Erie Railroad: Ten Years After

JAMES A. GORRELL* AND ITHAMAR D. WEED**

In an opinion from which it has by now become almost banal to quote,[1] Mr. Justice Brandeis uttered his famous dictum that, "There is no federal general common law."[2] That the eminent Justice never intended this remark in any broader sense than its reading in the full context of the opinion would indicate is clear not only from careful examination of his entire pronouncement but also from his own opinion in another case which he read on the same day that he handed down his decision in *Erie*. In that case, *Hinderlider v. LaPlata River and Cherry Creek Ditch Co.*,[3] Justice Brandeis said: "For whether the water of an interstate stream must be apportioned between the two states is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." In this decision, which in the reports follows immediately the *Erie* decision, Justice Brandeis himself recognized that there are cases where there is a "federal common law". Nevertheless, Justice Brandeis' dictum gave rise to no little wonder and confusion among the lower federal courts and writers in legal periodicals. Did it mean that the federal courts now lacked the power to "find" or "create" (as you will) any law except as the amanuensis of a state court, or was the decision to be less far reaching in its effect? In the ten years since that decision, the Supreme Court has perhaps not even yet had the opportunity to fully delineate all of the limits of that decision or to map out in entirety the shape of the law along the path it set, but it seems safe to say that the Court has been sufficiently consistent in pricking out the pattern initially indicated to foretell with some accuracy how the questions not yet decided will be handled as they do arise.

Perhaps as good a point as any to open a discussion of the extent and limits of Erie is with the comparatively recent decision of the Supreme Court in the case of *Clearfield Trust Co. v. United States*.[4] In that case, the question at issue involved a check drawn

* Of the firm of Vorys, Sater, Seymour & Pease, Columbus, Ohio.

** Of the firm of Vorys, Sater, Seymour & Pease, Columbus, Ohio; Editor-in-Chief, Ohio State Law Journal, 1938-39.

[1] See, *e.g.* Judge Learned Hand's lament that "I don't suppose a civil appeal can now be argued to us without counsel sooner or later quoting large portions of *Erie Railroad v. Tompkins*." Clark, *State Law in the Federal Courts*, 55 YALE L. J. 267, 269 (1946).

[2] Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[3] 304 U.S. 92, 110 (1938).

[4] 318 U.S. 363 (1943).

upon the Treasurer of the United States payable to one Barner for W. P. A. services rendered by him. The check was dated April 28, 1936, and although placed in the mail addressed to Barner, some unknown person intercepted it, forged the payee's name and cashed it at the store of the J. C. Penny Company in Clearfield, Pennsylvania, which paid value in good faith. Penny endorsed the check to the Clearfield Trust Company, which collected it from the United States through the Federal Reserve Bank of Philadelphia. Shortly after this, Barner notified his W. P. A. foreman that he had not received the check. It was not, however, until January 12, 1937, that notice was given the Clearfield Trust Company of the alleged forgery and not until August 31, 1937, that it was first notified that the United States was asking reimbursement upon the check. Suit was brought by the United States against the Clearfield Trust on November 16, 1939, and the J. C. Penny Company subsequently intervened. The district court held that the rights of the parties were to be determined by the law of Pennsylvania and that since the United States unreasonably delayed in giving notice of the forgery to the Clearfield Trust Company, it was barred from recovery under the Pennsylvania decisions. Although the district court's decision is not reported, it apparently decided the case upon the authority of *United States v. Guaranty Trust Company of New York.*[5]

[5] 293 U.S. 340 (1934). This case was also relied on by the Ninth Circuit in the case of Security-First National Bank of Los Angeles v. United States, 103 F. 2d 188, (C.C.A. 9th 1939), as a basis for finding, in a case substantially similar on its facts to the *Clearfield* case, that they were bound to follow the law of California. The Guaranty Trust case involved a U.S. Government check which was mailed from Washington, D. C. to the payee in Yugoslavia, but was intercepted in Yugoslavia, the payee's endorsement forged and the check cashed by a Yugoslavian bank. In due course the check was presented to the Guaranty Trust. That institution paid the check and in turn was paid by the Federal Reserve Bank and the check was then honored by the Treasury. When the forgery was discovered, the United States sued the Guaranty Trust, basing its claims on two principal grounds: (1) that the title to the check was never transferred by the forged endorsement, and (2) that the Guaranty Trust, having dealt with the Federal Reserve, was bound by its regulations and those of the Treasury to have the check charged back against it, if the Treasury chose to charge it back to the Federal Reserve. The first question the Supreme Court decided in favor of Guaranty on the basis of conflicts, applying the law of Yugoslavia under which title to the check did pass even though the endorsement was forged. It is on this point alone that the Supreme Court and the Third Circuit distinguished this decision in the *Clearfield* case. Justice Brandeis, in the Guaranty case, however, had decided the second point in the case against the Government on the ground that since it was the Government itself rather than the Federal Reserve which was suing, no agency relationship existed and, therefore, no consent by Guaranty to be bound by the regulations could be worked out. It was at this point that Justice Brandeis made the statement which caused the Ninth Circuit in the *Security-First National* case, *supra,* and presumably the District

The Circuit Court of Appeals for the Third Circuit, however, after distinquishing the *Guaranty* case, stated the question as being whether with these facts under the *Erie* rule they were constrained to look to the law as declared by the state courts.[6]

Having posed the problem, the Third Circuit then proceeded to decide that *Erie* was inapplicable and that they were, therefore, not bound to follow the state decisions.[7]

Having thus avoided the Pennsylvania rule, the Third Circuit then decided that under the appropriate federal decisions, delay in giving notice of forgery is only a defense to an endorsee under a forged endorsement where there is a showing that the endorsee suffered loss as a result of the delay. There being no such showing here, the holding was against the Trust Company.

A clear conflict thus being presented between the Third Circuit and the Ninth Circuit in *Security-First National Bank v. United States*[8] the Supreme Court granted certiorari and then affirmed the Third Circuit.[9] The Court adopted the circuit court's reasoning all along the line and expanded on the *Erie* point by stating that since the authority to issue the check stemmed from the Constitution and statutes of the United States, state law had no application and "In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."[10]

The Court then considered the advisability of selecting the state law as the federal rule, even though not obliged to do so by the *Erie* rule, but felt that in a case involving the issuance by the United States of its own commercial paper the benefits attendant upon the Government's being able to follow one uniform rule when

---

Court in the *Clearfield* case to stub their toes; he said: "As against the United States, the rights of the holder of its checks drawn upon the Treasurer are the same as those accorded by commercial practice to the checks of private individuals." Justice Brandeis undoubtedly meant merely that the government could not by regulation set up special rules for itself and thereby bind all who dealt with its paper, but the intervening *Erie* decision apparently convinced these lower courts that he meant that the "commercial practice" referred to was necessarily that determined by the local law.

[6] United States v. Clearfield Trust Co., 130 F. 2d 93, 94 (C.C.A. 3d 1942).

[7] The Third Circuit, although implying that *Erie*, in their opinion, was limited to diversity cases, expressly refused to base their decision on that ground, saying that in the absence of a Supreme Court decision to that effect, they would be guilty of uncalled for temerity in taking such a position.

[8] 103 F. 2d 188 (C.C.A. 9th 1939). See Note 5 *supra.*

[9] *Clearfield Trust Co. v. U. S.*, 318 U.S. 363 (1943).

[10] *Id.* at 366.

acting in a civil or contracting capacity far outweighed anything to be gained from adopting state law as the federal rule in such cases.[11]

Where does the *Clearfield* case fit into the pattern of the *Erie* case and its descendants? It is probable that the *Erie* case had no application to the problem presented in *Clearfield* for a reason additional to that given by the Supreme Court in distinguishing the two cases, but before submitting any such thesis, let us attempt to see *Erie* in its proper perspective after ten years by examining some of the subsequent Supreme Court cases dealing with the applicability or non-applicability of state law.

The cases can perhaps be classified into the following categories:

I. Cases where federal jurisdiction is based on diversity of citizenship and in which no problem is raised involving the Constitution or statutes of the United States.

II. Cases which involve the civil rights, interests or legal relations of the United States as a party to the action.

III. Cases which do not involve the civil rights, interests or legal relations of the United States as a party, but in which the jurisdiction of the federal court is based on a federal statute.

IV. Cases in which the basis of the jurisdiction of the federal court is diversity of citizenship or cases which arise in a state court where a question is raised involving the Constitution or a federal statute.

