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WEARY ERIE

ARTHUR JOHN KEEFFE, JOHN J. GILHOOLEY, GEORGE H. BAILEY AND DONALD S. DAY

It is the epigram that impresses. Glib reference to the rule in *Shelley's Case,* the *Deep Rock* doctrine, the rule of *Pennoyer v. Neff,* is convenient and reassuring. Only ten years have passed since the reversal of *Swift v. Tyson,*[1] but already the "rule of *Erie v. Tompkins*"[2] is established doctrine. It has run like wildfire through the whole field of federal practice. In almost every federal court opinion these days, there is a pontifical reference to the "rule of *Erie v. Tompkins.*" Like Caesar's wife, it is above suspicion.[3] The multitude of references indicate that *Erie v. Tompkins* is now a matter of pure faith.

At the risk of being burned for heresy, we do not think that the gospel of *Erie* stands the test of objective analysis.

The desirability of a rule which guarantees both uniformity and certainty is beyond question.[4] Yet recently, there have been faint rumblings of discontent directed at applications and interpretations of the *Erie* doctrine.[5] Is it possible that the evils complained of lie not in the fruit, but in the seed—that the fundamental difficulty stems from the creation rather than the application? We think that the broad policy formulated by the Supreme Court in reversing *Swift v. Tyson* was based upon a misconception of the problems involved in diversity litigation. From the moment of its inception, the *Erie v. Tompkins* panacea was destined for chaos.

I

The facts in the *Erie* case were simple. One dark night, Tompkins, a Pennsylvania resident, while walking along a right of way, was hit by a passing freight train of the Erie Railroad, a New York corporation. Tompkins brought a negligence action in the Federal District Court for the Southern District of New York. The Erie Railroad contended that since the tort occurred in Pennsylvania, Pennsylvania law should govern, and accordingly, the only duty owed to Tompkins was to refrain from

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1 16 Pet. 1 (U. S. 1842).

2 304 U. S. 64 (1938).

3 IV CLOUGH, PLUTARCH'S WORKS 266 (1891). "I wished my wife to be not so much as suspected," replied Caesar, as the reason for divorcing his wife.

4 Most reviews of the case at the time of its decision subscribed to the Court's result, directing their criticism to the manner in which the result had been reached. See Shulman, *The Demise of Swift v. Tyson,* 47 YALE L. J. 1336 (1938).

5 Broh-Kahn, *Uniformity Run Riot—Extensions of the Erie Case,* 31 KY. L. J. 99 (1943); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins,* 55 YALE L. J. 267 (1945); Cook, *The Federal Courts and the Conflict of Laws,* 36 ILL. L. REV. 493 (1942); Corbin, *The Laws of the Several States,* 50 YALE L. J. 762 (1941).

gross negligence. The district court, however, awarded Tompkins judgment. It relied on *Swift v. Tyson,* ruling that the responsibility of a railroad for injuries caused by its servants was a question of general law, upon which, in the absence of a local statute, the federal courts were free to exercise their independent judgment. Though the holdings of the Pennsylvania courts were persuasive, they were not binding. The district court applied the general rule that where the public has made open and notorious use of a railroad right of way for a long period of time, the railroad owes the duty of "ordinary care" to those using the permissive pathway. The verdict in favor of the plaintiff was affirmed by the Court of Appeals for the Second Circuit.[6] The Supreme Court undertook review by certiorari, and on April 25, 1938, the opinion was rendered.[7] Mr. Justice Brandeis began: "The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved."[8] Six of the eight judges answered yes, and a rule which for nearly a century had been imbedded in federal jurisprudence was committed to a judicial grave. Just the day before, federal courts exercising jurisdiction on grounds of diversity of citizenship had been required to apply only the statutes of the state, the state tribunals' construction of those statutes, and state decisions on matters of law peculiarly local. On questions of a more general nature, though the state decisions had been entitled to the highest attention and respect, the federal courts had been free to determine independently what the law was or should be. Now, the federal judge was bound to follow both the statutes and decisions of the state even though the particular state rule conflicted with that of the overwhelming majority of jurisdictions. The coup was complete. *Swift v. Tyson* was dead. At that instant, federal judges became automatons, and the push-button an integral part of the judicial process.

What reasons were offered in justification for such an astounding turnabout?

First: In *Swift v. Tyson,* Mr. Justice Story had erroneously interpreted § 34 of the Judiciary Act of 1789. That section provided:

> ". . . the *laws* of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." (Italics added).[9]

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6 90 F. 2d 603 (C. C. A. 2d 1937).
7 304 U. S. 64 (1938).
8 *Id.* at 69.
9 1 STAT. 92 (1789), 28 U. S. C. § 725 (1928), as amended, 62 STAT. A 101, 28 U. S. C. § 1652 (1948).

"Laws" meant unwritten as well as written, judicial as well as statutory; Mr. Charles Warren, in his recent research, had so "established."[10]

It was true that Warren had uncovered evidence that affected the interpretation of § 34. As originally drafted by Oliver Ellsworth, it had read, "the Statute law of the several states . . . and their unwritten and common law. . . ." Warren established that the word "laws" had been substituted for that phrase; he concluded that the alteration was one of form—not of substance.

Was that conclusion inescapable? Was it not possible that the substitution was intended to change the meaning of the statute? Moreover, assuming that Warren's interpretation of Ellsworth's intent was correct, did it necessarily follow that Congress had a like intent? Obviously these questions cannot be answered with confidence; they are at least debatable.[11] As a matter of fact, Professor Goodnow was convinced from a study of the state constitutional conventions that there was nothing to indicate an intention to deprive the United States courts of traditional judicial powers.[12] Mr. Justice Holmes thought that Mr. Warren's work demonstrated that Story "probably was wrong,"[13] while to the dissenting Mr. Justice Butler, it was no more than "suggestive."[14] But to Mr. Justice Brandeis, both the fact and the deduction had been "established," even though there had been no argument by counsel on the point. It would seem that the Court's determination of statutory interpretation without unequivocal supporting authority and without argument was, at best, evidence of a pre-conceived design to destroy an undesired judicial policy, the desigu to be effected whether the occasion was suitable for the task or not.[15]

Second: Almost as an apology for this unprecedented departure from

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[10] ". . . the word 'laws' in this Section 34 was not intended to be confined to 'statute laws,' as Judge Story held in the famous case of *Swift v. Tyson*, but was intended to include the common law of a State as well as the statute law." Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 52 (1923).

[11] McCormick and Hewins, *The Collapse of "General" Law in the Federal Courts*, 33 ILL. L. REV. 126 (1938).

[12] "We may therefore conclude that there was nothing said in the conventions, state or national, which either framed or adopted the United States constitution, clearly indicating that those responsible for that instrument intended to deprive either the new courts of the function . . . to lay down the laws applicable to the cases before them where this had not been determined by legislative authority, or to take away from Congress the legislative power to determine the law to be applied by the United States courts." GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 190 (1911).

[13] Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., 276 U. S. 518, 535 (1928) (dissenting opinion).

[14] Erie R.R. v. Tompkins, 304 U. S. 64, 86 (1938) (dissenting opinion).

[15] This view has been stated by others. "We may guess that the venerable but determined justice had made up his mind that without waiting for the gradual process of corrosion, a suitable occasion should be seized to destroy root and branch the heresy of 'general law'." McCormick and Hewins, *The Collapse of "General" Law in the Federal Courts*, 33 ILL. L. REV. 126, 132 (1938).

a fundamental theory of federal jurisprudence, the Court said: "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so."[16] This statement has conservatively been dubbed the Achilles heel of the opinion.[17]

It is difficult to determine exactly what was unconstitutional about the *Tyson* doctrine. Unquestionably Article III of the Constitution designates the federal courts as proper forums to litigate suits between "Citizens of different States."[18] Given jurisdiction, it would logically follow that a federal court would have the constitutional power to determine the controversy by any reasonable method. The choice of "federal common law" rather than the law of a particular state is clearly not so unreasonable as to be unconstitutional.

Unquestionably, Justice Brandeis was of the opinion that *Swift v. Tyson* did not promote uniformity.[19] He also believed that the doctrine encouraged "shopping for jurisdiction."[20] But this issue involves only a legislative choice of policy, and the awkward attempt to raise it to the dignity of a "constitutional question" seems no more than a makeweight intended to buttress a weak position.

Indeed the very assertion of a constitutional argument seems somewhat surprising. Especially so, when we recall that neither party had raised the issue and that in the *Ashwander* case[21] Justice Brandeis himself contended that the Court should "refrain from passing upon the constitutionality of an act of Congress unless obliged to do so . . ., when the question is raised by a party whose interests entitle him to raise it."[22] The constitutional argument should be recognized for what it is —an attempt to bolster a questionable decision and build the new practice of conformity on a principle so wide and deep that it would be difficult to overturn.

Third: Although the Brandeis opinion professes to rest the *Erie v. Tompkins* decision upon both a constitutional issue and a question of statutory construction, the problem was essentially one of policy. Instinct within the decision is the opinion that the *Swift v. Tyson* doctrine

16 Erie R.R. v. Tompkins, 304 U. S. 64, 77-78 (1938).
17 McCormick v. Hewins, *The Collapse of "General" Law in the Federal Courts*, 33 ILL. L. REV. 126, 134 (1938).
18 U. S. CONST. Art. III, § 1. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U. S. CONST. Art. III, § 2. "The judicial Power shall extend . . . to Controversies . . . between Citizens of different States. . . ."
19 Erie R.R. v. Tompkins, 304 U. S. 64, 74 (1938).
20 *Id.* at 75-77.
21 Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936).
22 *Id.* at 341 (concurring opinion).

did not properly balance the interaction of two basic judicial considerations. The court believed that the doctrine unduly sacrificed the advantage of having one settled body of law obtain in any geographical area in favor of a flexible and unfettered judicial process. It argued that the possibility of two courts within one state arriving at opposite results was confusing and unjust.[23] The Court admitted the advantage of national uniformity but urged that the doctrine had not effectively accomplished that end.[24]

Thus, the *Erie v. Tompkins* decision stands or falls upon two premises: (1) that the *Swift v. Tyson* doctrine promoted injustice and (2) failed to achieve national uniformity.

A critical examination of all the cases decided under *Swift v. Tyson* would seem to be most scientific way to test the validity of these premises. In order to delimit an otherwise insuperable task, a specific group of cases were chosen for the inquiry. No test could be more severe than an analysis of the cases cited by Justice Brandeis in the *Erie* case, those cases upon which his heaviest artillery was brought to bear and upon whose ruins the foundation of the *Erie* doctrine was laid.

First, did *Swift v. Tyson* promote injustice?[25] Was the possibility of diverse holdings within one state as insidious as the Court supposed?

A total of forty-eight cases cited by Justice Brandeis were reviewed and the following summarizes the result:

1) In eight cases, the *Swift v. Tyson* doctrine was not invoked or was not applicable. Of the eight, four cases were readily distinguishable from those previously before the state courts;[26] two

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[23] Erie R.R. v. Tompkins, 304 U. S. 64, 77 (1938).

[24] *Id.* at 74.

[25] At the outset, it should be recognized that any classification of decisions as "fair" or "unfair" is subject to criticism. Even the experienced trial judge, who is most familiar with the ingredients of a particular suit, often finds it difficult to determine "natural equities." However, since the *Erie v. Tompkins* decision rests at least in part on that type of analysis, our attempt at a similar classification seems justified. *Cf.* Schofield, *Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts,* 4 ILL. L. REV. 533, 541 (1910).

[26] (*a*) Gardner v. Michigan Central R. R., 150 U. S. 349, 358 (1893): Here there was no departure from the state law since it appeared that new evidence not before the state court was introduced when the case was removed to the federal court.

(*b*) Keene Five Cent Savings Bank v. Reid, 123 Fed. 221 (C. C. A. 8th 1903): This case was cited by Justice Brandeis as authority to the effect that the extension of "general law" was such as to include "obligations under contracts entered into and to be performed within the State" within the scope of the *Tyson* case. The question in the case was as to when the statute of limitations began to run against the mortgagee after several defaults by the mortgagor had been impliedly waived by the mortgagee. The Kansas and federal view on the point conflicted in respects not here material. The parties had stipulated in the contract that "this note and the coupons attached thereto, shall be governed by the law of Kansas." However the issue in the federal court concerned the right to foreclose on the security given for the note, and on this point the agreement was silent. Justice Brandeis's quarrel with the case is not clear. His point

arose on other than diversity jurisdiction;[27] and in two cases the court followed the state law.[28]

2) Four cases were so incompletely reported and the points at issue so narrow that their merits could not be properly evaluated.[29]

3) We consider thirty-one cases were properly decided.[30]

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that the "general law" was stretched to unreasonable lengths to cover "contracts entered into and to be performed with the State" means nothing at all, unless it means that the parties stipulated that Kansas law should apply to the question of foreclosure of the mortgage. That this is an untenable position can be readily perceived from the specific words of the contract itself.

(*c*) Lane v. Vick, 3 How. 464 (U. S. 1845): During the course of the *Erie v. Tompkins* opinion, the Court cited the *Lane* case as support for the contention that "State decisions construing . . . devises of real estate were disregarded." A reading of the *Lane* case reveals that this is not so. The Court expressly reviewed the state court decision but held that it differed and could be distinguished upon several valid grounds. "The parties in that case were not the same as those now before the court and that decision does not affect the interests of the complainants here. The question before the Mississippi court was whether certain ground, within the town plat, had been dedicated to the public use. The construction of the will was incidental to the main object of the suit and of course was not binding on anyone claiming under the will." Lane v. Vick, 3 How. 464, 476 (U. S. 1845). If the prior construction of the will would not have bound the litigants had they been before a Mississippi court, it cannot logically be said that the previous decision was "disregarded." It follows that the Supreme Court was right when it did not consider itself so bound.

(*d*) Foxcroft v. Mallett, 4 How. 353 (U. S. 1846): This is another case in which the state decision was said to have been "disregarded." However the Supreme Court in the *Foxcroft* case expressly stated that the "construction of the mortgage to the college in respect to this reservation or condition never appears to have been litigated."

[27] (*a*) Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397 (1888): This case came to the court based upon admiralty jurisdiction.

