THE COMMON LAW
AND
OUR FEDERAL JURISPRUDENCE
(Continued.)

II

Although the federal courts derive no "jurisdiction in criminal matters *from* the common law," they clearly have what has been expressed as "jurisdiction *of* the common law," [58] to give effect to the powers conferred by statute; and since many of the crimes defined by federal statutes are those which had a definite meaning in English common law, and in the common law of the colonies at the time of the adoption of the Constitution, the principles obtained from these sources constitute an indispensable guide to federal judges in administering criminal jurisdiction. Otherwise, it would sometimes be impossible to determine the character of the offenses which have been declared criminal by statute; for, in most cases, federal statutes defining wrongs as criminal do so only in general terms, or simply by title,[59] and the ingredients which constitute the offenses with which they deal must be ascertained by resorting to the English and the state common-law systems; accordingly, the common-law principles thus derived become the ultimate arbiter of the statutory offenses in question,[60] and the federal courts, in interpreting the Constitution, treaties and statutes in the light of the common law, exercise only the ordinary judicial prerogative of resorting to the sources which will most effectively aid them in carrying out their powers.

The same principle applies to the interpretation of criminal matters dealt with in the Constitution itself; for, in the words of Mr. Justice Mathews:

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[58] DUPONCEAU, JURISDICTION, *supra*, 20; KENT'S COMMENTARIES, I, 339.

[59] WHARTON, CRIMINAL LAW (11th ed. 1912), I, §§ 296-7; CONKLING'S JURISDICTION, 82-83; U. S. v. Coolidge, 1 Gallison 488, 491, Fed. Cas. No. 14,857 (C. C. 1815), per Story, *J.*

[60] WHARTON, *ibid.*

> "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are formed in the language of the English common law and are to be read in the light of its history."

To this, he added the following significant observation, which gives voice to the controlling thought of our present thesis; he said:

> "The code of constitutional and statutory construction which is gradually formed by judgments of this court in the application of the Constitution, and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, *and constitutes a common law resting on national authority.*" [61]

While this observation was made in the course of the exercise of a particular jurisdiction, it will be shown, as we proceed with our considerations, that the thought involved has general application.

Mr. Justice Brown, speaking along the same general lines, for the Supreme Court of the United States, once said:

> "We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guarantees of the rights of the citizens, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of the Magna Charta." [62]

Hence, when the Constitution expressly provides that "no bill of attainder or ex post facto law shall be passed," [63] the courts must necessarily determine the recognized meaning these terms conveyed at the time the Constitution was ratified; or, in other words, their common-law meaning.

For another example of the same sort of construction, when the fifth amendment guarantees that "No person shall be held

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[61] Smith v. Alabama, 124 U. S. 465, 478-9 (1888).
[62] Mattox v. U. S., 156 U. S. 237, 243 (1894).
[63] Article I, § 9.

to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury," the question as to what is an infamous crime becomes an important matter of interpretation, and the federal Supreme Court has said that it "could not accede to the proposition, sometimes maintained, that no crime is 'infamous' within the meaning of the fifth amendment that has not been so declared by Congress"; and, further, in effect, that we must resort to the common law for the meaning of this term.[64]

In *Schick v. United States*,[65] the federal Supreme Court again declared that the national Constitution "must be read in the light of the common law," and, when so viewed, it was quite plain that our fundamental law did not forbid a waiver of trial by jury for a minor offense.

In still another case, the Supreme Court, said, the guarantee of trial by jury "implies, not merely that the form of a jury trial be preserved, but also all its substantial elements"; and, in discussing what such elements are, the court went on to say: "Now unanimity was required of trial by jury at the common law . . . , and . . . a statute which destroys this substantial and essential feature is one abridging the right." [66] Here, again, as you see, resort is had to the general principles of the English common law, as necessary to constitutional construction.

There is, perhaps, no one thing more precious to the individual in the protection of his liberties than the writ of habeas corpus; yet the only reference to it in the Constitution is contained in article I, section 9, sub-section 2, which provides that "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." If nothing further had been stated than is

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[64] *Ex parte* Wilson, 114 U. S. 417, 422, 426 (1884).

[65] 195 U. S. 65, 67-69 (1904).

[66] Mr. Justice Brewer in American Pub. Co. v. Fisher, 166 U. S. 464, 467 (1896); Walker v. So. Pacific R. R., 165 U. S. 593 (1896).

"Trial by jury in the primary and usual sense of the term at common law and in the American constitutions is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them upon the law and to advise them upon the facts." Gray, *J.*, in Capital Tract. Co. v. Hof, 174 U. S. 1, 13 (1898).

contained in this provision of the Constitution, or in the Judiciary Act of 1789,[67] which authorizes the courts of the United States and the judges thereof to issue the writ, the privilege thus conferred would, in the words of Story, "be a mere dead letter for its most important purposes," since, again quoting from Story, "It is only by engrafting on the authority of the statutes the doctrine of the common law that this writ is made the great bulwark of the citizen against the oppressions of the government." [68]

Similarly, it is necessary to interpret through the common law the extent of the pardoning power of the President. Article II, section 2, of the Constitution provides: "The President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." The language here employed as to the power of pardoning must be construed by resorting to instances of the exercise of that power in England prior to the Revolution, and in America prior to the adoption of the Constitution. As the Supreme Court has stated: [69]

> "It was with the fullest knowledge of the law upon the subject of pardons and of the philosophy of government in its bearing upon the Constitution when [we] instructed Chief Justice Marshall to say,[70] 'as the power has been exercised from time immemorial by the executive of that nation whose language is our language and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.'"

Then the court added:

> "We still think so, and that the language used in the Constitution conferring the power to grant reprieves and

[67] 1 Stat. at L. 81, ch. 20, § 14.

[68] Story, *J.*, U. S. v. Coolidge, 1 Gallison 488, Fed. Cas. No. 14,857 (C. C. 1815). Since the first Act of 1789, six statutes have been passed dealing with the granting of the writ. However, none was passed until 1833.