I. *Cases where federal jurisdiction is based on diversity of citizenship and in which no problem is raised involving the Constitution or statutes of the United States.*

The confusion apparent among the lower courts in ascertaining the limits of *Erie* with respect to the absence of a "federal common law" has also manifested itself in the application of the *Erie* rule to strictly diversity of citizenship cases. Shades of *Swift v. Tyson* as well as the inherent difficulty in determining the case law

[11] Mr. Justice Douglas, speaking for a unanimous Court, summed up this point of view at page 367 of the opinion: "In our choice of the applicable federal rule we have occasionally selected state law. See *Royal Indemnity Co. v. United States*, supra. But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. And while the federal law merchant, developed for about a century under the regime of *Swift v. Tyson*, 16 Pet. 1, represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions."

of a given state, lacking a controlling decision of the highest court of the state, led numerous lower courts to conclude that the *Erie* doctrine should be restricted to those situations which involved traditional substantive law and where the highest court of the state had spoken on the subject. In cases not falling within these two categories, the federal courts did not consider themselves bound by state case law and decided the issue presented upon "general law" or their own conception of what the state law was. Viewed in retrospect, however, it is fairly clear that the Supreme Court meant the *Erie* decision to stand for the proposition that in diversity cases the federal courts must follow the law of the state except in matters of pleading and of those involving the administration of the federal judiciary machinery.[12]

In fairness to such lower courts, however, Mr. Justice Brandeis' references to the "substantive rules of common law applicable in a state" and the law of the state declared "by its highest court in a decision" left the federal tribunals without sufficient guideposts to discover the mandate of the Supreme Court with respect to the application of state law and, in fact, gave implied support to their position. Traditionally, the legal principles involved in a number of the cases following *Erie*, upon which the decision of the court turned, were procedural in nature. A literal interpretation of Justice Brandeis' opinion freed the lower courts, in their opinion, from applying the state law in such instances. Likewise, where the highest court of the state had not passed upon a specific subject, the trial and intermediate courts believed that they were at liberty to determine for themselves what the applicable law was. Not only the time honored prerogative under *Swift v. Tyson* of deciding what the law is but also undoubtedly an inarticulated feeling that they were abdicating their judicial functions to other tribunals caused the courts to construe strictly the *Erie* decision and to fail to forsee the implications of the *Erie* case in their true light. Two recent decisions of the Supreme Court[13] give the cue to the extent to which federal courts sitting in diversity cases must follow state law. Prior to discussing these cases and as introduction to an understanding of them, although many writers have thoroughly covered the field,[14]

[12] Palmer v. Hoffman, 318 U.S. 109 (1943) (pleading); Hardie v. Bryson, 44 F. Supp. 67, 72 (E.D. Mo. 1942) (refusing to apply state law as to immunity of non-resident party from service in state action in attendance at federal court in state); Restrictions of federal equitable jurisdiction as well as constitutional guarantees may also limit or vary the relief afforded in federal courts. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 105 (1945).

[13] Guaranty Trust Co. v. York, 326 U.S. 99 (1945); King v. Order of United Commercial Travelers, 68 Sup. Ct. 488 (1948) discussed *infra.* p. 277.

[14] *See* Clark, *State Law in the Federal Courts*, 55 YALE L. J. 267, 288 (1946).

it may be profitable to discuss briefly the cases decided by the Supreme Court in which it has been held that the federal courts, under *Erie R. Co. v. Tompkins*, must follow state law.

These cases fall into three general categories, viz: (1) substance versus procedure, (2) conflict of laws and (3) the applicable state law. The lower courts, generally, avoided the necessity of following the state law in the first class of cases by declaring the legal principles involved to be matters of procedure in which the federal courts were free to adopt their own rule of law.[15] Likewise, in another series of cases several circuit courts of appeals held that, lacking a decision of the highest state court on the subject they could determine for themselves what the state law was.[16]

In the first case to come before the Supreme Court in the substantive-procedural field the court held that the federal courts must follow the law of the state as to burden of proof.[17] Under the state law the burden rested upon the party attacking the legal title of a bona fide purchaser. This protection, afforded by the local law, the court said, "relates to a substantial right upon which the holder of recorded title . . . may confidently rely. . . . This was a valuable assurance in favor of its title."[18] Similarly, the Supreme Court held that the federal courts must apply the local law as to contributory negligence and as to the statute of limitations even in equity actions.[19]

Uncertainty nevertheless surrounds any given problem in this category until decided by the Supreme Court, no matter how predictable the outcome may be. An interesting problem in this field upon which the Supreme Court has not spoken directly is the extent to which federal courts are bound to follow the local law with respect to the direction of a verdict. Quite a few cases take the position that the matter of direction of the verdict "goes to the very essence of the exercise of the judicial function by the federal courts, and is in no sense a matter of local law."[20] But logically if the state

[15] See York v. Guaranty Trust Co., 143 F. 2d 503, 521 (C.C.A. 2d 1944); Cities Service Oil Co. v. Dunlap, 101 F. 2d 314, 316 (C.C.A. 5th 1939).

[16] See note 39 *infra*.

[17] Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939).

[18] *Id.* at 212.

[19] Palmer v. Hoffman, 318 U.S. 109 (1943) (contributory negligence); Guaranty Trust Co. v. York, 326 U.S. 99 (1945) (statute of limitations).

[20] Gorham v. Mutual Benefit Health and Accident Ass'n, 114 F. 2d 97, 99 (C.C.A. 4th 1940) *cert. denied*, 312 U.S. 688 (1941); McSweeny v. Prudential Ins. Co., 128 F. 2d 660 (C.C.A. 4th 1942) *cert. denied*, 317 U.S. 658 (1942); Zauderer v. Continental Cas. Co., 140 F. 2d 211 (C.C.A. 2d 1944).

Contra: Clay County Cotton v. Home Life Ins. Co., 113 F. 2d 856 (C.C.A. 8th 1940). Lennig v. New York Life Ins. Co., 122 F. 2d 871 (C.C.A. 3d 1941). Cooper v. Brown, 126 F 2d 874 (C.C.A. 3d 1942). Waldron v. Aetna Casualty and Surety Co., 141 F. 2d 230 (C.C.A. 3d 1944). Laxton v. Hatzel & Buehler Inc., 142 F. 2d 913 (C.C.A. 6th 1944). Detroit Edison Co. v. Knowles, 152 F. 2d 422 (C.C.A. 6th 1945). *Cf.* Goodall Co. v. Sortin, 141 F. 2d 427 (C.C.A. 6th 1944).

law governs burden of proof and presumptions[21] then it follows that the rules with respect to taking a case from the jury must also be so governed.[22] The question of the sufficiency of the evidence to allow the cause to go to the jury or direct the verdict was before the Supreme Court in *Stoner v. New York Life Ins. Co.*,[23] but the ruling in that case does not clarify the problem in its entirety although it has been cited by some intermediate courts for the proposition that the sufficiency of the evidence must be determined by state law.[24] In the *Stoner* case the Court reversed the circuit court of appeals for affirming a directed verdict where an intermediate state court had decided in a prior case involving the same parties, issues and substantially the same evidence that the evidence was sufficient to take the case to the jury. But this decision might well be regarded as an application of the doctrine of the "law of the case."[25] It would be unwise, however, to invite the conclusion that the cases in the lower courts are diametrically opposed in this situation. A majority of the cases in which the *Erie* doctrine was followed turned partly upon the question of what facts are necessary to constitute a cause of action or upon the requisite degree of proof.[26] In the line of decisions which refused to follow *Erie* there

---

[21] *See* New York Life Ins. Co. v. Gamer, 106 F. 2d 375 (C.C.A. 9th 1939) *cert. denied*, 308 U.S. 621 (1939), which followed state statute as to weight to be accorded presumptions.

[22] Clark, *State Law in the Federal Courts*, 55 YALE L. J. 267, 289 (1946). Judge Clark also suggests that logically "even the so carefully cherished right of 'comment' on the evidence may be either lost or greatly limited." Would the federal courts admit that "comment" on the evidence will "lead to a substantially different result"? *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

[23] 311 U.S. 464 (1940).

[24] *See* Lenning v. New York Life Ins. Co., 122 F. 2d 871, 872 (C.C.A. 3rd 1941), supra, note 20.

[25] 3 MOORE, FEDERAL PRACTICE 24 (Supp. 1947).

[26] Thus, in Laxton v. Hatzel & Buehler, Inc., 142 F. 2d 913, 916 (C.C.A. 6th 1944) the court said: "We think that the directed verdict was proper. We need not consider the rule of res ipsa loquitur because it is not accepted in the courts of Michigan. Before appellant was entitled to have his case submitted to the jury, he was required to introduce substantial proof . . . ." And in Clay County Cotton Co. v. Home Life Ins. Co., 113 F. 2d 856, 861 (C.C.A. 3d 1940) an action to recover an accidental death benefit, "The question presented by the motion to direct a verdict was whether a cause of action had been proved, which clearly is a question of substantive law and the state law applied." In Lennig v. New York Life Ins. Co., 122 F. 2d 871 (C.C.A. 3d 1941) the court held, following Pennsylvania law, that where evidence produced showed death was caused by external and violent means that an inference arose that the death was accidental sufficient to take case to jury, *Cf.* McCrate v. Morgan Packing Co., 117 F. 2d 702 (C.C.A. 6th 1941) reversing the trial court for charging contributory negligence contrary to Ohio law where there was no evidence of the same in the record.

was no indication that a different result would have obtained in the state courts, a fact which the courts were careful to point out. If the policy inherent in *Erie* is that the result be the same whether the action is tried in the state or federal court, will not, and should not, the federal courts be governed by the state law as to directed verdicts where that rule substantially affects the litigant's rights.[27]

The intermediate courts in the first two conflict of laws cases which have been decided by the Supreme Court assumed without reference to *Erie* that the conflicts rule to be applied was that of the federal courts.[28] Consistent with the theory of uniformity of result, however, the Supreme Court reversed both cases, holding that the law of the state of the forum governs the federal courts in the choice of the applicable state law. In the first case, *Klaxon Co. v. Stentor Elec. Mfg. Co.*,[29] the Supreme Court held that in an action for breach of a New York contract the federal court sitting in Delaware was required to follow the Delaware conflicts rule dealing with the interest to be awarded upon recovery.[30] In the other case, *Griffin v. McCoach*,[31] the personal representatives sued the insurance company on a New York policy in a district court in Texas, the company interpleading the assignees of the policy who had paid the premiums. The Court held that the conflict rule of Texas controlled and that a beneficiary without an insurable interest could not collect upon it since Texas could, as contrary to its public policy, decline to enforce such a contract. The purpose of this paper is to block out the amplifications and limitations of *Erie* and it is beyond its scope to criticize or question the applicability of the rule in a given situation, particularly in the field of conflict of laws. Yet, the temptation is such that it is difficult in passing not to mention at least two of the many interesting questions which the conflicts problems present. The one is present in the *McCoach* case.[32] The

[27] That the *Erie* doctrine restricts the powers of the trial court to comment on the evidence, grant a new trial or that practically a litigant will be deprived of a jury trial where he otherwise would be so entitled in federal court is highly doubtful. *See* Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 176 (1944).

