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# MR. JUSTICE FRANKFURTER, THE SUPREME COURT AND THE ERIE DOCTRINE IN DIVERSITY CASES

PHILIP B. KURLAND†

QUESTIONS of federal jurisdiction, for many people, involve no more than the application of technical formulae created only to confuse the uninitiated. More sophisticated students of government understand that these problems involve fundamental questions of power, and that the existence of democracy depends in no small part upon the proper allocation of such authority. Mr. Justice Frankfurter's position is clear.<sup>1</sup> His writings, both as a professor and as a judge, have been concerned to a large extent with these issues: whether, within the constitutional framework, authority is properly vested in the state or the federal judiciary, and whether, in that scheme, power properly belongs to the federal judiciary or to some other branch of the federal government.

A single aspect of the subject generally labelled federal jurisdiction will be examined in this Article: the extent to which the federal courts should be free to decide questions of law arising in diversity cases and how these questions should be answered. To deal solely with the writings of Justice Frankfurter in this area, however, would be to distort both the problems and his judgments concerning them. Although his professorial writings may well express his individual views, his actions on the Court are clearly those of an individual acting within the restraints imposed by the nature of that institution, indeed of an individual thoroughly cognizant of the needs for such restraints. A Supreme Court opinion, Frankfurter has said, is "an orchestral and not a solo performance."<sup>2</sup> A Justice whose name does not appear as the author of an opinion may, nonetheless, have made a substantial contribution to it. Opinions which do bear his name, when he does not write for himself alone, reflect not only his own views but those of the other members of the Court who have joined in his expression of judgment. Even when the name of but a single Justice appears on a dissent or concurrence, the opinion was necessarily expressed in response to the demand of other opinions, written differently.

Opinions authored by Mr. Justice Frankfurter are among the most important in the development of the rule of *Erie R.R. v. Tompkins*.<sup>3</sup> To name but two, *Guaranty Trust Co. v. York*<sup>4</sup> and *Angel v. Bullington*,<sup>5</sup> is sufficient to prove the point. Indeed, the governing doctrine might be better described

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This Article is the first part of a consideration of problems arising under the *Erie* doctrine. The second will appear in the *Yale Law Journal* in a later issue.

1. See, e.g., Frankfurter, J., dissenting in *Konigsberg v. State Bar*, 353 U.S. 252, 274 (1957).

2. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 43 (1937).

3. 304 U.S. 64 (1938).

4. 326 U.S. 99 (1945).

5. 330 U.S. 183 (1947).

if it took its name from *York* rather than *Erie*. Appreciation of the significance of Mr. Justice Frankfurter's opinions on this subject, however, requires a consideration of all the relevant opinions of the Court since *Erie*, an approach which is possible because the development of the *Erie* rule has taken place almost entirely during the Justice's tenure on the Court. Accordingly, this Article will not be confined to opinions on which the Justice's name appears. The absence of his name on an opinion does not, of course, mean that he had no part in its shaping. On the other hand, the importance to be attached to those opinions which he has authored should not be deemed an attribution to him alone of responsibility for their content. While he has had one of the more important roles in the symphony performance, his exact contribution to the formulation of the doctrine cannot be ascertained with fine accuracy, however many memoranda are left behind by those who have served on the Court with him. Not even the "behavioral sciences," with which the law schools are now in such close collaboration, can provide an answer here. In the area of federal jurisdiction, however, more than elsewhere in his judicial writings, the Justice's opinions may be said to reflect his personal beliefs—the result of many years of diligent scholarship—as well as his official views.<sup>6</sup>

#### ERIE AND THE CONSTITUTION

*" . . . the gratuitous courage of the Court and the fluidity of the Constitution."*

—51 HARV. L. REV. 1245 (1938).

*"For me, what is said has not a little kinship with the pronouncements of the Delphic oracle."*

—Frankfurter, J., concurring and dissenting in *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 439 (1956).

The right answer, Mr. Justice Frankfurter is fond of reminding us, often depends upon the right question.<sup>7</sup> No more vivid demonstration of the truth of this dictum has been written into our law than the Court's opinion in *Erie R.R. v. Tompkins*. "The question for decision," wrote Mr. Justice Brandeis, "is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved."<sup>8</sup> It was a good question, one without which the Court could not have overturned "a doctrine so widely applied throughout nearly a century."<sup>9</sup> But it was not the question raised by the parties to the litigation nor one to which an answer was required by the facts of the case.<sup>10</sup> Mr.

