identical language to a number of cases and controversies, the power of the courts in all of those cases and controversies must be the same. That is, it must be the full judicial power to decide and dispose of all such causes independently and without resort or deference to the decisions of any other tribunal or judicial system. Concededly, this is true of federal questions and admiralty matters. *Ex necessitate*, it must be true of controversies between states. And in cases affecting ambassadors, in controversies to which the United States is a party, in diversity of citizenship cases, in land grant controversies, in controversies between a state and citizens of another state, and in controversies between a state or its citizens and foreign states, its citizens or subjects, it must also be true. It may be unfortunate that the federal courts possess this power in all such cases. But it cannot be denied them without distorting the true, plain meaning of the Judiciary Article.

In some cases and controversies covered by the Judiciary Article, the federal courts must be deemed to be entirely independent and to possess complete judicial power to the exclusion of all other judicial systems. This would be true of federal questions and would follow from the "supreme law of the land" clause. In other cases, the federal courts, while possessing the power, may nevertheless share it with state courts possessing the same power. Such are admiralty matters and

cases affecting ambassadors. An act of Congress has made the judicial power of the federal courts exclusive in the former instance and could do likewise in respect of cases affecting ambassadors.⁵⁹ In the remaining controversies covered by the Judiciary Article, federal and state courts must share and exercise their judicial power equally, applying it to those causes which come within their jurisdiction. If the Judiciary Article be construed as impliedly extending the judicial power to *all* of these controversies, then, as in cases of admiralty, an act of Congress could render this power exclusive in the federal courts. If, on the other hand, the Article be construed as extending the power only to *some* of the enumerated controversies, it would appear that the judicial power would forever have to be shared by the federal courts with the state courts and that Congress possess no authority to vest such power exclusively in the federal courts.

It is unnecessary and perhaps premature—certainly unnecessary so far as the thesis of this paper is concerned—to express a preference for either of the latter possible interpretations of the Article. But this conclusion is inescapable, that the federal courts in the enumerated cases and controversies possess judicial power, and that that power renders them entirely independent of all other courts and judicial systems. This independence may be exclusive of such other courts and systems or it may be joint or in common with them, with the result that they too possess a like power. In the absence of an act of Congress, the latter alternative represents the relation of federal and state courts in diversity of citizenship cases. Unlike the act of Congress which vested the judicial power in admiralty cases exclusively in the federal courts, an act of Congress has intervened which has deprived the federal courts of their judicial power in diversity of citizenship cases. This is the Rules of Decision Act which imposes a limitation on the diversity of citizenship clause of the Judiciary Article. Without that Act, the federal courts could exercise the full extent of their judicial power in diversity of citizenship cases and would be entirely independent of the state courts. They would evolve their own principles of law under the influence and tradition of the common law and would apply those principles irrespective

⁵⁹ See note 16, *supra*.

of and without deference to the state courts. An enabling act of Congress might, on the other hand, lay down a set of substantive principles of law and thus establish the law which the federal courts should follow in such cases.⁶⁰ All of this is inherent in the Judiciary Article.

Now, this paper set out to demonstrate that the decision of the court in the *Erie* case as a constitutional question is unsound. Many arguments have been advanced in support of that thesis. These arguments are all cumulative. If any one of them should fall or seem untenable, the thesis itself would remain established; for any one of the many arguments advanced in favor of it would seem sufficient to support it. We might, therefore, terminate the paper at this point and, as in the case of a geometric theorem, mark it Q. E. D.

But we should not rest content with such a conclusion. The importance of the question impels a consideration of all available data in support of the conclusion. Up to this point, we have merely dealt with the internal evidence in the Judiciary Act and the Constitution which inescapably lead to the conclusion. By analogy to a study of ancient documents, we may say that the whole of the discussion up to this point has been a sort of constitutional exegesis or hermeneutics. In order to ascertain the true scope and meaning of both the Rules of Decision Act and the Judiciary Article, we have relied entirely upon the evidence furnished by those two documents alone. In order to make the discussion complete and to support, if possible, the conclusion from every angle, an examination of other documents and a consideration of external evidence in support of the thesis become imperative. We therefore turn to a discussion of such evidence.

Having ascertained that the diversity of citizenship clause of the Judiciary Article renders the federal courts entirely independent of the state courts in such matters, we naturally inquire whether, in view of the delegated, limited nature of the national government and the sharp separation of the powers of the states and the federal government, there was any justification for this broad grant to the federal courts; whether the conferring of this independent power on the federal courts in state questions was conscious and deliberate or was perhaps

⁶⁰ See note 54, *supra* and notes 79, 86, 88, *infra*.

an oversight. If it were the latter, then despite the internal evidence furnished by both the Judiciary Act and the Judiciary Article we should perhaps be warranted in saying that the decision in the *Erie* case is in harmony with the *spirit* of the Constitution. Such a conclusion would perhaps be justified on the theory that the Constitution creates a government of purely delegated powers, that such delegated powers are intended to cover only matters of national concern, and that in the absence of an express or necessarily implied delegation of power applicable to the local affairs of a state all powers not expressly or impliedly delegated are reserved to the states. As has been pointed out, such a conclusion would ignore the fact that the Judiciary Article itself should be deemed an express grant, that the judiciary constitutes a third, coequal branch of the federal government and that delegations of authority to that branch are as proper as to the other two branches. Nevertheless, if such a delegation of authority in the Judiciary Article should prove to have been unintentional, the result of carelessness and palpably inconsistent with the theory and purpose of the Constitution, we should perhaps be warranted or even induced to disregard it. It is, therefore, of paramount importance to ascertain the purpose of the framers of the Constitution in inserting the diversity of citizenship clause into the Judiciary Article.