[28] Stentor Elec. Mfg. Co. v. Klaxon Co., 115 F. 2d 268 (C.C.A. 3d 1940); Griffin v. McCoach, 116 F. 2d 261 (C.C.A. 5th 1940). *See* COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS, 108 (1942).

[29] 313 U.S. 487 (1941).

[30] Id. at 496 "Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors."

[31] 313 U.S. 498 (1941).

[32] 313 U.S. 498 (1941). While under certain circumstances the state may because of public policy refuse to lend the aid of its courts to the enforcement of rights acquired outside its borders, it may not under constitutional limitations "abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." Home Ins. Co. v. Dick, 281 U.S. 397, 410 (1930).

other is the problem confronting a federal court when the law of several states may be involved, *e.g.*, in unfair competition cases.[33] In the *McCoach* case if the assignees had sued in New York or in New Jersey, the home office of the insurance company, undoubtedly a contrary result would have obtained. Is this not the type of forum shopping which the *Erie* doctrine was fashioned to prevent?[34] On the other hand, if litigants under our federal system[35] have subjected themselves to the jurisdiction of more than one state court should they thereby be permitted to assert prejudice because the suit was brought in state Y instead of state X? Why then upon this calculated risk which they have assumed should the result be varied in the federal courts?[36]

---

[33] See *infra* p. 303.

[34] *See* Clark, *State Law in The Federal Courts,* 55 YALE L. J. 267, 287 (1946).

[35] See quotation from Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). Note 30 *supra.*

[36] Had the *McCoach* case been litigated in the courts of Texas, the personal representatives would have recovered. Forum shopping among states and federal courts sitting in different states is available where jurisdiction may be obtained in all situations arising under *Erie.* What then is the solution, if one is desired, in this area of forum shopping still open to parties since for practical purposes the door has been closed in federal courts? Notoriously, cases have been laid in one jurisdiction or another in anticipation of a different result, not only in like instances to the classical example of Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928) but in others, not the least of which is the enticement of a larger verdict. While equality is the aim of the law, diligence and resourcefulness continue to be rewarded, breaking out in another direction as the traveled way is barred.

One partial solution which has been offered in diversity cases is that the federal courts adopt the doctrine of the inconvenient forum to temporize the outcome and limit the choice of available forums. This discretionary rule of forum non conveniens has recently been applied by the Supreme Court in two five-to-four decisions on cases brought in the federal court in New York. In Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), the Court reversed the circuit court, holding that the district court did not abuse its discretion in dismissing a suit brought by a resident of Virginia in a federal district court in New York City against a Pennsylvania corporation qualified to do business in New York and Virginia for a loss by fire to plaintiff's property in Virginia. Koster v. Lumbermen's Mut. Cas. Co., 330 U.S. 518 (1947) likewise affirmed the application of the doctrine by the district court in a derivative suit brought in New York by a policyholder and citizen of that state against an Illinois mutual insurance company alleging breach of trust and praying for an accounting. Practically, however, the area in which the doctrine may be applied is quite limited. Moreover, the *Erie* rule may require the federal courts to apply the forum non conveniens rule of the forum state. The Supreme Court in these cases refused to decide whether state law was controlling since under New York law the result would have been the same. The Second Circuit held in the *Gilbert* and *Koster* cases that the federal courts are not bound to follow state rules in respect to discretionary declination of jurisdiction. Judge

More troublesome, perhaps, than whether an issue is to be governed by state law is the situation presented where the state law on that issue is confused, non-existent or the only expression to be found on the subject is an intermediate or trial court decision. Resentment on the part of the judges of the lower federal courts, not unnatural in a specific case, flows from a feeling that they are abdicating their judicial functions and prostituting their intellectual capacities when forced by the *Erie* rule to follow "a rigid wooden decision on the theory that it is required of (them) by law."[37] This attitude is summed up by Judge Clark in referring to the "mystic line" dividing procedure and substance "past which we dare not venture without state tutelage."[38] Thus, the federal appellate courts in the first four cases to reach the Supreme Court concluded that where the law had not been determined by the state court of last resort that they were not bound by the pronouncements of lower

Swan, who spoke for the majority in the *Koster* case, and Judge Chase concurred with Judge Learned Hand in Weiss v. Routh, 159 F. 2d 193, 195 (C.C.A. 2d 1945) in which Judge Hand said, "we are to remember the purpose of conformity in 'diversity cases.' It is that the accident of citizenship shall not change the outcome; a purpose which extends as much to determining whether the court shall act at all, as to how it shall decide, if it does. For this reason it seems to us that we should follow the New York decisions." Judge Clark, in the *Gilbert* decision, differentiated the *Weiss* case on the theory that the question of the internal management of a foreign corporation was "much nearer substantive law." Forum shopping being one of the prices that must be paid for our dual system of government, isn't it reasonable to limit it to the state court area? In view of the *Erie* doctrine, why should the federal courts allow a suit to be maintained where the only basis of jurisdiction is the fact that the defendant is amenable to service, where the only reason for bringing the action in the federal court is the hope of obtaining a more favorable result through the laws of the state of the forum or otherwise and where the courts of the state of the forum in their discretion would decline jurisdiction? Perhaps the more effective solution to forum shopping, although much more difficult, if not impossible of attainment, is to cut through the traditional concepts of substance and procedure in the field of conflict of laws and work to an adoption generally of the rule of modern courts, *i.e.* the law of the locus is to be applied to all matters of substance, and to all matters of procedure which are likely to vary substantially the outcome of the litigation, in the absence of a contrary policy, the objective being to obtain the same result in the forum which would have resulted in the courts of the locus. Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 194-195 (1944). The failure of the theory behind Swift v. Tyson, 16 Pet. 1 (U.S. 1842), to obtain uniformity of substantive law through adoption by the state courts of the federal rule precipitated the *Erie* doctrine. But *Erie* points the way to a less odious objective, namely uniformity of result by ignoring "form" for "substance."

[37] Clark, *State Law in the Federal Courts*, 55 YALE L. J. 267, 291-292 (1946).

[38] Gilbert v. Gulf Oil Corp., 153 F. 2d 883, 885 (C.C.A. 2d 1946), *supra* note 36.

state courts.[39] The Supreme Court in turn reversed the circuit courts of appeals. Its decisions in these and subsequent cases outline the circumstances under which the federal courts must follow the law of the state as announced by the lower state courts.

The Supreme Court in three of these cases held that it is the duty of the federal court to ascertain the state law from all available evidence and to follow the rule of law announced by an intermediate state appellate court unless convinced by other persuasive evidence that the state court of last resort would decide otherwise.[40] Although not determinative of the decisions, the state supreme courts in all three cases refused to review the decisions of the appellate courts.[41]

In the fourth case, *Fidelity Union Trust Co. v. Field*[42] the Court held that the federal court in New Jersey was bound by two decisions of the chancery trial court. The Court went to some length to point out that the rulings of the Court of Chancery of New Jersey carried considerably more weight than that of the ordinary trial court; that such rulings were ordinarily treated as binding in later cases; that when they are uniform over a course of years they are seldom set aside; and that the court of chancery was comparable to the intermediate appellate courts on the law side. There was no indication in the Court's opinion that the federal courts would be bound by the ruling of every trial court's decision as to the applicable state law as has been thought by some of the lower courts. *King v. Order of United Commercial Travelers*[43] has settled that problem at least in part.

The question in the King case was whether deceased's death resulted from participation in aviation within the meaning of that exclusion clause in the policy of insurance on which the action was founded. King, the deceased, lost his life following an emergency landing of a Civil Air Patrol airplane thirty miles off the coast of North Carolina. He was not seriously hurt from the landing and was still alive over two hours later; but when picked up some four and half hours after the landing he was dead. The medical diagnosis was "drowning as a result of exposure in the water." On these facts a common pleas court ruled against a different insurer on a

[39] West v. American T. & T. Co., 108 F. 2d 347 (C.C.A. 6th 1939); Field v. Fidelity Union Trust Co., 108 F. 2d 521 (C.C.A. 3d 1939); New York Life Ins. Co. v. Stoner, 109 F. 2d 874 (C.C.A. 8th 1940); Six Companies of California v. Joint Highway Dist. No. 13, 110 F. 2d 620 (C.C.A. 9th 1940).

[40] Six Companies of California v. Joint Highway District, 311 U.S. 180 (1940); West v. American Tel. & Tel. Co., 311 U.S. 223 (1940); Stoner v. New York Life Ins. Co., 311 U.S. 464 (1940).

[41] *See* King v. Order of United Commercial Travelers, 68 Sup. Ct. 488, 491 (1948), note 13 *supra*.

[42] 311 U.S. 169 (1940).

