Michigan Law Review

Volume 36 | Issue 8

1938

CONSTITUTIONAL LAW - FEDERAL COURTS - LAW TO BE APPLIED IN CASES OF DIVERSITY OF CITIZENSHIP - SWIFT v. TYSON OVERRULE

Frank B. Stone
University of Michigan Law School

COMMENTS

CONSTITUTIONAL LAW — FEDERAL COURTS — LAW TO BE APPLIED IN CASES OF DIVERSITY OF CITIZENSHIP — SWIFT V. TYSON OVERRULED — A recent personal injury case, *Erie Railroad v. Tompkins*,[1] arose in the federal district court, based upon diversity of citizenship, in which the defendant urged that state judicial decisions of Pennsylvania, the locus delicti, imposed no liability on it for negligence to trespassers. The plaintiff denied that such was the Pennsylvania law and alternatively replied that the issue of law was one to be determined by the federal court without regard to the law of Pennsylvania. On April 25, 1938, a verdict for the plaintiff was unanimously set aside by the Supreme Court. Two members, Justices Butler and McReynolds, based their decision upon the law of Pennsylvania. The other six, however, denied any merit in the plaintiff's alternative reply, and held the federal courts bound by the law of Pennsylvania, thereby disapproving the rule of *Swift v. Tyson*.[2]

[1] Erie R. R. v. Tompkins, (U. S. 1938) 58 S. Ct. 817.
[2] 16 Pet. (41 U. S.) 1 (1842).

When the Supreme Court reverses a rule like that of *Swift v. Tyson*, established for nearly a hundred years and involved in a thousand cases, the decision is of unusual practical interest. When the majority of the Court expressly holds that a statutory construction established for such a period and acquiesced in by Congress cannot be upset,[3] but that the decision must be put upon constitutional grounds, it suggests a deeper meaning for the case. Thus *Erie Railroad v. Tompkins* has been characterized by a member of the Court as "one of the most sensational rulings in 100 years."[4] The opinion of Justice Butler, concurred in by Justice McReynolds, which upholds the rule of *Swift v. Tyson*, and the opinion of Justice Reed which would reconstrue the Judiciary Act of 1789[5] to avoid the rule, only seem to lend greater weight to the opinion of the Court delivered by Justice Brandeis and insisting upon the constitutional issue.[6] Whether the case was inadequately argued upon this point, as the minority charges, or not, the case raises again all the numerous implications of *Swift v. Tyson*, and goes beyond into fundamental principles of the federal system.

I.

The problem posed in these cases arises directly from the dual nature of the American federal system, with its difficult relationships of checks and balances between the central government and that of the states. A unique development of the American Constitution was the establishment of a federal judiciary, designed to assert and defend that document. The Constitution set out merely a basic framework calling for the establishment of a Supreme Court[7] and authorizing the establishment of inferior courts by Congress.[8] The Judiciary Act of 1789,[9]

[3] This argument was the basis of reaffirming the rule in Baltimore & Ohio R. R. v. Baugh, 149 U. S. 368, 13 S. Ct. 914 (1893). GRAY, THE NATURE AND SOURCES OF THE LAW, § 537 (1909).

[4] DETROIT FREE PRESS, May 5, 1938. For interesting comments, see Hamilton, "Mr. Justice Black's First Year," 95 NEW REPUBLIC 118 (June 8, 1938).

Legal writers have generally assumed the rule to be settled, especially Schofield, "Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts," 4 ILL. L. REV. 533 (1910). But see statements by Dobie, "Seven Implications of Swift v. Tyson," 16 VA. L. REV. 225 (1930).

[5] 1 Stat. L. 73 at 92, § 34, 28 U. S. C. (1935), § 725.

[6] The Court will not decide a constitutional question if it can avoid the question by construction. Crowell v. Benson, 285 U. S. 22, 52 S. Ct. 285 (1931).

[7] U. S. Constitution, art. 3, § 1.

[8] U. S. Constitution, art. 1, § 8 (9).