When the members of the Constitutional Convention came to the consideration of a judiciary to enforce the national laws, a sharp division of opinion was to be observed among them. The anti-nationalists could find no excuse for the creation of a separate system of courts. They felt that the national laws and the authority conferred by the Constitution would be amply safeguarded by the courts of the several states.⁶¹ They were willing

⁶¹ The various plans for a Constitution which were originally proposed to the Convention, except the Hamilton plan, dealt rather summarily with the judiciary. In all the plans except that proposed by Hamilton, the jurisdiction of the federal judiciary was either made appellate over the state courts or where the federal judiciary was given original jurisdiction it was limited to a very few specified matters, such as impeachment of national officers, collection of national revenues, punishment of piracies and felonies on the high seas, etc., and in general to matters affecting the national peace and harmony. See *Journal of The Debates, U. S. Constitutional Convention 1787* (ed. Hunt, Putnam 1908) (referred to as *Journal of Debates*) pp. 17 (Randolph plan), 29 (Pinckney plan), 136 (Report of Committee of Whole on Randolph plan), 141 (Paterson plan), 163

to permit review of the decisions of the state courts on questions of purely national concern by a single national tribunal, a supreme court, which might perhaps also be entrusted with a very limited original jurisdiction in such matters as impeachment. Members of the Convention who were of this frame of mind, of course, did not persuade the Convention, as our whole structure of federal courts testifies.

Opposed to this group of anti-nationalists were the moderates, men who were willing to compromise and embody in the Constitution the theory and practice of both federalism and nationalism, and the strong nationalists. These two groups prevailed, at least with respect to the judiciary, as the creation of federal courts manifests. On many matters, some essential and some of minor significance, they differed among themselves. But on perhaps three points they were agreed: 1. "An effective Judiciary establishment commensurate to the legislative authority was essential" to enforce the national laws and authority.⁶² 2. The courts of the states, although theoretically capable of serving this purpose, were utterly incompetent, untrustworthy and "The willing instruments of the wicked and arbitrary plans of their masters" (the state legislatures).⁶³ Incompetence,

(Hamilton plan). In commenting on the two principal and fundamentally different plans (Randolph and Paterson), Wilson said: "11. In one (Randolph) the jurisdiction of national tribunals to extend, etc. —; an appellate jurisdiction only allowed in the other (Paterson). 12. Here (Randolph) the jurisdiction is to extend to all cases affecting the National peace and harmony; there (Paterson) a few cases only are marked out" (Journal of Debates 147). Luther Martin opposed the creation of any inferior federal tribunals, because "they will create jealousies and oppositions in the State Tribunals, with the jurisdiction of which they will interfere" (Journal of Debates 389). Mr. Sherman "was willing to give the power to the Legislature (to appoint inferior tribunals) but wished them to make use of the State Tribunals whenever it could be done with safety to the general interest" (Journal of Debates 389).

⁶² Madison, Journal of Debates 82; Ghorum, *id.*, 389; The Federalist (Lodge ed.) No. LXXX, 497: ". . . every government ought to possess the means of executing its own provisions by its own authority"

⁶³ Madison: "Confidence cannot be put in the State Tribunals as guardians of the National authority and interests. In all the States these are more or less dependent on the Legislatures. In Georgia they are appointed annually by the Legislature. In Rhode Island the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislature who would be the willing instruments of the wicked and arbitrary plans of their masters" (Journal of Debates 373). Randolph: (observed) "that the Courts of the States cannot be trusted with the administration of the National laws" *id.* 389). Hamilton: "The Courts of neither of the

venality, instability and dependence on the whims and wickedness of their masters, the legislatures! The courts of the states did not elicit the respect of those members of the Convention who prevailed with respect to the judiciary. 3. But even if they had merited their respect, an inducement to create a national judiciary would still have presented itself in the fact that at this early stage of union and confederation, the policy of the states and nation was apt to be diametrically opposed.⁶⁴ The local policy, as it found expression in the courts of the states, would often clash with the policy of the nation; and it would, therefore, be improper to entrust the decision of questions of national concern to the state courts.

The first of these observations would alone have been sufficient to warrant the establishment of a federal judiciary. The repeated pronouncement of the other reasons discloses a

granting states could be expected to be unbiased. The laws may have even prejudged the question, and tied the courts down to decisions in favor of grants of the state to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government" (The Federalist, No. LXXX, Lodge ed., 498). See also argument of Hu Williamson, note 47, *supra*.

This distrust of the state courts, which must have continued in the first Congress, may account for the failure of the Rules of Decision Act to require the federal courts to follow the state law in equity cases. The distrust of the Convention was directed to the courts, that is, the judges of the states and not to the juries which decided questions of fact "in the trials at common law". It was probably believed by the Convention and the first Congress that a jury of twelve men, no matter how incompetent its individual members might be, would come to a correct conclusion on issues of fact. It only remained then for the judge to apply the law to a verdict thus reached; and a patently venal or erroneous judgment based upon such a verdict could be readily corrected. Hence, the federal courts could be charged with applying in a diversity case the decisions of the state courts in common law causes, where the state merely applied the law to an issue of fact correctly determined. But where the judge determined the issues of fact in an equity case, his venality and incompetence were apt not only to lead to an erroneous decree after the decision of the question of fact but were likewise apt to produce a thoroughly unsound decision on the disputed question of fact. As his decision on the facts carried considerable weight, Congress no doubt felt it was less likely to be corrected, on appeal, than an erroneous judgment would be on writ of error in a common law case. Hence, decisions of the state courts in equity cases were more distrusted than those in common law matters; and Congress may for this reason have left the federal courts free to use their independent judgment in deciding equity cases.

⁶⁴ See Luther Martin, note 61, *supra*; Hamilton, note 63, *supra*; Randolph: "The objects of jurisdiction are such as will often place the general and local policy at variance" (Journal of Debates 373).

deep-rooted distrust of the state courts; and this distrust and suspicion resulted in the Convention's entrusting to the federal courts through the Judiciary Article matters that do not superficially appear to be of national concern (e.g., controversies between citizens of different states, land grant controversies, controversies between a state and citizens of another state, etc.). The diversity of citizenship clause can be accounted for on this ground and on this alone.⁶⁵

The federalists and anti-nationalists, of course, contended that review of the state courts in such controversies by the Supreme Court or by a single federal appellate tribunal would answer all the objections of the nationalists to the entrusting of such causes to the state courts. But the prevailing temper of the Convention was too hostile to the state courts to permit of such a solution of the problem.