(*b*) Pennsylvania R.R. v. Hughes, 191 U. S. 477 (1903): Here the jurisdiction of the federal court was based upon a "federal question," rather than diversity of citizenship.

[28] (*a*) Baltimore & O. R.R. v. Goodman, 275 U. S. 66 (1927): There is absolutely no evidence that Justice Holmes failed to follow the Ohio rule in the *Goodman* case. Counsel for defendant cited two Ohio cases in support of the decision finally handed down by Holmes. It is significant that counsel for plaintiff never raised the issue of the *Tyson* rule. Immediately after the *Goodman* decision, the Supreme Court of Ohio cited it with approval as conforming with the existing Ohio view. Pennsylvania R.R. v. Rusynik, 117 Ohio St. 530, 538, 159 N. E. 826, 828 (1927); Toledo Term. R. R. v. Hughes, 115 Ohio St. 562, 154 N. E. 916 (1926); Detroit T. & I. R.R. v. Rohrs, 114 Ohio St. 493, 151 N. E. 714 (1926).

(*b*) Knox & Lewis v. Alwood, 228 Fed. 753 (S. D. Ga. 1915): Justice Brandeis cited this case as an example of federal "disregard" of state law. However the federal court actually followed the law of Georgia to the last detail. Hilton & Dodge Lumber Co. v. Alwood, 141 Ga. 653, 658, 81 S. E. 1119, 1121 (1914).

[29] Lake Shore & M. S. Ry. v. Prentice, 147 U. S. 101 (1893); Green v. Keithley, 86 F. 2d 238 (C. C. A. 8th 1936); Norfolk & P. Traction Co. v. Miller, 174 Fed. 607 (C. C. A. 4th 1909): These three cases concerned the policy of exemplary damages. Harrison v. Foley, 206 Fed. 57 (C. C. A. 8th 1913): This case dealt with the admissability of certain testimony concerning a gift *causa mortis*.

[30] Chronological list of the thirty-one cases analyzed: (*a*) Rowan v. Runnels, 5 How. 134 (U. S. 1847); (*b*) Williamson v. Berry, 8 How. 495 (U. S. 1850); (*c*) Watson v. Tarpley, 18 How. 517 (U. S. 1855); (*d*) Chicago City v. Robbins, 2 Black. 418 (U. S. 1862); (*e*) Mercer County v. Hackett, 1 Wall. 83 (U. S. 1863); (*f*) Gelpcke v. City of Dubuque, 1 Wall. 175 (U. S. 1863); (*g*) Supervisors v. Schenck, 5 Wall. 772 (U. S. 1866); (*h*) Butz v. City of Muscatine, 8 Wall. 575 (U. S. 1869); (*i*) Yates v. Milwaukee, 10 Wall. 497 (U. S. 1870); (*j*) Railroad Co. v. Lockwood, 17 Wall. 357 (U. S. 1873); (*k*) Boyce v. Tabb, 18 Wall. 546 (U. S. 1873); (*l*) Hough v. Railroad Co., 100 U. S. 213 (1879); (*m*) Oates v. National Bank, 100 U. S. 239 (1879); (*n*) Railroad Co. v. National Bank, 102 U. S. 14 (1880); (*o*) Burgess v. Seligman, 107 U. S. 20 (1882); (*p*) Myrick v. Michigan Central R.R., 107 U. S. 109 (1882); (*q*) Pana v. Bowler, 107 U. S. 529 (1882); (*r*) Gibson v. Lyon, 115 U. S. 439 (1885); (*s*) Enfield v. Jordan, 119 U. S. 680 (1886); (*t*) Barber v. Pittsburgh R. R., 166 U. S. 83 (1896); (*u*) Praesido County v. Noel-Young Bond Co., 212 U. S. 58 (1908); (*v*) Kuhn v. Fairmont Coal Co., 215 U. S. 349 (1909);

4) In only six do the holdings seem erroneous.[31]

Although it would be impracticable to review all forty-eight cases in this paper, it seems desirable to discuss several of the cases we classify as "properly decided."

The *Municipal Bond* cases[32] represent an important class of decisions unjustly attacked by Justice Brandeis.

About the middle of the last century the legislatures of several midwestern states, desiring to encourage the development of the railroads within their jurisdictions passed statutes enabling municipalities to subscribe to railroad stock with the funds received from the sale of municipal bonds. The bond sales were not successful until the state supreme courts ruled that the laws empowering the issuance of these bonds were constitutional. Relying upon these rulings, investors felt more secure and began to purchase the bonds. Finally the day of reckoning arrived; but when the eastern bona fide holder sued the municipality for payment, the state supreme courts reversed their earlier holdings on the most technical grounds imaginable,[33] held the bonds invalid, and repudiated the debt. Those creditors who could do so turned to the federal courts for relief. In every case, the Supreme Court recognized the obligation in vigorous language.[34] The justice of these decisions cannot be sincerely questioned.[35]

(*w*) Salem Trust Co. v. Manufacturers Finance Co., 264 U. S. 182 (1923); (*x*) Pokora v. Wabash R.R. 292 U.S. 98 (1933); (*y*) Boseman v. Insurance Co., 301 U. S. 196 (1936); (*aa*) Yates v. Illinois Central R.R., 137 Fed. 943 (N. D. Ill. 1905); (*bb*) Curtis v. Cleveland C. C. & St. Louis R.R., 140 Fed. 777 (E. D. Ill. 1905); (*cc*) Johnson v. Charles D. Norton Co., 159 Fed. 361 (C. C. A. 6th 1908); (*dd*) Interstate Realty & Investment Co. v. Bibb County, Ga., 293 Fed. 721 (C. C. A. 5th 1923); (*ee*) Midland Valley R.R. v. Jarvis, 29 F. 2d 539 (C. C. A. 8th 1928); (*ff*) Cole v. Pennsylvania R.R., 43 F. 2d 953 (C. C. A. 2d 1930).

[31]Black & White Taxi & Transfer Co. v. Brown and Yellow Taxi & Transfer Co., 276 U. S. 518 (1927); Baltimore & O. R.R. v. Goodman, 275 U. S. 66 (1927); Beutler v. Grand Trunk Junction R.R., 224 U. S. 85 (1911); Baltimore & O. R.R. v. Baugh, 149 U. S. 368 (1892); Fowler v. Pennsylvania R.R., 229 Fed. 373 (C. C. A. 2d 1916); Eells v. St. Louis K. & N. W. R.R., 52 Fed. 903 (S. D. Iowa 1892).

[32]Enfield v. Jordan, 119 U. S. 680 (1886); Pana v. Bowler, 107 U. S. 529 (1882); Supervisors v. Schenck, 5 Wall. 772 (U. S. 1866); Gelpcke v. City of Dubuque, 1 Wall. 175 (U. S. 1863); Mercer County v. Hackett, 1 Wall. 83 (U. S. 1863).

[33] Enfield v. Jordan, 119 U. S. 680 (1880) (where the bonds were held unenforceable because issued by a "town" instead of a "township" or "village"); Pana v. Bowler, 107 U. S. 529 (1882) (where the bonds were held void because the authorization election was presided over by a "moderator" instead of a "supervisor," "assessor," or "collector"); Supervisor v. Schenck, 5 Wall. 772 (U. S. 1866) (where the bonds were declared invalid because the authorization election was ordered by a "county court" instead of a "Board of Supervisors").

[34] "To this rule, thus enlarged we adhere. It is the law of this court. It rests upon the plainest principle of justice. . . . We shall never immolate trust, justice and the law because a state tribunal has erected the altar and decreed the sacrifice." Gelpcke v. Dubuque, 1 Wall. 175, 206-07 (U. S. 1863).

[35] See app. 8 *infra*. It should be noted that these decisions had a tremendous nationwide effect on municipal bond issues by convincing investors that the integrity of the issue would be preserved. Long, *A Warning Signal for Municipal Bondholders: Some Implications of Erie Railroad v. Tompkins*, 37 MICH. L. REV. 589 (1939).

In *Hough v. The Railroad,*[36] an employee of the defendant had been killed when the train upon which he was an engineer hit an obstruction on the track and was derailed. He had warned his superior of defects in the equipment and had been assured that repairs would be made forthwith. At that time, the Texas courts held very rigidly to the "fellow-servant" doctrine and also held that an employee's use of equipment, known to be defective, was contributory negligence, as a matter of law. The Supreme Court refused to follow the Texas rules. On the fellow-servant issue, the Court thought that there was a "well-defined" exception to the rule where the employer exposed his employees to unreasonable hazards. On that ground, the fellow-servant doctrine was inapplicable. Turning to the question of contributory negligence, the Court ruled that the use of apparatus known to be defective was a question of fact for the jury and not a question of law in every case. On that basis, the Court used the *Tyson* doctrine to mitigate a very arbitrary and unjust state rule.[37]

In *Midland Valley R. R. v. Jarvis,*[38] the railroad held a right of way deed over property in Kansas. Defendants were lessees of the mineral rights in these lands by a lease from the heirs of the railroad's grantor. The railroad sought to enjoin the defendants from drilling or constructing pumps, oil wells, or power plants in such a way as to interfere with the operation of the railroad. The Kansas courts had handed down inconsistent opinions as to whether a railroad right of way amounted virtually to a fee.[39] However the Court of Appeals for the Eighth Circuit, expressly assuming that the law of Kansas would not permit an injunction, granted that remedy. The court reviewed at length the great burdens placed upon railroads by the "general" law and felt that the high standards of performance imposed should not be hampered by interference through the use of the right of way by owners of the servient estate, even though such use might be justified under the principles announced in local decisions. Not only is this decision in line with the overwhelming weight of authority,[40] but it also meets the highest standards of justice, expediency, and good sense.[41]

Perhaps the most interesting decision cited by Brandeis as indicative

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[36] Hough v. Railroad Co., 100 U. S. 213 (1879).

[37] The doctrine of the *Hough* case was subsequently accepted in Texas. See app. 15 *infra.*

[38] Midland Valley R.R. v. Jarvis, 29 F. 2d 539 (C. C. A. 8th 1928).

[39] The Kansas cases are collected in Midland Valley R.R. v. Sutter, 28 F. 2d 163, 164-66 (C. C. A. 8th 1928).

[40] *Id.* at 165.

[41] A converse holding in this type of case would have magnified present day problems in this field far beyond the serious proportions they independently attained. Rostow, *The Price of Federalism,* Fortune Magazine, Dec. 1948, p. 165.

of the injustice of *Swift v. Tyson* was *Cole v. Pennsylvania R. R.*[42] A passing train, at Watkins Glen, N. Y., ignited dry grass on the railroad's right of way, and the fire spread over abutting land to the lands of another and finally to the plaintiff's premises. Under the "New York fire rule" the railroad was not liable to an owner of land not abutting upon its premises for damages caused by fire even though the railroad had negligently caused the injury. The "general" law imposed liability for any forseeable consequences that naturally flowed from the negligent act even though the fire crossed the lands of numerous intervening owners before causing damage to the plaintiff.

Judge Augustus Hand, admitting that "both logic and the overwhelming weight of authority"[43] supported his action, applied the general rule. It seems strange that the Judge took this particular opportunity to fire a wholly gratuitous volley[44] at the very rule which permitted him to ignore a most unjust and thoroughly condemned principle of law.[45]

These decisions speak for themselves.

There would seem to be little purpose in discussing the six cases cited in the *Tompkins* opinion which we concede are "wrong" except to mention that in every one of these cases, the erroneous decision was not necessarily a result of the *Swift v. Tyson* doctrine. The way was always open for the federal court to modify the "general" law to fit the particular facts presented where it appeared that the established "federal" rule would require an unfair result.

The *Black and White Taxicab* case[46] is the decision most frequently cited as indicative of the intrinsic injustice of the *Tyson* doctrine. As a matter of fact, most writers condemn the doctrine in general terms and then point to this one decision. In reality, the case merely illustrates a situation where the "federal" rule should have been modified.

In the *Taxicab* case, the plaintiff corporation had originally incorporated in Kentucky. It had negotiated a contract with a railroad for the exclusive privilege of soliciting patronage at a railroad station. A contract of this type had long been considered by the Kentucky courts as contrary to the state's public policy. A dispute arose when the railroad attempted to grant a similar franchise to another taxicab company. Preferring to have the controversy decided under "general" law, plaintiff

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42 43 F. 2d 953 (C. C. A. 2d 1930).

43 *Id.* at 955.

44 *Id.* at 956-57.

45 Beale, *Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 642 (1920); Edgerton, *Legal Cause*, 72 U. OF PA. L. REV. 211, 367-68 (1924); Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 118 (1911); 51 C. J. 1167 (1930). But see Note, 71 A.L.R. 1102 (1931).

46 Black & White Taxi & Transfer Co. v. Brown & Yellow Taxi & Transfer Co., 276 U. S. 518 (1928).

transferred its rights to a Tennessee corporation in order to create the requisite diversity of citizenship. The Supreme Court applied the established "federal" rule and the plaintiff received judgment. The decision seems erroneous because there was ample evidence that the transfer to the Tennessee corporation was illusory. The transaction's only purpose was to create a set of facts to meet federal jurisdictional requirements. However, *Swift v. Tyson* did not command such a decision. In fact, the very flexibility of that doctrine permitted the Supreme Court to examine the substance of the transaction and to modify the federal rule so that under these particular facts Kentucky law could have been followed. The decision is erroneous only because of the Court's failure to do this.

The investigation of those cases cited in *Erie v. Tompkins* which were decided under the ground-rule of *Swift v. Tyson* require several conclusions. First, in a large majority of the cases, the court reached a fair and equitable result. Second, that in those cases where the result was unfair, the result did not stem from the *Swift v. Tyson* doctrine but from an erroneous application of that doctrine.

The second premise of Brandeis that *Swift v. Tyson* did not achieve national uniformity is equally vulnerable.

One of the basic policy considerations which law and lawyers have faced since the inception of the federal system has been the need for uniformity of law throughout the several states. Ellsworth himself[47] and later Webster[48] pleaded for what might be called "perfect" unification. Indeed, some have gone so far as to say that uniformity was the object of the diversity of citizenship clause,[49] and one at least to assert that uniform law was the great object of the Constitution itself.[50] In modern times the need for uniformity is even more urgent.[51] The increase in the number of uniform statutes and the scholarly endeavors to restate the law are recognitions of the necessity for the very maximum of uniformity in our laws.