6. Cf. Frankfurter, J., dissenting in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943).

7. See, e.g., Frankfurter, J., concurring in *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 170 (1946): "Putting the wrong question is not likely to beget right answers even in law."

8. 304 U.S. at 69. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

9. 304 U.S. at 77.

10. See the dissenting opinion of Mr. Justice Butler, *id.* at 80; Hart, *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 HARV. L. REV. 579, 610 (1940).

Justice Brandeis, however, with the “right” answer at hand, and “motivated” by his “devotion to the federal principle,” deemed it appropriate to frame the “right” question.<sup>11</sup>

Just as Professor Gray has “explained” why Story wrote the opinion he did in *Swift v. Tyson*,<sup>12</sup> speculation is possible on why Mr. Justice Brandeis reached for this question in contradiction of his own first principles.<sup>13</sup> Did Brandeis recognize *Erie* as his last chance to uproot *Swift v. Tyson* before his imminent retirement? If so, why did he pass up the same opportunity a few weeks earlier by concurring in an opinion for the Court by Mr. Justice Butler, which applied federal general common law to the question whether a presumption of suicide existed in a suit on an insurance policy?<sup>14</sup>

Whatever the reasons, Brandeis’s unusual conduct was the more extraordinary; for, contrary to the policies he had carefully enunciated,<sup>15</sup> he chose to rest his case on the resolution of a constitutional issue which could have been avoided:

“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.”<sup>16</sup>

This unconstitutionality of the application of federal judge-made law in diversity cases was grounded on the views earlier expressed in dissents by Mr. Justice Field in *Baltimore & O.R.R. v. Baugh*,<sup>17</sup> and by Mr. Justice

11. FREUND, ON UNDERSTANDING THE SUPREME COURT 58 (1949); see also Freund, *Mr. Justice Brandeis*, in MR. JUSTICE 99, 111-12 (Dunham & Kurland ed. 1956). It will surprise some that the *Erie* opinion, certainly as important as any written by Mr. Justice Brandeis, is not mentioned in his most recent full-length biography. See MASON, BRANDEIS: A FREE MAN'S LIFE (1946).

12. GRAY, THE NATURE AND SOURCES OF THE LAW 253 (2d ed. 1921).

13. *E.g.*: “Justice Brandeis himself has been considered by an authoritative interpreter to have a strong conviction of the value of decentralization and the need for guarding the power of the states in their sphere. [Frankfurter, *Mr. Justice Brandeis and the Constitution*, in MR. JUSTICE BRANDEIS 47, 84-85 (1932).] 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.’

“As a ‘good war sanctifies any cause’ almost any opportunity might be suitable to such a purpose.” McCormick & Hewins, *The Collapse of “General” Law in the Federal Courts*, 33 ILL. L. REV. 126, 131-32 (1938).

14. *New York Life Ins. Co. v. Gamer*, 303 U.S. 161 (1938). Mr. Justice Black dissented on the ground that state law should control and the result reached by the majority was inconsistent with the law of the state. *Id.* at 172.

15. See, especially, Brandeis, J., concurring in *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936). *Cf.* Freund, Introduction to THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS xvi-xvii (Bickel ed. 1957).

16. 304 U.S. at 77-78.

17. 149 U.S. 368, 401 (1893).

Holmes in *Kuhn v. Fairmont Coal Co.*<sup>18</sup> and *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*<sup>19</sup> Brandeis's conclusion was that:

"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 in a statute or by its highest court in a decision is not a matter of federal concern.<sup>[20]</sup> There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such power on the federal courts. . . .

" . . . In disapproving that doctrine we do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789, or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States."<sup>21</sup>

Mr. Justice Frankfurter was not yet a member of the Court which thus razed the elaborate structure built on the cornerstone of *Swift v. Tyson*. Mr. Justice Black, the only member of the Court now serving who participated in the *Erie* decision, joined the Brandeis opinion. Mr. Justice Reed, in what may yet prove to be his most important opinion, concurred in the reversal of *Swift v. Tyson* but disagreed with the constitutional approach used by the majority:

"The 'unconstitutional' course referred to in the majority opinion is apparently the ruling in *Swift v. Tyson* that the supposed omission of Congress to legislate as to the effect of decisions leaves federal courts free

18. 215 U.S. 349, 370-72 (1910).