We have just said that the Judiciary Article extends the federal judicial power to many matters which appear to be of purely local concern. Actually, it is preferable to regard the matter in a different light. Either the Convention regarded these matters as of national concern and relating to the general welfare, or they in fact became matters of national concern and interest by being incorporated into and covered by the Judiciary Article.⁶⁶

The Convention no doubt reasoned that in diversity of citizenship cases involving purely local questions, it was essential that the non-resident should receive an impartial administration of justice and that he should obtain the decision of an unbiased tribunal competent to pass upon his case. But knowing the state tribunals as they thought they did, they regarded such an

⁶⁵ What is said of the diversity of citizenship clause is, for the most part, equally applicable to the other clauses in the Judiciary Article which bear no relation to delegated legislative or executive powers but relate solely to the powers of the judiciary. And what is true of those clauses is equally applicable to the diversity clause. As we are concerned, however, only with the *Erie* case and the diversity clause, our observations are confined largely to that clause. The point here made is that the diversity clause can be explained first, because the Convention deemed diversity jurisdiction a matter of national concern, second, because they mistrusted the state courts, and third, because they regarded it as impossible for local judges even when not venal and incompetent to be wholly impartial to non-residents.

⁶⁶ See, Art. V, Sec. 1 of Hamilton plan (Journal of Debates 171); Proposal of Madison with reference to 13th Resolution (*id.* 389); Remarks of Representative Nicholson in 7th Congress, note 75, *infra*.

objective as utterly unobtainable in the state courts. The state courts were incompetent and too venal to deal properly even with controversies between their own citizens. That, coupled with what was believed to be a vicious hostility of the states toward non-residents,⁶⁷ made it highly undesirable to put such non-residents at the mercy of the local courts. Of course, if the non-resident voluntarily submitted to the local jurisdiction, his interests ceased to be of national concern. But if he resisted the local jurisdiction, his case became a subject of the national concern and general welfare. The Convention felt bound to protect him both against incompetency and against local hostility to "foreigners".

Arguing against and logically destroying Hamilton's argument that the diversity of citizenship jurisdiction was essential to preserve the privileges and immunities of non-residents,⁶⁸ the federalists and anti-nationalists claimed that the problem could be solved by affording a federal review of the state court decisions. But the Convention desired soundness of decision in the first instance, no doubt to relieve the burden of such procedure on the federal reviewing court and no doubt likewise to guard against errors which could not be corrected on such review because of the nature of appellate review and its dependence upon the record made in the court of first instance. It cannot be too strongly emphasized that what the Convention sought was soundness of decision in the first instance. And it was for this reason that federal courts were created and for this reason that their judicial power was made to extend to matters that would otherwise seem of purely local concern.

Soundness of decision in the federal courts could be obtained only if they were liberated from all dependence on the state courts. This was, of course, taken for granted in cases involving federal questions, i.e., matters arising from the exercise of delegated powers. But it was also inherent in the grant of judicial power over controversies which became of national concern only because they were entrusted to the federal courts in the Judiciary Article. In other words, the federal courts in a diversity case could administer consummate justice only if they could dispose of the matter in accordance with their own under-

⁶⁷ See remarks of Luther Martin, note 61, *supra*; Hamilton, note 63, *supra*; Randolph, note 64, *supra*; Hu Williamson, note 47, *supra*.

⁶⁸ The Federalist, No. LXXX, 498.

standing of the applicable law and without deference to the decisions of state courts in similar matters. The state courts were not to be trusted with the decision of such questions even between their own citizens. They were venal, incompetent, subject to the whims of the legislature and subject to removal at the pleasure of the law makers. Surely they could not be entrusted with passing upon the interests of "foreigners". And in neither of the matters could their decisions serve as a guide to the federal courts in disposing of matters within the federal judicial power. The federal courts had to remain free, and unfettered by the errors and pitfalls in the decisions of the state courts. Independence of decision, i.e., full exercise of the judicial power, was thus the quintessence of the exercise of diversity jurisdiction by the federal courts.

The Convention was undoubtedly as aware as we are today of the nature of judicial action. Courts decide cases on the basis of precedent. If none exists at the time of decision, they create a precedent by that decision. This precedent is binding as to all future controversies which come within its tenor. If they have established a precedent in a controversy between their own citizens, it will govern a similar one subsequently arising between citizens of different states. Per contra, a precedent established in a diversity case will bind citizens of the same state subsequently presenting an analogous controversy. Even venal and incompetent courts and those subject to the pleasure of a wicked legislature act in this manner. Even a court that accepts bribes or is for other reasons moved to act not impartially will adhere to the principle of precedents but will find means of distinguishing them or distorting the facts in order to avoid their binding effect. Or, a court that is hostile to "foreigners" might simply overrule a precedent once settled in favor of its own citizens. And, when the question again arose between citizens of the same state, the court might overrule its overruling decision and return to the law established by the overruled decision. If such judicial maneuvering were apparent, the "privileges and immunities" clause would undoubtedly afford a remedy; and review by the Supreme Court would correct any injustice to "foreigners".

But, in numerous instances, because of the nature of appellate review and the inherent right of courts to overrule

and re-overrule their decisions,⁶⁹ there would be no remedy against such unjudicial action. Hence, the Convention did not deem it wise to commit the causes of non-residents to tribunals which they inherently distrusted unless the non-residents themselves should submit to their jurisdiction. And in conferring upon the federal courts judicial power over such controversies, the Convention naturally intended to free them of dependence upon the state courts whose decisions they regarded as inept, unsound and thoroughly untrustworthy. It should thus be clear that the Convention intended and deliberately provided in the Judiciary Article that in all matters therein entrusted to the federal judicial power the federal courts should exercise complete independence of decision and should dispose of all controversies within their jurisdiction in accordance with their own sense of justice and what they deemed to be the controlling principles of jurisprudence, unfettered by the decisions of any other tribunal or system of courts than their own ultimate reviewing tribunal. If there were any doubt at all about this, it would have to be resolved in favor of the thesis here advanced, in view of the contemporary and other evidence which we shall proceed to examine.

Paterson, as we have seen, was a strong anti-nationalist. He proposed a federal, strongly anti-national plan for a Constitution. Nevertheless, in the fifth Article or Resolution of his plan, he proposed that the federal "judiciary so established shall have authority to hear and determine . . . by way of appeal in the dernier resort . . . in all cases in which foreigners may be interested . . ."⁷⁰ Paterson undoubtedly realized that cases in which foreigners are interested might involve only local questions of state law. He was nevertheless willing to entrust such cases to ultimate disposition by the federal judiciary on appeal. It is inconceivable that he intended to bind the federal reviewing court on state questions in such appeals by the decision of the highest state court. If that were his intention, review by the federal court would be purposeless and of no avail. When he proposed review of the decisions of state court in matters involving foreigners, he intended that the "supreme tribunal" should have full power and authority not only to hear the appeal

⁶⁹ Cf. *Vandenbark v. Owens-Illinois Glass Co.*, U. S. Sup. Ct. No. 141, Oct. Term, 1940, Jan. 6, 1941.