[69] *Ex parte* Wells, 18 Howard 307, 310-11 (U. S. 1855).

[70] U. S. v. Wilson, 7 Peters 150, 160 (U. S. 1833).

pardons must be construed with reference to its [common-law] meaning at the time of its adoption." [71]

All the foregoing instances, in which it was necessary to resort for purposes of interpretation [72] to the English common law, are important as showing that there is, as Mr. Justice Mathews said, "a common law of interpretation resting on national authority." [73] We must remember, though, that, in the cases under discussion, the common law was not used as a means of extending jurisdiction, or of enlarging substantive rights and duties, but only as a means of understanding and properly administering rights already created by the Constitution or by federal statute. This so-called "common law of interpretation" is, however, a form of unwritten law, and therefore may be considered as part of the federal common law, designated as "a common law resting on national authority"; this is so, even on the criminal side of federal jurisprudence, which, in the main, up to the present, we have been considering. Now let us turn to the subject of federal civil jurisdiction.[74]

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[71] See an interesting modern exposition of this subject by Taft, *C.J.*, in U. S. v. Grossman, U. S. Adv. Reports, March 2, 1925, 45 Sup. Ct. 332.

[72] It is interesting to note among these cases of interpretation the question of impeachment. By Article II, § 4, "The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of Treason, Bribery, or other high crimes and misdemeanors." While this is a question not for the courts, but for the Senate, it illustrates the importance of the common law as a necessary guide in interpreting the Constitution. Treason is defined in the Constitution itself; for the definition of bribery, resort must be had to the common law. What are and what are not high crimes and misdemeanors is to be ascertained by recourse to the same system of jurisprudence. See STORY, CONSTITUTION, I, §§ 796-800; BURDICK, LAW OF THE AMERICAN CONSTITUTION, 87; RAWLE, CONSTITUTION (2d ed. 1829), 273.

[73] Smith v. Alabama, *supra*.

[74] Mr. Duer, "a contemporary admirer of Madison," and a commentator on the Constitution, said in writing of the common law in the Federal courts, "It has been a subject of much discussion whether the United States, in their national capacity, have actually adopted the common law, and to what extent, if at all, it may be considered a part of national jurisprudence. . . . The general question as to the application and influence of the system in reference to our national institutions, has not been settled upon clear and definite principles, and may still be regarded, especially in *civil* cases, as open for further investigation." DUER'S CONSTITUTIONAL JURISPRUDENCE, 42.

FEDERAL CIVIL JURISDICTION

So far as the power to entertain jurisdiction in civil cases is concerned, it is provided by article III, section 2, sub-section 1, of the Constitution that "the judicial power [of the United States] shall extend [inter alia] to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority . . . , to controversies between two or more states . . . [and] between citizens of different States." Here we have a grant of national judicial power, to be exercised when certain specified conditions exist; and, pursuant to article III, section 1, Congress has created (with the exception of the Supreme Court, which is a constitutional tribunal) the courts necessary to give effect to this jurisdiction.[75]

It is a well-known rule, and one which needs no special emphasis, that, to quote from Chief Justice Marshall, "Courts which originate in common law possess a jurisdiction which must be regulated by the common law until some statutes change its established principles; but courts which are created by written law and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." [76] Necessarily, therefore, the federal courts cannot transcend their constitutional and statutory jurisdiction.

Furthermore, unlike a state court whose jurisdiction is said to be *in locum*,[77]—that is, a jurisdiction co-extensive with its territory—the federal courts exercise no exclusive territorial jurisdiction, except, of course, in places such as the District of Columbia [78] and the national territories. The jurisdiction con-

[75] By the Judiciary Act of 1789 and subsequent acts.

[76] *Ex parte* Bollman, 4 Cranch 75, 93 (1807), per Marshall, *C.J.*

[77] DUPONCEAU, JURISDICTION, 31, 32.

[78] "As against the United States, regarded as co-extensive with the federal Union of states and operating within the territorial limits of the states, it is undoubtedly true that there are no common law offenses; for the jurisdiction there given to the United States by the federal constitution is distinctly and expressly restricted by the powers enumerated in the Constitution. But . . . as to the authority of the United States in the [District of Columbia] the question is not what power has been conferred upon it, but rather what power has been inhibited to it. . . . The United States have supreme and exclusive power over the District of Columbia, and they are not limited to the govern-

ferred by the Constitution arises only because of either the subject-matter involved or the character of the parties in a particular action; and, in the provisions of the judiciary article of the Constitution, it will be observed that, among others, there are three distinct and important classes of cases over which the federal courts are given jurisdiction: (1) *Cases in which citizens of different states are opposite parties;* and in this class it is immaterial what is the nature of the controversy, for the character of the parties gives jurisdiction. (2) *Cases in which states are parties;* and here, again, the subject-matter is immaterial, provided the case is justiciable. (3) *Cases which arise under the Constitution, laws or treaties of the Union.* In this last class, it is immaterial who are parties, for the subject-matter gives jurisdiction.

When courts are created, whether of limited or unlimited power, they must administer some sort of law in cases within their jurisdiction; and, as we have already said, if no particular direction is given concerning the system to be followed, and there is no constitutional or statutory restriction against administering any special kind of law, the courts will not refuse to exercise their jurisdiction simply because of lack of such direction.[79] On the contrary, if matters within their jurisdiction, on which statutory law is silent, come before them, they apply such principles as will effect a just and proper result under the circumstances of each case. Thus the federal courts,[80] in the exercise

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mental powers in the Constitution specifically enumerated as defining their jurisdiction for the country at large." De Forest v. U. S., 11 App. D. C. 458, 464 (1898), quoted in Harrison v. Moyer, 224 Fed. Rep. 226 (D. C. 1915); see also Kendall v. U. S., 37 U. S. (12 Peters) 522 (1838); and as to the jurisdiction of Congress over the territories, Mormon Church v. U. S., 136 U. S. 1, 42 (1890).