[9] 1 Stat. L. 73-93. See generally, Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 HARV. L. REV. 49 (1923), for an excellent historical study.

enacted under this authority, was not only a very necessary but a permanently formative step in the building of the federal system. Reflected in that act is the perennial issue, then hotly burning, of states' rights versus centralization. Fears of the Federalists as to irresponsible acts by the states and their legislatures were insignificant compared to those of the anti-Federalists as to the power of the federal judiciary. Under these circumstances the act was necessarily a compromise in which the Federalists again achieved a large measure of political success.

The most noteworthy feature of the Judiciary Act is that it set up an independent system of federal courts, concurrent with the state courts. While the Constitution contemplated the establishment of inferior courts, the action was not made mandatory upon Congress[10] and the system might have worked without them. Congress has never given to the courts the maximum jurisdiction authorized by the Constitution, although no discretion was expressly given it to regulate the original jurisdiction.[11] The jurisdiction has been classified under two heads: that depending upon the subject matter and that depending upon the parties.[12] The former power extends to "all Cases in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other Public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;" the latter "to controversies to which the United States shall be a Party;—to controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States," etc.[13] In passing the Judiciary Act, Congress evidently ascribed little importance to the jurisdiction based on diversity of citizenship.[14] The jurisdiction was probably given more to prevent unfair treatment of litigants than from distrust of state courts,[15] while express provisions in

[10] Note 8, supra. Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 HARV. L. REV. 49 at 65 (1923). But see Schofield, "Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts," 4 ILL. L. REV. 533 at 538 (1910).

[11] Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 HARV. L. REV. 49 at 67-70 (1923).

[12] Martin v. Hunter's Lessee, 1 Wheat. (14 U. S.) 304 (1816); Cohens v. Virginia, 6 Wheat. (19 U. S.) 264 (1821); The Moses Taylor, 4 Wall. (71 U. S.) 411 (1866).

[13] U. S. Constitution, art. 3, § 2.

[14] Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 HARV. L. REV. 49 at 79 (1923).

[15] GRAY, THE NATURE AND SOURCES OF THE LAW, § 531 (1909); Ball, "Revision of Federal Diversity Jurisdiction," 28 ILL. L. REV. 356 at 357 (1933). Goodnow, however, cites varying arguments made in the constitutional convention as to the purpose of the federal judiciary. GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 185-191 (1911). See also Burgess v. Seligman, 107 U. S. 20 at 33-34, 2 S. Ct. 10 (1882), for a statement as to the purpose of federal jurisdiction justifying the rule of Swift v. Tyson.

the Constitution were established to limit state legislatures from passing unfair laws.[16] But upon this basis of jurisdiction has arisen a large part of the business of the federal courts.[17]

Whatever the motive was in setting up an independent system of courts, establishment of the courts has not settled what law they should apply. It was early held that power to regulate procedure is incidental to the courts and that if Congress has not spoken the courts must proceed on their inherent powers.[18] Any distinction between procedure and substance rapidly breaks down, especially as between equitable remedies and equitable rights.[19] A congressional statute of frauds has been suggested under this power.[20] As to "substantive" law in general,[21] the issue is yet unsettled whether Congress has power to establish the rules of decision in those courts. The alternative is to restrict Congress to regulating procedure of the courts and to legislation based upon the other enumerated powers of the legislative article. Beyond this the federal government may through its courts enforce rights derived from state law.

As to the powers derived by Congress from the authority to establish courts, a distinction has been suggested according to the basis of federal jurisdiction.[22] If jurisdiction depends upon subject matter, the rules of decision are easily derived. By hypothesis, if the case arises under the Constitution, the laws or the treaties, the basis of decision already exists. As to cases affecting ambassadors, the power to conduct foreign relations and punish offenses against the law of nations is granted to the federal government.[23] As to the admiralty jurisdiction, power is given Congress to punish maritime crimes and regulate naval

[16] U. S. Constitution, art. 1, § 10.

[17] See citations infra, note 57.

[18] Wayman v. Southard, 10 Wheat. (23 U. S.) 1 (1825); GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 151-152 (1911); 2 WILLOUGHBY, CONSTITUTIONAL LAW, § 824 (1929).