19. 276 U.S. 518, 532-36 (1928). The Holmes theory may be read as an assertion of a constitutional doctrine of separation of powers between the judicial and legislative branches of the federal government rather than between national and state functions.

20. Had he stopped here, Mr. Justice Brandeis might have resolved the problems created by *Swift v. Tyson* without raising the specter of constitutional limitation on federal power, a ghost then but recently laid to rest after the Roosevelt Court fight.

21. 304 U.S. at 78-80. Section 34 of the First Judiciary Act read as follows: "[T]he 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." Act of Sept. 24, 1789, c. XX, § 34, 1 STAT. 92. In *Swift v. Tyson*, Story, J., wrote an opinion for the Court, which held that "the laws of the several states" meant "local statutes or local usages" and not judicial decisions. In 1923, Charles Warren demonstrated that the writers of § 34 did not mean to restrict "laws" so narrowly but intended to include decisional law as well as statutory law. Warren, *New Light on the History of the Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51-52, 81-88, 108 (1923).

The 1948 codification of this section reads as follows: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 62 STAT. 944 (1948), 28 U.S.C. § 1652 (1952).

to interpret general law for themselves. I am not at all sure whether, in the absence of federal statutory direction, federal courts would be compelled to follow state decisions. There was sufficient doubt about the matter in 1789 to induce the first Congress to legislate. No former opinions of this Court have passed upon it. Mr. Justice Holmes evidently saw nothing 'unconstitutional' which required the overruling of *Swift v. Tyson*, for he said in the very opinion quoted by the majority, 'I should leave *Swift v. Tyson* undisturbed, as I indicated in *Kuhn v. Fairmont Coal Co.*, but I would not allow it to spread the assumed dominion into new fields.' . . . If the opinion commits this Court to the position that the Congress is without power to declare what rules of substantive law shall govern federal courts, that conclusion also seems questionable. . . . The Judiciary Article and the 'necessary and proper' clause of Article One may fully authorize legislation, such as this section of the Judiciary Act."<sup>22</sup>

In the almost twenty years since *Erie*, the Supreme Court has shed little more light on this subject. All of the cases decided on the basis of the *Erie* doctrine have been resolved in a manner which avoided the need to examine its relationship to the Constitution. Mr. Justice Brandeis himself indicated that the parties could, in effect, substitute federal "general" law for the applicable law of the appropriate state simply by relying "almost entirely on federal precedents."<sup>23</sup> Yet permitting the parties in a law suit to license the federal courts to ignore state law is hardly consistent with recognition of a constitutional barrier, since the interest, if any, which is constitutionally protected belongs to the state, not to an individual.

In his dissent in *Guaranty Trust Co. v. York*,<sup>24</sup> Mr. Justice Rutledge charged that the majority position expressed by Mr. Justice Frankfurter sounded like constitutional doctrine. Presumably the suspect language is:

"In overruling *Swift v. Tyson*, . . . *Erie R. Co. v. Tompkins* did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare. . . . Law was conceived as a 'brooding omnipresence' of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law, even in cases where a legal right as the basis for relief was created by State authority *and could not be created by federal authority* and the case got into the federal court merely because it was 'between Citizens of different States' under Art. III, § 2 of the Constitution of the United States."<sup>25</sup>

This is a slim fragment on which to base a conclusion of the sort suggested by Mr. Justice Rutledge, but straws are necessary for the making of bricks.

*York* was, apart from this language, the culmination of a series of cases that might have afforded an answer to the constitutional question. Section

22. 304 U.S. at 91-92.

23. *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 113 n.1 (1938).

24. 326 U.S. at 114.

25. *Id.* at 101-02. (Emphasis added.) See also text following note 32 *infra*.

thirty-four provided for the application of state rules of decision only in "trials at common law."<sup>26</sup> This language would seem clearly not to include suits in equity. On the other hand, the constitutional thesis would be equally applicable to actions at law or in equity. Thus, if the Court were compelled to apply the doctrine in equity cases as well as actions at law, the mandate could come from the Constitution but not from the language of the statute.