⁷⁰ Journal of Debates, 1941.

but also to "determine" the governing substantive law, i.e., to establish the controlling legal principle to be applied. The clause in the Paterson plan relating to foreigners, if not the forerunner, is the equivalent or counterpart of the present clause extending the judicial power "(to controversies) between a state, or the citizens thereof, and foreign states, citizens or subjects".⁷¹

Hamilton entertained a like interest in litigation involving foreigners. In suggesting amendments to the Randolph plan, he proposed a clause similar to the one proposed by Paterson. "This court to have . . . an appellate jurisdiction in all causes in which . . . the Citizens of foreign Nations are concerned."⁷²

His own, more elaborate plan, which he proposed as a substitute for the several other plans tendered to the Convention, contained a substantially identical clause to that in the Paterson plan, and also a clause relating to diversity of citizenship cases. His language is: "The Supreme Court shall have . . . an appellate jurisdiction both as to law and fact in all cases which shall concern the citizens of foreign nations, in all questions between the citizens of different states, and in *all others* in which the *fundamental rights of this Constitution are involved*, subject to such exceptions as are herein contained and to such regulations as the Legislature shall provide" (italics supplied).⁷³

Hamilton thus proposed ultimate review of purely state questions in diversity cases by the Supreme Court, which in such matters must fix and settle the applicable law and could not be bound by the decision of the court which it was reviewing. And, in the clause containing the exception, he laid the foundation for the Rules of Decision Act. The Legislature was to be entrusted with power to restrict the review and thus to impose a limitation upon the exercise of the judicial power in such matters. The Legislature might, for example, provide that on all state questions the Supreme Court should regard the decisions of the state courts as "rules of decision".

Hamilton thus clearly regarded diversity cases and other matters wholly unrelated to delegated legislative powers as

⁷¹ For a discussion of this provision of Article III, see *Monaco v. Mississippi*, 292 U. S. 313 (1934); also see notes 38, 46, *supra*.

⁷² Journal of Debates 163.

⁷³ *id.*, 171.

involving fundamental constitutional, i.e., national, questions. Madison, and, in fact, the entire Convention were of the same opinion. They distinguished matters involving delegated legislative powers from other matters concerning the national welfare. Madison proposed: "that the jurisdiction (of the National Judiciary) shall extend to all cases arising under the national laws; and to such *other* questions as may involve the national peace and harmony".⁷⁴ This was agreed to by the Convention, "nem. con.", i.e., without dissent.

Representative Nicholson, a leading anti-federalist, fifteen years later expressed the same opinion. In the debate over the repeal of the Adams Circuit Court Act of 1801 he said: ". . . it was rightly judged that (the judicial power of the federal courts) should not extend to any other cases of judicial cognizance than those which might be deemed somewhat of a general nature and whose importance might affect the general character or general welfare of the nation".⁷⁵ He knew, of course, that the Judiciary Article contained a diversity of citizenship clause and other clauses having no relation to the national legislative power. Yet he considered these matters "somewhat of a general nature" and as affecting the general character or general welfare of the nation.

Naturally, if these matters were of national concern and of importance to the general welfare, in a constitutional sense they are within the unlimited judicial power of the federal courts; and those courts must, therefore, dispose of such causes in accordance with their own rules of law and without reliance upon the decisions of any other tribunal.

Both by the Judiciary Article and the First Article of the Constitution, Congress was given the power to ordain and establish courts inferior to the Supreme Court. The power to create a court necessarily implies the power to determine not only its rules of practice and procedure but likewise the substantive rules of law that are to shape its decisions.⁷⁶ The parallel existence of two or more courts or judiciaries necessarily assumes the existence of two or more systems of jurisprudence which those courts *may* adopt and incorporate into their

⁷⁴ *id.*, 389.

⁷⁵ 7th Cong., 1st Sess., Feb. 26, 1802; see Warren 37 Harv. L. Rev. 49, 53.

⁷⁶ See following discussion.

decisions.⁷⁷ The creation of equity, admiralty and probate courts in England, side by side with the common law courts, not only automatically removed the matters dealt with by such courts from the jurisdiction of the common law courts, but also rendered inapplicable to them the principles of the common law which were enforceable in the common law courts.⁷⁸ Similarly, the existence, side by side, of federal and state courts necessarily implies the existence of two systems of jurisprudence that may be adopted and enforced in these respective courts. This would seem inevitably so if the Supreme Court had not, without any argument or citation of authority, declared the contrary. But undoubtedly the framers of the Constitution, their contemporaries and the early expounders of the Constitution were in a better position to interpret the Constitution than these latter day jurists.

Winthrop, for example, in his "Letters of Agrippa" says:⁷⁹

⁷⁷ What is meant is that each system of courts would develop its own jurisprudence. Thus, in dealing with a case between A and B, the court of a state may decide that $x = y$. That is the jurisprudence of the state. The federal court in dealing with an identical controversy might decide either that $x = y$ or that $x = z$. Either decision would be the jurisprudence of the federal court. Its agreement with the court of the state would be incidental or accidental rather than under any compulsion of statute or inherent limitation in the federal judicial power. Courts functioning in this manner are truly coordinate courts and not parts of an integrated system of courts. See *Vandenbark v. Owens-Illinois Glass Co.*, 110 F. (2d) 310 (C. C. A. 6th, 1940), rev'd. U. S. Sup. Ct. No. 141, Oct. Term 1940, Jan. 6, 1941.

⁷⁸ In this country, at least during the period of the Confederation and for a time even after the adoption of the Constitution, the situation was extremely confused. Some states had common law, chancery, probate and admiralty courts. Others had only some of these, for example, common law and chancery or common law and probate. In still others, there was only a single common law court which dealt with common law, equity, admiralty and probate matters. What law was applied it is difficult to determine with absolute certainty. But it is certain that when the subject matter of what we understand to be a particular jurisdiction, such as probate or admiralty, was disposed of by the court of another jurisdiction, such as common law or chancery, the practice and procedure and, it is fair to say, the substantive law of the latter court governed. Thus in New Jersey, admiralty and probate causes were triable by jury. In Georgia, all causes were triable by jury and were appealable from the general jury to a special jury. In Connecticut, chancery and admiralty matters were triable by jury. In general, see *The Federalist*, No. LXXXIII (Lodge ed.) 524-526. After the adoption of the Constitution the Pennsylvania common law courts (there were no equity courts) enforced equitable remedies but generally applied the principles of the common law. See *Sims v. Irvine*, 3 Dall. 425 (1799).