[19] Cook, " 'Substance' and 'Procedure' in the Conflict of Laws," 42 YALE L. J. 333 (1933); GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 192-194 (1911).

[20] GRAY, THE NATURE AND SOURCES OF THE LAW, § 529 (1909). Matters of evidence are similar. GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 162, note 2, 170-171 (1911).

[21] As to common-law jurisdiction over crimes, see Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 HARV. L. REV. 49 at 73 (1923); von Moschzisker, "The Common Law and Our Federal Jurisprudence," 74 UNIV. PA. L. REV. 109 (1925), 270, 367 (1926), especially at 109-130; United States v. Hudson, 7 Cranch (11 U. S.) 32 (1812); United States v. Bevans, 3 Wheat. (16 U. S.) 336 (1818); GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 150-151 (1911).

[22] GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 160 (1911). This suggestion is made but refuted by reference to the rule of Swift v. Tyson.

[23] U. S. Constitution, art. 1, § 8 (10), (11); art. 2, § 3; 2 WILLOUGHBY, CONSTITUTIONAL LAW, § 840 (1929).

captures.[24] Especially in the case of maritime law, the Supreme Court has been active in finding generally recognized principles of maritime law.[25] Thus it is to be noted that the law is derived from sources of greater or less certainty in each of these categories.

It is in the cases in which jurisdiction rests upon the identity of the parties that the real issue arises as to the derivation of the law. Here the sharp issue arises as to the extent of the federal power. The two extreme positions which might be taken illustrate the unsettled concept of the federal system. The first of these might be called the states' rights view. According to this view, Congress is limited to the enumerated powers of Article I of the Constitution and derives from the power to establish courts only minimum power to regulate their procedure. When the federal courts take jurisdiction on the basis of diversity of citizenship, they are bound, according to the conflicts of law technique, to apply the law of the foreign state which is the place of contracting, of the injury, or whatever the case may be. In this manner the court is applying its own law,[26] including its conflicts doctrine that refers it to the law of a foreign state. The reference is always qualified by the privilege and duty of the forum to employ its own procedure,[27] remedial devices, and basic concepts of public policy. It is also limited by the necessity of proving the foreign law as it then exists,[28] since in absence of clear proof the forum may presume that the common law or some basic standards of justice exist there.[29] By use of that presumption, the forum fulfills its duty of deciding all cases in which jurisdiction is properly invoked without saying that the law is non-existent or too confused to apply.[30] This technique has been continuously applied in the state courts and of recent years has been increasingly reviewed and supervised by the Supreme Court under the due process[31] or the full faith and credit clauses.[32] Thus the technique has become more crystallized and more binding upon the states.

[24] U. S. Constitution, art. 1, § 8 (10), (11).

[25] 3 WILLOUGHBY, CONSTITUTIONAL LAW, § 857 (1929); GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 153-157 (1911).

[26] In the words of Judge Learned Hand, "no court can enforce any law but that of its own sovereign. . . . A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs." Guiness v. Miller, (D. C. N. Y. 1923) 291 F. 769 at 770.

[27] See citations in note 19, supra.

[28] The Court will follow the latest decision in the foreign law. See, Holmes dissenting, Kuhn v. Fairmont Coal Co., 215 U. S. 349 at 371, 30 S. Ct. 140 (1910), citing Fairfield v. Gallatin County, 100 U. S. 47 (1879).

[29] Cuba R. R. v. Crosby, 222 U. S. 473, 32 S. Ct. 132 (1912).

[30] But see Rogers v. Guaranty Trust Co., 288 U. S. 123, 53 S. Ct. 295 (1933), and Slater v. Mexican Nat. R. R., 194 U. S. 120, 24 S. Ct. 581 (1904), in which the forum found itself unable to enforce the foreign right.

[31] See generally, Dodd, "The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws," 39 HARV. L. REV. 533 (1926); Home Insurance Co. v. Dick, 281 U. S. 397, 50 S. Ct. 338 (1930).