[79] "It is apparent that the Federal judiciary is as much entitled, when the matter is one of Federal jurisdiction, to exercise its own independent judgment and make its own declarations as to what, as affecting the matter in hand, the unwritten law is, as it is for a state judiciary to declare what such law is, touching a matter within the jurisdiction of the State." WASHINGTON LAW REPORTER, Vol. XLVII, 179-180 (1919).

[80] The Court of Claims, created by congressional statute, is a court which exercises jurisdiction, not in and for the District of Columbia, nor for any district or circuit, but for the entire United States, in all cases against the national government. The form of procedure is statutory, supplemented by rules of its own adoption.

of jurisdiction received from the Constitution or the Congress, if there is no statute on a particular point, or special direction concerning the law to be enforced, will administer common-law principles, when applicable to the circumstances involved; and, as we shall presently see, in some instances, particularly where matters of general concern are at stake, the federal judges act without restriction in determining what these principles are and the sources from which they shall be deduced, or the authorities to be followed.

Those who deny the existence of federal common law are entirely correct in stating that neither the Constitution itself nor any statute passed in conformity with it has expressly or impliedly adopted the English common law for use in the United States courts; but, while the principles of that system have not been adoped as rules of decision, there is no mention, except in section 34 of the Judiciary Act of 1789, of any other system to be administered in cases on which statutory law is silent, and this situation has not precluded the federal courts from exercising their jurisdiction, and administering, for that purpose, the principles of law they consider appropriate to the circum-

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"As to this court thus organized, and clothed with a jurisdiction wholly national in character, the express ruling of the Supreme Court is to the effect that the general law controlling its action is the common law. . . . There is no act of Congress which adopts the common law as the rule of action for the Court of Claims. The reasons which declare the common law to be the system governing its action apply equally to the other courts of the United States." Murray v. Chicago & N. W. Ry. Co., 62 Fed. 24, 38 (C. C. 1894), per Shiras, *J.*

In Moore v. U. S., 91 U. S. 270-4 (1876), Mr. Justice Bradley said: "The Court of Claims, like a court of equity or admiralty, or an ecclesiastical court, determines the facts as well as the law; and the question is, whether they may determine the genuineness of a signature by comparing it with other handwriting of the party. By the general rule of the common law, this cannot be done either by the court or a jury; and that is the general rule of this country, although the courts of a few states have allowed it, and the legislatures of others, as well as of England, have authorized it. In the ecclesiastical courts, which derived their forms of proceeding from the civil law, a different rule prevails. The question is, By what law is the Court of Claims to be governed in this respect? May it adopt its own rules of evidence? or is it to be governed by some system of law? *In our opinion, it must be governed by law; and we know of no system of law by which it should be governed other than the common law.* That is the system from which our judicial ideas and legal definitions are derived."

See also U. S. v. Palmer, 128 U. S. 262 (1888); Reynolds v. N. Y. Trust Co., 188 Fed. 611 (C. C. A. 1911).

stances before them. These principles have been largely drawn from the English common law, for that system, forming as it does the basis of American jurisprudence, permeates all our institutions, and the federal judges quite naturally resort to it; but in matters of general concern they consider themselves free to consult also the decisions of the various state courts, the civil law, or other sources, and to deduce from them what they conceive to be the true rules in any case. The accumulation of these rules as administered in the federal courts represents a body of unwritten law, and one which, if our original analysis of the nature of common law be correct, can justifiably be termed a federal common law. Consequently, we may assert that the failure to adopt, in the Constitution or congressional statutes, the English common law, does not prevent the federal courts from possessing their own common law on the civil side;[81] and, further, that, from necessity, they are gradually building up, by their successive decisions in particular cases, a body of principles—or, in this sense, an independent *system of* common law—as we shall see by examining their exercise of the jurisdiction expressly granted to them.

In discussing the three before-mentioned distinct classes of cases within the civil jurisdiction of the federal courts, as set forth in the judiciary article of the Constitution, it seems best to consider them in the following order.

1. *Controversies between Citizens of Different States*

There is no branch of federal jurisdiction which is as interesting in the study of our subject, or which has developed so extensively, as that arising from diversity of citizenship. It has assumed an importance which, as a reading of the convention

[81] "It would be a most extra-ordinary state of things that the [English] common law should be the basis of the jurisprudence of the states originally composing the Union, and yet a government ingrafted upon the existing system should have no jurisprudence at all. If such be the result, there is no guide and no rule for the courts of the United States . . . except so far as Congress has laid or shall lay down a rule." STORY, CONSTITUTION (5th ed. 1891), I, p. 111.

debates [82] and contemporary literature [83] will disclose, was clearly not foreseen by the framers.

In view of local jealousies at the time of the constitutional convention, it was but natural for each state to suppose that, when its citizens' causes were being tried in another state, they might be subjected to "local prejudices and sectional views." Hence there was a desire to provide an impartial court, in which the non-citizen would receive the application of the same law as a state court would give its own citizens. This "guarantee of impartiality" would, in those times, have been a very valuable privilege to "a Puritan from New England, engaged in litigation with a Pennsylvania Quaker, or a far-off South Carolinian, claiming to recover land in New York from a citizen thereof holding some possessory title"; [84] consequently the diverse-citizenship clause was inserted in the Constitution to insure no discrimination against non-citizens in the administration of justice. "There is not a trace," says Mr. Warren, "of any other purpose than the above to be found in any of the arguments made in 1787-1789 as to this jurisdiction." Then he adds:

> "The idea that a federal court in a state was to administer any other than the law of that state, or was to . . . administer law as an entirely free and independent tribunal, never appears to have entered the mind of anyone." [85]

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[82] ELLIOTT'S DEBATES, Vol. III, pp. 433, 549, 556, 570.

[83] HAMILTON, THE FEDERALIST, LXXX: "If it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different states and their citizens."