Almost immediately after *Erie* was handed down, the Court decided the question of the rule's application to equity cases. Mr. Justice Reed, writing for a unanimous Court, said, rather elliptically, in *Ruhlin v. New York Life Ins. Co.*: "The doctrine applies though the question of construction arises not in an action at law, but in a suit in equity."<sup>27</sup> In the face of his very recent dissent, he was unlikely to be asserting that *Erie* was, after all, a constitutional doctrine. But shortly thereafter, in a nondiversity case, Mr. Justice Stone, speaking for seven of the eight members of the Court who participated in the decision, seemed to affirm the suggested distinction between the compulsion of the statute and that of the Constitution. In *Russell v. Todd*, he wrote:

"The Rules of Decision Act does not apply to suits in equity. . . .

". . . In the circumstances we have no occasion to consider the extent to which federal courts, in the exercise of the authority conferred upon them by Congress to administer equitable remedies, are bound to follow state statutes and decisions affecting those remedies."<sup>28</sup>

At the next term of Court, in a case involving the enforceability of a Totten trust pursuant to a New Jersey statute, the question arose whether the federal courts had to follow decisions of the New Jersey court of chancery to the effect that such a trust was not enforceable despite the very specific language of the statute. The Court, in an opinion by Mr. Chief Justice Hughes, held that they did. Without any reference to the "equity" question, the unanimous Court applied the *Erie* principle: "It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstances of diversity of citizenship."<sup>29</sup> On the same day, however, Mr. Justice Stone delivered an opinion for the Court in which he suggested a refinement of the doctrine: "Since the equitable relief sought in this suit is predicated upon petitioners' legal rights growing out of respondent's unlawful transfer of the stock to the assignee of the life tenant, the state 'laws' which, by § 34, . . . are made 'the rules of decision in trials at common law' define the nature and extent of petitioners' right."<sup>30</sup> Accordingly, equity followed the

26. See note 21 *supra*.

27. 304 U.S. 202, 205 (1938).

28. 309 U.S. 280, 287, 294 (1940).

29. *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 180 (1940). See the reference to § 34, or the guiding rule, *id.* at 177 n.3. See also *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208 (1939).

30. *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940).



law in those cases "predicated upon . . . legal rights," and the law followed state laws of decision because of section thirty-four. The rule to be applied to purely equitable cases was thus left undetermined; apparently, the only compulsion on the Court in this context would come from the Constitution. But in the same term, the doctrine was applied, probably erroneously, to a statutory interpleader action, again without reference to this issue.<sup>31</sup>

This was the posture of the law when *Guaranty Trust Co. v. York* arrived at the Supreme Court. Mr. Justice Frankfurter, on behalf of the Court, resolved the problem without finding resort to the Constitution necessary:

"In exercising their jurisdiction on the ground of diversity of citizenship, the federal courts, in the long course of their history, have not differentiated in their regard for State law between actions at law and suits in equity. Although § 34 . . . directed that the 'laws of the several states . . . shall be regarded as rules of decision in trials at common law . . .,' this was deemed, consistently for over a hundred years, to be merely declaratory of what would in any event have governed the federal courts and therefore was equally applicable to equity suits. . . . Indeed, it may fairly be said that the federal courts gave greater respect to State-created 'substantive rights' . . . in equity than they gave them on the law side, because rights at law were usually declared by State courts and as such increasingly flouted by extension of the doctrine in *Swift v. Tyson*, while rights in equity were frequently defined by legislative enactment and as such known and respected by the federal courts. . . .

". . . In giving federal courts 'cognizance' of equity suits in cases of diversity jurisdiction, *Congress never gave*, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law."<sup>32</sup>

In this last sentence, at least, is a hint of a congressional power that by implication denies both the constitutional thesis put forward in *Erie* and the interpretation of *York* by Mr. Justice Rutledge. With the statute now amended to apply to all "civil actions,"<sup>33</sup> the possibility of distinguishing between the constitutional command and that of Congress has disappeared. The *Erie* rule is today clearly applicable in equity cases by act of the legislature, though the act may be redundant.