[32] This more novel suggestion is made over a dissent by Justice Brandeis in Brad-

This theory, that conflicts of law rules would be used in determining the federal law, was asserted by John Marshall at the Virginia Convention to ratify the Constitution.[33] Other commentators feared that Congress might be able under the Constitution to change the conflicts rule.[34] Recent researches by Professor Warren have shown by documentary evidence that section 34 of the Judiciary Act was inserted at a late moment in Congress and merely intended to declare Marshall's theory that the federal courts are bound by state law both statutory and judicial in origin.[35] Such intention was corroborated by influential and contemporary statesmen in early cases before the Supreme Court.[36] Whether deviation is constitutionally possible is quite a different question.

The other or nationalizing theory is put forth most strongly by Professor Goodnow.[37] It finds in the authorization to establish a system of federal courts the federal power to provide the law that shall be employed in those courts.[38] Such a constitutional interpretation is the more natural implication from that authorization if the federal government is to have a real supremacy over the states in matters other than those in which specific legislative power is delegated in Article I. It avoids the distinction between substance and procedure, a distinction which is impossible to draw except in degree of materiality. But, on the other hand, as it extends federal legislative power beyond the func-

ford Elec. Co. v. Clapper, 286 U. S. 145, 52 S. Ct. 571 (1932). Application of a Swift v. Tyson rule by state courts generally would practically abolish conflicts principles. See 43 Harv. L. Rev. 135 (1929). Such a tendency has not yet been checked by the Supreme Court.

[33] GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 188 (1911); von Moschzisker, "The Common Law and Our Federal Jurisprudence," 74 UNIV. PA. L. REV. 109 (1925), 270 at 279-280, 367 (1926). But see references cited in note 15, supra.

[34] Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 HARV. L. REV. 49 at 84 (1923).

[35] Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 HARV. L. REV. 49 at 81-88 (1923). The section reads, "The laws of the several States, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in courts of the United States, in cases where they apply." 1 Stat. L. 92 (1789), 28 U. S. C. (1935), § 725.

[36] Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 HARV. L. REV. 49 at 88, note 85 (1923); Brown v. Van Bramm, 3 Dall. (3 U. S.) 344 (1797); Sims v. Irvine, 3 Dall. (3 U. S.) 425 (1799).

[37] GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 191-194 (1911).

[38] According to this theory, section 34 of the Judiciary Act vindicates the power of Congress. GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 180 (1911). Following the logic of Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438 (1920), would not the provision be an improper delegation of legislative power to the states?

tional grants of Article I, it gives the federal government legislative power over all subjects, provided that the status of diverse citizenship exists.[39] Thus in each geographical area there exists one law of commercial paper for local citizens and a different law for him who can say, "I am a foreign citizen." A partial application of this theory is illustrated in the rule of *Swift v. Tyson.*

2.

A lengthy controversy was raised or at least crystallized by the decision of *Swift v. Tyson*[40] in 1842. That decision, written by Justice Story, illustrates the centralizing and unifying influence. In the first place, Justice Story gave a narrow construction to section 34 of the Judiciary Act by holding that it bound the federal courts to follow only the statute law of the states. In reaching this decision, the Court relied heavily upon the language of the section, "laws."[41] Under the then prevailing theories of jurisprudence, judicial decisions were evidence of law and not themselves law.[42] Not only do the documents available to Professor Warren and the citations from contemporaries refute this construction, but so do the circumstances of 1789 when statute law in the states was meager as compared to the body of judicial decisions.[43]

Eliminating the controlling effect of the Judiciary Act by such construction, Justice Story, with the unanimous concurrence of his colleagues, proceeded to erect his famous rule of *Swift v. Tyson;*[44] to wit, that in matters of commercial law and general jurisprudence the federal courts will exercise an independent judgment as to what the governing common law is.[45] The obvious purpose of the rule is to establish uniformity in the commercial law of the nation in the face of a local doctrine of which the Court disapproves. In several ways the rule has failed.

In application the rule suffers from its indefinite scope. The limitation of the rule to "general law," "general jurisprudence," or "general commercial law" satisfied a political necessity but is too vague for

[39] GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 203-209 (1911).

[40] 16 Pet. (41 U. S.) 1 (1842).