⁷⁹ *Massachusetts Gazette*, Dec. 11, 14, 1787; see Warren, *op. cit.* 37 *Harv. L. Rev.* 49, 84.

“Causes of all kinds between citizens of different states are to be tried before the Continental Court. The court is not bound to try it according to the local laws where the controversies happen; for in that case it may as well be tried in the state court. The rule which is to govern the new courts must therefore be made by the court itself, or by its employees, the Congress. . . . Congress, therefore, have the right to make rules for trying all kinds of questions relating to property between citizens of different states. . . . The right to appoint such courts necessarily involves in it the right to defining their powers and determining the rules by which their judgment shall be regulated. . . . It is vain to tell us that a maxim of common law required contracts to be determined by the law existing where the contract was made; for it is also a maxim that the legislature has the right to alter the common law.”

Winthrop thus not only thought that federal courts under the Constitution had the power to apply a different law in diversity cases from that enforced in the state courts; but he also believed they would and should exercise this power.

No less enlightening are the remarks of Representative Nicholas of Virginia in opposing a proposed change in the Circuit Court Act of 1801.⁸⁰ “ ‘He stated that the estate of Lord Fairfax, with the quit rents due thereon, had been confiscated . . . ; notwithstanding the confiscation, the heirs of Lord Fairfax had sold all their rights, which the assignees contended remained unimpaired. It might be their wish to prosecute in a Federal Court, expecting to gain advantages in it which could not be had from the courts of Virginia. His object was to defeat the purpose by limiting the jurisdiction of the Circuit Court to sums beyond the amount of quit rents alleged to be due by any individual.’ ”

This purpose of Representative Nicholas to employ the courts in behalf of or against a particular individual or group may not be consonant with our understanding of and reverence for the judiciary. But it discloses beyond all peradventure that he believed the federal courts possessed the power and would, in fact, apply a different rule of law than that obtaining in the state courts. And these remarks were made twelve years after the enactment of the Rules of Decision Act! The fact

⁸⁰ 6th Cong., 2nd Sess., Jan. 7, 1801; see Warren, *op. cit.* 78.

that his views prevailed indicates that they must have had some influence on the sixth Congress.

Mr. Hu Williamson, one of the signers of the Constitution, favored the diversity jurisdiction under the Third Article because it gave a superior remedy against iniquitous and unconstitutional state paper money, legal tender and stay laws. "Is it not better", he said,⁸¹ "to have a Court of Appeals in which the judges can only be determined by the laws of the nation?" And then he says: "This court is equally to be desired by citizens of different states." Why? The answer is found in his first statement: because the federal court will apply its own law, the law of the nation.

Mr. Justice Paterson was an anti-nationalist. In the convention, he wanted to limit the jurisdiction of the federal courts more than was proposed in the Randolph plan.⁸² Nevertheless, when on the bench in 1796, i.e., seven years after the enactment of the Rules of Decision Act, he said during the course of an argument, when it was urged that Section 34 of the Judiciary Act required the federal court to apply the law of Rhode Island: "I shall certainly consider myself bound in some cases by the practice of the state courts."⁸³ Apparently he did not feel bound to follow the state practice in *all* cases.

At the same argument, Mr. Justice Chase refused to consider the common law of the state as binding upon the federal court. He said: "I shall be governed in forming my opinion by what the common law says must be the effect of a judgment by default; without regarding the practice of the state. If indeed the practice of the several states were in every case to be adopted, we should be involved in an endless labyrinth of false constructions, and idle forms."⁸⁴

In the same case, the defendant in error was represented by Mr. Mifflin, a signer of the Constitution from Pennsylvania, which, it should be remembered, had proposed a plan which would have required the federal courts to follow the state courts both in substance and practice.⁸⁵ At the argument, he and his co-counsel assumed and apparently entertained no doubt that

⁸¹ Warren, *op. cit.* 82, ftn. 78; see note 47, *supra*.

⁸² Journal of Debates 121, 136, 141, 147; see note 31, *supra*.

⁸³ Brown v. Van Braam, 3 Dall. 343, 346, ftn. 1 (1796). He referred not only to procedure but also to substantive law.

⁸⁴ *id.*

⁸⁵ The Federalist, No. LXXXIII (Lodge ed.) 528.

Congress had power to project its own system of jurisprudence in contradistinction to that of the several states.⁸⁶ They contended for the application of the Rules of Decision Act to common law questions solely as a matter of convenience and to avoid the discontent and perplexity that a novel system of jurisprudence might have engendered. They assumed that the Rules of Decision Act was a limitation on the Judiciary Article and they regarded it as salutary and expedient. They apparently regarded it as a restriction on the federal judicial power because of legislative fiat and not because of any inherent limitation in the constitutional grant of power.⁸⁷

Half a century later, the case of *Swift v. Tyson*, now relegated to the limbo of antiquarian curiosities, was decided. The Court, of course, as their decision reveals, entertained no doubt of the *power* of the courts under the Judiciary Article to enforce a federal system of jurisprudence and decline to follow the law of the states. They may have erred in the construction of the Rules of Decision Act as not applying to the common law of a state, and the Court in the *Erie* case has so held. But their assumption and exercise of an independent judicial power is significant.

Even more significant is the argument of Mr. Dana, unsuccessful counsel, in that case. He urged upon the Court the construction of the Rules of Decision Act which was adopted by the Court in the *Erie* case. But he regarded it as a limitation on the Judiciary Article rather than as declaratory thereof.

⁸⁶ "But, on the other hand, it is obvious that any project for a general system of jurisprudence; coextensive with the union, could only have engendered discontent, and must have been abortive. To have attempted a theory of law and practice entirely novel, would have occasioned endless perplexity; and to have superceded (sic) the settled practice of some states, in order to introduce the practice of others; to compel, for instance, the lawyers of Massachusetts to study and enforce the practice of the lawyers of South Carolina, would have occasioned endless jealousy and inconvenience. From these considerations the Congress wisely enacted" the Rules of Decision Act. 3 Dall. at 352.