Ten years after *York*, the constitutional problem was raised more directly but again treated tangentially. In *Bernhardt v. Polygraphic Co.*,<sup>34</sup> the question was whether the federal courts were bound, in a diversity suit, to follow ancient Vermont authorities which refused to honor arbitration clauses in contracts between the litigating parties. The respondent argued that the right to a stay of the judicial proceedings, sought to permit the arbitration hearings to proceed, was a question governed by the terms of section three of the Fed-

31. *Griffin v. McCoach*, 313 U.S. 498 (1941). See Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1236 n.62 (1946).

32. 326 U.S. at 103-05. (Emphasis added.)

33. See note 21 *supra*.

34. 350 U.S. 198 (1956).

eral Arbitration Act.<sup>35</sup> On this point, Mr. Justice Douglas, writing for the Court, said:

"If respondent's contention is correct, a constitutional question might be presented. *Erie R. Co. v. Tompkins* indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases. . . . Our view, as will be developed, is that § 3, so read, would invade the local law field. We therefore read § 3 narrowly to avoid that issue."<sup>36</sup>

Mr. Justice Frankfurter, in his concurring opinion, agreed with this approach:

"In view of the ground that was taken in that case for its decision, it would raise a serious question of constitutional law whether Congress could subject to arbitration litigation in the federal courts which is there solely because it is 'between Citizens of different States,' . . . in disregard of the law of the State in which a federal court is sitting. Since the United States Arbitration Act of 1925 does not obviously apply to diversity cases, in light of its terms and relevant interpretive materials, avoidance of the constitutional question is for me sufficiently compelling to lead to a construction of the Act as not applicable to diversity cases. Of course this implies no opinion on the constitutional question that would be presented were Congress specifically to make the Arbitration Act applicable in such cases."<sup>37</sup>

The difference between the two opinions on this point is that the majority found that application of the Arbitration Act "might" present a constitutional question, while Mr. Justice Frankfurter believed that it "would" present such an issue. Those who would find that these expressions of doubt support "the view that the disability is constitutional," however, are grasping at straws.<sup>38</sup>

In still another case, where the Court was silent on the point, the constitutional question noted in *Bernhardt* might have been tacitly resolved. *Ragan v. Merchants Transfer & Warehouse Co.* involved a direct conflict between a state statute and rule three of the Federal Rules of Civil Procedure.<sup>39</sup> The former provided that actions were begun with the service of summons; the latter deemed an action commenced when the complaint was filed. In *Ragan*, the statute of limitations had run after the filing of the complaint in the federal district court but before the service of summons. In a rather mechanical opinion, without a hint of the possible constitutional issue involved, Mr. Justice Douglas, on behalf of a majority which included Mr. Justice Frankfurter, held that the issue was governed by state law and the claim barred, although the plaintiff had complied with all the requirements to begin an action in the federal court prior to the expiration of the limiting period. The constitutional question

35. 9 U.S.C. § 3 (1952).

36. 350 U.S. at 202.

37. *Id.* at 208.

38. See Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 799 n.9 (1957).

39. 337 U.S. 530 (1949); cf. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (dissenting opinions by Justices Douglas (Frankfurter joining) and Rutledge; FED. R. CIV. P. 23).

might have been resolved sub silentio in any of several ways consistent with this conclusion. The Court might have held that the constitutional base for *Erie* required the application of state law;<sup>40</sup> or that rule three was intended to be subordinate to state law and therefore no conflict really existed, a difficult construction to sustain; or that the constitutional question was not present because, as Mr. Justice Frankfurter said elsewhere on behalf of himself and Justices Black, Douglas and Murphy, "the Rules are not acts of Congress and cannot be treated as such,"<sup>41</sup> another means of concluding that no conflict existed. But so far as the opinion reveals, the Court chose to ignore the issue.

The decisions of the Court since *Erie* might be searched in an attempt to discover whether the rationale for the existence of the diversity clause in the Constitution offers a solution to this problem. Mr. Justice Frankfurter has asserted, with the concurrence of some of his brethren, that article three should be treated as static and unchanging in its meaning.<sup>42</sup> So viewed, the problem is one of discovering what the language of this article meant to those to whom it was addressed in the late eighteenth century. If, on the other hand, article three is to be treated like the less specific clauses of the Constitution—"due process," "equal protection of the laws," "Commerce . . . between the States"—the problem is to ascertain the contemporary significance of this portion of the judiciary article.