[43] 68 Sup. Ct. 488 (1948).

substantially similar policy relying in part on the decision of the district court in the *King* case. The circuit court in reversing the district court held that the decision of the common pleas court was not controlling and proceeded to determine what the Supreme Court of South Carolina would probably rule in a similar situation. Speaking for the Court in affirming the circuit court of appeals Mr. Chief Justice Vinson took pains to point out the apparently little weight accorded common pleas decisions in South Carolina's own courts. The Chief Justice cautiously remarked, however:

> . . . we are deciding only that the Circuit Court of Appeals did not have to follow the decision of the Court of Common Pleas for Spartanburg County. We do not purport to determine the correctness of its ruling on the merits. Nor is our decision to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts.[44]

The criticisms which stem from this phase of the *Erie* doctrine, however, have not been solved by the Supreme Court in its decisions following *Erie*. The first, already referred to, decries the stifling of the federal courts in performing their judicial function of interpreting the state case law and statutes, forcing the courts to follow a formalistic pattern of adopting as the law the decision of an intermediate appellate or trial court.[45] The other involves the deprivation of the litigants' right to persuade the state courts not to follow a decision of the inferior state courts[46] and even the court of last resort to reverse its prior ruling.[47] But in the vast majority of the cases these perplexing problems do not arise and the federal courts are determining state law in the manner in which courts normally decide cases.[48] The emphasis, perhaps, is best placed on the effectuation of the policy of the *Erie* doctrine.

The *Erie* doctrine requires the federal courts to follow the state law. State law, within the limits already discussed, is to be ascertained from all available data. Nonexistence or uncertainty of state law does not justify the federal courts to dismiss the case without prejudice to proceed in the state courts to secure a determination of the questions of state law involved.[49] Unless some principle or

---

[44] *Id.* at 493.

[45] Clark, *supra* note 37.

[46] Judge Allen in West v. American Tel. & Tel. Co., *supra* note 39 at 350 said: "While it, (the decision of the Court of Appeals of Cuyahoga County) of course, has persuasive force, it is not binding on the court of appeals for the other 87 counties of Ohio."

[47] 59 HARV. L. REV. 1299 (1946).

[48] Clark, *supra* note 37.

[49] Meredith v. Winter Haven, 320 U.S. 228 (1943).

policy requires the federal courts to decline equity jurisdiction[50] it is their duty to decide all questions of state law in diversity cases.[51]

Viewed in the light of the theory behind the *Erie* doctrine the decisions of the Supreme Court are consistent and sound. To avoid a substantially different result and discrimination against the citi-

[50] The Supreme Court in Meredith v. Winter Haven, *supra* note 49, recognized that equity jurisdiction may be withheld and state determination of the question involved sought or required, for example where adjudication in the federal court would interfere with the collection of state taxes or fiscal affairs of the state, or the domestic policy of the state governing its administrative agencies. Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101 (1944) is an example of the first class in which the Court remanded the case to the district court to retain the bill pending a construction of the state statute by the state courts. *Cf.* A. F. of L. v. Watson, 327 U.S. 582 (1946). In Burford v. Sun Oil Co., 319 U.S. 315 (1943), an example of the second class, the Court reversed the court of appeals and affirmed the district court dismissing the complaint, refusing to enjoin the order of State Railroad Commission of Texas permitting the drilling of oil wells separated by distance less than the minimum prescribed. While jurisdiction in both cases did not depend on diversity, federal questions were involved. Mr. Justice Black said "a federal equity court . . . may, in its sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise, 'refuse to enforce or protect legal rights the exercise of which may be prejudicial to the public interest' for it 'is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state government in carrying out their domestic policy.'" Burford v. Sun Oil Co., *supra* at 317-318. Uncertainty concerning the meaning of the local law may not be the only criterion for determining whether in its discretion the federal court will refuse jurisdiction leaving the moving party the alternative of obtaining a state authoritative ruling. The federal court may be justified in retaining jurisdiction where there is also uncertainty surrounding the adequacy of the state remedy. *See* Hillsborough v. Cromwell, 326 U.S. 620, 628 (1945). Because of the rule that where the local law is in doubt, *i.e.* the proper interpretation of a state statute has not been decided by authoritative state decision and a federal constitutional question turns upon such an interpretation, the federal court will hold the case until such determination is made by the state courts, the lawyer is in somewhat of a quandry. If he starts initially in the state courts he may have to rely solely on an appeal to the Supreme Court for a ruling in his favor on the federal question. He cannot start over in the federal courts for a decision on the merits in the state courts will be res adjudicata to a subsequent diversity action in the federal courts. Angel v. Bullington, 330 U.S. 183 (1947). To assure himself of a decision in the federal courts on the federal question he is forced to start the action in the federal courts and at some stage in the proceedings having the case remanded to the district court to be held pending a determination of the local law in the state courts.

[51] "*Erie R. Co. v. Tompkins, supra,* did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern." Meredith v. Winter Haven, 320 U.S. 228, 237 (1943).

zens of a state[52] it is the duty of the federal courts to apply the law as it exists at the time of decision either in the trial court or on appeal.[53]

Thus a contrary conclusion in the *West* and *Stoner* cases[54] would give the losing party an opportunity in a diversity case to avoid the adverse decision of the state court where the case was remanded for further proceedings by relitigating the same issue between the same parties in the federal court. In the *Six Companies* case, the decision of the intermediate appellate court had, without disapproval, remained as the only expression of the state law for over twenty years.[55] *Fidelity Trust Co. v. Field*[56] has provoked considerable critical comment particularly since the circuit court's opinion has been cited approvingly by other vice-chancellors of New Jersey in departing from the prior cases which the Supreme Court held were binding on the federal courts.[57] It may be of significance that the point of law involved in the *Fidelity* case was the construction of a New Jersey statute. In such cases, the Supreme Court has followed a policy of looking to intermediate state court decisions for statutory interpretation.[58] But the fact remains that the decisions of the court of chancery in the *Fidelity* case were the only authoritative expressions of the state law at the time it was decided. Conceivably, it may be to the advantage of a litigant, in an isolated case, to start or remove a case to federal court where it appears that the ruling of the state intermediate court may be seriously questioned. On the other hand, to suggest that the state precedent might not be followed is in the main to admit that such a state decision would not be controlling in the federal courts.[59] That the federal courts are not required to follow "blindly" the ruling of any and all intermediate courts including *nisi prius* is inherent in the *King* decision.[60] Considerable latitude is given to the lower federal courts within the framework of the court's decisions to de-

[52] *See* Angel v. Bullington, *supra* note 50.

[53] "Until such time as a case is no longer *sut judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court." Vandenbark v. Owens-Illinois Co., 311 U.S. 538, 543 (1941). *Cf.* Huddleston v. Dwyer, 322 U.S. 232 (1944).

[54] *Supra* note 40.

[55] Six Companies of California v. Joint Highway District, 311 U.S. 180, 188 (1940).

[56] 311 U.S. 169 (1940).

[57] Clark, *State Law in the Federal Courts*, 55 YALE L. J. 267, 292 (1946).

[58] Russel v. Todd, 309 U.S. 280 (1940).

[59] *E.g.*, where the state rule is based upon an outmoded federal law. Breisch v. Central R.R. of New Jersey, 312 U.S. 484 (1941).

[60] King v. Order of United Commercial Travelers, 68 Sup. Ct. 488, 491 (1948).

termine what the state law is. Where the courts have decided on the basis of the state law that the decision of a lower state court is not controlling either because of the standing or the court or convincing evidence to the contrary the Supreme Court will probably leave the result undisturbed.[61]

The iniquities, if they are such, which have been said might follow from the application in diversity cases of the pronouncements of intermediate and lower state courts are minor when considered in the light of the "evils" which the *Erie* doctrine was fashioned to prevent. "The nub of the policy" is that for the same issues in a federal court sitting in effect as "another court of the State", the accident of citizenship "should not lead to a substantially different result."[62] The purpose is effectuated where the federal court approximates "as closely as may be State law in order to vindicate without discrimination a right derived solely from a State."[63]

The influence of the *Erie* decision did not stop with those cases in which it was meant to apply, *i.e.*, where jurisdiction is based on diversity of citizenship. The doctrine carried over and state law was followed by many of the lower federal courts in a number of the cases which are discussed in the succeeding sections of this paper.

II. *Cases which involve the civil rights, interests or legal relations of the United States as a party to the action.*

The Supreme Court's answer to the problem posed by this section has been foreshadowed by the prior discussion of the *Clearfield* case.[64]

This type of case has, in the past, however, caused some concern and confusion among the lower federal courts. Some of these courts have felt that even in matters where the federal government was involved in a civil action, *Erie* dictated that unless a provision of the Constitution or a particular federal statute expressly covered the specific matter in question, state law must govern. Thus the Ninth Circuit in the case of *Alameda County v. United States*,[65] which involved a suit by the United States for specific performance of a contract for the operation of certain bridges, entered into be-

[61] *See* MacGregor v. State Mutual Life Ass. Co., 315 U.S. 280, 281 (1942). In Huddleston v. Dwyer, supra note 53, at 237 the court said "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts, . . ." See also quotation from King v. Order of United Commercial Travelers, *supra*, p. 277.

[62] Guaranty Trust Co. v. York, 326 U.S. 99, 108-109 (1945).

[63] Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946).

[64] 318 U.S. 363 (1943).

[65] 124 F. 2d 611 (C.C.A. 9th 1941).

tween the Secretary of War and Alameda County, California, felt bound by *Erie* to apply California law. The court dismissed the contention of the United States that federal law should apply, because the origin of its rights in the premises derived first from its Constitutional power over navigable waters and "secondly through enactment of the Act of 1910." As to the Constitutional provision, the court said that nothing in the Constitution purports to put any obligation on the county to maintain any bridge. Such an obligation if present came from the contract and not from the Constitution. As to the statute, the conclusion of the court was, "Regarding the statute in question, there is nothing in it which confers on appellee any right against appellant."[66]

In other words, the Ninth Circuit took the position that unless the Federal Constitution or a federal statute deals specifically with the matter under consideration, *Erie* requires the federal courts to follow the state law.