[41] Ibid., at p. 18.

[42] GRAY, THE NATURE AND SOURCES OF THE LAW, §§ 540, 544 (1909).

[43] GRAY, THE NATURE AND SOURCES OF THE LAW, § 534 (1909).

[44] Personal criticism of Justice Story as expressed by GRAY, THE NATURE AND SOURCES OF THE LAW, § 539 (1909), has been refuted in von Moschzisker, "The Common Law and Our Federal Jurisprudence," 74 UNIV. PA. L. REV. 109 (1925), 270 at 283-284, 367 (1926).

[45] See statement of the rule by Pitney, J., dissenting, in Southern Pacific R. R. v. Jensen, 244 U. S. 205 at 249, 37 S. Ct. 524 (1917).

use.[46] Justice Story's concession that the rule should not be used against long established local customs nor against "rights and titles to things having a permanent locality, such as the rights and titles to real estate,"[47] helps but little. In the thousand cases which have litigated the scope of the rule, extensions of the rule have been made over numerous dissents dating back to 1845[48] until the rule has been applied to contracts, torts against persons and property, and even title to real estate.[49] That the limitation was a purely politic self-limitation on the power of the Supreme Court, rather than a logical necessity[50] derived from the word "laws," has been recognized by Justice Holmes, who proposed a more functional test—whether the law should be made uniform.[51] There is no doubt that much of the vagueness of the rule results from its application for functional rather than formal reasons and from the extra zeal of the Court in applying it when the state decision deviates widely from the norm of judicial decision.

While Justice Story's concept of a natural law, existing beyond territorial boundaries and beyond the specific decisions of tribunals which merely declare it, has been much citicized,[52] it represents the powerful drive toward uniformity. The obstacles and friction over which the movement for uniform state laws has progressed illustrate both the necessity of the movement and the difficulty in obtaining the cooperation of forty-eight separate states. Whether the federal courts have the authority to act as national unifiers is doubtful. To decide what law shall be unified is difficult. To decide what the rule shall be assumes that the decision of the Supreme Court will be more satisfactory than the decision of the local tribunal.[53]

Even if it is desirable for the federal courts to have the unifying power indicated, the sanctions behind the power are so weak as to

[46] See discussion in the principal case, 58 S. Ct. 817 at 820-822; Sharp and Brennan, "The Application of the Doctrine of Swift v. Tyson since 1900," 4 IND. L. J. 367 at 384-385 (1929); GRAY, THE NATURE AND SOURCES OF THE LAW, § 536 (1909).

[47] Swift v. Tyson, 16 Pet. (41 U. S.) 1 at 18-19 (1842).

[48] Lane v. Vick, 3 How. (44 U. S.) 464 at 477 (1845), where Justice McKinley dissented.

[49] Cases collected in the principal case, 58 S. Ct. 817 at 821; Yates v. Milwaukee, 10 Wall. (77 U. S.) 497 (1870).

[50] GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 194-195 (1911).

[51] Holmes, dissenting in Kuhn v. Fairmont Coal Co., 215 U. S. 349 at 371, 30 S. Ct. 140 (1910); Schofield, "Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts," 4 ILL. L. REV. 533 at 535 (1910).

[52] Holmes, J., dissenting in Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518 at 532, 48 S. Ct. 404 (1928); Dobie, "Seven Implications of Swift v. Tyson," 16 VA. L. REV. 225 at 232 (1930).

[53] Dobie, "Seven Implications of Swift v. Tyson," 16 VA. L. REV. 225 at 234, 240 (1930).

render its exercise futile. States may escape the rule by the clumsy expedient of codifying their law.[54] The decision of the general commercial law can be applied only in cases of diversity of citizenship. The supremacy of federal law cannot be enforced on the states by requiring conformity to the decision in cases which do not invoke jurisdiction of the federal courts.[55] In holding that no federal question exists to review divergent state decisions, the Supreme Court has prevented the drastic nationalization of the law.[56] Thus the sanction for uniformity upon the state courts rests only on the prestige of Supreme Court decisions. It is not governmental in character. Small wonder then that many divergencies remain.[57]