Several theories have been offered on the original meaning. In Professor Crosskey's opinion, the federal judiciary clearly was intended to be supreme in making law to govern cases brought before both federal and state courts.<sup>43</sup> Under this theory, *Erie* is the unconstitutional judicial decision, not *Swift v. Tyson*. No recent decision of the Court supports this thesis. To Mr. Friendly, the diversity clause was designed to create a forum more sympathetic to the commercial interests in the country than were either the state legislatures or courts.<sup>44</sup> To Professor Yntema and Mr. Jaffin, the clause was meant to make available a forum in which noncitizens would be treated fairly.<sup>45</sup> Professor Hart, somewhat derisively, suggests:

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40. See HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 674 (1953) (hereinafter cited as HART & WECHSLER).

41. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1940) (dissenting opinion).

42. See Frankfurter, J., dissenting in *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646-47, 654 (1949). See also Vinson, C.J., dissenting, *id.* at 645. *But see* Jackson, J., *id.* at 585-86; Rutledge, J., concurring, *id.* at 619-20.

43. See 1 CROSSKEY, *POLITICS AND THE CONSTITUTION* chapters XVIII-XXI (1953); 2 *id.* chapters XXIII-XXVI.

44. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 496-97 (1928): "In summary, we may say that the desire to protect creditors against legislation favorable to debtors was a principle reason for the grant of diversity jurisdiction, and that as a reason it was by no means without validity."

45. Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869 (1931). Professor Frankfurter, as he then was, wrote a reply in defense of the Friendly thesis. Frankfurter, *A Note on Diversity Jurisdiction—In Reply to Professor Yntema*, 79 U. PA. L. REV. 1097 (1931).

"It must be inferred that the present members of the Supreme Court believe that the framers of the diversity clause, and the successive Congresses which have acted under it, were moved only by a desire to afford out-of-state litigants the protection of the superior, or potentially superior, personnel, fact-finding processes and housekeeping rules of the federal courts."<sup>46</sup>

If the Court accepts the Friendly theory, it must recognize a power in the federal government to make rules of decision for diversity cases. On the other hand, the agreement by the Court with the Yntema thesis could be an indication of a constitutional barrier to the exercise of such power. And the Yntema view apparently has prevailed, in the Court's language if not its judgments, almost from the beginning.<sup>47</sup>

Although expressions of doubt have occasionally appeared in the Court's recent opinions,<sup>48</sup> Mr. Justice Frankfurter's statement in his opinion in *Lumbermen's Mut. Cas. Co. v. Elbert* is not untypical of the approach now generally taken by the Court:

"The stuff of diversity jurisdiction is state litigation. The availability of federal tribunals for controversies concerning matters which in themselves are outside federal power and exclusively within state authority, is the essence of a jurisdiction solely resting on the fact that a plaintiff and a defendant are citizens of different States. *The power of Congress to confer such jurisdiction was based on the desire of the Framers to assure out-of-state litigants courts free from susceptibility to potential local bias.* That the supposed justification for this fear was not rooted in weighty experience is attested by the fact that so ardent a nationalist as Marshall gave that proposal of the Philadelphia Convention only tepid support in the Virginia Convention. 3 Elliott's Debates 556 (1891). But in any event, whatever 'fears and apprehensions' were entertained by the Framers and ratifiers, there was fear that parochial prejudice by the citizens of one State toward those of another, as well as toward aliens, would lead to unjust treatment of citizens of other States and foreign countries."<sup>49</sup>

Such an approach to the history of the diversity clause leans on the side of a constitutional base for the *Erie* rule.

If the historical approach is rejected, the issue turns on a consideration of the function diversity jurisdiction does or should perform in the modern American nation.<sup>50</sup> The question becomes more difficult, for by far the most persuasive argument is that diversity jurisdiction serves no constructive func-

46. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 512 n.77 (1954). For another construction, see text following note 76 *infra*.

47. See Marshall, C.J., in *Bank v. Deveaux*, 9 U.S. (5 Cranch) 36, 50 (1809); Story, J., in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 141, 160 (1816).

48. See, e.g., Rutledge, J., in *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 622 (1949).

49. 348 U.S. 48, 54 (1954) (concurring opinion). (Emphasis added.) Cf. text at note 60 *infra*.