In another case also involving a contract of the United States, in this case a suit by a contractor against the United States for breach of contract, the Tenth Circuit Court of Appeals decided, by merely stating it as a principle, that *Erie* forced them to determine the matter in accordance with the law of the state of the forum.[67]

Several other lower court cases have, however, gone the other way. In *Kolker v. United States*,[68] Judge Coleman said flatly: "But in a case involving the construction of such government contracts, local law is not controlling".

The interpretation of *Erie* expressed in the *Alameda County* line of cases is perhaps open to question on the basis of Brandeis' own express exception[69] as well as on the ground that they were not diversity cases.

There is, however, a further and perhaps even stronger reason running through the thinking in this type of case as to why *Erie*

---

[66] *Id.* at 616.

[67] United States v. Brookridge Farm, 111 F. 2d 461 (C.C.A. 10th 1940).

[68] 40 F. Supp. 972, 973 (D. Md. 1941). The "such contracts" referred to were building projects being conducted by the Department of Agriculture. Similarly decided were United States v. Grogan, 39 F. Supp. 819 (D. Montana 1941) (involving an action by the United States to enforce a construction contract) and Byron Jackson Co. v. United States, 35 F. Supp. 665 (S.D. Cal. 1940) (involving a seller's action in federal court against United States, on a contract made in the District of Columbia for sale of pumps and holding that a clause providing for liquidated damages was enforceable under federal principles irrespective of *Erie* and irrespective of actual damages, notwithstanding the law of California whereby such clauses would not be conclusive).

[69] "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state." Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

does not apply and why state law should be followed sparingly, if at all. This reason, later to be articulated by the Supreme Court in the *Clearfield* and other decisions, was early suggested by Judge Yankwich in *Byron Jackson v. United States,* when he pointed out that the United States Government should not, in its contractual undertakings, be subjected, in determinations as to their validity, to the law of forty-eight different states. Rather, the contracting agencies should be entitled to rely on one uniform rule.[70]

Although the *Alameda County* case was decided as late as 1941, the Supreme court as early as 1939, the year after the decision in the *Erie* case, had already decided that this type of case was an exception to the *Erie* doctrine. In *Board of Commissioners v. United States,*[71] the Supreme Court by implication rejected the doctrine later to be expressed in the *Alameda County* case, and pointed toward their adoption of Judge Yankwich's philosophy. In the *Board of Commissioners* case, an action was brought by the United States in behalf of one of its Indian wards for taxes unlawfully paid. In 1861 the United States had made a treaty with the Pottawatomie Indians which provided that lands held by the United States in trust for the Pottawatomie Indians were "exempt from taxation", etc. The lands in questions here were so held, but in 1918 the Secretary of the Interior, over the objection of this Indian, had cancelled her trust patent and issued instead a fee simple patent; in consequence, Jackson County, where the land was located, began to subject the land to its regular property taxes. Later Congress authorized the cancellation of fee simple patents issued over the objection of the allottees and the United States began these proceedings to recover for its Indian ward the taxes paid to Jackson County. The district court gave judgment for the taxes and also for six percent interest. Under Kansas law a taxpayer may not recover from a county, interest upon taxes wrongfully collected. The question on appeal was the allowance of the interest. The county urged upon the court that the *Erie* case bound the district court to follow the Kansas decisions and disallow the interest. The majority of the Supreme Court, although disallowing the interest because to allow it here would be inequitable, declined to base their decision on the Kansas decisions. Mr. Justice Frankfurter, speaking for the court, said, "Since the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of Kansas."[72]

---

[70] *Supra* note 68 at 667.

[71] 308 U.S. 343 (1939).

[72] *Id.* at 349.

This doctrine, however, does not mean that state law will never be followed in such a case, but if it is, it is because the federal court believes, as a matter of policy, that the best federal rule in a particular case would be the adoption of the applicable state rule as a matter of federal law. This, of course, is completely different from the *Erie* command.

In *Royal Indemnity v. United States*[73] for example, the appropriate measure of damage, expressed in terms of interest, for delayed payment of a contractual obligation to the United States was before the Court. There was no applicable federal statute and the Court declared that in that case it was up to the federal courts themselves to fix the appropriate rate. The Court, speaking through Mr. Justice Stone, said, in effect, that in such a case the federal courts would determine the answer in accordance with their own criteria.[74]

The majority then decided to adopt as the federal rule the rate of interest prevailing in the state where the obligation was given and to be performed, in this case New York. The dissent, written by Mr. Justice Black and concurred in by Justices Murphy and Douglas, felt that the subjection of federal obligors to varying rates of interest dependent upon where they resided was unfortunate and they felt that the rate of interest should be uniform and that the Court should set it at a lower figure than the six percent which was the statutory New York rate.[75]

It was in the *Clearfield Trust*[76] case, previously discussed, that the Court gave its most articulate exposition, up to that time, of this limitation to the *Erie* doctrine.[77]

In 1947, the Court finally had before it the question of a contract entered into by an agency of the federal government where the statute authorizing the contract is silent on the particular point

[73] 313 U.S. 289 (1941).

[74] *Id.* at 296.

[75] In U.S. v. Bethlehem Steel Corp. 315 U.S. 289 (1942), the Court avoided the question of whether *Erie* would compel the application of local law to contracts of the Emergency Fleet Corporation. It would seem reasonably clear, however, from the cases discussed above that if the Court were forced to a decision of that point it would decide that such contracts, being contractual obligations of the United States, would be governed by federal rather than state law. See discussion of Priebe & Sons v. United States, *infra*, p. 294.

[76] 318 U.S. 363 (1943).

[77] In National Metropolitan Bank v. United States, 323 U.S. 454 (1945), the court flatly reaffirmed the *Clearfield* decision in a case involving somewhat similar facts. It is a matter of perhaps passing interest that Mr. Justice Douglas, who wrote the opinion of the Court in the *Clearfield* case, merely concurred in the result in the *Metropolitan Bank* decision, but gave no reasons for his apparent disagreement with the reasoning of the Court's opinion which was delivered by Mr. Justice Black.

involved. It was this question which the Ninth Circuit in the *Alameda* case had answered by finding that *Erie* applied and it was this same question, too, which the Supreme Court itself had sidestepped in the *Bethlehem Steel* case.[78] In *Priebe & Sons v. United States*[79] the issue was squarely presented and decided. In that case the Federal Surplus Commodities Corporation (FSCC) had entered into a contract with Priebe & Sons, Inc. for the purchase of dried eggs for shipment to England and Russia under Lend Lease. The contract contained two provisions concerning "liquidated damages"; one dealt with delays in delivery and was not applicable in this case because deliveries were timely. The other provision provided for the payment of "liquidated damages" if the contractor failed to have the specified quantities of eggs inspected and ready for delivery on the date named in the offer. As a matter of fact, on that date the contractor had not had the eggs inspected, although they were inspected and delivered by the time delivery was actually called for. When the FSCC discovered this fact, it deducted from its payments to the contractor the amount specified in the contract as "liquidated damages" and the contractor brought this suit in the Court of Claims to recover the amount so withheld plus interest. The majority, speaking through Mr. Justice Douglas, first decided the question of what law should apply by stating summarily:

> It is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law.[80]

The majority then decided that under "principles of general contract law" such a provision for liquidated damages was invalid because since the government suffered no injury and there was no delay in delivery it was in reality a penalty rather than an attempt to fix compensation for an anticipated loss. Being a penalty it would not be enforced. Mr. Justice Black, with whom Mr. Justice Murphy agreed, dissented on the ground that since Congress had nowhere, in the various statutes authorizing federal agents to enter into contracts, expressly or impliedly forbade the inclusion of such clauses, he could not see why their inclusion in arm's length contracts should be nullified because of the Supreme Court's "invocation of a nebulous 'general contract law'."[81] Justice Black, however, prefaced his dissent with the statement that he regarded the decisions of the Court since the *Erie* case, "as having established that the construction and validity of *all* Government contracts are gov-

[78] U. S. v. Bethlehem Steel Corp., 315 U.S. 289 (1942).
[79] 68 Sup. Ct. 123 (1947).
[80] *Id.* at 125.
[81] *Id.* at 127.

erned by federal law, whether executed under authority of the Lend-Lease Act or any other."[82]

This series of cases would appear to have crystallized a definite exception to the *Erie* doctrine. If it is correct to say that the *Erie* doctrine is limited to cases where federal jurisdiction is grounded on diversity then, of course, this line of cases could be explained on that ground alone. The Supreme Court, however, has not based its decisions on that somewhat narrow ground. This exception to the *Erie* case is also, of course, explicitly recognized by Justice Brandeis in his opinion in that case where he says:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.[83]

The Supreme Court, however, had apparently felt that there is an additional and perhaps even more forceful reason for departing from the *Erie* doctrine in cases where the United States is a party and where its civil rights, interests or legal relations are involved.[84] It is the fact that when the Government's civil rights or its interests as a contracting party are involved it may be important as a matter of policy that there be a uniform rule throughout the forty-eight states.

---

[82] *Id.* at 219. Mr. Justice Frankfurter wrote a separate dissent, in which the Chief Justice joined. His view was, in substance, that although he would agree with the majority that in ordinary times the silence of Congress would indicate a desire to have its contracts governed by "ordinary rules of contract law," these were not ordinary times and, therefore, he would find an implied authorization of a wider power for federal contracting agents operating during an emergency under such unusual legislation.

[83] Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). This statement however, was somewhat enigmatic and confused the Ninth Circuit in the *Alameda* case, as to what should be done where the Federal Constitution or the federal statute shed absolutely no light on the problem before the court. In such a case which involves "judicial legislation" rather than "interpretation," the Ninth Circuit, erroneously as it turned out, decided that Justice Brandeis' exception was not applicable.