[84] W. M. Meigs, 45 AM. L. REV. 47, 50 (1911).

[85] WARREN, *New Light on the History of the Federal Judiciary Act*, 37 HARV. L. REV. 49, 83 (1924).

See also ELLIOTT'S DEBATES, III, 551, 556, 557.

When John Marshall was questioned in the Virginia ratifying convention "In what court and by what law, in cases arising under the citizenship

Even though the correctness of Mr. Warren's statement be conceded, still, if, as a matter of fact, the situation has developed otherwise, should not this be acknowledged? Again, though some writers appear to think the original intent was that state common law, as laid down by the courts of the state where the federal trial tribunal might be located, should be strictly followed by federal courts in cases between citizens of different states, and no independent federal common law was intended to be developed, yet, in the absence of an express prohibition of that course, was not the final development of a federal common law inevitable? Both these questions, it seems, must be answered in the affirmative, as will be shown.

To give effect to the jurisdiction created by the diverse-citizenship clause of the Constitution, and to prescribe the law which should be administered in such cases, Congress provided, by section 34 of the Act of 1789, organizing the first judiciary, that the "*laws* of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." [86] It seems to have been intended that the word "laws" in this act should include not only the statutes of the particular state in which the case was tried, but also its common law as well; and Mr. Warren claims that the federal courts, when deciding cases arising under the diverse-citizenship clause, were intended always to follow [87] state law, both statute and

clause, the case would be tried?" his answer was, "By the law of the place where the contract was made."

See also Lankford v. Platt Iron Works, 235 U. S. 461, 478 (1914); Scott v. Sandford, 19 Howard 393, 580 (U. S. 1856).

[86] 1 Stat. 92. As to meaning of trials at common law, see note 4, *supra*.

[87] "That Congress which passed the Judiciary Act intended to limit 'the laws' to statutes, seems very improbable; if for no other reason, because in many of the states, the statute law was so meagre, and for the first 50 years of the Government no such limitation was put on the expression, 'the laws,' by the Supreme Court. In no case did that court sanction a refusal by a Federal Court to follow a rule laid down by the State Courts. It is to be observed, however, that the only cases during this period which came before the court, where any question as to following the decisions of a State Court was presented, were cases concerning land or involving the interpretation of a State Constitution or statute." GRAY, THE NATURE AND SOURCES OF LAW (1st ed. 1909), §§ 533-4.

common. He thinks that this is shown by his discovery of the original paper on which the amendment containing section 34 was written.[88] As first drafted, the amendment provided that the "statute law of the several states *in force for the time being, and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same, or otherwise* . . . shall be regarded . . . as rules of decision." Before the amendment was actually submitted, the words, "statute law" were stricken out and the word "laws" was inserted with a caret, before the words "of the several states," and the succeeding words given above in italics were also eliminated. Mr. Warren argues, with some force, that these changes indicate "that the word 'laws' was intended to be a concise expression and a summary of the more detailed enumeration of different forms of state law set forth in the original draft." [89] The first Attorney General, Edmund Randolph, understood the meaning of section 34 in this sense, as would appear from his report to the House of Representatives, December 27, 1790, suggesting amendments to the Judiciary Act. Furthermore, counsel and Chief Justice Ellsworth, in cases [90] as early as 1797 and 1799, construed the word "laws" as including the common law of the states.

During the first half-century of the Supreme Court's history, it never refused to follow state decisions, whether applying to the common law or statutes, as the true exposition of the law of the state involved—a position which Chief Justice Marshall maintained while he was on the bench; [91] and, although all the particular state decisions we have in mind either concerned controversies over title to land or had to do with the interpretation

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[88] Warren, 37 HARV. L. REV. 49, 86 (1924).

[89] *Ibid.*

[90] Brown v. Van Bramm, 3 Dallas 344, 352 (U. S. 1797); Sims v. Irvine, 3 Dallas 425, 457 (U. S. 1799).

[91] 45 AM. L. REV. 47, 55 (1911), W. M. Meigs.
36 AM. L. REV. 498, 515 (1902), E. C. Eliot.

of state constitutions,[92] there is no intimation to be found in the federal opinions during the period in question that the court would not have followed the state law in all kinds of cases. In short, the settled practice of the federal courts during the first half-century of our national existence seems to have been a consistent adherence to what Mr. Warren claims to have been the evident intention of section 34 of the Judiciary Act.

This practice received a severe setback in 1842 at the hands of Judge Story, in *Swift v. Tyson*,[93] which was a suit on a bill of exchange by the indorsee, a citizen of Maine, against the acceptor, a citizen of New York, the defense averred being fraud and failure of consideration. Plaintiff had taken the bill in satisfaction of a pre-existing debt, and the question arose whether defendant was entitled to produce certain evidence to show that plaintiff was not a holder for value. By the law of New York, where the suit was brought, the satisfaction of a debt in such cases was not a valuable consideration, and it was argued that, under section 34 of the Judiciary Act, the New York decisions were conclusive on the federal Supreme Court; but the latter refused to follow the New York law, and held that plaintiff was a *bona fide* holder, the court saying, by Mr. Justice Story:

> "In all the various cases which have hitherto come before us for decision this court has uniformly supposed that the true interpretation of section 34 limited its application to state laws strictly local, that is to say, to the positive statutes of the state and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate and other matters immovable and intraterritorial in their nature and character; and we have not the slightest difficulty in holding that this section, upon its

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[92] BURDICK, LAW OF THE AMERICAN CONSTITUTION (1922), § 48, says: "Practically all of the cases will be found to involve the construction of state legislation or the determination of the law in regard to real estate."

See Jackson v. Chew, 12 Wheaton 153, 168 (U. S. 1827); Green v. Neale, 6 Peters 291 (U. S. 1832).

[93] 16 Peters 1, 17, 18 (1842).

Warren believes that had Story seen the original memorandum of the Judiciary Act at the time he made this decision, he would have held otherwise. 37 HARV. L. REV. 49, 85 (1924).