It can hardly be seriously contended that the federal courts, operating under *Swift v. Tyson,* did not exert a powerful influence upon the initiation and singular success of uniform statutory laws.[52] However,

47 ". . . perfect uniformity must be observed thro' the whole union or jealousy and unrighteousness will take place; and for a uniformity one judiciary must pervade the whole." FORD, ESSAYS ON THE CONSTITUTION 159 (1892).

48 "We can have no Union, no respectability, no national character, and what is more no national justice till the States resign to one *supreme head* the exclusive power of legislating, judging and executing, in all matters of a general nature." FORD, PAMPHLETS ON THE CONSTITUTION 46 (1888).

49 Bank of United States v. Deveaux, 5 Cranch. 61, 83 (1809) (argument of counsel).

50 Crosskey, *Address,* 19 ILL. VOTERS BULLETIN, No. 4 (1939).

51 See note 41 *supra.*

52 See Commissioners' note to § 52 of the Uniform Bills of Lading Act, where

the one question that has never properly been answered is to what extent *Swift v. Tyson* operated to achieve uniformity of decisional state law.

There has been really but one attempt at such an evaluation.[53] Professor Frankfurter concluded that "*Swift v. Tyson* did not promote uniformity. . . . Evidence is wanting that state courts yield their own law."[54] This bold categorical negative is buttressed by evidence, fragmentary and misleading.[55] We are led to an entirely different conclusion.

Considerations of space and simplicity precluded an analysis of all the cases cited in the *Erie* opinion. For convenience, twenty cases were chosen as the subject matter of the inquiry. The attempt was to determine the effect of *Swift v. Tyson* ultimately upon the law of the state whose rule the federal court refused to follow. An analysis of these cases is included in an appendix to this article. The results convinced us that the rule did promote uniformity to a substantial degree—not that its effect was immediate but that it exerted a subtle, albeit inexorable, pressure upon the state court to march in harmony with its fellows.[56]

Of the cases examined, the *Tyson* doctrine established a substantial degree of uniformity in thirteen. The rule was expressly rejected in seven cases, and in four of the latter cases, the state rule still in existence is unique, outmoded, and contrary to the great weight of American authority.[57]

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the general principle of uniformity in the interpretation of the act is expressly credited to *Swift v. Tyson* 4 UNIFORM LAWS ANN. 77 (1922). See CRAWFORD, NEGOTIABLE INSTRUMENTS LAW ANN. 30 (1st ed. 1897). The express declaration in many of the uniform acts that the statute be interpreted uniformly operates to direct the federal courts to apply the *Tyson* doctrine. UNIFORM FIDUCIARIES ACT § 13; UNIFORM PARTNERSHIP ACT § 4; UNIFORM SALES ACT § 74; UNIFORM WAREHOUSE RECEIPTS ACT § 57. For a general discussion of this problem, see Beutel, *Common Law Judicial Technique and the Law of Negotiable Instruments*, 9 TULANE L. REV. 64 (1934).

[53] Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L. Q. 499 (1928).

[54] *Id.* at 529.

[55] A group of random cases were selected for examination. To support his proposition, Professor Frankfurter demonstrated that in these cases the state court promptly rejected the federal rule at the first available opportunity. The ultimate effect of the federal rule was disregarded. The determination of the issue on such a narrow ground was premature. See app. 1, 9, 16, 17 *infra*. Justice Brandeis' conclusion that *Swift v. Tyson* did not promote national uniformity was largely based upon Professor Frankfurter's research. *Erie R.R. v. Tompkins*, 304 U. S. 64, 74 (1938).

[56] See the discussion of *Gelpcke v. Dubuque* in the appendix for an excellent example. The appendix also illustrates that in some cases, while the federal rule has not been completely adopted, the case law of the state has developed to the point where the requiem for the older state view awaits but a proper forum and set of facts.

[57] See the text discussion of *Cole v. Pennsylvania R.R.* and the appendix discussion of *Railroad Co. v. Lockwood*. Indeed, one need go no further than the *Erie R.R. v. Tompkins* opinion itself to illustrate the point. The Pennsylvania substantive rule was conceded by counsel to be a lonely minority view. *Tompkins v. Erie R.R.*, 90 F. 2d 603, 604 (C. C. A. 2d 1937); RESTATEMENT, TORTS § 334 (1934).

These results are not surprising. It was to be expected that a majority of state courts would respond to the prestige and wisdom of the Supreme Court. *Union Savings Ass'n v. Seligman*[58] illustrates this point of view. In that case, the Missouri Supreme Court stated:

> "It is with reluctance that I agree to overrule any case decided by this court, and this reluctance is the greater where a line of decisions is to be overthrown. . . . The Supreme Court of the United States, every member of the bench concurring, has, since *Griswold v. Seligman* . . . was decided by this court, announced doctrines in conflict with our rulings in that case . . . and while we are under no obligations to yield our own and adopt the opinions either of the Supreme Court of the United States, or of the appellate courts of sister states, it is our duty to receive light on doubtful questions, from whatever source it may come. It does not become us to shut our eyes to what other respectable courts have held, and blindly follow what we have decided because we have decided it."[59]

Likewise, it was to be expected that some state courts would be quick to resent the intrusion upon their sacred judicial power, that they would take the first available opportunity to vent their ire on the *Tyson* rationale by categorically refusing to follow the federal rule. In most cases, the rejection was emotional rather than rational. This attitude is illustrated in *McClure v. Owen*[60] when the Supreme Court's decision of *Gelpcke v. Dubuque* was first considered by the Iowa Supreme Court. It declared:

> "It will be observed, that, while it is quite true [that] several decisions of this court . . . are overruled by the series of adjudications declaring the county and city railroad bonds void, the Supreme Court . . . [has] disregarded principles at the very foundation of the federal judicial power, without the restraining influence of which, the country will be launched upon the stormy sea of judicial conflict between State and federal courts, or will avoid this by succumbing to the decrees of one great federal arbiter of judicial questions.
>
> . . . . While such decisions may, in some cases, attain the ends of justice, the probability is, they will work quite a different result, and by disturbing precedents, will have the general effect of undermining the very fabric of our system of jurisprudence. . . ."[61]

Despite this initial condemnation of the Supreme Court's decision, the Iowa court eventually accepted the holding of that case.[62]

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[58] 92 Mo. 635, 15 S. W. 630 (1887).
[59] *Id.* at 643-44, 15 S. W. at 632.
[60] 26 Iowa 243 (1868).
[61] *Id.* at 258.
[62] See app. 9 *infra.*

Thus, if one passes beyond the initial petulant refusal to follow the federal view and traces the cases down through the years, a consistent pattern of piecemeal absorption can be perceived until in many instances the older state rule has been replaced by the federal rule.

Admittedly, the federal rule was not accepted in every instance. But which was the better choice? The *Erie v. Tompkins* doctrine by requiring absolute conformity offered uniformity within one state. But approaching the problem from a national view, the *Erie* doctrine emphasized the weakness of the federal system by encouraging different rules of law in the various states. On the other hand, the *Swift v. Tyson* doctrine, while sometimes resulting in different rules of law within one state, offered the hope of eventual national uniformity. Again—which was the better choice?

This question cannot be answered with certainty unless we consider the complications which have arisen from the application of the *Erie v. Tompkins* doctrine.

II

The ramifications of the *Erie* doctrine have been so widespread that it would be a mountainous task to attempt to uncover and present all its difficulties. For the sake of convenience, an attempt has been made to departmentalize those problems considered most indicative of its impracticality.

Substance and Procedure

The asserted limitation of the *Erie* rule at the time of its adoption was its pertinence to substantive questions. Nowhere was there any doubt of federal supremacy in the promulgation of its own rules of procedure. Only when the federal courts were confronted with a problem of law fairly defined as substantive would they be required to abide by state decisional or statutory law. The conformity crusade extended no further than this.

Though plausible enough in its naked exposition, the substantive-procedural demarcation actually mounted the federal courts on the dilemma's horns. Since the nub of the policy underlying *Erie v. Tompkins* was that the accident of diversity of citizenship should not lead to a substantially different result by a state and federal court within the same geographical area, the rationale of the rule would seem equally applicable to questions which though procedural in name, if observed, would produce a different result.

For example, Rule 23(b) of the Federal Rules of Civil Procedure provides that in order to maintain a minority stockholder's action, the

plaintiff must have owned stock in the corporation at the time the wrong occurred.[63] On the other hand, some states do not so require. In these states, if a non-resident plaintiff, who had acquired ownership subsequent to the commission of the wrong, brought his action in the local state court, he might win; but if the action were commenced in a federal district court within that state, he would definitely lose.[64] This must follow because the rule at issue has been defined by the Supreme Court as procedural, and the *Erie* doctrine is therefore inapplicable. It is obvious, however, that such a result would be offensive to the spirit of *Erie* because divergent results would be reached by state and federal courts within the same geographical area.

When faced with this dilemma, some federal courts defined the issue as substantive.[65] Conformity was thereby preserved. In branding such issues as substantive, however, inferior federal tribunals in effect adjudicated that the Supreme Court, in recommending Rule 23(b), exceeded the power granted to it because the congressional mandate to the Court was that it adopt federal rules which would "neither abridge, enlarge, nor modify the substantive rights of any litigant."[66] For this reason, Brandeis' failure to join with the Supreme Court in its recommendation of the rules has the merit of consistency. Furthermore, if as Brandeis suggested, "Congress has no power to declare substantive rules of common law applicable in a State . . . ,"[67] then congressional adoption of these rules is unconstitutional. At any rate, burden of proof,[68] contributory negligence,[69] presumptions,[70] and state statutes

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[63] "In an action brought to enforce a secondary rigbt on the part of one or more shareholders in an association, . . . the complaint . . . shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law. . . ." FED. R. CIV. P., 23(b).

[64] H F G Co. v. Pioneer Pub. Co., 162 F. 2d 536 (C. C. A. 7th 1947); Perrott v. United States Banking Corp., 53 F. Supp. 953, 956 (D. Del. 1944); Holtzoff, *The Federal Rule of Civil Procedure and Erie Railroad Co. v. Tompkins,* 24 J. AM. JUD. SOC'Y 57, 59 (1940); Ilsen, *Recent Cases And New Developments in Federal Practice and Procedure,* 16 ST. JOHN'S L. REV. 1, 28 *et seq.* (1941); Note, 41 COL. L. REV. 104 (1941).

[65] *See* Toebelman v. Missouri-Kansas Pipe Line Co., 41 F. Supp. 334, 340 (D. Del. 1941), *modified,* 130 F. 2d 1016 (C. C. A. 3d 1942); Summers v. Hearst, 23 F. Supp. 986, 992 (S. D. N. Y. 1938); Overfield v. Pennroad Corp., 48 F. Supp. 1008, 1018 (E. D. Pa. 1943), *rev'd on other grounds,* 146 F. 2d 889 (C. C. A. 3d 1944); Tunks, *Categorization and Federalism,* 34 ILL. L. REV. 271, 287 (1939); Notes, 38 COL. L. REV. 1472, 1483-84 (1938), 41 COL. L. REV. 989 (1941).

[66] 48 STAT. 1064, 28 U. S. C. § 723(b) (1934), as amended, 62 STAT. A 124, 28 U. S. C. § 2072 (1948).

[67] Erie R.R. v. Tompkins, 304 U. S. 64, 78 (1938).

[68] Cities Service Oil Co. v. Dunlap, 308 U. S. 208 (1939); Clark, *Procedural Aspects of the New State Independence,* 8 GEO. WASH. L. REV. 1230 (1940).

[69] Palmer v. Hoffman, 318 U. S. 109 (1943); Cities Service Oil Co. v. Dunlap, 308 U. S. 208 (1939); *cf.* Francis v. Humphrey, 25 F. Supp. 1 (E. D. Ill. 1938).

[70] Montgomery v. Hutchins, 118 F. 2d 661 (C. C. A. 9th 1941); New York Life Ins. Co. v. Gamer, 106 F. 2d 375 (C. C. A. 9th 1939), *cert. denied,* 308 U. S. 621 (1939); 9 U. OF CHI. L. REV. 113, 123 (1941); 25 IOWA L. REV. 375 (1940); 17 N. Y. U. L. Q. REV. 466 (1940).

of limitation,[71] right to trial by jury,[72] impleading of third party defendants,[73] res judicata,[74] and *forum non conveniens*[75] have all been held matters of substantive import to which federal courts are bound to apply the state rules. It has even been suggested that federal courts must follow state decisions in such rules as the direction of verdict, taking a case from the jury, and the right of comment on the evidence.[76]

Other courts, however, when confronted with this problem, elected to follow the more desirable federal rule even though the outcome of the litigation differed from that reached in the state courts. Rather than examine the efficacy of the rule whose spirit they were offending these courts paid lip service to it by defining the rule as procedural. As a result of these decisions, there arose a body of federal opinions no less inconsistent with related state decisions than those so thoroughly condemned by Mr. Justice Brandeis in *Erie v. Tompkins*.[77] It became apparent that only by a drastic revamping of the orthodox substantive-procedural dichotomy could the Court effectuate the policy to which it had been committed.

Backed to the wall in *Guaranty Trust Co. v. York*,[78] the Court, through Mr. Justice Frankfurter, declared that a "policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties."[79] Mr. Justice Frankfurter discarded the existing method of making the substantive-procedural classification and adopted a new test. He accepted the true rationale of the *Erie v. Tompkins* decision by inquiring whether the issue would "significantly affect the result" of the litigation.[80] Apparently, if the suit would be "significantly

[71] Guaranty Trust Co. v. York, 326 U. S. 99 (1945); Bomar v. Keyes, 162 F. 2d 136 (C. C. A. 2d 1947), *cert. denied*, 332 U. S. 825 (1947); *cf.* Pepper v. Truitt, 158 F. 2d 246 (C. C. A. 10th 1946). These cases, however, do not answer the question whether state or federal rules are to be followed in determining the effective method of commencing an action so that the statute will be tolled. On this point see text at p. 509-10.