[84] Judge Yankwich had foreseen in 1940 with almost prescient insight the line which the Supreme Court was to take in these cases. See *supra* note 68. At least one lower federal court has adopted this same line of reasoning in questions involving the ownership and rights in United States savings bonds. In United States v. Dauphin Deposit Trust Co., 50 F. Supp. 73 (M.D. Pa. 1943) it was held that federal law and not state law determines the ownership of such savings bonds in a decedent's estate. The district court said at page 77, "This constitutes another example in the constantly increasing list of cases where application of the doctrine of Erie R. Co. v. Tompkins, supra, will lead to more confusion in the Federal law."

Although there may be situations, as in *Royal Indemnity Co. v. United States*,[85] where even in cases such as these the federal court *may* select as *the federal rule* the state law, there are also other cases where federal policy may, in the opinion of the courts, compel, as a practical matter, a uniform rule throughout the country. In the *Clearfield Trust* case, *e.g.*, the Supreme Court felt that as a matter of administrative practicality in the federal government's issuance of commercial paper, federal officials should be able to rely on one uniform rule throughout the United States. The Court apparently placed a great deal of weight on this point as has been noted from language previously quoted.[86]

At least one strong reason for this exception to *Erie* therefore is the desire of the federal courts to retain within their power the right to determine the rules to be applied, in order that they may insure uniformity in those cases where it is believed federal administrative efficiency or convenience make uniformity desirable.

In a quite recent case,[87] the Supreme Court has extended this doctrine to a case in which the non-contractual or tortious relations of the United States as a party are involved. The problem presented was whether the government could recover from the Oil Co., as a tortfeasor, the amounts expended by the government for hos-

---

[85] *Supra* note 73. But even in that case compare Mr. Justice Black (with whom Mr. Justice Douglas and Mr. Justice Murphy concurred) dissenting: "I am of opinion that since our 'judicial law-making' is and must be national in its scope, the law which we adopt fixing a rate of interest for transactions such as that here involved should operate with uniformity throughout the nation."

[86] *Supra* note 11 at 367. The soundness of this view might be queried in view of the fact that conversely it requires the local merchant, banker or other citizen who receives government commercial paper in the course of his business to be familiar with two sets of rules governing commercial paper. It might also be suggested that large national industrial or commercial concerns issuing their commercial paper are faced with the same practical problems as is the federal government, but are not provided with any such set of uniform rules upon which they may rely. There is in this view, perhaps more than a hint of the traditional concept of the rights of the sovereign over and above the rights of the citizen—a concept which in another setting (the immunity of the sovereign from suit without consent) Mr. Justice Frankfurter has recently characterized as a doctrine which is "an anachronistic survival of monarchical privilege and runs counter to democratic notions of the moral responsibility of the State. Kennecott Copper Corp. v. State Tax Comm., 327 U.S. 573, 580 (1946). Whether or not, as a matter of policy, the sovereign in its ordinary business dealings should be governed by a different set of rules than those applicable to ordinary citizens in the same sort of transactions, such nevertheless seems to be the present view of the federal courts. For an indication of the English view on this point, *see* King v. International Trustee, A.C. 500 (1937).

[87] United States v. Standard Oil Co. of California, 67 Sup. Ct. 1604 (1947).

pitalization and soldier's pay for a soldier injured through the negligence of the Oil Co.

The first question which the court had to determine was whether state or federal law governed. In determining that this was a matter of federal law in which, in the absence of an applicable Act of Congress, it was for the federal court to fashion the governing rule according to its own standards, the Court rendered a somewhat elaborate and quite instructive dissertation on the limitations of *Erie*.[88] In addition, the Court felt that, quite aside from the inapplicability of *Erie*, a matter so distinctly federal as the government-soldier relationship and one which involved federal fiscal policy there was every reason policywise to ignore state law and establish a uniform national rule.

Having so decided the Court then determined that in absence of congressional action there is no cause of action in favor of the Government against a third party who has injured one of its servants.[89]

It is evident that in all of these cases the evil of opposing results which *Erie* was fashioned to prevent is absent and so the purpose behind *Erie* is not defeated by ignoring it in this type of case. This exception to *Erie* then, if exception it is, is probably amply justified both in logic and policy.

III. *Cases which do not involve the civil rights, interests or legal relations of the United States as a party, but in which the jurisdiction of the federal court is based on a federal statute.*

This type of case, of course, falls within Justice Brandeis' own qualification of *Erie*[90] once the question raised by the Ninth Circuit in the *Alameda County*[91] case has been answered successfully. That is since these cases, by definition, arise under a federal statute, they are not within the ambit of *Erie* unless Justice Brandeis meant that his exception was only applicable when the provision of the Constitution or the Act of Congress involved dealt specifically with the problem before the Court. The Ninth Circuit in the *Alameda County* case, so interpreted Brandeis' statement. The Supreme

[88] It is somewhat illuminating that the Court's opinion was delivered by Mr. Justice Rutledge and that in the course thereof he expressly says that *Erie* is limited to cases of diversity jurisdiction. In D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447 (1942), this same Justice again speaking for the Court had purposely sidestepped this question, although Mr. Justice Jackson in a concurring opinion had urged upon the Court the view now enunciated by Justice Rutledge in the instant case.

[89] Mr. Justice Frankfurter concurred in the result, but wrote no separate opinion. Mr. Justice Jackson dissented, but merely on the ground that the Court should have imposed liability.

[90] *Supra* note 69.

[91] *Supra* note 65.

Court, however, was not long in fashioning a different theory. An early post-*Erie* case, *Deitrick v. Greaney*,[92] involved an action brought by a receiver of a national banking association to compel payment of a promissory note. The Court refused to accept a defense on the note raised by the defendant which was based on local law. The Court brushed aside the *Erie* argument, by stating and thus deciding:

> But it is the federal statute which condemns as unlawful respondents' acts. The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted.[93]

In the case of *D'Oench, Duhme & Co. v. F. D. I. C.*,[94] the facts involved a suit by the FDIC on a note given to a bank by the defendant. The defendant had had a secret agreement with the bank that the note would not be enforced. The defenses on the note were lack of consideration because of the agreement and that the FDIC was not a holder in due course. The majority decided the case in favor of the FDIC on the basis of federal law relying on the analogy of *Deitrick v. Greaney*. Mr. Justice Frankfurter, concurring, felt that since the law of either of the two states which might have been applicable would have led to the result reached by the majority, it was not necessary and therefore not wise to base the decision on "federal law".

It was Mr. Justice Jackson, however, who in his concurring opinion faced squarely the *Erie* question. He first posed the problem as follows:

> I think we should attempt a more explicit answer to the question whether federal or state law governs our decision in this sort of case than is found either in the opinion of the Court or in the concurring opinion of Mr. Justice Frankfurter.[95]

He then answered the question thus posed:

> I do not understand Justice Brandeis' statement in *Erie R. Co. v. Tompkins*, 304 U.S. 64 at 78, that 'There is no federal general common law,' to deny that the common law may in proper cases be an aid to, or the basis of, decision of federal questions.[96]
>
> A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the

---

[92] 309 U.S. 190 (1940).
[93] *Id.* at 200.
[94] 315 U.S. 447 (1942).
[95] *Id.* at 465.
[96] *Id.* at 469, 470.

> last analysis its descision turns upon the law of the United States, not that of any state. Federal law is no juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes. It is found in the federal Constitution, statutes or common law. Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present. *Board of Commissioners v. United States,* 308 U.S. 343, 350.[97]

The Supreme Court thus adopted the idea that where jurisdiction is based on a federal statute then all problems arising in connection therewith (whether dealt with by the statute or not) are matters for judicial determination by the federal courts as matters of federal common law and the *Erie* doctrine has no application. It was only to a very limited extent that *Erie* had deprived the federal courts of their power to legislate interstitially, if we may paraphrase Mr. Justice Holmes' apt remark.[98]

In *Heiser v. Woodruff*,[99] the Court dealt with bankruptcy and decided that nothing in *Erie* "requires a court of bankruptcy, in applying the Statutes of the United States governing the liquidation of bankrupts' estates, to adopt local rules of law in determining what claims are provable, or to be allowed, or how the bankrupts' estate is to be distributed among claimants."[100]

In cases arising under federal statutes, of course, the *Black and*

---

[97] *Id.* at 471-472.

[98] In Holmberg v. Armbrecht, 327 U.S. 392 (1946), a suit was brought against certain bank stockholders under a section of the Federal Farm Loan Act making such stockholders liable for a 100% assessment. The defendant contended that the action was barred by the New York State ten year statute of limitations which applies when no other limitation is specifically prescribed. The Supreme Court held that a federally created equitable right could not be barred by a state statute where the result would be inequitable as it was felt it would in this case. A comparison of this case with Guaranty Trust Co. v. York, 326 U.S. 99 (1945), will amply illustrate the difference in approach to the same question in the *Erie* and non-*Erie* case.

[99] 327 U.S. 726 (1946).

[100] *Id.* at 731. The same view had been previously expressed by the Court in Wragg v. Federal Land Bank of New Orleans, 317 U.S. 325 (1943). See Clark, *State Law in the Federal Courts*, 55 YALE L. J. 267, 281 (1946). There is, however, nothing in these cases which necessarily says that in the appropriate case, the federal court cannot apply state law; these cases do no more than decide that matters arising under the bankruptcy laws are federal questions to be decided by the federal courts without regard to the *Erie* doctrine.