> true intendment and construction, is strictly limited to the local statutes and local usages before stated and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in decisions of local tribunals, but in the general principles and doctrines of commercial jurisprudence."

The announcement of this new doctrine by Story was to have, as we shall presently see, a far-reaching effect on the subsequent development of the federal law in cases under the diverse-citizenship clause. Its effect can be likened partially to Mr. Justice Chase's ruling in *United States v. Worrall,*[94] that the courts could entertain no indictments for crimes at common law; which earlier determination, while not appreciated in its full significance at the time it was announced, yet, later, became the settled law of federal criminal practice, and may now be regarded as a landmark in that branch of jurisprudence. Similarly, the decision of Judge Story, that in certain cases the applicable common law is not to be sought in the decisions of the state tribunals but in general principles, is a landmark in federal civil jurisprudence; and, although the extent to which it would be carried may not have been perceived at the time, this federal ruling registered the first real departure from the practice which had theretofore prevailed, under section 34 of the Judiciary Act, of strictly following state decisions. Incidentally, it is interesting to observe that the same judge who had endeavored, but without success, to assert a broad common-law criminal jurisdiction in the federal courts, was the first to assert the right of the federal courts in cases under the diverse-citizenship clause to disregard state decisions in matters of commercial law and to administer what he considered to be general principles of the law merchant, which, though resting largely on the civil law, is, of course, with us, a branch of the common law.

Professor Gray,[95] in assigning causes which he thought led to the decision in *Swift v. Tyson,* says of the writer of the opinion, that Story, being "possessed by a restless vanity" and

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[94] 2 Dallas 384 (C. C. 1798).

[95] GRAY, THE NATURE AND SOURCES OF LAW (1st ed. 1909), § 539.

being at the time occupied in writing a "book on bills of exchange," was led "to dogmatize on the subject." Other critics [96] have alluded to Story's "restless ambition" as being responsible for the enunciation of the *Swift v. Tyson* doctrine; but these criticisms leave wholly out of account the concurrence of his brother judges on the bench.

During the same term of court in which *Swift v. Tyson* was decided, Judge Story again, in *Carpenter v. Insurance Company*,[97] when construing a policy of fire insurance, reiterated the doctrine of the former case, and said:

> "The questions under our consideration are questions of general commercial law, depending upon the construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or custom; whatever respect, therefore, the decisions of the state tribunals may have on such a subject, and they certainly are entitled to respect, they cannot conclude the judgment of this court."

Then he added these significant words:

> "On the contrary, we are bound to interpret this instrument according to our opinion of its true intent and object, aided by all the light which can be obtained from all external sources whatever; and if the result at which we have arrived differs from that of these learned state courts, we may regret it, but it cannot be permitted to alter our judgment."

A review of the myriad cases decided under the diverse-citizenship clause since *Swift v. Tyson* would be both laborious and uninteresting. The germinal doctrine which Story there planted has been well watered and nurtured by subsequent justices of the Supreme Court, and has grown, with occasional interruptions, until it now covers not only questions of general commercial law, but also other fields of common law. It is interesting to note that in 1892, the Supreme Court, in *B. &*

[96] W. M. Meigs, 45 AM. L. REV. 47 (1911).
[97] 41 U. S. (16 Peters) 495, 511 (1842).

O. R. R. Co. v. Baugh,[98] gave as one of its reasons for continuing to extend the doctrine, that, notwithstanding the decision in *Swift v. Tyson,* Congress had never altered section 34 of the Judiciary Act so as to compel the Supreme Court to follow state decisions in every case.[99]

At the present time no useful purpose would be served by an attempt to evaluate the various arguments for and against the original adoption or the subsequent extension of the rule that, in cases which demand such a course, the federal courts may and will make their own pronouncements of the governing law;[100] suffice it to say this rule has become too well established to be doubted. Our own practical concern is, first, to classify in a general manner the instances where the United States courts follow or refuse to follow the law of the state in which a case was adjudged or whose common law would ordinarily be applicable on other grounds (as, for example, because a contract in suit was executed in that state[101]), and, next, to determine the exact nature of the law which is administered when state decisions are disregarded.

The test seems to be that, if the matter[102] does not involve the construction or the interpretation of state constitutions,[103] or

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[98] 148 U. S. 368 (1892).

[99] GRAY, THE NATURE AND SOURCES OF LAW (1st ed. 1909), § 537.

[100] Some of the reasons given for the practice of the federal courts in deciding independently of state decisions seem to be (1) the feeling that it is beneath the dignity of the federal court to decide a case according to the decisions of the state court, when it is convinced that those decisions are wrong on principle: (2) the hope that what is deemed the better opinion of the federal court may induce the state court to overrule the decisions which the federal court regards as erroneous; (3) the possible apprehension that deference to the decisions of the courts of the particular state in which the action arises will create an apparently conflicting body of federal precedents, and destroy uniformity of decision in that court; (4) the hope that a uniform body of federal precedents unvaried by the state in which the action originates, and which the contract or transaction in question had its situs, may in time form the nucleus of a general and uniform body of non-statutory law, to which the state courts as well as the federal courts may gradually conform.

[101] Haskell v. McClintic-Marshall Co., 289 Fed. 405, 409 (C. C. A. 1923).

[102] See generally as to this subject, 33 YALE L. J. 855, 856-7 (1924); 12 CAL. L. REV. 425 (1924).

[103] The federal courts follow the interpretation of the state constitution, Elmendorf v. Taylor, 10 Wheaton 152 (U. S. 1825); or of the state statutes, Douglas v. Noble, 261 U. S. 165 (1922); McCutchen v. Union Trust Co., 271 Fed. 586 (C. C. A. 1921), when the interpretation is given either by a decision

statutes, or is not concerned with peculiarly local questions[104] and customs, or rules of property,[105] the federal courts consider themselves not bound by local decisions; consequently, in matters of general concern, there has been opened to them a wide field of subjects, in the settlement of which they repeatedly have said they will administer general principles of jurisprudence. Included within this field comes first in importance, both historically and by its own merits, the subject of commercial paper,[106] with all its ramifications and ever-growing interests.