[72] Ross v. Service Lines, 31 F. Supp. 871 (E. D. Ill. 1940); Beagle v. Northern Pacific R.R., 32 F. Supp. 17 (W. D. Wash. 1940). *Contra*: Hollingsworth v. General Petroleum Corp., 26 F. Supp. 917 (D. Ore. 1939).

[73] *See* Thompson v. Cranston, 2 F. R. D. 270 (W. D. N. Y. 1942), *aff'd*, 132 F. 2d 631 (C. C. A. 2d 1942); *cf.* Keeffe and Cotter, *Service of Process in Suits Against Directors*, 27 CORNELL L. Q. 74, 83 (1941).

[74] Angel v. Bullington, 330 U. S. 183 (1947); Note, 33 VA. L. REV. 357 (1947).

[75] Koster v. Lumbermen's Mutual Casualty Co., 330 U. S. 518 (1947); Gulf Oil Co. v. Gilbert, 330 U. S. 501 (1947).

[76] Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L. J. 267, 289 (1946).

[77] Ettelson v. Metropolitan Life Ins. Co., 137 F. 2d 62 (C. C. A. 3d 1943); Diederich v. American News Co., 128 F. 2d 144 (C. C. A. 10th 1942); Gallup v. Caldwell, 120 F. 2d 90 (C. C. A. 3d 1941); Krisor v. Watts, 61 F. Supp. 845 (E. D. Wis. 1945); Perrott v. United States Banking Corp., 53 F. Supp. 953 (D. Del. 1944); MacDonald v. Central Vermont R. R., 31 F. Supp. 298 (D. Conn. 1940); Satink v. Holland Township, 28 F. Supp. 67 (D. N. J. 1939); Summers v. Hearst, 23 F. Supp. 986 (S. D. N. Y. 1938).

[78] Guaranty Trust Co. v. York, 326 U. S. 99 (1945).

[79] *Id.* at 110.

[80] *Id.* at 109.

affected" by the application of the federal rule, that rule is substantive in nature and must be disregarded. Thus, the Court retained the original substantive-procedural classification which had been handed down in *Erie v. Tompkins* but overruled that decision to the extent that the method of making the classification was radically altered. Only by that course could the Court assure that the accident of diversity of citizenship would not substantially affect the result of the litigation. All that remained was to determine what issues were "significantly affected" by federal practice.

That the determination of this question is not as easy as one would expect is illustrated by three cases presently pending in the Supreme Court.

In *Beneficial Industrial Loan Corp. v. Smith,*[81] a minority stockholder brought an action in the District Court of New Jersey. A New Jersey statute provided that if a minority stockholder did not own 5% of the outstanding shares of stock or if the value of his stock did not exceed $50,000, the corporation could require the plaintiff to post security for reasonable expenses, including attorney's fees.[82] The plaintiff contended that the New Jersey statute was inapplicable in the federal court since it was procedural. The district court agreed but the Court of Appeals for the Third Circuit reversed. It pointed out that the New Jersey statute announced the "public policy"[83] of that state. It was the purpose of the statute to restrict the institution of irresponsible derivative actions, which experience had shown were often brought solely for the benefit of the minority stockholder and his attorney. Under the rationale of *Guaranty Trust Co. v. York,* the statute was clearly applicable in the federal court. On February 28, 1949, the Supreme Court granted certiorari.

The second case presently pending in the Supreme Court is *Ragan v. Merchants Transfer and Warehouse Co.*[84] Ragan instituted an action in the Federal District Court for Kansas for damages arising from an automobile collision. Pursuant to Rule 3 of the Federal Rules of Civil Procedure, he "commenced" his civil action by "filing a complaint with the Court."[85] Pursuant to Rule 4, a Deputy United States Marshal served a summons upon the defendant. However, between the filing of

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[81] 170 F. 2d 44 (C. C. A. 3d 1948), *cert. granted,* 17 U. S. L. WEEK 3259 (U. S. March 1, 1949).

[82] N. J. STAT. ANN § 14:3-15 (Supp. 1948).

[83] Beneficial Industrial Loan Corp. v. Smith, 170 F. 2d 44, 50 (C. C. A. 3d 1948).

[84] 170 F. 2d 987 (C. C. A. 10th 1948), *cert. granted,* 17 U. S. L. WEEK 3259 (U. S. March 1, 1949).

[85] "A civil action is commenced by filing a complaint with the court." FED. R. CIV. P., 3.

the complaint and the service of the summons, the Kansas statute of limitations expired. Under the law of Kansas, the statute of limitations continued to run until the actual service of the summons.[86] There was no doubt that if the case had been pending in the Kansas state court, the cause of action would have been barred.[87] Despite this the District Court for Kansas took jurisdiction. Laying aside the presumptive state result, it reasoned that the method of instituting an action was essentially procedural.[88] The Court of Appeals for the Tenth Circuit reversed. Under the test laid down in *Guaranty Trust Co. v. York,* there was no question that the application of Rule 3 of the Federal Rules of Civil Procedure "substantially affected" the result of this particular suit. On February 28, 1949, the Supreme Court granted certiorari in the *Ragan* case.

The third case pending in the Supreme Court is *Interstate Realty Co. v. Woods.*[89] In order to comprehend the full impact of this litigation on the *Erie* doctrine, it is necessary to review briefly two other decisions by the Supreme Court.

In 1912 in the *Lupton* case,[90] the Court determined the applicability of § 15 of the New York General Corporation Law[91] to the federal courts. Section 15 provided:

> "No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured . . . [a] certificate."

The Supreme Court ruled that the New York statute could not constitutionally operate to restrict the jurisdiction of the federal courts. Chief Justice Hughes stated: "The State could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of a valid contract."[92]

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86 KAN. GEN. STAT. ANN § 60-308 (1935).

87 "I concede—freely concede that if this case was pending in the State Court, if it had been commenced in the State Court and pending in the State Court then the cause of action would have been barred. . . ." Ragan v. Merchants Transfer and Warehouse Co., 170 F. 2d 987, 992 (C. C. A. 10th 1948).

88 On similar facts, the Federal District Court for the Eastern District of Wisconsin reached the same result. Krisor v. Watts, 61 F. Supp. 845 (E. D. Wis. 1945). *See* Isaaks v. Jeffers, 144 F. 2d 26 (C. C. A. 10th 1944), *cert. denied,* 323 U. S. 781 (1944); *cf.* Yudin v. Carroll, 57 F. Supp. 793 (W. D. Ark. 1944); Schram v. Homes, 4 F. R. D. 119 (E. D. Mich. 1943).

89 168 F. 2d 701 (C. C. A. 5th 1948), *rehearing granted,* 170 F. 2d 694 (1948), *cert. granted,* 17 U. S. L. WEEK 3238 (U. S. Feb. 2, 1949).

90 David Lupton's Sons Co. v. Automobile Club of America, 225 U. S. 489 (1912).

91 N. Y. GEN. CORP. LAW § 15 (1904), as amended, N. Y. GEN. CORP. LAW § 218 (1943).

92 David Lupton's Sons Co. v. Automobile Club of America, 225 U. S. 489, 500 (1912).

The second case which must be considered with relation to the *Interstate* case is *Angel v. Bullington.*[93] It involved a North Carolina statute substantially similar to the New York statute in the *Lupton* case, except that it prohibited a suit for the recovery of a deficiency judgment.[94] The plaintiff, a resident of Virginia, had foreclosed a purchase-money mortgage on property in Virginia. The mortgagor, a resident of North Carolina, was not subject to personal service in Virginia, so the plaintiff instituted his action to recover the remainder of the debt in a North Carolina Superior Court. On appeal, the North Carolina Supreme Court closed its doors to the plaintiff, ruling that the statute was jurisdictional.[95] Without appealing from that holding, the plaintiff commenced a new action in the Federal District Court for the Western District of North Carolina. The district court ruled that since the North Carolina statute had been construed by its own courts as procedural, under *Erie v. Tompkins,* the federal courts could take jurisdiction. On appeal, the Supreme Court reversed.

The *Bullington* decision is ambiguous. Mr. Justice Frankfurter apparently rests the holding primarily upon the basis that the North Carolina state decision was res judicata, that the plaintiff's remedy was to appeal to the Supreme Court of the United States from the North Carolina Supreme Court holding. If the decision had been restricted to this narrow point, the status of the *Lupton* decision would have been unchanged. However there is language in the opinion that raises the applicability of the *Erie* doctrine. In the course of his opinion, Mr. Justice Frankfurter states:

> "Cases like *Lupton's Sons Co. v. Automobile Club* . . . are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with *Erie Railroad v. Tompkins.* . . . That decision drastically limited the power of federal district courts *to entertain suits* in diversity cases *that could not be brought* in the respective State courts or were barred by defenses controlling in State courts." (Italics added).[96]

Now this is an amazing statement. No authority was cited to support it. The language can only be interpreted as deliberate dicta to the effect that if the *Lupton* case had arisen under the *Erie* doctrine, the Court would reach an opposite result. Even though the res judicata issue had not been available in the *Bullington* case, the result would have been the same. This obviously followed from the test laid down in *Guaranty*

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[93] 330 U. S. 183 (1947); Note, 33 VA. L. REV. 357 (1947).
[94] N. C. GEN. STAT. ANN. § 45-36 (1943).
[95] 220 N. C. 18, 16 S. E. 2d 411 (1941).
[96] Angel v. Bullington, 330 U. S. 183, 192 (1947).

Trust Co. v. York because the issue whether the federal court had jurisdiction substantially affected the result of the litigation. Syllogistically, the argument is impeccable; but at least three of the judges in the Supreme Court, and probably more, are not prepared to apply the *Erie* doctrine until the jurisdictional issue has been determined. Mr. Justice Reed dissented:

> "In reaching the conclusion which it does, this Court decides that if a state court does not have the power to adjudicate a cause, neither does a federal court in that state. It also departs from controlling precedents that state enactments on jurisdiction, remedies and procedures do not affect the jurisdiction, remedies or procedures of federal courts. It is true that these antedate the *Erie* case but that case did not change the state and federal jurisdiction."[97]

Mr. Justice Rutledge realized that a constitutional issue arose from a reversal of the principle laid down by Chief Justice Hughes in the *Lupton* case. Justice Rutledge said:

> "The *Erie* rule did not purport to change the law of federal jurisdiction in diversity cases, taking it out of the hands of Congress and the federal courts and putting it within the states' power to determine."[98]

As applied to the facts in the *Lupton* case, the test laid down in *Guaranty Trust Co. v. York* for determining the applicability of the *Erie* doctrine seems unconstitutional. The Constitution grants the plenary power of determining the jurisdiction of the federal courts to the Congress, not to the States. Such a construction of § 34 of the Judiciary Act, based on the *Erie* doctrine, operates to delegate Congressional power to the States. Even though the delegation is indirect, it is unconstitutional.[99]

The *Interstate* case raises the issue squarely. In a nut-shell, the case is the *Lupton* situation under the *Erie* doctrine. The particular statute happens to be one enacted in Mississippi,[100] instead of New York. The District Court for the Northern District of Mississippi applied the *Guaranty Trust Co. v. York* test and accordingly held that it was with-

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97 *Id.* at 198-99 (dissenting opinion).

98 *Id.* at 210 (dissenting opinion).

99 It should be noted that there is at least one method by which the Court might evade the "constitutional" argument in the *Interstate* case. The Mississippi statute might be construed as not depriving the Mississippi courts of "jurisdiction" to grant the plaintiff recovery, but instead, as merely providing that the defendant may set up the statute as a defense. *See* Newell Contracting Co. v. State Highway Commission, 195 Miss. 395, 15 So. 2d 700 (1943). The Supreme Court might then rule that even though it may be true that a state cannot constitutionally deprive a federal court of its jurisdiction, the Mississippi statute may be pleaded as a defense. This argument is unsatisfactory. The same reasoning was rejected in the *Lupton* case. In addition, the validity of the constitutional issue will remain unanswered.

100 MISS. CODE ANN. §§ 5319, 5339, 5343 (1942).

out jurisdiction. The Circuit Court of Appeals for the Fifth Circuit reversed, relying upon the *Lupton* case. It interpreted the *Bullington* decision as exclusively "concerned with the application of the doctrine of res judicata. . . ."[101] On February 1st, 1949, the Supreme Court granted certiorari in the *Interstate* case.

The Supreme Court's disposition of the *Beneficial Loan, Ragan,* and *Interstate* cases may clarify several of the more ambiguous aspects of the *Erie v. Tompkins* doctrine.

A reversal of the *Beneficial Loan* case seems unlikely. There is no question but that the New Jersey minority stockholder's statute, although phrased in a procedural manner, proclaims a definite policy of the state. The New Jersey statute operates in this particular case to "substantially affect the result" of the litigation. A Supreme Court holding that the statute does not bind the federal courts in New Jersey could only be interpreted as at least a partial return to the substantive procedural distinction. The trend is definitely in the opposite direction. However, the Court may invent some method of evading the logical, but unfortunate, result dictated by the principle of absolute conformity.

The *Ragan* case presents a more difficult problem. That case, not only involves the substantive-procedural question, but the validity and effect of the Federal Rules of Civil Procedure.. The *Ragan* case, unlike the *Beneficial Loan* case, does not primarily present a question of state policy. Whether the statute of limitations tolls or does not toll when a complaint is filed with the court is not of great import. The question goes to technical administration, rather than to state policy. Thus, the Supreme Court is faced with a case where the issue is clearly procedural but where plaintiff's counsel admitted that if the case were pending in the state court, the cause of action would be barred. In addition, the application of the *Erie* rationale will apparently operate in direct conflict with Rule 3 of the Federal Rules of Civil Procedure.

If there was ever an opportunity to go *Erie* all the way, this is it. The Court need not qualify its previous position. It has consistently reiterated and expanded the conformity principle. At the same time, the Court has never before had occasion to go quite this far.