White Taxicab[101] type of situation could not arise and the policy basis underlying *Erie* was not present so it is not surprising that the *Erie* doctrine was early ignored.[102] The present state of the cases can perhaps be summarized as follows: if jurisdiction is based on a federal statute the judicial determinations are always matters of federal law, made without reference to the *Erie* doctrine, but since a federal statute is involved it is the statute which will govern the applicable law as well as all other questions. If, therefore, the statute expressly or by implication directs that the state law be followed, the federal court must, of course, as a matter of federal law, follow the applicable state law. The federal court also may, as in the *Royal Indemnity* case,[103] determine the federal rule by reference to the state law if that appears appropriate in a given case.[104] If the federal court in a given situation feels that policywise it would be best to follow the state law it can usually do so by finding the "necessary implication" in the federal statute involved. If the court feels otherwise and the statute is silent, the question is still a matter of "federal law" for "federal determination".[105]

An interesting question, which has not yet reached the Supreme Court, has arisen in connection with some of the lower court decisions under the Miller Act.[106] This Act was passed for the protection of subcontractors, suppliers of material, etc., to contractors holding government contracts and permits them to tap a source of

---

[101] Black and White Taxicab Co. v. Brown and Yellow Taxicab Co., 276 U.S. 518 (1928).

[102] In fact uniformity of decision between state and federal courts (the real point of *Erie*) is furthered by this line of thought because, as will be developed *infra*, p. 306, in cases where a federal statute is involved the federal rule governs whether the case be in the federal court solely on diversity grounds or even if it is brought in the state court.

[103] 313 U.S. 289 (1941).

[104] This thought is well expressed in a tax case, Helvering v. Stuart, 317 U.S. 154, 161 (1942): "The intention of Congress controls what law federal or state, is to be applied. *Burnet v. Harmel, 287 U.S. 103, 110; Lyeth v. Hoey, 305 U.S. 188, 194.* Since the federal revenue laws are designed for a national scheme of taxation, their provisions are not to be deemed subject to state law 'unless the language or necessary implication of the section involved' so requires. *United States v. Pelzer*, 312 U.S. 399, 402-3. This decision applied federal definition to determine whether an interest in property was called a 'future interest.' When Congress fixes a tax on the possibility of the revesting of property or the distribution of income, the 'necessary implication' we think, is that the possibility is to be determined by the state law." This statement of judicial attitude is equally applicable to all federal statutes and reflects the federal courts' approach whether the statute in question be taxation, bankruptcy or other.

[105] The cases which have arisen to date under the various federal statutes have been collected in a Note in 59 HARV. L. REV. 966 (1946). See also Annotation, 140 A.L.R. 717 (1942).

[106] 40 U.S.C.A. Secs. 270a, 270b and 270c (1943).

indemnification not otherwise directly open to them. The suits are brought by the subcontractors, etc. under Section 2b of the Act which provides that:

> Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere.

Thus, although there may or may not be diversity of citizenship, the basis for federal jurisdiction is the federal statute rather than diversity. Inasmuch as the suit is on a contract concerning which the statute says nothing, most lower federal courts have felt that *Erie* controls and state law must govern, despite the fact that federal jurisdiction is grounded on a federal statute.[107] At least one other federal court, however, relying on the fact that these cases are brought under a federal statute, has held that *Erie* has no application.[108] The facts that the construction of the federal statute is in no way involved and that usually the laws of the state where the federal court is sitting are, as one court has put it, "both *lex loci contractus* and *lex fori*",[109] are strong reasons for applying the laws of the state rather than fashioning a different rule. It is submitted, however, that those courts which have applied the local law on the ground of an *Erie* mandate have perhaps reached a correct result, but for the wrong reasons. It would be more symmetrical and perhaps more logical to say that there is a federal statute and therefore federal law governs, but that the "necessary implication" from the statute, is that Congress intended that the federal courts should follow the applicable local rule. The reasons recited by the courts for applying *Erie* would, it is suggested, be equally opposite for finding the "necessary implications" in the statute.

A more difficult and perlexing problem, and one that has also not yet been entirely clarified by the Supreme Court, is presented by the unfair competition cases. These cases may arise when an action is brought in the federal court on the basis of a federal statute for infringement of a copyright, or a trademark and there is joined with it a second cause of action for unfair competion based

---

[107] In United States v. Henke Construction Co., 157 F 2d 13 (C.C.A. 8th 1946), *e.g.*, the court said: "While the present action is brought under a federal statute it is in the nature of an action on contract and the consideration of the federal statute is not involved." The court then went on to hold that *Erie* as extended and applied by the *Klaxon* case was applicable. To the same effect see United States, *ex rel.* Gillioz v. John Kerns Construction Co., 50 F. Supp. 692 (E.D. Ark. 1943); United States v. Blair, 147 F. 2d 840 (C.C.A. 8th 1945).

[108] Liebman v. United States, 153 F. 2d 350, (C.C.A. 9th 1946).

[109] United States, *ex rel.* Gillioz v. John Kerns Construction Co., *supra* note 107.

on substantially the same facts as those involved in the infringement issue.[110] They may also arise when the unfair competition action is brought alone as a common law action and federal jurisdiction is based solely on diversity of citizenship grounds. In this latter type case, however, the Supreme Court has decided that *Erie* applies and local law governs.[111]

Two problems are raised in the *Hurn v. Oursler*[112] class of cases. First is what law governs in the infringement case itself. This would not appear too difficult and in line with the cases previously discussed it would seem that, there being a federal act involved, "a federal common law rather than a local common law should be applied in formulating a gloss for, or filling a lacuna, in the act."[113] The Supreme Court, however, has not yet passed on the point. In the *Pecheur Co. v. National Candy Co.* case,[114] the Supreme Court asked for argument on the point of whether local or federal law should be applied (both the district and the circuit courts having failed to consider or apply local law) in a suit for infringement under the Trademark Act of 1905. When the case was briefed in the Supreme Court, however, it was discovered for the first time that the complaint had alleged that the suit was grounded on a registered trademark when actually the registration was under the Copyright Law. In view of this, the Court concluded that the only cause of action which the record would support would be a common law one of unfair competition and trademark infringement and that was clearly governed by "local law". The case was therefore remanded for application of the appropriate local law.

Whatever decision is reached on the question arising under the federal statute, there is still the problem of what law should govern the second cause of action for common law "unfair competition" which only slips into a federal court on the coattails of the truly federal action by being within the ambit of the *Oursler* case. Both of these questions have been the subject of much scholarly discus-

---

[110] It was Hurn v. Oursler, 289 U.S. 238 (1933) that had decided that where claims of infringement (under a federal statute) and unfair competition (common law) rest on identical facts a federal court having properly gained jurisdiction in the first cause of action may retain jurisdiction to try the second even though there is no diversity of citizenship or other basis for federal jurisdiction.

[111] Pecheur Lozenge Co. v. National Candy Co., 315 U.S. 666 (1942). See also Fashion Guild v. Trade Commission, 312 U.S. 457, 468 (1941).

[112] *Supra* note 110.

[113] This phrase is borrowed from Judge Wyzanski's opinion in National Fruit Product Co. v. Dwinell-Wright Co., 47 F. Supp. 499 (D. Mass. 1942), aff'd., 140 F. 2d 618 (C.C.A. 1st 1944).

[114] *Supra* note 111.

sion[115] as well as no little judicial treatment. Probably the most thorough analysis of the matter by a court, to date, was that made by Judge Wyzanski in the *National Fruit Product Co.* case.[116] In that case Judge Wyzanski first decided that the question of infringement of registered trademarks is a matter of federal law. In this view the District Judge seems to be corroborated by most if not all the cases thus far decided on the point.[117] In considering the second point of the unfair competition cause of action appended to the infringment claim, Judge Wyzanski carefully weighed the arguments propounded by Zlinkoff,[118] and others in favor of applying a federal common law to the unfair competition claim. He said:

> There is an anomaly in the same tribunal applying to the same set of facts at the same time two different rules of law. Moreover, where a federally registered mark is involved, the problem of unfair competition, by hypothesis, involves commerce among several states, and alleged torts in several states. In such a case reference to the law of the state where the United States court sits requires a consideration not only of local tort rules, but also of local state rules of conflict of laws, Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477; and if those local state rules of conflict of laws were those set forth in American Law Institute, Restatement, Conflicts, Sec. 378, 383, 384, then the United States Court would be required to frame its opinion, mould its decree and assess damages for each state where the alleged tort occurred. R.C.A. Mfg. Co. v. Whiteman, 2 Cir., 114 F. 2d 86, 89 col. 2; Triangle Publications v. New England Newspaper Publishing Co., D. C. Mass., 46 F. Supp. 198, 203. See Note, 41 Col. L. Rev. 1403. Again, in many states there is, because of the long reign of Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865, now in existence no body, or at least no modern body, of local law of unfair competition. Reference to local law would sometimes be reference to archaic decisions. At other times it would be meaningless because there would be no local decisions and the federal courts would have to indulge in a presumption that local courts, when the matter came before them, would follow federal decisions and text books, citing exclusively federal decisions. Cf. Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 113, 59 S. Ct. 109, 83 L. Ed. 73, note 1. Finally, unfair competition is under modern conditions of

---

[115] See *e.g.* for an exhaustive treatment of the subject, Zlinkoff, *Erie v. Tompkins: In Relation to the Law of Trademarks and Unfair Competition.* 42 COL. L. REV. 955 (1942). See also, Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289. (1940).

[116] *Supra* note 113.