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or by repeated dicta of the state court of last resort, Gibson Coal Co. v. Allen, 280 Fed. 28 (C. C. A. 1922). To this general rule there is this qualification that, if state decisions are conflicting, the latest will prevail unless it nullifies earlier decisions under which rights had accrued, Burgess v. Seligman, 107 U. S. 20 (1882); see also Pease v. Peck, 18 Howard 595, 599 (U. S. 1855).

[104] Speaking of matters of "local concern," Mr. Justice Miller, in Bucher v. Cheshire R. R. Co., 125 U. S. 555, 584 (1887), states the rule to be that "where local law or custom has been established by repeated decisions of the highest courts of a state, it becomes the law governing the courts of the United States sitting in the State."

Matters which have been considered of local concern include evidence, municipal liability for defects in sidewalks, Detroit v. Osborn, 135 U. S. 492 (1889); interpretations of the Statute of Frauds even on questions common to all statutes, Beckwith v. Clark, 188 Fed. 171 (C. C. A. 1911); and the rule denying recovery against a carrier for injuries received while traveling on Sunday. Bucher v. Cheshire R. R. Co., *supra*.

[105] In matters relating to "rules of property" we have such cases as the construction of deeds and wills, Buford v. Kerr, 90 Fed. 513 (C. C. A. 1898); but in Foxcroft v. Mallett, 4 How. 353, 379 (U. S. 1846), the court said: "A decision of a state court upon the construction of a deed as to matters and language belonging to the common law and not to any local statute, although entitled to high respect, is not conclusive upon this court"; the validity of mortgages, Wilson v. Perrin, 62 Fed. 629 (C. C. A. 1894); the rights of riparian owners, St. Anthony Water Power Co. v. Commissioners, 168 U. S. 349 (1897); fraudulent conveyances, Dooley v. Pease, 180 U. S. 126 (1900); chattel mortgages, Cutler v. Huston, 158 U. S. 423 (1894); conditional sales, Bryant v. Drygoods Co., 214 U. S. 279 (1908); and adverse possession, Scott v. Mineral Development Co., 130 Fed. 497 (C. C. A. 1904). Perhaps the most striking exception to the rule that the federal courts will follow state decisions in matters relating to the rules of property is seen in Kuhn v. Fairmont Coal Co., 215 U. S. 349 (1909). Mr. Justice Holmes filed a strong dissenting opinion.

[106] Swift v. Tyson, 16 Peters 1 (U. S. 1842); Watson v. Tarpley, 18 Howard 517 (U. S. 1855).

"The payee or indorser of a bill upon its presentment and upon refusal by the drawee to accept has the right to immediate recourse against the drawer. He is not bound to wait to see whether or not the bill will be paid at maturity. A state statute which forbids a suit from being brought in such a case until after maturity of the bill can have no effect upon suits brought in the courts of the United States." Oates v. National Bank, 100 U. S. 239 (1879); Cudahy Co. v. State Bank, 134 Fed. 538 (C. C. A. 1904); Taylor v. National Bank, 262 Fed. 168 (D. C. 1919).

Insurance contracts [107] are likewise looked upon as matters of general concern, as are also certain contracts which do not relate to specific property or are not dependent upon state statutes or local usages.[108] In *Haskell v. McClintic-Marshall Company,*[109] a building contract, executed in Pennsylvania but to be performed in Washington, provided for the arbitration of any dispute arising between the parties. Although the state courts of both Pennsylvania and Washington regarded this stipulation as valid, a federal circuit court of appeals, in a case involving the contract, denied its validity, following the rule laid down in former decisions of the United States Supreme Court. Here, Judge Rudkin said:

> *"It was a settled rule of the common law that a general agreement to submit to arbitration did not oust the courts of jurisdiction,* and this rule has been consistently adhered to by the federal courts . . . Opposing counsel concede the general rule, but maintain that a different rule obtains in Pennsylvania, where one of the contracts was made, and in Washington, where the suit is pending, and that this court should adopt and follow the local rule. But the question is one of general law, upon which the decisions of the [United States] Supreme Court are controlling. As said by the court in Mitchell v. Dougherty,[110] 'We have not felt called upon to discuss in detail the several Pennsylvania cases which have been urged upon our attention . . . ; the question before us is not as to the enforcement of the contract in accordance with the law of the place where it was

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"If state statutes do not declare but change the rules of the common law as to commercial paper, it would seem that the federal courts are bound to follow the statute." Moses v. Nat. Bank, 149 U. S. 298 (1892); Mutual Life Ins. v. Lane, 151 Fed. 276 (C. C. 1907); U. S. Bank v. Daniel, 12 Peters 32 (U. S. 1838).

The most interesting recent example in the field of commercial law is Salem Trust Co. v. Mfg. Finance Co., 264 U. S. 182 (1921).

[107] Carpenter v. Ins. Co., 41 U. S. (16 Peters) 495 (1842); Meigs v. London Assurance Co., 126 Fed. 781 (C. C. 1904); Bragg v. Meyer, McCall. 408, Fed. Cas. No. 1801 (C. C. 1858).

[108] Delmas v. Merchants Mutual Ins. Co., 14 Wall. 661 (U. S. 1871); Gilbert v. American Surety Co., 121 Fed. 499 (C. C. A. 1902), 190 U. S. 560 (U. S. 1902); Edwards v. Davenport, 20 Fed. 756 (C. C. 1883); Reynolds v. N. Y. Trust Co., 188 Fed. 611 (C. C. A. 1911); Bancroft v. Hambly, 94 Fed. 975 (C. C. A. 1899).

[109] 289 Fed. 405, 409 (C. C. A. 1923).