Of the three cases, the *Interstate* case presents the most difficulty. A decisive split of opinion can be expected. The Court is faced with a real dilemma. If the Mississippi statute is held inapplicable to the federal courts, constitutional objections will be avoided; but the test laid down in *Guaranty Trust Co. v. York* would be severely inundated and the persuasive force of the cases decided under the *York* rule ma-

[101] Interstate Realty Co. v. Woods, 170 F. 2d 694, 695 (C. C. A. 5th 1948).

terially weakened. Moreover, the Court would expressly sanction opposite results in different courts within the same state—the situation for which *Swift v. Tyson* was so thoroughly condemned. The Court would be forced to recognize that a federal court sitting in diversity is more than a court of the state. A raft of cases raising the problem whether an issue is jurisdictional or non-jurisdictional would necessarily follow. On the other hand, a reversal of the *Interstate* case would have the merit of consistency and the *York* test would be salvaged. But at what price? The Court would expressly authorize state legislatures to restrict the jurisdiction of the federal courts. As the *Lupton* case so clearly indicates, § 34 of the Judiciary Act as so construed would clearly contravene the constitutional rights of non-resident litigants. The dilemma involves more than a mere application of the *Erie* doctrine; it illustrates the fundamental weakness of the doctrine itself.

These three cases are typical of the numerous decisions which have turned upon the applicability of *Erie v. Tompkins*. Contrary to its expected effect, the doctrine has operated to create uncertainty and to promote litigation of issues which do not go to the merits of the controversy. Although it may be true that the "Federal Digest, through the 1937 volume, lists nearly 1000 decisions involving the distinction between questions of general and of local law,"[102] it is equally true that in the eleven years since the birth of *Erie v. Tompkins,* the Supreme Court has devoted 40 full-length opinions in explanation and clarification of the *Erie* rule. Whatever may have been the validity of Brandeis' criticism that *Swift v. Tyson* promoted needless litigation, the *Erie v. Tompkins* doctrine is subject to even greater reproach on the same score.

If only the substantive-procedure distinction were prerequisite to the application of *Erie,* there would be sufficient difficulty. However, there is another major problem in its administration. After it has been determined that the issue is one in which state decisional law must be ascertained and followed, the court is immediately confronted with the problem of how that law is to be ascertained.

Determining Applicable State Law

In the *Erie* case, Mr. Justice Brandeis announced that the law of the state as declared by its "highest court"[103] must be applied. Did this by implication exclude the decisions of inferior tribunals? The

[102] Erie R.R. v. Tompkins, 304 U. S. 64, 74 n. 8 (1938).

[103] "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. And whether the law of the State shall be declared by its Legislature or its highest court in a decision is not a matter of federal concern." Erie R.R. v. Tompkins, 304 U. S. 64, 78 (1938).

Supreme Court later said no. Such an arbitrary distinction would sanction the very condition which the *Tompkins* decision condemned—different results in state and federal courts. Since there are countless legal issues which have not or never will be adjudicated in the highest state courts, such a rule would improperly limit the *Erie* doctrine. Despite its apparent advisability, the solution necessarily adopted by the Court has proved equally as distasteful as the condition sought to be remedied.

The principal objection to the rule arises from the difficulty of its practical administration. It is agreed that the federal courts are bound by decisions of some of the lower state tribunals, but which ones? Numerous decision by the Supreme Court have not provided an answer. Except insofar as the cases provide a general guide in that they pass upon the effect of a decision by a particular court in a particular state, the Supreme Court decisions leave the status of other state tribunals undetermined.

A comparison of *Fidelity Union Trust Co. v. Field*[104] and *King v. Order of United Commercial Travelers of America*[105] illustrates the confusion.

In the *Field* case, a New Jersey statute[106] had been twice construed by the Chancery Court of New Jersey.[107] These decisions had not been reviewed by New Jersey's highest court. The Court of Appeals for the Third Circuit found it impossible to distinguish the facts in the two Chancery cases from those in the *Field* case but concluded that it was not bound by the two decisions because they did not "truly express the state law."[108] The Supreme Court reversed. It pointed out that under New Jersey law, "a uniform ruling . . . by the Court of Chancery . . . over a course of years will not be set aside by the highest court 'except for cogent and important reasons'."[109] The Court stated:

> "At the present time the *Thatcher* and *Travers* cases [the two Chancery cases] stand as the only exposition of the law of the State with respect to the construction and effect of the statutes of 1932, and the Circuit Court of Appeals was not at liberty to reject these decisions merely because it did not agree with their reasoning."[110]

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104 108 F. 2d 521 (C. C. A. 3d 1939), *cert. granted,* 309 U. S. 652 (1939), *rev'd,* 311 U. S. 169 (1940).

105 65 F. Supp. 740 (W. D. S. C. 1946), *rev'd,* 161 F. 2d 108 (C. C. A. 4th 1947), *aff'd,* 333 U. S. 153 (1948).

106 N. J. STAT. ANN. § 17:9-4 (1923), repealed, N. J. STAT. ANN. § 17:9A-336 (A) (12) (Supp. 1948).

107 Thatcher v. Trenton Trust Co., 119 N. J. Eq. 408, 182 Atl. 912 (1936); Travers v. Reid, 119 N. J. Eq. 416, 182 Atl. 908 (1936).

108 108 F. 2d 521, 526 (C. C. A. 3d 1939).

109 311 U. S. 169, 179 (1940).

110 *Ibid.*

In the *King* case, the plaintiff sued on an insurance policy which insured against accidental death but contained a clause exempting the company from liability for "death resulting from participation . . . in aviation." The insured lost his life when a plane in which he was flight observer made an emergency landing in the Atlantic Ocean. He was not seriously injured in the landing, but the plane sank and he was dead when picked up in a life jacket four and a half hours later. The medical diagnosis established that he had drowned "as a result of exposure in the water. . . ."[111] The District Court for South Carolina, sitting in diversity, allowed recovery under the broad principles of South Carolina insurance law "that ambiguities in an insurance contract are to be resolved in favor of the beneficiary, and that the cause of death . . . is the immediate, not the remote cause."[112] Two months later a South Carolina court, the Court of Common Pleas for Spartanburg County, also allowed Mrs. King recovery in a suit against a different insurer on a policy which contained an almost identical aviation clause.

The *King* case was then appealed to the Circuit Court of Appeals. That court reversed the District Court in spite of the decision of the Spartanburg county court. That decision was not controlling "since it was not binding on other South Carolina courts and since the court rendering it had relied on the District Court's ruling"[113] in the *King* case. Due to South Carolina's general theories of proximate cause in tort cases and considerable authority in other jurisdictions, the Circuit Court of Appeals did not believe that the decision by the Spartanburg county court was a valid expression of the law of South Carolina.

The United States Supreme Court granted certiorari. At that time, the South Carolina Court of Common Pleas for Greenville County handed down a decision which followed the view taken by the Circuit Court of Appeals. The Supreme Court affirmed, but not on the basis of the recent decision by the Greenville county court. It expressly stated that the "Circuit Court of Appeals did not have to follow the decision of the Court of Common Pleas for Spartanburg County."[114] The Supreme Court stressed the fact that "an unappealed decision of a Court of Common Pleas is binding only upon the parties who are before the Court in that particular case and would not constitute a precedent in any other case in that Court or in any other court in the State of South Carolina."[115] The Court stated that "it would be incongruous indeed to hold the federal court bound by a decision which

111 333 U. S. 153, 154 (1948).
112 *Id.* at 155.
113 *Id.* at 157.
114 *Id.* at 162.
115 *Id.* at 160.

would not be binding on any state court."[116] However the Court cautioned that the *King* decision was not "to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts."[117]

What is the practising lawyer to conclude from the *Field* and *King* decisions? He might surmise that federal courts, unless convinced by persuasive data that the highest court of the state would decide otherwise, are bound by the lowest state tribunal unless a decision by that tribunal would not constitute a precedent in another case. With this general rule, the practising lawyer then turus to his particular case. He wonders which of the courts in his jurisdiction hand down decisions which "constitute a precedent in another case." Does the Municipal Court of New York City fall within that category? How about the County Court of Westchester County? He wonders what type of "persuasive data" will be sufficient to establish that "the highest court of the state would decide otherwise." If the federal court is bound to arrive at the same result as would the highest court of the state, it logically follows that the federal court should be permitted to use exactly the same type of "data" as would the highest state court. If the *Erie* doctrine is to apply full force, the federal court should be permitted to consider the economic and social policies of the highest state court. Decisions in other jurisdictions would be pertinent if the highest state court would also consider them. After determining what type of "data" the federal court will consider, the practising lawyer then wonders how "persuasive" that "data" must be. Must the "data" be more "persuasive" than the highest court of the state would require? Logically, no. Or, on the other hand, is this problem one of practical administration, so that the principles of the *Erie* doctrine need not be applied?

Perhaps the best solution for the practising lawyer is to make a guess and then appeal the case to the Supreme Court.

The situation is more confused by the fact that the lower federal courts have reacted against the restrictive position taken by the Supreme Court. Where there are direct holdings or compelling dicta by the highest state courts, of course the *Erie* rule is generally observed;[118] but in their absence, the lower courts have invented exceptions whereby they are permitted to use independent judgment to decide on the merits.

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116 *Id.* at 161.
117 *Id.* at 162.
118 Boston Casualty Co. v. Bath Iron Works Corp., 136 F. 2d 31 (C. C. A. 1st 1943); Rohm v. Interstate Motor Freight System, 133 F. 2d 154 (C. C. A. 6th 1943); Stinson v. Edgemoor Iron Works, 55 F. Supp. 861 (D. Del. 1944).

If the cases cited by the lower state court are not in point,[119] if there is a higher court dicta to the contrary,[120] if in affirming the holding of the intermediate court the state supreme court has explicitly left the particular issue open,[121] or if the intermediate court decisions are opposing,[122] the federal courts may decide independently of these rulings.

Escapes are not limited to these situations. The difference between state and federal results may be explained on the ground that the federal court is not bound by a state finding of fact even where the evidence in both cases is the same.[123] There may be some question as to what the state decision means[124] or a great deal of time may have elapsed since the state case was decided.[125] If neither party pleads or proves the state law, the federal court may use its own judgment;[126] furthermore, if after judgment in a federal court, the state courts indicate a change in state law, a rehearing will be granted.[127] And if there is no state law on the subject, some courts hold that they are not required to speculate as to how the state court might decide but may reach a decision which reason dictates or which sound judgment demands, with the faith that the local courts will reach the same decision when the question comes before them.[128]

Thus, as a matter of actual practise, it is often impossible to determine whether a decision by a state court will or will not be binding upon a federal court. But apart from this lamentable uncertainty, the *Erie* doctrine is subject to still another criticism.

Assume a situation similar to that which existed in the *Field* case. Two state intermediate courts have agreed upon the interpretation of a state statute. A non-resident plaintiff brings a suit which is dependent upon that interpretation. If the state decisions support his claim, he will institute his action in the federal court, and that court will be obligated to apply these decisions. Even the Supreme Court of the United States would be powerless to review the interpretation. But note that an opposite result would be reached if plaintiff brings his

119 Cooper v. American Airlines, 149 F. 2d 355 (C. C. A. 2d 1945).
120 Order of United Commercial Travelers of America v. Meinsen, 131 F. 2d 176 (C. C. A. 8th 1942).
121 Wickes Boiler Inc. v. Godfrey-Keeler Co., 121 F. 2d 415 (C. C. A. 2d 1941).
122 United States v. Norsam Realty Corp., 125 F. 2d 456 (C. C. A. 2d 1942). *Contra*: Yoder v. Nu-Enamel Corp., 117 F. 2d 488 (C. C. A. 8th 1941).
123 Purcell v. Summers, 145 F. 2d 979 (C. C. A. 4th 1944).
124 Arab Corp. & Duneco v. Bruce, 129 F. 2d 94 (C. C. A. 5th 1942).
125 Wells v. Kansas City Life Ins. Co., 46 F. Supp. 754 (D. N. D. 1942).
126 Jamison Coal & Coke Co. v. Goltra, 143 F. 2d 889 (C. C. A. 8th 1944).
127 Vandenbark v. Owen-Illinois Glass Co., 311 U. S. 538 (1941).
128 Dailey v. Parker, 152 F. 2d 174 (C. C. A. 7th 1945); New England Mutual Ins. Co. v. Mitchell, 118 F. 2d 414 (C. C. A. 4th 1941), *cert. denied*, 314 U. S. 629 (1941); *cf.* Meredith v. Winter Haven, 320 U. S. 228 (1943); Franzen v. E. I. DuPont De Nemours & Co., 146 F. 2d 837 (C. C. A. 3d 1944); Jackman v. Equitable Life Assurance Society of United States, 145 F. 2d 945 (C. C. A. 3d 1944).

action in the state court. No previous decision would foreclose defendant from arguing his case on the merits, receiving a determination of its soundness and justice, or prosecuting an appeal to the highest court in the state.

In addition, the *Erie* doctrine has encouraged "shopping" of a different type. As a further price of conformity, uniform federal conflicts of law rules have been sacrificed.[129]

Prior to *Erie v. Tompkins*, the federal courts had always assumed the power to determine which state law would be applicable in conflicts cases.[130] It was one thing to declare that state decisions controlled local situations, but it was quite another to deify them as to matters arising entirely outside the state. Certainly, there exists no such constitutional requirement. Especially in this area, where local prejudices would be most likely to affect rights derived in other states, federal independence should be encouraged.[131] Despite the merits of this argument, the *Klaxon* case[132] expressly ruled that federal courts must follow the conflicts of law rules of the states in which they are respectively situated.

The manner in which this ramification of the *Erie* doctrine encourages "shopping" is illustrated in *Order of United Commercial Travelers of America v. Meinsen*.[133] A Missouri resident purchased an insurance policy in Ohio from an Ohio insurance company. Under the law of Ohio, a provision in the policy containing a short statute of limitations was valid. However, the plaintiff instituted his action on the policy in a federal district court in Missouri, and that court was bound by the Missouri public policy declaring such clauses void. Of course a different result would have been reached if that action had been commenced in an Ohio federal court. Thus, the *Erie* doctrine permitted the plaintiff to "shop" for a jurisdiction whose public policy afforded him opportu-

129 Griffin v. McCoach, 313 U. S. 498 (1941); Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487 (1941); Seaboard Surety Co. v. First Nat'l Bank & Trust Co., 121 F. 2d 288 (C. C. A. 8th 1941); Breslin v. Nat'l Surety Co., 114 F. 2d 65 (C. C. A. 3d 1930); Sampson v. Channell, 110 F. 2d 754 (C. C. A. 1st 1940); New England Mut. Life Ins. Co. v. Spence, 104 F. 2d 665 (C. C. A. 2d 1939); Meinsen v. Order of United Commercial Travelers, 43 F. Supp. 756 (W. D. Mo. 1942); Wells Fargo Bank & Union Trust Co. v. Titus, 41 F. Supp. 171 (S. D. Tex. 1941).