⁸⁷ In a brief per curiam opinion, the Court affirmed the Circuit Court because of the construction given to the laws of Rhode Island by the courts of that state. Mr. Justice Chase, however, "observed that he concurred in the opinion of the Court; but that it was on common law principles, and not in compliance with the laws and practice of the state." 3 Dall. at 356, fn. 2. Query: Can Mr. Justice Chase at that early date have been so dead wrong or so utterly disregarding of Congressional legislation as to the compulsion of the Rules of Decision Act in common law matters?

He said: "To have attempted to create a code of laws by legislative enactment would have been without present avail to the courts; and even with the aid of future experience and after years of labor could not be expected to be perfect."⁸⁸ He thus was certain that Congress had the power to create such a code of laws. But he pointed out that Congress had preferred the course required by the Rules of Decision Act because of its expediency and the cumbersomeness and difficulty of creating and expounding a separate system of law for the federal courts.

Two of the bitterest opponents of the Constitution and the Judiciary Article were Elbridge Gerry and Richard Henry Lee. Both refused to sign the Constitution. Both were leading protagonists of the preservation of complete state sovereignty. Gerry regarded the judiciary provisions of the Constitution as the keystone to the national plan which the Constitution embodied. Lee led the crusade for amending the Constitution after its adoption. He utterly disliked and feared the judiciary provisions. What these two men had to say about Article III is, therefore, of extreme importance, by way of comparison with what we have seen was the consensus among the moderates and the ardent supporters of the Constitution as it now stands.

Gerry said:⁸⁹ "My principle objections to the plan are . . . that the judicial department will be oppressive. There are no well-defined limits of the judiciary powers, they seem to be left as a boundless ocean. It would be a Herculean labor to attempt to describe the dangers with which they are replete." One naturally asks, what dangers, why will the judiciary be oppressive? Because it was bound to and, in fact, was devised for the purpose of encroaching on the jurisdiction and exercise of judicial power by the state courts. It would take matters into its own hands and dispose of them differently than the mistrusted state courts.

In speaking of the Judiciary Act of 1789, Lee wrote:⁹⁰ "So far as this has gone, I am satisfied to see a spirit prevailing that promises to send this system out, free from those vexations

⁸⁸ 16 Pet. at 10.

⁸⁹ Warren, *op. cit.* 54-55; see note 90, *infra*.

⁹⁰ 2 The Letters of Richard Henry Lee, May 28, 1789 (to Patrick Henry); Warren, *op. cit.* 62-63. In accord with Lee's view that the Judiciary Act was a limitation on the Judiciary Article and did not permit the federal courts to occupy the entire field opened to them by the Constitution, see notes 19 and 25, *supra*.

and abuses that might have been warranted by the terms of the Constitution; . . . it must never be forgotten, however, that the liberties of the people are not so safe under the gracious manner of government as by the limitation of power." What could be clearer than this statement? The Judiciary Act curbed the powers of the federal courts which were inherent in the Judiciary Article. The former was a limitation, the latter an extensive grant, "as a boundless ocean". The Judiciary Act, including of course the Rules of Decision section, placated Lee and served as a substitute for the Constitutional Amendments which he sought to have Congress adopt. But he would have preferred an amendment of the Judiciary Article. Only in that way could the powers of the federal courts be effectively curbed. The limitation on their power should be made a part of the grant creating them. The Judiciary Act as an Act of Congress was merely a "gracious manner of government" and could be repealed at any time.

Perhaps the most convincing evidence of the thesis advanced in this paper is furnished by Hamilton. In the plan which he proposed for a Constitution, as an alternative to the plans of Randolph and Paterson, he sought to analogize the judicial process in the federal courts to that in the state courts by providing that "all civil causes . . . which have been heretofore triable by jury in the respective States, shall in like manner be tried by jury (in the federal courts)".⁹¹ For the nationalist that Hamilton was known to be, this appears to have been a large concession to the advocates of complete state sovereignty. It was, of course, not a complete surrender of the judicial or any other federal power to the states; but it was a deliberate effort to have the federal courts proceed identically with the state courts in the very important matter of jury trial,⁹² which almost convulsed the Convention and continued

⁹¹ Journal of Debates 171.

⁹² Jury trial was a question of substance, than which no more important one convulsed the Convention and later critics of the Constitution. To A and B, whether citizens or non-residents of State X, it was far more important that they should have the same right of jury trial in the federal court sitting in X as in the state courts of X than it was that the federal court should apply to their legal rights the same contract, tort or property law as the courts of X. See long discussion of this in *The Federalist*, No. LXXXIII, *passim*. And yet the Constitution did not guarantee this right of jury trial! See *The Federalist*, No. LXXXIII, 526-528.

to be a bone of contention after the adoption of the Constitution. Hamilton's plan was not accepted by the Convention, and even his gesture to the states in the matter of jury trial was not taken up. What he has to say about the relation of federal and state courts after the adoption of the Constitution is, therefore, of prime importance.

In the *Federalist*, he advocated the adoption of the Constitution, and explained and defended its various provisions. In No. LXXXIII, he says:⁹³ "This alone demonstrates the impolicy of inserting a fundamental provision in the Constitution which would make the state systems a standard for the national government in the article under consideration, and the danger of encumbering the government with any constitutional provisions, the propriety of which is not indisputable." In other words, the Constitution itself did not contain the essence of the Rules of Decision Act which the Supreme Court in the *Erie* case has declared that it did contain!

In the same essay on the succeeding page, he again says: "These appeared to be conclusive reasons against incorporating the systems of all the states, in the formation of the national judiciary, according to what may be conjectured to have been the attempt of the Pennsylvania minority."⁹⁴ The Rules of Decision Act is, therefore, not inherent in the Judiciary Article. It is the culmination of the efforts of the Pennsylvania minority!