[110] 90 Fed. 639, 645 (C. C. A. 1898).

made, but it is as to whether a court of the United States should, because of the parties' agreement in advance to abstain from invoking its jurisdiction, refuse to enforce the contract at all, [and,] upon this question, the decisions of the Supreme Court of the United States are controlling.'"

In addition to the subjects of commercial paper, insurance, and certain contractual relations, arising in cases between citizens of different states, it is important also to notice instances of tort. In this latter field, the fellow-servant rule [111] of the common law has been recognized and followed on many occasions by the federal Supreme Court. In *Hough v. Railway,*[112] the common-law rule exempting one from liability to an employee for injuries caused by the negligence of a fellow servant, was up for consideration, and Mr. Justice Harlan, delivering the opinion, said:

"The questions before us, in the absence of statutory regulations by the state in which the cause of action arose, depend upon principles of general law, and in their determination we are not required to follow the decisions of the state courts."

Later, in the case of *Baltimore R. R. Co. v. Baugh,*[113] the question at issue was whether the engineer and fireman of a locomotive were fellow servants. The Supreme Court held they occupied that relation, saying, by Mr. Justice Brewer:

"The question is essentially one of general law; it does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property; but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.'"

Similarly, the courts have recognized, and treated independently of state decisions, other phases of tort liability, namely,

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[111] Chicago & St. Paul R. R. Co. v. Ross, 112 U. S. 377 (1884).

[112] 100 U. S. 213, 226 (1879).

[113] 149 U. S. 368, 370, 378 (1892); Mr. Justice Field dissented (p. 391): "I think the judgment of the Circuit Court is correct in principle and in accord with the settled law of Ohio, which, in my opinion, should control the decision."

nuisance and contributory negligence,[114] as well as the relations of carriers where the question was not one affecting interstate commerce.

It may be profitable to notice two cases concerning carriers. In the first one, *Myrick v. Michigan Central R. R. Co.*[115] the question was whether a bill of lading, issued in Illinois, was a through contract. The rulings of the Supreme Court of Illinois that, as a matter of law, such bills as the one involved constituted a through contract, were claimed to be conclusive, but the federal Supreme Court declined to follow the Illinois decisions. In the second case, *Railroad Company v. Prentice,*[116] the point at issue concerned the right to recover from defendant punitive damages for the wanton and oppressive conduct of one of its conductors toward a passenger, and the federal Supreme Court said, through Mr. Justice Gray:

> "This question, like others affecting the liability of a railroad corporation as a common carrier of goods or passengers—such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment—is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of an express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several states."

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[114] In Snare v. Friedman, 169 Fed. 1, 11-12 (C. C. A. 1909), the nature of a nuisance attractive to children was considered and decided in accordance with the general principles of jurisprudence, and in disregard of state decisions on the subject; likewise, the question of what constitutes a nuisance or obstruction to a navigable stream; Yates v. Milwaukee, 10 Wall. 497, 506 (U. S. 1869); as well as the test to be applied in determining contributory negligence. Southern Ry. Co. v. Smith, 214 Fed. 942 (C. C. A. 1914); Hemingway v. R. R. Co., 114 Fed. 843 (C. C. A. 1902).

[115] 107 U. S. 102 (1882); see also N. Y. R. R. v. Lockwood, 17 Wall. 357, 367 (U. S. 1873); Pa. R. R. Co. v. Hummell, 167 Fed. 89 (C. C. A. 1909); B. & O. v. Thornton, 188 Fed. 868 (C. C. A. 1911).

Amendments to the Inter-State Commerce Act, Barnes' Fed. Code, § 7976, now govern the liability of the initial carrier to the holder of the bill of lading, and the liability of the connecting carriers to the initial carrier. The relations of the connecting carriers to the holder of the bill of lading, and to each other, remain as at common law. Oregon, etc., R. R. Co. v. McGinn, 258 U. S. 409, 413 (1921).

[116] 147 U. S. 101, 106 (1892).

The examples already given, to which others might be added,[117] indicate how broadly the national courts decide cases on general principles according to their independent view of the law. By their decisions in cases involving matters of common concern, arising in litigation between citizens of different states, and in other fields of jurisdiction,[118] these tribunals are gradually building up a body of unwritten law, national in its scope, and founded, as the federal judges have constantly emphasized, on general principles of the common law. Why should not this body of unwritten law, arising from federal decisions, be accurately called, what it really is, federal common law?

The name by which we designate non-statutory law will not change its inherent character. If it be independent federal "common law," in the sense in which we understand that term, it does not become something else by being called by a different name; but the application of such law to particular cases may well prove confusing, and otherwise harmful, if it is not properly termed. A Pennsylvanian suing another citizen of his state in reference to any of the matters of general concern which we have just been discussing, knows that his rights will be decided by Pennsylvania law; let him, however, be in controversy with a New Jersey citizen over one of these matters; if the case is in the federal courts at Philadelphia, under the diverse-citizenship clause, and there is no state statute involved, his rights are determined, not by Pennsylvania common law, but by the general principles of jurisprudence, or common law, as announced and

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[117] See note in 40 L. R. A. (N. S.) 381 (1912), for a thorough review of the subject.

[118] For example, under Article I, § 2, of the Constitution, the federal judicial power extends (in addition to the several classes of cases mentioned in the first lecture, *supra*, and to be discussed later) to "controversies to which the United States shall be a party"; and in Cox v. United States, 31 U. S. (6 Peters) 172 (1832), and Duncan v. United States, 32 U. S. (7 Peters) 435 (1833) (both cases of suits on official bonds, signed in Louisiana, to secure the faithful fulfilment of official duties for the national government in that State), it was decided that, since the accounting of moneys received by the principal debtor, or the official in question, had to be at the seat of the national government, it was plainly the intent of the parties that the obligations of the contract of suretyship were to be executed, or performed, there, and, hence, the general, or common-law, rule that, under such circumstances, the law of the place of performance applied, controlled in suits on such bonds.

administered by the federal courts. Simply by crossing the street, from his state court to the federal tribunal, he may enjoy rights different from, and be subject to duties other than, those enforced in his local courts.[119] Therefore, in matters of general concern, a citizen of a particular state, in controversy with a citizen of another state, should be given a fair opportunity to recognize that—however it may be designated—there is an independently-built-up body of non-statutory law, administered by the federal courts, which may vary from the non-statutory law of his own state. What is this, if not federal common law, and why not so term it?