130 Ogden v. Saunders, 12 Wheat. 213 (U. S. 1827); COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 108 (1942).

131 "That a state forum in a conflict of laws case may, subject to constitutional limitations, refuse to recognize a cause of action founded upon a foreign set of operative facts is an accepted infirmity of the prevailing conflict of laws system. But, to perpetuate this infirmity in the federal courts, where jurisdiction for suits between citizens of different states was created to afford an impartial tribunal free from local prejudices, vitiates that very purpose of diversity of citizenship jurisdiction." Wolkin, *Conflict of Laws in the Federal Courts: The Erie Area*, 94 U. OF PA. L. REV. 293, 298-99 (1946).

132 Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487 (1941).

133 131 F. 2d 176 (C. C. A. 8th 1942); *see* Order of United Commercial Travelers v. Wolfe, 331 U. S. 586 (1947).

nity to evade the express terms of the insurance policy. The doctrine operated to forestall a different result in the "court-house around the corner" but completely ignored the court-house just across the state border. Admittedly, the federal system has an inherent defect in that "shopping" will always exist to a limited extent, but the *Erie* doctrine does not solve the problem. It merely substitutes a different method of "shopping." The Court is trying to destroy a horrible reflection by building a new mirror. It just won't work.

Thus, the rule of absolute conformity, the rule which relegates the federal courts to a position distinctly inferior to state tribunals, has operated to achieve the very iniquities it was intended to cure—"uncertainty" and "shopping." In addition, the *Erie* doctrine has had a more subtle and unfortunate effect in another field of the law. It has greatly changed that category of issues previously considered "federal."

The Federal Field

Although the Court has been liberal in extending the *Erie* doctrine into the field of "procedure" and in expanding the class of state decisions which federal courts must follow, in related areas complete independence of federal courts has been jealously preserved.

Except for a brief period immediately following the *Erie v. Tompkins* decision, there has never been any doubt that where the jurisdiction of the federal court arises from a "federal question" rather than "diversity of citizenship," the "laws of the several states"[134] do not apply. The federal court system is integrated where "the Constitution, treaties or statutes of the United States"[135] so provide or imply. Thus, suits under the Federal Reserve Act, the Sherman Anti-Trust Act, or the Labor Management Relations Act do not normally involve the *Erie* doctrine. Neither state statutory nor state decisional law is pertinent. Of course the federal statute may expressly or impliedly provide that state law is applicable. For example, in the recent *Spiegel* case,[136] the Supreme Court looked to state law to determine whether the settlor of an *inter vivos* trust retained an interest in the corpus of the trust until the moment of his death. That question determined whether the corpus of the trust should be included in his estate for taxation purposes. Bankruptcy presents another federal field where state law may be indirectly pertinent. In *Corn Exchange Bank and Trust Co. v.*

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134 1 STAT. 92 (1789), 28 U. S. C. § 725 (1928), as amended, 62 STAT. A 101, 28 U. S. C. § 1652 (1948).

135 *Ibid.*

136 Spiegel's Estate v. Comm'r, 69 Sup. Ct. 337 (1949); Conway, *I. R. C. § 811 (c)—The Church and Spiegel Interpretation,* 34 CORNELL L. Q. 376 (1949).

Klauder,[137] the Supreme Court looked to state law to determine whether there had been a preference.

Theoretically, however, the *Erie* doctrine is invoked only where jurisdiction is predicated upon diversity of citizenship. In this field, the doctrine has been applied and construed liberally. There is one exception. Even though the jurisdiction of the court is based upon diversity of citizenship, the Supreme Court has shown increasing susceptibility to the argument that federally created rights are being litigated. Under these conditions, the proceeding is analogous to an action based on "federal question" jurisdiction—at least in so far as the federally created right is involved. "If the case involves rights under an obligation of the United States, if the rights involved arise under a federal statute, or if the policy of a federal statute requires uniformity in the field in which the particular action lies,"[138] the *Erie* doctrine is inapplicable even though the jurisdiction of the court is based upon diversity of citizenship. Federal common law is invoked.

A recent decision of the Supreme Court is indicative of this trend. In *Francis v. Southern Pacific Co.*,[139] minor children brought an action pursuant to the Utah "death statute"[140] to recover damages for the death of their father. The suit was instituted in a federal court in Utah, jurisdiction being based upon diversity of citizenship. The complaint alleged that the father, a railroad employee, had been killed in Utah while riding the railroad as an interstate passenger. The father had traveled on a free pass, not in connection with his duties as an employee. The pass provided that the user assumed all risk of injury and absolved the railroad from any liability. According to the law of Utah, the waiver was invalid; but according to federal law, the waiver was effective insofar as it exempted the liability of the railroad for "ordinary" negligence. Both Utah and federal courts agreed that the railroad would be liable for wanton negligence. That question never arose because the federal court charged the jury according to the federal rule. The jury found for the railroad. On appeal, the issue was whether the state or federal rule was applicable. The Supreme Court affirmed the judgment of the trial court. To support its position that the federal rule was applicable, the Court referred to the Hepburn Act and cases interpreting it. In 1906, the Hepburn Act[141] imposed a criminal liability on railroads issuing free passes to anyone except its

137 318 U. S. 434 (1942).
138 Note, *Exceptions to Erie v. Tompkins: The Survival of Federal Common Law*, 59 HARV. L. REV. 966, 976 (1946).
139 162 F. 2d 813 (C. C. A. 10th 1947), *aff'd*, 333 U. S. 445 (1948).
140 UTAH CODE ANN. § 104-3-11 (1943).
141 24 STAT. 379, 387 (1887), 49 U. S. C. § 22 (1946).

employees and their families. Although previous Supreme Court decisions had held that waivers on free passes were valid, it was not until 1923 in the *Van Zant* case[142] that the Court decided the duty of an interstate carrier to one riding on a free pass was to be determined by the Hepburn Act, not by state law:

> "The provision for passes, with its sanction in penalties, is a regulation of interstate commerce to the completion of which the determination of the effect of the passes is necessary. . . ."[143]

In 1940, Congress had passed the Transportation Act,[144] amending the Hepburn Act but not substantially changing its provisions concerning free passes. The Supreme Court interpreted this legislation as congressional approval of the *Van Zant* ruling that the entire "free pass" problem was a question of federal law, and that a waiver on a free pass was effective insofar as it exempted the railroad from liability for "ordinary" negligence.

Three justices dissented. They argued that state law should govern the effect of a waiver on a free pass. They pointed to the Utah "death statute" as the real basis for the substantive right.[145] The minority also urged that even if the question was one of federal law, the alleged federal rule should be abandoned as inconsistent with existing social policy.[146] The dissenters maintained that the decisions which had established the federal rule had been invalidated by *Erie v. Tompkins*. Except for the *Van Zant* case, which had been primarily concerned with the application rather than the interpretation of the Hepburn Act, all decisions which had applied the federal rule had been decided under *Swift v. Tyson*. Those cases had dealt with the "federal common law" rather than an interpretation of the Hepburn Act. Since the "federal common law" had been abolished by *Erie v. Tompkins*, a fresh opportunity existed to determine the effect of a waiver on a free pass.

But our concern is not with the merits of a particular federal rule of law; it is with the effect of *Erie v. Tompkins* on the whole field of the law. What the *Erie* rule has changed is the dimensions of the federal areas where the jurisdiction of the court is based upon diversity of citizenship. Paradoxically, the decision has resulted in a widespread expansion of the area within which federal law is controlling instead of protecting the rights of the forty-eight states.

Another recent decision by the Supreme Court shows that the *Erie*

142 Kansas City So. R. R. v. Van Zant, 260 U. S. 459 (1923).
143 *Id.* at 468.
144 54 STAT. 898, 900 (1940), 49 U. S. C. § 22 (1946).
145 Francis v. Southern Pac. Co., 333 U. S. 445, 456 (1948).
146 333 U. S. at 452, 471.

doctrine may be limited where a federal statute is incidentally involved. In *Sola Electric Co. v. Jefferson Electric Co.*,[147] the plaintiff sued for breach of price-maintenance provisions in a patent-license contract. The defendant contended that the patents were invalid and the contract therefore violated the Sherman Act. The plaintiff replied that, according to state law, defendant was estopped to deny the validity of the contract. The Court rejected the state law. It stated:

> ". . . the doctrine of [the Erie case] is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. . . . When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield."[148]

Another Supreme Court decision of the same type opens a new vista for the application of federal common law in diversity suits. In *O'Brien v. Western Union Telegraph Co.*,[149] a defamatory message was transmitted by telegraph from Massachusetts to Michigan. The Court held that the defendant's privilege was to be determined by federal common law because the Telegraph Company was subject to comprehensive regulation under the Federal Communications Act.

The same reasoning should be equally applicable to other situations. The radio industry is subject to the same degree of federal regulation as is the telegraph industry. How can radio libel or slander be distinguished from the facts in the *O'Brien* case?

It is inconsistent with *Erie* to apply federal common law to questions two or three times removed from the federal statute under which the suit is brought. In a national business such as telegraph, radio or television, chaos will result if a uniform federal common law be not applied. As an antidote to the law forbidding intermeddling with state-created rights, the federal courts have simply confined the area within which they are impotent, at the same time enlarging the bounds within which they still retain independence of thought and decision. In this respect, the very essence of the doctrine has been unconsciously repudiated.

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147 317 U. S. 173 (1942).

148 *Id.* at 176.

149 113 F. 2d 539 (C. C. A. 1st 1940), 54 HARV. L. REV. 141; *cf.* Vaigneur v. Western Union Tel. Co., 34 F. Supp. 92 (E. D. Tenn. 1940), 41 COL. L. REV. 125 (1941); American Surety Co. v. First Nat'l Bank, 141 F. 2d 411 (C. C. A. 4th 1944), *cert. denied*, 322 U. S. 574 (1944).

The trend is but one manifestation of a desire by a great number of federal courts to free themselves from the binding rigidity of the *Erie* decision and to return once again to the judicial function.

Conclusion

It seems reasonable to draw the following conclusions:

1. *Erie R.R. v. Tompkins* is now a matter of pure faith. It is followed blindly and in disregard of the public interest.

2. On its own facts, the *Erie* case was unjustly decided. If the state of Pennsylvania absolves the railroad from responsibility for such negligence, its rule is unjust and should not be forced upon the federal courts.

3. The validity of the Charles Warren research on § 34 of the Judiciary Act of 1789 should have been briefed and tested by the fire of oral argument. The refusal of the majority to consent to this argument was intolerant. Until the controversy is litigated, the research of Warren cannot be accepted as justification for *Erie R.R. v. Tompkins*.

4. Any attempt to attack *Swift v. Tyson* on constitutional grounds is untenable. The argument is so devoid of merit that even the most ardent defenders of *Erie* have abandoned it.

5. The doctrine of *Swift v. Tyson* promoted justice. An analysis of the cases cited in the *Erie* opinion indicates that almost every application of the *Tyson* doctrine resulted in a fair decision. Contrast this with *Erie* which chains the federal courts to provincial and antiquated state holdings. New York's monstrous one house fire rule is a perfect example.

6. Granted that taxicab concessions at railroad stations should be regulated by state not national law, a matter not free from doubt, the *Black and White Taxicab* case was an instance of manufactured diversity. The very flexibility of the *Tyson* rule permitted the Court to cope with that situation. The misapplication of *Swift v. Tyson* in this one case justifies neither a general criticism nor an abolition of the whole doctrine.

7. The true diversity case to which Story intended to apply *Swift v. Tyson* is a litigation between citizens of different states. In giving jurisdiction to the federal courts in such cases, it must have been the intention of the draftsmen of our Constitution to grant federal judges the traditional judicial powers. John J. Parker, Senior Judge of the Court of Appeals for the Fourth Circuit, points out that it is "absurd

to hold in a suit on contract between citizens of different states that a federal court must apply the law of the state of the party charged with the breach because suit had to be brought against him in that state."[150] Absurd it is, but precisely the present state of the law.

8. It was Story's far-sighted thought that in deciding controversies between citizens of different states, the Supreme Court of the United States would gradually achieve national uniformity in our law. *Erie R.R. v. Tompkins* rests in large part upon the proposition that national uniformity did not result from *Swift v. Tyson.* The evidence is available and we have examined it. From our study we submit there can be no doubt that *Swift v. Tyson* lived up to Story's ideal.

9. The greatest virtue of *Swift v. Tyson* is its flexibility. Any system of law must be continuously adaptable to changing social conditions. Until a state legislature adopts a rule of law by statute, there is great merit in granting a free exercise of the judicial process. If the federal rule is unsatisfactory, the state legislature can provide a remedy. If the corrective statute is constitutional, the federal courts will respect it.

10. Pressure is being exerted to extend *Erie* into the field of federal procedure. This trend has resulted in confusion and technicality. It also endangers the advancement which has resulted from the adoption of the Federal Rules of Civil Procedure. Because of *Erie,* the Advisory Council has already amended Rule 14 to make it impossible to implead a joint tortfeasor. We can only hope that the expansion of *Erie* into the field of procedure will be checked by the Supreme Court's disposition of the *Beneficial Loan, Ragan,* and *Interstate* cases.

11. The doctrine of *Erie R.R. v. Tompkins* is also being pressed to ridiculous limits in determining the applicable state decisional law. The rule that the Supreme Court of the United States must follow an outdated decision by an inferior state court is ludicrous. Its very incongruity has resulted in needless litigation and proverbially bad law.