Continuation of the divergency has, therefore, led to a certain amount of jockeying between courts. This is the necessary result when the choice of substantive law rests upon technical requirements of jurisdiction rather than upon logical principles of conflicts of law. The attempt to create a uniform national law based upon jurisdiction of courts has created within the same geographical area two sets of laws having no systematic division like that of the enumerated bases for federal legislation. In order to get into federal courts or to stay out, numerous devices have been used ever since the organization of the dual system.[58] Some of these, such as change of residence, asking for less than the jurisdictional amount, assignments which do not fall within the prohibition of the jurisdictional statute, and others, seem relatively legitimate or at least inescapable. Others, such as the use

[54] Dobie, "Seven Implications of Swift v. Tyson," 16 VA. L. REV. 225 at 236 (1930); Burns Mortgage Co. v. Fried, 292 U. S. 487, 54 S. Ct. 813 (1934). See also Schofield, "Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts," 4 ILL. L. REV. 533 at 550 (1910), arguing for a uniform construction of the Negotiable Instruments Law; Beutel, "Common Law Judicial Technique and the Law of Negotiable Instruments—Two Unfortunate Decisions," 9 TULANE L. REV. 64 (1934).

[55] In Schofield, "Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts," 4 ILL. L. REV. 533 at 546 (1910), it is suggested that Article VI, par. 2, of the Constitution requires the supremacy of the federal law.

[56] Delmas v. Insurance Co., 14 Wall. (81 U. S.) 661 (1871); Tidal Oil Co. v. Flanagan, 263 U. S. 444, 44 S. Ct. 197 (1924), explaining the famous case of Gelpcke v. Dubuque, 1 Wall. (68 U. S.) 175 (1864).

[57] The success achieved in unifying the law has been thoroughly discussed by Professors Frankfurter and Yntema. See Frankfurter, "Distribution of Judicial Power Between Federal and State Courts," 13 CORN. L. Q. 499 (1928); Yntema and Jaffin, "Preliminary Analysis of Concurrent Jurisdiction," 79 UNIV. PA. L. REV. 869 at 881-886, note 23 (1931); Frankfurter, "A Note on Diversity Jurisdiction—in Reply to Professor Yntema," 79 UNIV. PA. L. REV. 1097 (1931).

[58] Ball, "Revision of Federal Diversity Jurisdiction," 28 ILL. L. REV. 356 at 362-364 (1933). See Mecom v. Fitzsimmons Drilling Co., 284 U. S. 183, 52 S. Ct. 84 (1931); principal case, 58 S. Ct. 817 at 819-821.

of the corporate fiction, have been singled out for special criticism and might be prevented.[59]

The result of this situation has led to agitation against *Swift v. Tyson* and against the existence of federal diversity jurisdiction.[60] Legislation to abrogate the rule and perhaps even the jurisdiction were proposed in 1932 and bitterly argued as a result of the *Black & White Taxicab* case.[61] The proposal of abandoning the jurisdiction went far beyond the grievance.[62]

3.

The decision in *Erie Railroad v. Tompkins* cites the above defects of the rule in reversing it. The decision might be put upon the grounds suggested by Justice Reed, reinterpretation of the Judiciary Act. The weakness in the argument has already been suggested. Not only has the passage of time confirmed the construction, but the repassage of the act by Congress has ratified the original interpretation.[63] Unsuccessful agitation in Congress to change the statute can hardly form a basis for a new judicial interpretation.

The Court, therefore, found it necessary to put the reversal of the rule upon a constitutional ground. The abuses of the rule are recited to indicate that federal divergence from state decisions for the benefit of foreign citizens denies equal protection of the laws.[64] Implying an equal protection clause from the due process clause of the Fifth Amendment is necessary before this limitation can be invoked against the federal government.[65] Even so, a classification of parties set out in the Constitution itself can hardly be arbitrary and unconstitutional if the

[59] Yntema, "The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States," 19 A. B. A. J. 71 at 74-75 (1933).