The question just put cannot be answered by saying that, in view of section 34 of the Judiciary Act (which provides that the "laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply"), the law administered by the federal courts in the kind of litigation under immediate consideration must, somehow, be classed as state common law; for, even though it be conceded that, in such cases, the federal courts originally were supposed to follow local decisions, and, in so doing, to be guided by the common law, as well as the statutory law of a state, and, further that the accumulation of decisions in cases determined under this plan would in no sense represent an independent system of federal law, they did not in all instances adhere to the plan. As we have seen, instead of "automatically echoing" the state common law, the federal courts came to adopt, in what they called cases involving matters of general concern, their own conceptions of applicable general principles. Did they not by this method achieve indirectly the same result, so far as the kind of cases in question are concerned, as would have followed had Congress never passed section 34 of the Judiciary Act? Or was this not in effect saying, under the act, that the

[119] HARE, CONSTITUTIONAL LAW, I, 447-9.
"Diverse citizenship jurisdiction in the federal courts now, in many cases, instead of preventing a discrimination *against* a non-citizen, results in discrimination *in their favor*, and *against* the citizen; and instead of making one law for all in a state, makes different law for citizen and non-citizen." Warren, *New Light on the History of the Judiciary Act*, 37 HARV. L. REV. 49, 85 (1924).

common law of the several states did not apply as rules of decision in such cases? However, these questions may be answered, the result is the same—common law differing from state common law, which, since it is administered by the federal courts, ought to be called federal common law.

It is not intended to question either the wisdom or propriety of the position taken by the United States courts.[120] It would seem, however, that at least to the extent of what they term matters of general concern, these tribunals, by the course pursued, have in fact developed an independent system of federal common law for the class of cases we have thus far been considering; though, as shall later be shown, this is by no means generally conceded, either by the federal judiciary or other writers on the subject. But, whether the fact involved be conceded or denied, the evidence remains; and, notwithstanding the protestations to the contrary, the evidence at hand shows the steady, and probably irresistible, development in this country of what may be properly termed a federal common law. This is not at all to be wondered at, for we know that wherever the lawyer trained in the forms, usages and blessings of the English common law puts his foot, that system, in some form, is bound to follow.

As stated at the beginning, precise expression and accurate thought are essentials to one another, and both are necessary to a proper understanding of any legal system. A lack of correct terminology in the naming of such a system inevitably leads to confusion of thought and to the numerous ills which follow in its wake, two of the most harmful being the presence of legal subterfuges and endless discussion, both of which hinder the proper and orderly administration of the law. On the other hand, calling a legal system by the name which its development warrants and which correctly describes it, tends to bring about

[120] For a defense of the position of Mr. Justice Story and subsequent justices, in deciding matters of general concern independently of state decisions, see an article in 4 ILL. L. REV. 533 (1910), where the writer argues that "the judicial power conferred by the Constitution on federal courts to hear and decide civil cases at law or in equity arising between citizens of different states, is analogous to the judicial power to hear and decide controversies between two or more states."

straight thinking, the honest expression of views, and, what is more important, a general, equal and certain application of the rights and privileges which the system comprehends; thus preventing the partiality which may result when, as at present, the federal courts in some instances exercise an entirely independent view of the common law, differing from that of the state in which the cause is tried, and in other cases, of the same general class, so far as classes are now marked out and recognized, where they enforce the state view of the common law, strictly as such.

As before said, it is not necessary to the existence of a federal common law that the English common law, or any other like system, be expressly or impliedly adopted either by the Constitution or by statutes passed in conformity with it. On the contrary, when federal judges, having parties before them under an authorized jurisdiction, administer what they, in their uncontrolled judgment, conceive to be the general principles necessary to effect a just and proper result according to the circumstances of each case, the accumulation of non-statutory rules thus announced and applied may, in itself, constitute a system of federal common law.

If the history of the cases in the United States courts shows the development of such a system, would it not be best to recognize the fact and proceed henceforth upon that basis, regardless of whether we like it or not? The question involved, though momentous, presents but the admission of a reality, which it is always best to face and acknowledge. Here, it must be remembered, the proposition is to acknowledge, not that a common-law system exists in the sense that jurisdiction may be taken thereunder of causes of action not either expressly or impliedly provided for in the written laws of the United States,[121] but the fact

[121] For example, it has frequently been held that, since there is no common law of the United States (in the broad sense of that term), whatever claim to priority the United States may have in the payment of debts due, it must rest, not upon the theory of sovereign prerogative, but upon the express provisions of Congressional statutes. At common law, it is true, the sovereign is entitled to priority over the claims of individual creditors, and that such a priority was asserted and recognized can be seen from English cases. Furthermore, certain states have recognized this prerogative of the Crown as part of their own common law; but in the case of the United States Government, such a common law priority was early denied: U. S. v. Bank of North Carolina, 6 Peters 29

that, in certain classes of litigation, where jurisdiction is duly authorized and there are no constitutional or statutory rules which control the case, applicable common-law principles will be applied by the federal courts independently of the source whence derived, and that the pursuing of this course in the past, has given us, as it was bound to do, an independent system of federal common law.

(*To be concluded.**)

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1832), per Story, *J.*; see also Equitable Trust Co. v. Connecticut Brass Corp., 290 Fed. 712, 716-23 (C. C. A. 1923), for a discussion of the It seems also that the National government does not possess the comprerogative of *parens patriae*. See Wheaton v. Peters, *supra*; Walker Newspaper Co., 130 Fed. 593 (C. C. 1904).

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