12. Not satisfied with chaining federal courts to procedural law as expounded by a state's lowest court, there is a gallant effort being made to extend *Erie* beyond diversity cases into the field of federal law. The American Bar Association has proposed that preferences in bankruptcy be determined by state law. If Justice Frankfurter has his way, a trustee in bankruptcy will not be allowed to sue in any federal court where the bankrupt could not sue. The problem is difficult because in many cases it is impossible to distinguish state law points that arise

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150 Parker, *Erie v. Tompkins—In Retrospect: An Analysis of Its Proper Area and Limits,* 35 A.B.A.J. 19, 86 n. 14 (1949).

incidentally in a bankruptcy, patent, or radio case from similar points arising in a diversity case. But as Eugene Rostow has recently pointed out, the country's business cannot be subjected to forty-eight rules of law when so much of its business is national in scope.[151]

13. The whole history of this controversy has glorified Story rather than Brandeis. Story's genius lay in his ability to foresee the advisability of a national system of law where the particular controversy was not local in nature. He conceived of diversity jurisdiction as one method of encouraging interstate relations by insuring for the out-of-state litigant an unprejudiced tribunal operating under one impartial and uniform body of law. Even in the absence of local prejudice, Story realized that the constitutional power of the federal courts to establish law which would operate nationally could be utilized to aid in the development of the union, particularly in the field of commerce. Brandeis, motivated by a misconception of the practical effect of the Story concept and influenced by a rational abhorrence of the possibility of contradictory rules within one geographical area, has plunged us into a morass of technicality and confusion. Furthermore, his policy of absolute conformity has made impossible the eventual fruition of the concept of a national law, so necessary in our day when state borders become steadily more imperceptible.

What can be done about it? The answer is clear. Reverse *Erie* and return to *Swift v. Tyson.* If the Court cannot bring itself to do this, then the next best thing is to modify rigorously the *Erie* doctrine so that we would return to the approximate status which had evolved under *Swift v. Tyson* immediately prior to the *Erie* case. The Court had begun to realize that the policies of uniformity and conformity must be confined to their separate spheres.[152] A pragmatic approach which will make provision for the interplay of the unique conflicting interests which history has taught us are at work in diversity cases seems to be the only exit from the legal labyrinth of *Erie.* More specifically, a decision is needed which will declare definitively the areas in which conformity

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151 Rostow, *The Price of Federalism,* Fortune Magazine, Dec. 1948, p. 165.

152 Mr. Justice Cardozo gave voice to this concept in Mutual Life Co. v. Johnson, 293 U. S. 335, 339 (1934). "Without suggesting an independent preference one way or the other, we yield to the judges of Virginia. . . . The case will not be complicated by a consideration of our power to pursue some other course. The *summum jus* of power, whatever it may be will be subordinated at times to a benign and prudent comity. At least in cases of uncertainty we steer away from a collision between courts of state and nation *when harmony can be attained without the sacrifice of ends of national importance.*" (Italics added).

Judge Clark has subscribed to a similar view. "But may there not be a lesson in this experience, that no violent arbitrary rule can be wholly successful in adjusting sovereign rights in a federal system, and that perhaps a middle or at least a more gradual way, may be more successful in the long run?" Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins,* 55 YALE L. J. 267, 278 (1945).

must be sacrificed to uniformity and, conversely, when conformity is to reign supreme.

Such a decision, drawing upon the experience gained from the past, would (1) return the federal courts to their function of judging, (2) give flexibility without an unreasonable amount of instability, (3) balance the conflicting policies of uniformity and conformity, confining each to its proper sphere, and (4) abolish the crazy disarray of cases born in the wake of *Erie R.R. v. Tompkins*.

APPENDIX

(1) Swift v. Tyson, 16 Pet. 1 (U. S. 1842): The subsequent acceptance by New York of the *Swift v. Tyson* principle is elaborately discussed in BRITTON, HANDBOOK ON THE LAW OF BILLS AND NOTES 380 (1943). Professor Yntema nicely refutes Professor Frankfurter's assertion that the *Tyson* rule was not conducive to uniformity by tracing the subsequent history of the case in eight jurisdictions and substantiating his position on the battle ground chosen by Professor Frankfurter himself. Yntema and Jaffin, *Preliminary Aspects of Concurrent Jurisdiction*, 79 U. OF PA. L. REV. 869, 881 (1931).

(2) Lane v. Vick, 3 How. 464 (U. S. 1845): The case involved the construction of a will and it does not appear that the precise point arose subsequently in the Mississippi courts. Because of the unique phraseology of the will, the case has not been very active in the state reports. However, four states have cited it with approval. *Arkansas*: Cox v. Britt, 22 Ark. 567 (1861). *California*: Hart v. Burnett, 15 Cal. 530 (1860). *Colorado*: Bacon v. Nichols, 47 Colo. 31, 105 Pac. 1082 (1909). *Wisconsin*: Maxcy v. Oskosh, 144 Wis. 238, 128 N. W. 899 (1910); Ehle v. Ehle, 73 Wis. 445, 41 N. W. 627 (1889). But see Note, 71 A. L. R. 1102, 1104 (1931). Here again the writer refuses to realize that in this case there was no departure from state law; the precise issue had never come before the Mississippi courts. See note 26 (*c*) *supra*.

(3) Foxcroft v. Mallett, 4 How. 353 (U. S. 1846): The point at issue was the construction of a real estate deed. The language used in the deed was unusual; consequently, the case has not been very active. On the question whether or not a judgment in partition bars the legal title, the case was not followed in Maine. Foxcroft v. Barnes, 29 Me. 128 (1848). It does not appear that counsel relied upon the federal case in his argument. Nor is *Foxcroft v. Mallett* in line with the weigbt of authority on the partition question. See Note, 144 A. L. R. 9, 21 (1943).

(4) Rowan v. Runnels, 5 How. 134 (U. S. 1847): Plaintiff and defendant entered into a contract for the sale of slaves in 1836. In 1837, the courts of Mississippi held such contracts void. The plaintiff sued in the federal courts on the promissory note given as consideration under the contract and was permitted to recover. The Supreme Court held that decisions of state courts invalidating contracts, which were perfectly legal when made, could not have a retroactive effect. The rule of *Rowan v. Runnels* was expressly approved and quoted by the Mississippi court. "If a contract when made was valid under the laws of the state as then expounded and administered in its Courts of justice, its validity and obligation cannot be impaired by any . . . subsequent decision of its Courts." Wisconsin Lumber Co. v. State, 97 Miss. 571, 598, 54 So. 247, 249 (1910).

(5) Williamson v. Berry, 8 How. 495 (U. S. 1850): This case was never followed by the New York courts. Brevoort v. Grace, 53 N. Y. 245, 251, 252 (1873). The Supreme Court subsequently reversed the *Berry* case. Suydam v. Williamson, 24 How. 427 (U. S. 1860).

(6) Watson v. Tarpley, 18 How. 517 (U. S. 1855): In a decision directly contra to the Mississippi rule, the Court held that the holder of a dishonored bill of exchange has the right of immediate recourse over against the drawer. Mississippi had held that such a payee was barred from commencing his action until the date of maturity. Mississippi is now in line with the *Watson* case. MISS. CODE ANN. § 192 (1942).

(7) Chicago City v. Robbins, 2 Black 418 (U. S. 1862): The question was whether an owner was liable for the negligence of an independent contractor or his servants. The early rule in Illinois was that such an owner was not liable provided he used due care in selecting the contractor. Scammon v. City of Chicago, 25 Ill. 424 (1861). In the *Robbins* case, the Court refused to follow the *Scammon* case and engrafted a broad exception on the rule—that the owner was liable when the contractor was hired to perform an inherently dangerous task. Accordingly, a municipality was held liable for

damages occurring as a result of the negligence of the employees of an independent contractor hired by the city to fix its streets. The *Robbins* case was cited with approval by the Illinois court. City of Bloomington v. Bay, 42 Ill. 503, 507 (1867); City of Springfield v. LeClaire, 49 Ill. 476, 479 (1869). The Illinois courts continued to cite the *Scammon* and *Robbins* cases side by side, apparently limiting the holding of the *Robbins* case to municipalities. Finally, the legislature intervened and passed a statute which applied the *Robbins* view in all cases. ILL. ANN. STAT. c. 48 §§ 60-69 (1935). In Griffiths and Son Co. v. National Fireproofing Co., 310 Ill. 331, 335, 141 N.E. 739, 740 (1923), the court held that the *Scammon* case was old law and refused to follow it; the *Robbins* coup in Illinois was complete. The case is also the weight of authority in the United States. See Note, 29 A. L. R. 736 (1924).

(8) Mercer County v. Hackett, 1 Wall. 83 (U. S. 1863): In Diamond v. Lawrence County, 37 Pa. 353 (1860), the highest court of Pennsylvania held that certain bonds given to a railroad in return for stock and then negotiated by the railroad to a bona fide purchaser were invalid. During the course of the opinion, the court made this surprising statement: "We have said, on several former occasions, that we will not treat bonds like these as negotiable securities. On this ground we stand alone. All the courts American and English are against us. Be it so." The Supreme Court in the *Hackett* case refused to apply this narrow Pennsylvania doctrine and held that such bonds were negotiable—a decision in line with the great weight of Anglo-American authority. Twenty-one years later, the choice of the two conflicting cases came before the Pennsylvania Supreme Court. In an opinion, unique for its sarcasm and bitterness, the *Diamond* case was rejected. Kerr v. Corry, 105 Pa. 282, 292-93 (1884).

(9) Gelpcke v. City of Dubuque, 1 Wall. 175 (U. S. 1863): The history of the treatment of this case by the Iowa courts is most interesting. Early in Iowa history, the constitutionality of railroad subscriptions by municipalities was first affirmed in Dubuque County v. Railroad Co., 4 Greene 1 (Iowa 1853). Later the power was denied in State v. Wapello County, 13 Ia. 388 (1862). Then came *Gelpcke v. Dubuque* in the Supreme Court, where the power was upheld. In McClure v. Owen, 26 Ia. 243, 253 (1868), the *Gelpcke* case was severely criticized and specifically rejected. The next case was Hanson v. Vernon, 27 Ia. 28 (1869). Judge John F. Dillon, author of the monumental work on municipal corporations, held that the legislature had no constitutional power to authorize municipalities to tax to aid railroad construction. Then came a sharp break in the decisions, one that, according to Judge Dillon, "virtually overthrew the line of decisions denying the power." 1 DILLON, MUNICIPAL CORPORATIONS 570 (5th ed. 1911). Snell v. Leonard, 55 Ia. 553, 8 N. W. 425 (1881); Renwick, Shaw, & Crossett v. Davenport & N. W. R.R., 47 Ia. 511 (1877); and Stewart v. Polk County, 30 Ia. 9 (1870), all supported the constitutionality of legislative authorization of municipal taxation to aid railroads. Judge Dillon was "constrained to admit that a long and almost unbroken line of judicial decisions in the courts of most of the States, as well as in the Supreme Court of the United States, has established and settled the principle that, in the absence of special restrictive constitutional provisions, it is competent for the legislature to authorize a municipal or public corporation to aid, in the manner above indicated, [i.e., stock subscriptions, issuance of negotiable bonds, and taxation] the construction of railways running near, or to, or through its territory." 1 DILLON, MUNICIPAL CORPORATIONS 569 (5th ed. 1911). Even Judge Beck, who wrote the opinion in the *McClure* case and dissented in the *Stewart* and *Renwick* cases, finally concurred in the *Snell* case. It seems perfectly obvious that *Gelpcke v. Dubuque* was surreptiously absorbed in Iowa and consciously accepted in other jurisdictions. See Note, 14 L. R. A. 475, 479 (1891). The *Gelpcke* doctrine also created "substantial uniformity" on the question of bond recital estoppel. Long, *A Warning Signal for Municipal Bondholders: Some Implications of Erie Railroad v. Tompkins*, 37 MICH. L. REV. 589, 594 (1939). Another authority points out that eighteen states, including Iowa, have followed the *Dubuque* case on this point. 6 MCQUILLAN, MUNICIPAL CORPORATIONS 245-46 (2d rev. ed. 1937). On the point of retroactivity of judicial decision in general, the *Dubuque* case is expressly and unqualifiedly accepted in *State v. O'Neil*, 147 Ia. 513, 526, 126 N. W. 454, 458 (1910) (concurring opinion). Professor Frankfurter's conclusion that the *Gelpcke* case was not accepted in Iowa seems, at best, doubtful; certainly it was premature.

(10) Supervisors v. Schenck, 5 Wall. 772 (U. S. 1866): A bona fide purchaser of bonds issued by Marshall County, Illinois, sued for reimbursement in a federal court. An unreported state decision had held that these bonds were void since the election authorizing their issuance had been convened by the county court rather than the town board of supervisors as the statute specifically required. Cook v. Supervisors of Marshall County, 38 Ill. 44 (1865). In the *Schenck* case, the Supreme Court refused to follow the Illinois precedent and held that, at least with regard to an innocent holder of the

bonds, the county was estopped to deny that the election had been properly convened because of the acquiescence and acts of the county authorities. There can be no doubt that the Illinois courts continued to follow the *Cook* case. Curiously enough, it does not appear that the *Schenck* case was subsequently urged in the Illinois courts. The effect of the *Schenck* case in Illinois, therefore, cannot be properly evaluated. However the *Schenck* case is the general weight of authority. See Note, 1915A L. R. A. 917 (1915). The foremost authority in the field unequivocally accepts the *Schenck* rationale. 2 DILLON, MUNICIPAL CORPORATIONS 1195 (5th ed. 1911).

(11) Butz v. The City of Muscatine, 8 Wall. 575 (U. S. 1869): Did a legislative grant of special authority to a municipality to borrow money and pay for stock subscribed to a railroad corporation impliedly repeal, *pro tanto,* existing charter limitations upon the rate of taxation? The Supreme Court found such an implication and contradicted the Iowa view. The case was rejected by the Iowa courts. Iowa R.R. Land Co. v. The County of Sac, 39 Ia. 124, 137 (1874). The older authority of Clark Dodge & Co. v. City of Davenport, 14 Ia. 494 (1863), has been consistently applied in the Iowa courts. Judge Dillon seems to think, however, that the balance of authority in the United States is with the *Butz* case. 1 DILLON, MUNICIPAL CORPORATIONS 582 (5th ed. 1911).