[60] See articles cited in notes 57, 58, and 59, supra. Also Campbell, "Is Swift vs. Tyson an Argument for or against Abolishing Diversity of Citizenship Jurisdiction?" 18 A. B. A. J. 809 (1932); Parker, "The Federal Jurisdiction and Recent Attacks upon It," 18 A. B. A. J. 433 (1932).

[61] Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518, 48 S. Ct. 404 (1928). See citations in the principal case, 58 S. Ct. 817 at 819-820. The Court finds that the criticism was "widespread."

[62] Yntema, "The Jurisdiction of the Federal Court in Controversies Between Citizens of Different States," 19 A. B. A. J. 71 at 75 (1933); Ball, "Revision of Federal Diversity Jurisdiction," 28 ILL. L. REV. 358 at 367-368 (1933).

[63] See note 3, supra.

[64] Judicial as well as legislative action can violate this provision. Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U. S. 544, 43 S. Ct. 636 (1923). See Dobie, "Seven Implications of Swift v. Tyson," 16 VA. L. REV. 225 at 239-240 (1930), on allowing the non-resident his choice of weapons in a protracted legal duel.

[65] This was no obstacle in Heiner v. Donnan, 285 U. S. 312 at 326, 52 S. Ct. 358 (1932). But see dissent of Stone, J., 285 U. S. at 338.

classification is used as intended. The other classifications used in the rule seem somewhat more subject to attack. The Court holds that the distinction between local and general law is not only so vague as to afford no standard of conduct but it is a classification that Congress has no power to make. Nor is the distinction between statute law and judicial decision a matter of federal concern.[66]

The other basis of the constitutional argument is more seriously urged—that the federal government, through the courts themselves, has exceeded its constitutional authority. Justice Brandeis puts this in the criticized phrase "that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states."[67] Reference to the context indicates that the Court does not rely merely upon the "invisible radiations" of the Tenth Amendment, but believes that assertion of a federal common law exceeds any granted federal powers.[68]

The power of Congress is similarly limited by decision to that legislation authorized in Article I of the Constitution. The authority to establish courts evidently carries with it no power to declare the substantive rules applicable in those courts other than those authorized under some other grant like the power to regulate commerce among the several states.[69] This question had long been argued, but never decided even by *Swift v. Tyson*. The power of the judiciary under the rule of *Swift v. Tyson* went so far as to give the federal government the power to declare the law in all cases of diversity citizenship. It seems

[66] Principal case, 58 S. Ct. 817 at 822. This argument seems analogous to the attack on a penal statute for indefiniteness of standard. Seven Cases v. United States, 239 U. S. 510, 36 S. Ct. 190 (1915), and the tests as to classification as set out in Missouri, K. & T. Ry. v. May, 194 U. S. 267 at 269, 24 S. Ct. 598 (1904).

[67] Principal case, 58 S. Ct. 817 at 823. This was the basis of the majority opinion in United States v. Butler, 297 U. S. 1, 56 S. Ct. 312 (1936). See criticisms in the dissent of Justice Stone, 297 U. S. 1 at 83, and in 34 MICH. L. REV. 366 at 380-383 (1936).

[68] Query as to whether this denial goes so far as to prevent the court presuming, in the absence of other proof, that the common law exists in the jurisdiction. Note 29, supra. In the opinion of this writer the fault of Swift v. Tyson was in making such a presumption conclusive, refusing to admit evidence of the law of the states. Incorporation in the opinion of the first dissent against the rule indicates the Court's belief. Field, J., dissenting in Baltimore & Ohio R. R. v. Baugh, 149 U. S. 368 at 401, 13 S. Ct. 914 (1893).