Again in the same essay, speaking of the argument made by some, that trials in the federal courts should be the same as in the state courts with respect to trial by jury, Hamilton says:⁹⁵ "I presume it (i.e. this argument) to be, that causes in the federal courts should be tried by jury, if, in the State where the courts sat, that mode of trial would obtain in a similar case in the state courts; that is to say, admiralty causes should be tried in Connecticut by a jury, in New York without one. The capricious operation of so dissimilar a method of trial in the same case, under the same government, is of itself sufficient to indispose every well-regulated judgment towards it. Whether the cause should be tried with or without a jury, would depend in a great number of cases, on the accidental situation of the court and parties." And Hamilton no doubt thought and

⁹³ Lodge ed., 527.

⁹⁴ *id.*, 528.

⁹⁵ The *Federalist*, No. LXXXIII (Lodge ed.) 526.

probably would have said, if the possibility had occurred to him: "Whether the cause should be decided by the law of A or B or by the principles of the common law as understood and enforced by the federal courts cannot be made to depend upon the fortuitous place where the court sits. The capricious operation of so dissimilar a judicial process in the same cases, under the same government, is of itself sufficient to indispose every well-regulated judgment towards it."

Speaking of the grant to Congress of the power to institute inferior federal courts, he uses language that bears an unmistakable resemblance to that employed by Mr. Winthrop.⁹⁶ "A power to constitute courts is a power to prescribe the mode of trial."⁹⁷ And he might have added, if he had not deemed it clear beyond all peradventure: "and likewise the power to determine the rule which is to govern such courts and the right to define their powers and establish the rules by which their judgment shall be regulated."⁹⁸

Speaking of diversity of citizenship and certain other cases covered by the Judiciary Article, he says: "The *power of determining* causes . . . between the citizens of different states, is . . . essential to the peace of the Union . . ." (italics supplied).⁹⁹

When it is borne in mind that Hamilton's purpose in the *Federalist* was to "sell" the Constitution to those who were chary of the encroachment of the national government on the sovereignty of the states, his frank and repeated assumption of the independence of the federal judiciary in all matters entrusted to its judicial power is highly significant. To an impartial student of language, unfettered by a vast accumulation of judicial lore and sceptical of specious arguments, whether based upon the provisions of the Constitution or anything else, Hamilton's words furnish convincing proof that the federal judiciary is endowed with complete independence of decision in all matters which come within the scope of its judicial power.

⁹⁶ See note 79, *supra*, and text *ad loc.*

⁹⁷ The *Federalist*, No. LXXXIII (Lodge ed.) 518.

⁹⁸ Language to this effect was used by Winthrop. See note 79, *supra*.

⁹⁹ The *Federalist*, No. LXXX (Lodge ed.) 496. Hamilton does not speak of the power of determining causes in accordance with principles laid down by other courts. The thought never occurred to him and would have been swiftly repudiated if it had.

In the same way that we have set forth the statements and comments of the more distinguished members of the Convention and contemporary and later jurists and constitutional lawyers, we might cite innumerable other opinions which accord with those herein cited. But that would extend to unreasonable limits a paper which has already gone beyond the extent originally intended. Suffice it to say that the statements and opinions of contemporaries, federalists and non-federalists, nationalists and anti-nationalists, and others who were in a position to know and should have apprehended the scope and significance of the federal judicial power all lead inescapably to the following conclusions:

1. The Judiciary Article invests the federal courts with complete independence of decision in all causes to which the federal judicial power is made to extend, whether those causes *now* be deemed matters of national or only local concern. In determining and disposing of such causes, the federal courts are an end unto themselves and need neither consult nor defer to the decisions of any other tribunal or judicial system.

2. The Rules of Decision Act is a limitation and curb on the extensive judicial power of the courts under Article III. It is a legislative exercise of the power inherent in the grant to constitute inferior courts. As the will of the legislature, it may be either repealed, or expanded or contracted; that is, the limitation on the power of the courts may be extended, restricted or entirely removed. As a question of policy, it is of no concern to the judiciary, which must simply enforce it as properly construed.

3. Both under the Judiciary Article, section 2(1), as well as section 1, and under the grant to Congress of the power to "constitute Tribunals inferior to the Supreme Court", Congress has undoubted power not only to repeal the Rules of Decision Act, but likewise to "create a code of laws"¹⁰⁰ and "project a general system of jurisprudence, coextensive with union"¹⁰¹ and, in general, to establish the "rule which is to govern the (federal) courts"¹⁰² and to define "their powers and (determine) the rules by which their judgment shall be regulated".¹⁰³

¹⁰⁰ See note 88, *supra*.

¹⁰¹ See note 86, *supra*.

¹⁰² See note 79, *supra*.

¹⁰³ *id.*

4. The majority opinion in the *Erie* case as a constitutional decision, being out of harmony with these conclusions, is judicial legislation—is constitutional amendment by decision.

CONCLUSION

Constitutional amendment by decision is not an unfamiliar occurrence in the unfolding of our judicial process.¹⁰⁴ It may be wise or unwise. It may even be an usurpation of power by the judiciary. The important thing is that it should be recognized when it occurs. If unwise, it can then be corrected.

Without passing judgment on the wisdom of the particular amendment by decision in the *Erie* case, it is well to consider what the decision should have been in the absence of such an exercise (or, should we say, usurpation?) of the judicial power.

Mr. Justice Butler pointed out in the *Erie* case¹⁰⁵ that the discoveries and conclusions of Mr. Charles Warren, which formed the basis of that decision had not been argued and that their soundness could not simply be assumed, whether as a matter of statutory interpretation or as a question of constitutional law. It may, for example, be that, in amending the draft of the Rules of Decision section and in eliminating the provision "their unwritten or common law . . ." and in enacting the section as it now stands, Congress *intended* to make the section inapplicable to the common law decisions of the state courts.¹⁰⁶ Certainly that was the way Mr. Justice Chase con-

¹⁰⁴ See Sieveking, *Die doppelte Gerichtsbarkeit in den Vereinigten Staaten* (1935), and book note ad id. 49 Harv. L. Rev. 1222.

¹⁰⁵ See his dissenting opinion.