(12) Yates v. Milwaukee, 10 Wall. 497 (U. S. 1869): Municipal authorities of the City of Milwaukee, acting under the authority of the state, attempted to remove a wharf which had been erected in navigable waters. In support of the right to do so, the authorities relied upon two grounds, one of which was that the one who had built the wharf had no title to the soil. The Wisconsin court, in the earlier case of Yates v. Judd, 18 Wis. 126 (1864), had held that the builder had no title to the soil and refused to enjoin an adjoining riparian owner from dredging the stream. In the *Yates* case, the Supreme Court held that whether the plaintiff had title to the soil or not, he had certain riparian rights and that these rights were property rights which could not be arbitrarily impaired by the municipality or, *a fortiori,* by a private individual. Subsequently, in Diedrich v. Northwestern Union R.R., 42 Wis. 248, 271, 272 (1877), Wisconsin rejected the rule handed down by the Supreme Court in *Yates v. Milwaukee.* However, in McLennan v. Prentice, 85 Wis. 427, 444, 55 N. W. 764, 770 (1893), the Wisconsin courts began to fire away at their previous holdings. In Lathrop v. Racine, 119 Wis. 461, 473, 97 N. W. 192, 196 (1903), language in the *Yates* case was quoted and adopted. Recently, in City of Milwaukee v. Millbrew, Inc., 240 Wis. 527, 533, 3 N. W. 2d 386, 390 (1942), Wisconsin accorded an additional accolade to *Yates v. Milwaukee.* There can be no doubt that the tenor of the Wisconsin decisions since the *Diedrich* case has been to follow the holding of *Yates v. Milwaukee* which the *Diedrich* decision purported to reject. Furthermore, the *Yates v. Milwaukee* rule is generally accepted as the weight of authority. See Note, 21 A. L. R. 207 (1922).

(13) Railroad Co. v. Lockwood, 17 Wall. 357 (U. S. 1873): The New York courts had ruled that a driver traveling on a railroad with his flock for whom he had paid and was in turn entitled to a "free pass," was a "gratuitous passenger." Accordingly, the railroad could exculpate itself from liability for negligence. The Supreme Court in the *Lockwood* case held that it was unlawful for a common carrier to stipulate for exemption from fault liability. The Court said: "In deciding a case which involves a question of such importance to the whole country, a question on which the Courts of New York have expressed such diverse views and have so recently and with such slight preponderancy of judicial suffrage, come to the conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law." Railroad Co. v. Lockwood, 84 U. S. 357, 368 (1873). When the point arose again in the New York courts, the *Lockwood* view was not adopted. Anderson v. Erie R.R., 223 N. Y. 277, 119 N. E. 557 (1918); Mynard v. Syracuse R.R., 71 N. Y. 180 (1877). Bissell v. N. Y. Cent. R.R., 25 N. Y. 442 (1862), remained the New York view. However, the *Lockwood* case accords with the American weight of authority. See Notes, 1916A, L. R. A. (N. S.) 623; 5 R. C. L. 12 (1914). According to Shepard's citator, the *Lockwood* case has been cited over 250 times in 45 jurisdictions. While it was impracticable to determine the exact effect of the case in each jurisdiction, it would seem a conservative judgment that the case has been a very decisive factor in shaping the overwhelming majority view in this country. The corollary judgment that its effect on uniformity was substantial seems reasonable and probable inference. The "much discountenanced New York view" is the subject of comment in a Note, 20 CORNELL L. Q. 495, 497 (1935).

(14) Boyce v. Tabb, 18 Wall. 546 (U. S. 1873): The facts were similar to *Rowan v. Runnels* (app. 4 *supra*). The action was brought to enforce a promissory note given as consideration for the sale of slaves in 1861. At that time the sale of slaves was lawful

in Louisiana. In 1865, Louisiana adopted the Thirteenth Amendment; and in 1867, the Supreme Court of Louisiana held that such contracts, whether partially executed or completely executory, were void and could not be enforced in Louisiana courts. The Supreme Court in *Boyce v. Tabb* refused to follow the Louisiana rule. (Although the Court did not refer to it specifically, nor are the briefs of counsel available as an aid, the probability is that the Louisiana case which the Court refused to follow was Wainwright v. Bridges, 19 La. Ann. 234 (1867).) It does not appear that the facts of *Boyce v. Tabb* ever came again before the Louisiana courts; and therefore its effect on Louisiana law is difficult to determine. However, this much is clear. At the time the *Tabb* case came to the Supreme Court, the Louisiana case was a solitary one among the states of the South. If Louisiana continued to favor the holding in *Wainwright v. Bridges,* and we so assume, the holdings were contrary to those of neighbors, who, beset by the same peculiarly local problem, decided in line with the ruling of *Boyce v. Tabb. Alabama*: Hubbard v. Baker, 48 Ala. 491 (1872); McElvain v. Mudd, 44 Ala. 48 (1870). *Arkansas*: Hastings v. White, 26 Ark. 308 (1870). *Florida*: McNealy v. Gregory, 13 Fla. 417 (1871) *Illinois*: Roundtree v. Baker, 52 Ill. 241 (1869). *South Carolina*: Calhoun v. Calhoun, 2 S. C. 283 (1870).

(15) Hough v. The Railroad, 100 U. S. 213 (1879): The facts in this case have already been discussed. See text at p. 501. The doctrine laid down by the Court in the *Hough* case was accepted and followed by the Texas courts. Houston & T. C. Ry. v Marcelles, 59 Tex. 334, 338 (1883); Texas M. R. Co. v. Whitemore, 58 Tex. 276, 288 (1883).

(16) Oates v. First National Bank, 100 U. S. 239 (1879): The facts were not unlike those in *Swift v. Tyson* itself. Two questions were presented: (1) Is a bank a holder in due course when it takes a promissory note as collateral security for a pre-existing debt in consideration for an extension of time to pay the debt? (2) Does the fact that the bank charged a usurious interest rate mitigate against it as a holder in due course? As to the first question, Professor Frankfurter seems to suggest that the holding in the *Oates* case, that the bank was a holder in due course, was in conflict with the law of Alabama. Fenouille v. Hamilton, 35 Ala. 319 (1859). In truth, the point appears to have been an open one in Alabama because there is no evidence in the *Fenouille* case that an extension of time was granted as additional consideration for the collateral security. See BRITTON, HANDBOOK ON THE LAW OF BILLS AND NOTES 369 (1943). In any event, § 25 of the N. I. L. codified the *Oates* rule. This would seem to settle the Alabama law even in the *Fenouille* situation. On the point of usurious interest, the development of Alabama law is puzzling. *Compare* Capital City Ins. Co. v. Quinn, 73 Ala. 558 (1883) *with* Wildsmuth v. Tracy, 80 Ala. 258 (1885). *Compare* Saltmarsh v. Tuthill, 13 Ala. 390 (1848) *with* Jones v. Moore, 212 Ala. 248, 251, 102 So. 200, 203 (1924) *and* Hoots v. Williams, 116 Ala. 372, 374, 22 So. 497, 498 (1897). Both the *Hoots* and *Jones* cases are directly contrary in spirit, if not the facts, to the *Saltmarsh* and *Fenouille* cases. The two more recent decisions cite the *Oates* case as proper authority. The law of the *Oates* case seems to be the law of Alabama today by the familiar process of piecemeal absorption.

(17) The Railroad v. National Bank, 102 U. S. 14 (1881): The facts are also similar to *Swift v. Tyson.* Sec. 25 of the N. I. L. changed the old rule of Coddington v. Bay, 20 Johns. 637 (N. Y. 1822), in New York. For a complete discussion of the history of this subject in New York, see BRITTON, HANDBOOK ON THE LAW OF BILLS AND NOTES 380 (1943). Kelso v. Ellis, 224 N. Y. 528, 121 N. E. 364 (1918), brought New York into harmony with *Swift v. Tyson* and *The Railroad v. National Bank,* yet Professor Frankfurter implied that the New York rule was still antithetic to *Swift v. Tyson.* Frankfurter, *Distribution of Judicial Power between United States and State Courts,* 13 CORNELL L. Q. 499, 529 (1928).

(18) Burgess v. Seligman, 107 U. S. 20 (1882): Seligman and Company, eastern bankers, loaned money to a Missouri railroad and took bonds and a large block of the railroad's stock as collateral security. The stock was to be held "in trust" and the stock-transfer book of the corporation noted that Seligman held the shares "in escrow." Seligman had voting privileges. He exercised his privilege by proxy on two occasions. The railroad was adjudged a bankrupt, and a creditor sued Seligman for a pro rata share of his debt by virtue of a Missouri statute which permitted such suits against stockholders of a defunct corporation. The statute expressly exempted those who held the stock "in trust" or as "collateral security." In two earlier cases, the Missouri courts held Seligman liable. The Supreme Court refused to follow these decisions and held that as a matter of common law or under the statute Seligman could not be classified as a stockholder. Five years later, another creditor brought suit against Seligman in the Missouri courts. In Union Savings Ass'n v. Seligman, 92 Mo. 635, 643-44, 15 S. W. 630, 632 (1887), the Supreme Court of Missouri reversed its earlier holdings and expressly

adopted the *Burgess v. Seligman* rule. There can be no clearer case of a subsequent acceptance by a state court of a federal rule contrary to its own, and formulated in direct opposition to it.

(19) Pana v. Bowler, 107 U. S. 529 (1882): This case was similar to the *Gelpcke v. Dubuque* situation. The courts of Illinois had ruled certain municipal bonds void on the technical ground that the election authorizing the issuance of the bonds had been presided over by a "moderator" instead of a "supervisor," "assessor" or "collector." Lippincott v. Pana, 92 Ill. 24 (1879). The bonds recited that the election had been properly held. They were countersigned by the proper town officials. The Supreme Court held that as to a bona fide purchaser, the township was estopped from denying the validity of the bonds. The precise question decided in the *Bowler* case never appears to have been litigated again in Illinois. Out-of-state holders naturally sued in the federal courts, and apparently no resident of Illinois was hardy enough to press the argument of the *Bowler* case upon an Illinois court. It is true that in subsequent cases involving injunctions against tax assessments to pay off technically imperfect bonds, the Illinois courts held to their old rule. However, in none of these cases was a bona fide purchaser involved. Choisser v. People *ex rel.* Rude, 140 Ill. 21, 29 N. E. 546 (1892); Williams v. People *ex rel.* Wilson, 132 Ill. 574 (1890); Chicago & Iowa R.R. v. Mallory, 101 Ill. 583 (1882). Perhaps the adoption of the N. I. L. in Illinois has foreclosed the question with respect to a holder in due course. This seems a reasonable conclusion; and if it is true, then Illinois is in line with the *Bowler* case. See BRITTON, HANDBOOK ON THE LAW OF BILLS AND NOTES 78 (1943). At any rate, the *Bowler* case is the decided weight of authority. See Notes, 1 A. L. R. 1535, 1536-39 (1919), 86 A. L. R. 1057, 1059 (1933), 19 R. C. L. 1015 (1917).

(20) Enfield v. Jordan, 119 U. S. 680 (1886): The issue was the validity of bonds issued by the municipality of Enfield, Illinois. The enabling statute gave this power to "any village, city, county, or township." In Welch v. Post, 99 Ill. 471 (1881), the Supreme Court of Illinois held that Enfield was a "town" and did not come within the terms of the enabling statute. Consequently, the bonds were void even in the hands of bona fide holders. The court brushed aside the prior case of *Martin v. People ex rel Huck*, 87 Ill. 524 (1877), which had ruled that a neighboring "town," Lake, was empowered to issue bonds. The court did not undertake to overrule the *Martin* case and further admitted that its holding was incongruous because it granted the power to higher and lower entities in the municipal hierarchy, but not to "towns." This was the confused state of the law in Illinois when *Enfield v. Jordan* came before the United States Supreme Court. The Court could not bring itself to follow the confused and irrational *Welch* opinion. It justified its action on the basis that the Illinois decisions were inconsistent. The first case to come before the Illinois courts subsequent to the *Enfield* case on this general point was *Longenecker v. Harvey*, 142 Ill. 573, 32 N. E. 295 (1892). Although the precise issue did not involve the validity of municipal bonds, the court cited and followed the *Martin* case and held that the words "town" and "township" were synonymous in Illinois law. The case did not refer to either the *Welch* or *Enfield* decisions. Next came Phillips v. Town of Scales Mound, 195 Ill. 353, 358, 63 N. E. 180, 182 (1902), which cited and followed both the *Enfield* and *Martin* cases. Later *People ex rel. M. Mohlenbrock v. Pike*, 197 Ill. 449, 452, 64 N. E. 393, 394 (1902), and *Town of Cicero v. Hass*, 244 Ill. 551, 553, 91 N. E. 574, 576 (1910), specifically followed the rationale of the *Longenecker*, *Martin*, and *Enfield* cases. Although none of these later cases involved bond issues, they are most persuasive that the terms "town" and "township" are used interchangeably in modern Illinois law. If the *Welch* case arose today, the Illinois courts would reach an opposite result. It can hardly be argued that the *Enfield* case did not serve to bring the *Martin* view to full fruition in Illinois.

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POSTSCRIPT

The Supreme Court of the United States on June 20, 1949 affirmed Cohen v. Beneficial Loan Corp. 17 U. S. Law Week 430, and Ragan v. Merchants Transfer and Warehouse Co., 17 U. S. Law Week 4564, and reversed J. S. Woods v. Interstate Realty Co., 17 U. S. Law Week 4565. Alone of all the Court Mr. Justice Rutledge wrote one dissent to all three decisions saying in part: "There is sound historical reason for believing that one of the purposes of the diversity clause was to afford a federal court remedy, when, for at least some reasons of state policy, none would be available in the state courts. It is the gloss which has been put upon the *Erie* ruling by later decisions, e.g. Guaranty Trust Co. v. York, 326 U. S. 99 which in my opinion is being applied to extend the *Erie* ruling far beyond its original purpose or intent, and in my judgment, with consequences and implications seriously impairing Congress' power, within its proper sphere of action to control this type of litigation in the federal courts."

These decisions spell the death of diversity litigation in the federal courts and compel those courts to follow state procedure in diversity cases. The only hope for the future lies in the dissent of Justice Rutledge. Let us believe that he is right and that his view will one day triumph.