[117] Judge Wyzanski's decision was affirmed by his own superiors in 140 F. 2d 618 (C.C.A. 1st 1944), see also Time, Inc. v. Vioblin Corp. 128 F. 2d 860 (C.C.A. 7th 1942) *cert. denied*, 317 U.S. 673 (1942); Philco Corp. v. Phillips Mfg. Co., 133 F. 2d 663 (C.C.A. 7th 1943).

[118] See note 115 *supra.*

> national commerce a subject adapted for national, uniform treatment, more particularly since large investments have been made on the faith of the broad protection the federal courts developed between 1900 and Tompkins' case in 1938. Cf. Robert S. Lynd, The People As Consumers, Report of President Hoover's Research Committee on Recent Social Trends in the United States, vol. II, ch. XXII, p. 876.[119]

Judge Wyzanski concludes, however, that these arguments are not overly persuasive. As to the argument that there may be a conflict problem involving forty-eight states, the Judge doubts if the states will adopt a "checker-board jurisprudence" and until that happens the *Klaxon* case will not force the federal courts to do so. He further concludes that the absence of state decisions because of the reign of *Swift v. Tyson,* however true it may be of other states, does not apply to Massachusetts. Finally the point that national commerce requires national rules on this subject, he feels is a matter for Congress and not the courts to implement. Judge Wyzanski's ultimate decision that local law should apply seems to find authoritative support by implication at least from the Supreme Court in the *Pecheur Lozenge Co., Inc. v. National Candy Co.,*[120] and the other lower federal courts have also veered strongly in this direction.[121]

Certainly any other result would be inconsistent with the trend in the strictly *Erie* situations heretofore discussed and would be difficult, if not impossible to reconcile with the uniformity philosophy which underlies the *Erie* decision.

IV. *Cases which arise in a state court or in which the basis of the jurisdiction of the federal court is diversity of citizenship but*

---

[119] *Supra* note 113, National Fruit Product Co. v. Dwinell-Wright Co., 47 F. Supp. 499, 503-04 (D. Mass. 1942), *aff'd,* 140 F. 2d 618 (C.C.A. 1st 1944). Judge Clark in his article, *State Law in the Federal Courts, supra,* lays great stress on what he terms the "federal specialties," in which he includes cases of unfair competition based on trademark infringement. He concludes, however, that the fears expressed by those who urge the federal law approach are probably more fanciful than real and that, "Except for some slight nuances of emphasis, this law may well be much the same whether expounded by state or federal judges." For a good example of the practical operation of this idea, *see* Judge Clark's opinion in Lucien Lelong Inc. v. Lander Co., Inc., 164 F. 2d 395 (C.C.A. 2d 1947), *affirming,* 67 F. Supp. 997 (S.D. N.Y. 1947).

[120] See note 111 *supra.*

[121] See *e.g.* Mishawaka Rubber & Woolen Mfg. Co. v. Panther-Panco Rubber Co., 55 F. Supp. 308 (D. Mass. 1944) and Skinner Mfg. Co. v. Kellogg Sales Co., 143 F. 2d 895 (C.C.A. 8th 1944), *affirming* 52 F. Supp. 432 (D. Neb. 1943), *cert denied,* 323 U.S. 766 (1944).

where a question is raised involving the Constitution or a federal statute.

These cases, of course, present the opposite side of the coin. If whenever a federal act is involved federal law, rather than local law, shall apply "in formulating a gloss for, or filling a lacuna, in the act", then consistency and uniformity would require that the federal rule should also govern whenever a federal statute is indirectly involved, even if the basis for federal jurisdiction is solely diversity or even if the case arises in a state court. To reach any other result would do violence to the *Erie* tenet of uniformity.

In a very recent case[122] the Supreme Court recognized this principle. In that case a suit was brought by guardians of minor children to recover damages from the railroad for the death of the father, who was killed while riding on a train of the defendant. Jurisdiction was founded on diversity of citizenship. The deceased had been riding on a free pass which provided by its terms that the user assumed all risk of injury to person or property whether by negligence or otherwise and the user absolved the issuing company from liability therefor. Under the applicable local law (Utah) recovery is permitted against a railroad when its negligence was responsible for a passenger's death, whether that passenger rides on a free pass containing an attempted waiver of liability for negligence or pays his fare in money. The Hepburn Act,[123] however, one of the various statutes regulating interstate commerce, deals with "free passes" on interstate carriers. As early as 1904, even before the Hepburn Act, the Supreme Court had held that a provision in a "free pass" similar to the one in the instant case absolved the railroad from liability caused by ordinary negligence.[124] The Hepburn Act was passed in 1906 and limited the cases in which "free passes" could be issued and after that Act the course of decisions remained consistent with the *Adams* case.[125] In 1940 the statutes dealing with railroads were revamped and the free pass provisions were modified only to permit free transportation to additional classes of persons — no changes were made in the established judicial interpretation. In view of this history the court determined that the issuance of free passes and the judicial determination of their legal effect was a federal matter to the exclusion

[122] Francis v. Southern Pacific Co., 68 S. Ct. 611 (1948).
[123] 34 STAT. 584 (1906); 49 U.S.C. §1 (1940).
[124] Northern Pacific R. Co. v. Adams, 192 U.S. 440 (1904).
[125] *Ibid.*

of state law and *Erie* had no application.[126] The majority further determined that since Congress had amended the Act without changing the judicial decisions relevant thereto, those judicial determinations had in fact become part of the Act and therefore the rule as expressed in the *Adams* case was the federal law which must be followed. Mr. Justice Black was joined by Justices Murphy and Rutledge in dissenting. The ground of the dissent seemed to be, first, that no Act of Congress had invaded the power of the state of Utah to provide damages for this kind of wrongful death and therefore, since *Erie*, if Utah law would permit recovery, the federal courts were bound to follow that law. The dissent went on to say, however, that even if this case were to be governed by federal law they could not agree with the majority that the *Adams* case was necessarily binding on them as the federal rule and they would reexamine that rule in the light of today and would overrule it.

The majority indicated that the federal rule of the *Adams* case would by virtue of the Supremacy Clause have to be followed by a state court should the case have arisen there.[127] This result, of course, is a necessary and logical extension of the majority's reasoning and despite the rumblings of the dissent over the primary conclusion of the majority the principle that when the interpretation of a federal statute or provision of the United States Constitu-

[126] For an earlier unanimous decision on the same point see Sola Electric Co. v. Jefferson Co., 317 U.S. 173 (1942) which involved a suit in which diversity of citizenship was the basis for federal jurisdiction. In that case the plaintiff alleged that it was the owner of a certain patent, that it had entered into a license contract with the defendant to manufacture transformers under the patent on payment of a royalty and that the agreement had contained a provision that the price of transformers sold by the defendant were not to be more favorable than the prices and other conditions prescribed by the plaintiff for its own sales and those of its other licensees. Defendant challenged certain features of the patent and asserted that for that reason the price control features of the agreement rendered the agreement invalid and the plaintiff could not recover. The plaintiff replied that the defendant was estopped to challenge the price-fixing clause by showing that the patent is invalid and the price restriction accordingly invalid because not protected by the patent monopoly. The lower courts had agreed that the defendant by accepting the licensing agreement was estopped from denying the validity of the patent. The Supreme Court, however, in an unanimous opinion reversed, saying that the price fixing agreement was illegal under the Sherman Act unless it is coupled with a valid patent and since a federal statute is, therefore, involved, the laws of Illinois as to whether or not there would be estoppel are not applicable. The Court said that this was a matter of federal law to be decided by the federal courts. The Court then went on to decide that to permit an estoppel would be to thwart the purpose of the Sherman Act and so denied it.

[127] In fact the Court cited with approval a case in the *Adams* line of decisions which had arisen in a state court in which this result had been reached. Kansas City So. R. Co. v. Van Zant, 260 U.S. 459 (1923).

tion is in some manner involved in a case arising in a state court or in a federal court under diversity jurisdiction, the interpretation of the federal problem must be made in line with federal rather than state rules seems to be presently the law.[128] Certainly symmetry, consistency and the logic of *Erie* would all have been ignored had the Court come to any other conclusion.

In conclusion, the Supreme Court, in the ten years since *Erie*, has gone quite far in clarifying the extent and limits of that somewhat enigmatic decision. The *Erie* doctrine applies only to those cases where jurisdiction is grounded upon diversity of citizenship and even there if a "federal question" is raised, state law will not be binding as authority on the federal courts. Where federal jurisdiction is founded on grounds other than diversity of citizenship there is still a "federal common law." If in deciding the issues, the federal courts follow the state law where by federal statute, or the Constitution, the question is left to judicial implementation, it is not because *Erie* so requires. Rather, state law is followed because the court finds in the statute a direction either express or by "necessary implication" to that effect, or the court determines as a matter of federal law that it will adopt as the federal rule the pertinent state law.

In the solution of questions involving federal statutes or the Constitution, the federal rule governs even though the case may arise initially in the state courts. In these situations it is evident that the desideratum of uniformity which undoubtedly underlies *Erie* is fulfilled rather than frustrated. Similarly, this same aim can be detected in the Supreme Court's approach to the strictly *Erie* cases where jurisdiction is based on diversity. In those cases, the touchstone is uniformity of result. Formalistic concepts of substance and procedure are to be swept away so that all rights derived solely from the state may be, within the framework of our federal system, adjudicated in the federal courts with substantially the same result as would obtain in the state court across the street or a block away.

---

[128] In Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) a case arising in the courts of the state of Pennsylvania was reversed by the Supreme Court because of the failure of the state court to apply federal rather than local law in a suit by a seaman under Section 33 of the Merchant Marine Act (46 U.S.C. §688). The Court said at page 245: "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law." *Cf.* United States v. Waddell, 323 U.S. 353 (1945).