[69] See the interesting case of Kansas v. Colorado, 206 U. S. 46, 27 S. Ct. 655 (1907), discussed by GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 165-166 (1911). In that case the power of Congress to regulate irrigation was denied. Under Professor Goodnow's theory, the regulation of water rights might have been upheld if argued under the power of Congress to prescribe the law in the federal courts between two litigating states. See 2 WILLOUGHBY, CONSTITUTIONAL LAW, § 825 (1929); and Parker, "The Common Law Jurisdiction of the United States Courts," 17 YALE L. J. 1 at 17 (1907).

anomalous to imagine that the federal judicial power should exceed the legislative power, that the federal courts may declare a rule of commercial paper that Congress is powerless to alter. Therefore, unless the federal judicial power exceeds the legislative power,[70] the rule of *Swift v. Tyson* argued forcefully for the existence of such a power in Congress. Should the power to establish courts be construed to mean that the federal government is at liberty to provide substantive legislation (e.g., a negotiable instruments law) and regulate the legal relations of all persons of diverse citizenship, the powers of the national government would be immensely increased.[71] Since the federal courts have jurisdiction over all cases to which the United States is a party, similar reasoning could distort the federal power until Congress could make any matter whatsoever a crime against the United States, regardless of whether or not interstate commerce or some other basis of federal power exists. The specific enumeration of legislative powers in Article I seems to deny that a construction may be given to any one of them that will so completely engulf the others.[72]

Thus the latest step taken by the Supreme Court in the enforcement of the technique of conflicts of laws throws constitutional theory back toward states' rights or decentralization. So basic an issue of judicial statesmanship as is raised by this case can hardly be settled without more adequate argument. Hence the case of *Erie Railroad v. Tompkins*, while reversing the rule of *Swift v. Tyson* and binding federal courts to follow state law, subject only to federal procedure and remedies, can hardly do more than raise the constitutional question as to the federal powers. It is submitted that the implications of the rule were anomalous and tended toward a much more nationalized government than was ever contemplated in 1787[73] or fully admitted since. Unification of laws by Congress should proceed so far as it can

[70] Whether the judicial power is broader than the legislative power has been much discussed. Dobie, "Seven Implications of Swift v. Tyson," 16 VA. L. REV. 225 at 234-235 (1930); Schofield, "Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts," 4 ILL. L. REV. 533 at 538-539 (1910). Baldwin, "The Extent of the Judicial Power of the United States," 18 YALE L. J. 1 at 5 (1908), quotes a suggestion from Kansas v. Colorado, 206 U. S. 46, 27 S. Ct. 655 (1907), that the legislative powers of Congress are carefully enumerated in Article I, § 8, while Article III, § 2 (1) used unlimited language: "The Judicial Power shall extend to all Cases. . . ." This results in the unusual situation that the Court may declare a rule that cannot be altered by the legislature.

[71] The effect of the power is briefly discussed in GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 203-209 (1911).

[72] GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 149, 152 (1911), uses Article I, § 8 (19), to imply legislative power from the judicial article. Implication of the power from the express authorization to establish the inferior federal courts would seem easier.

[73] Notes 14-16, 33-36, supra.

be supported under the enumerated powers like the taxing and the commerce powers in their present broader interpretations.[74] In fields of state power, the unification attempted through the federal courts failed to force state conformity. Hence other forces must be used for that end, especially the exchange of legal learning and commissions seeking the cooperation of the independent state legislatures. Therefore, recognizing the divergency, the technique of the conflict of laws defining what the law shall be according to relatively certain methods is an improvement over defining legal rights on the basis of a citizenship status which can be altered at will.[75]

Frank B. Stone

---

[74] The purpose of this comment is decidedly not to argue for lessened powers in Congress. The writer believes, however, that assertion of the power to prescribe all law for federal courts is on the one hand contrary to the intent of the enumerated powers and on the other hand an unfortunate discrimination based upon status. On honest revaluation of those powers rather than upon use of federal courts will the solution of the problem of greater centralization be found. See, for example, Holmes, "The Federal Spending Power and State Rights," 34 MICH. L. REV. 637 (1936).

[75] See the expressed hopes of Dobie, "Seven Implications of Swift v. Tyson," 16 VA. L. REV. 225 at 226, 240-242 (1930). The solution offered by Ball, "Revision of Federal Diversity Jurisdiction," 28 ILL. L. REV. 358 at 377, note 98 (1933), is for the Court quietly to follow the rule of each state. Only repudiating the rule of Swift v. Tyson explains why the Court will vary its decision according to the latest decisions in each state.