¹⁰⁶ Mr. Warren (37 Harv. L. Rev. 49, 88) relied principally upon three sources for his conclusion that the amendment of the draft of Section 34 was not intended to alter its sense but merely to condense its statement. The first was a report of Attorney General Randolph to Congress, in which he used the term "laws" as covering both statutory and common law. The statement had no reference to Section 34 and of course merely indicates how Randolph used or understood a particular term. The second was the Van Braam case, to which reference has already been made (see notes 83, 86, *supra*). Counsel on both sides were agreed in that case that the law of Rhode Island should be applied under Section 34. Their sole dispute was as to the effect of the Rhode Island law. Their arguments, therefore, can hardly be considered more than persuasive and as indicating what they understood by Section 34. Moreover, they urged that Section 34 should move the Court to apply the local law. They did not take the position that Section 34 required that result. The Court, in a very brief opinion, affirmed the judgment because of the "laws, and the practical construction of the courts of Rhode Island." The Court

strued it.¹⁰⁷ And Mr. Justice Paterson, though regarding it as binding "in some cases" curiously did not apparently regard it as binding in all common law matters.¹⁰⁸ And the whole court, in *Swift v. Tyson*, after a deliberate and thorough consideration of the question, expressly held that it was inapplicable to the common law or law merchant question then before the court. Surely they were in a better position to pass upon the scope and extent of the judicial power than jurists of 1938.

Moreover, the court in the *Erie* case expressly recognized that their decision could not stand on statutory grounds. Congress had clearly acquiesced in the construction given to the Rules of Decision Act to exclude local common law matters for well nigh a century, and had during that time re-enacted it as so construed into the Revised Statutes. Perhaps, this latter day Congress agreed with the court in *Swift v. Tyson* and all its corollaries and if called upon today to legislate upon the matter would enact a statute identical with the Act as construed for a century or more.

As the Court pointed out in *Swift v. Tyson*, the instability of common law decisions of the state courts, the fact that they could be and frequently were overruled, argues strongly against the duty of the federal courts to follow them in the absence of a clear mandate of Congress to that effect. And above all, the very nature of common law decisions "indisposes the well regulated judgment" to assume that Congress has imposed such a mandate upon the federal courts, especially in view of Con-

obviously did not feel compelled to follow the local law. They did so because it was expedient, simpler, and the wiser course, that is, out of comity. At least, their opinion is open to that construction. And Mr. Justice Chase concurred only in the judgment and refused to concur on that ground. And Mr. Justice Paterson apparently did not feel bound to concur on that ground (see note 83, *supra*). The third authority relied upon was *Sims v. Irvine*, 3 Dall. 425 (1799). The question in that case, however, was not so much whether the federal courts should follow a local rule of substantive law but whether they should apply in the law courts a remedy which was considered peculiar to equity. There was no question of giving the plaintiff a remedy which he could obtain only in Pennsylvania. The question was whether he should obtain that remedy on the equity or law side of the federal court. And the Court held that the federal courts in Pennsylvania should give a remedy at law, because that was the only remedy obtainable in the Pennsylvania courts; and it had there "become an established legal right."

¹⁰⁷ See note 87, *supra*.

¹⁰⁸ See note 83, *supra*.

gress's acquiescence in the course of decision since *Swift v. Tyson*.

According to the Blackstonian Theory, judicial decisions are declaratory in nature. They do not make law. They discover the law as it has always existed. If that is the case, then certainly federal courts, with the assistance of able counsel, can and should be permitted to discover and decide that law as well as the state courts. They are less subject to the whims and shifts of public opinion in the state, to which the local judges often succumb. And even if the state courts are no longer subject to the will of their wicked masters, the legislature, the tenure of office is short; and it is no secret and has not been deemed a discredit to them that they often keep their eyes riveted on the next election. Surely nothing could more seriously impair the soundness of their decisions than this uncertainty of continuity on the bench.

But the declaratory theory of judicial decision has been questioned. Surely it received a terrific assault in the *Erie* decision. It has been observed that courts often do not merely discover the law. They frequently make the law, that is, they legislate. Even those who are responsible for this observation do not attempt to justify it. They state it as an empirical fact. They do not say that courts should legislate. They merely recognize that they do legislate. This is as much of an usurpation of power by the courts as assumption of jurisdiction would be where none exists. The federal courts of course will not recognize or follow an erroneous assumption or mistaken exercise of jurisdiction by the state courts where none exists. Why, then, should they defer to an usurpation of legislative functions by the state courts, if judicial decision is in fact legislative? The answer naturally is, that whether or not they should as a matter of policy, Congress has not clearly imposed upon them a mandate to do so.

Regardless, therefore, of the angle from which we approach the subject, whether from the standpoint of the Rules of Decision Act or the Judiciary Article, whether in the light of contemporary and propinquitous expositions of the Constitution or from the nature and theory of judicial decision, the whole doctrine of the *Erie* case is unsound and collapses under impartial scrutiny.

That, however, does not mean that the *result* reached in the *Erie* case is unwarranted, improper or cannot stand. For the Supreme Court, as the ultimate reviewing tribunal, exercising the complete independence of decision which we have seen the entire federal judiciary possesses under the Constitution, may well direct the lower federal courts in diversity matters to defer to decisions of the state tribunals.¹⁰⁹ This has been the course of decision in equity cases even before the *Erie* case plunged into the constitutional question.¹¹⁰ And it may perhaps be deemed as much an exercise of the independent judicial power of the federal courts as decision directly in conflict with the state decisions would be.¹¹¹ But, if the federal courts adopted such a course, it would be as a matter of comity or independent appraisal and decision rather than by reason of any non-existent constitutional or statutory compulsion.

¹⁰⁹ Or, better, the Supreme Court, in determining the rules of law to be applied in decisions which it reviews might simply arrive at a conclusion which accords with the decisions of the particular state. Thus, in State A where the law was that $x = y$, the Supreme Court, having open to it that or any other conclusion, might decide to follow the decisions of the courts of A rather than those of some other states where $x = z$. This would, of course, establish the uniformity of decision in the federal system, which was the object of *Swift v. Tyson*, but it would nullify the object of the *Erie* case, which is to establish uniformity of decision in each jurisdiction. There is this to be said against the latter view and in favor of the former, that the Judiciary Article certainly contemplates complete independence and uniformity of decision in the federal courts, and that if the *Erie* case is unsound on both constitutional and statutory (the Court was at least uncertain) grounds, we are remitted squarely to the provisions of the Constitution for a guide as to the power and operation of the federal courts.

A subsequent article will be devoted to a consideration of the various extensions of the *Erie* case since its decision. Although, as observed in the text, the result of the *Erie* case can be justified, the extensions of its doctrine cannot be regarded so sympathetically.

¹¹⁰ See note 23, *supra*.

¹¹¹ See note 77, *supra*.