50. See HART & WECHSLER 896-97.

tion worth preserving.<sup>51</sup> The best defense of diversity jurisdiction lies in the relief it offers state courts from a large number of cases which many state systems are in no condition to absorb.<sup>52</sup> The once superior procedure of the federal courts is slowly but surely losing its advantage as the states amend their codes of procedure. The once superior quality of the federal judiciary has disappeared—in part because of the increase in numbers and in part because the income tax so largely forecloses accumulation of capital by practicing lawyers that persuading first-rate counsel to become trial judges in the federal system is now as difficult as convincing able lawyers to accept nominations to the state bench. Diversity jurisdiction provides advantages to big-city lawyers to the extent the district courts and courts of appeals hold their sessions in the large cities within their districts and circuits. But the system is also more expensive. In some measure the federal courts offer juries chosen from a broader geographical base and, generally, from a group of higher economic and social status. Evaluation of this factor depends on the conception of the jury and its function in our judicial system. None of these considerations seems to justify the existence of diversity jurisdiction in our federal system today.<sup>53</sup> Moreover, so long as the issue remains in the realm of speculation, foreclosing ultimate exercise of federal power by adopting *Erie's* constitutional theme would certainly be unwise.

Whatever the advantages or disadvantages of diversity jurisdiction, the Court's decisions offer little guidance as to the position it will adopt if called upon to determine whether *Erie* announces a constitutional limitation on the power of Congress and the federal courts. In the course of treating other problems, various members of the Court have issued relevant dicta. Some are clear, like Mr. Justice Douglas's statement in *Ullmann v. United States*:

"[T]his Court has always been willing to re-examine and overrule constitutional precedent, even those old and established. In *Erie R. Co. v. Tompkins* . . . this Court overruled *Swift v. Tyson* . . . which had been a rule of decision for 95 years."<sup>54</sup>

Others are more ambiguous, like Mr. Justice Frankfurter's statement in the *Tidewater* case:

"We are here concerned with the power of the federal courts to adjudicate merely because of the citizenship of the parties. Power to

51. See Frankfurter, J., concurring in *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 235-36 (1948).

52. For example, the trial courts in Cook County, Illinois are presently some four to five years behind on their trial calendars. To place the additional burden on them of handling the cases which are now filed in the federal court under diversity jurisdiction would be to cause a breakdown of the Illinois judicial system.

53. The best arguments that could be mustered in favor of retaining diversity jurisdiction were not very good when first offered. See, e.g., Bigelow, Sears, Eagleton, Kent, Tefft & Hinton, *Limiting Jurisdiction of the Federal Courts*, 31 MICH. L. REV. 59, 64-65 (1932). They have lost all their validity in the interim, in large measure due to *Erie* and the bankruptcy laws.

54. 350 U.S. 422, 455 (1956) (dissenting opinion). But see text at note 35 *supra*.

adjudicate between citizens of different states, merely because they are citizens of different states, has no relation to any substantive rights created by Congress."<sup>55</sup>

This, of course, might be an historically accurate statement if it means that Congress has not legislated substantive rules of decision for application in diversity cases. On the other hand, the statement may be construed as a limit on congressional power. But if "one of the most treacherous tendencies in legal reasoning is the transfer of generalizations developed for one set of situations to seemingly analogous, yet essentially different, situations,"<sup>56</sup> equally dangerous is the use of a dictum to answer a question which was not before the Court when the statement was made.

Since relevant assertions are, nevertheless, ammunition which an advocate can put to good use, Mr. Justice Frankfurter's views might be garnered from some of his pre-judicial writings. When he was still Professor Frankfurter, he wrote an article that would seem to deny a constitutional base for *Erie*. In 1928, shortly after the *Taxicab* case,<sup>57</sup> he made it clear that he agreed with the Brandeis-Holmes thesis that *Swift v. Tyson* ought to be removed from the books.<sup>58</sup> But he would have left it to Congress to wield the eraser:

"Whatever is to remain of diversity jurisdiction, the law to be administered by the federal courts is the law of the states. Whenever that law is authentically declared by the state, either by legislation or adjudication, state law ought to govern in state litigation, whether the forum of application is a state or federal court. *Swift v. Tyson*, with all its offspring, is mischievous in its consequences, baffling in its application, untenable in theory, and, as Mr. Charles Warren recently proved, a perversion of the framers of the First Judiciary Act. It results in two independent law-makers within the same state emitting conflicting rules concerning the same transactions. The fortuitous circumstance of residence of one of the parties at the time of the suit determines what rule is to prevail in particular litigation."<sup>59</sup>

Then, after applauding Holmes's dissent in the *Taxicab* case—including its reference to the constitutional problem—and rejecting the argument of uniformity as a reason for retaining *Swift v. Tyson*, he concluded:

"[W]hether the roots of the doctrine be in rational theory or obscure impulse, it is now too strongly imbedded in our law for judicial self-

55. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 650 (1954) (dissenting opinion). See also text at notes 25, 32, 37 *supra*.

56. *Braniff Airways, Inc. v. Nebraska State Bd. of Equalization*, 347 U.S. 590, 603 (1954) (Frankfurter, J., dissenting).

57. 276 U.S. at 532.

58. Mr. Justice Cardozo's name should be added to this list, though characteristically he seemed to be satisfied with the gradual erosion of the *Swift* rule. See *Hawks v. Hamill*, 288 U.S. 52 (1933), and the comment thereon in Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1932*, 47 HARV. L. REV. 245, 289-91 (1933). See also *Mutual Life Ins. Co. v. Johnson*, 293 U.S. 335 (1934); Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68, 92 (1935).

59. Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 526-27 (1928).

correction. Legislation should remove this doctrine, which, though derived from diverse-citizenship jurisdiction, denies its basis. For non-resident litigants were given a federal tribunal to secure a fair administration of state law, not the administration of independent law.”<sup>60</sup>

Such a conclusion, as Mr. Justice Reed argued in his concurring opinion with regard to Holmes’s dissent in the *Taxicab* case, cannot be reconciled with the Brandeis thesis as to the constitutional nature of the *Erie* doctrine. But Mr. Justice Frankfurter may no longer hold this view. His opinion in *Lumbermen’s Mut. Cas. Co. v. Elbert* could reflect a change of position.<sup>61</sup>

In any event, the solution seems to be easier for occupants of academic chairs than for those on the bench. Whether Mr. Justice Frankfurter’s views on this score will accord with Professor Frankfurter’s remains to be seen. Still, the difference of vantage points continues to make the problem as simple for the cloistered professors as it is difficult for the jurists. Thus, Professor Currie tells us:

“I take it to be the general understanding that Mr. Justice Brandeis’ invocation of the Constitution as a basis for overruling *Swift v. Tyson* was a bit of judicial hyperbole which, having served its purpose, should not be permitted to mislead even the most literal-minded reader. It is difficult to take seriously any objection to a general power to prescribe rules of decision for the federal courts in the face of the clear language of the Constitution:

The Congress shall have Power . . . To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>62</sup>

On the other hand, Professors Hart and Wechsler, with equal certainty if less detail, assert that *Erie* must be what it says it is, the expression of a constitutional principle.<sup>63</sup> In their admirable casebook, they suggest that it is not “consistent with the purposes of the Constitution to have two sets of rules about these basic and primary matters—one for co-citizens and diverse citizens who cannot [or do not] get into federal court, and the other for diverse citizens who can [and do].”<sup>64</sup> Nor, they seem to say, is it “consistent with the theory

60. *Id.* at 529-30.

61. See text at note 49 *supra*.

62. Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 468-69 (1955), condensed in *The Erie Doctrine and Transfers of Civil Actions*, 17 F.R.D. 353, 372 (1955). See also Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 273, 278 (1946); Dodd, *The Decreasing Importance of State Lines*, 27 A.B.A.J. 78, 83 (1941); McCormick & Hewins, *The Collapse of “General” Law in the Federal Courts*, 33 ILL. L. REV. 126, 135 (1938). Professor Broh-Kahn wrote a more elaborate brief in support of this position. Broh-Kahn, *Amendment by Decision—More on the Erie Case*, 30 KY. L.J. 3 (1941).

63. Wechsler, *supra* note 51, at 239 nn.19 & 21; Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 509-13 (1954). See also Bowman, *The Unconstitutionality of the Rule of Swift v. Tyson*, 18 B.U.L. REV. 659 (1938).

64. HART & WECHSLER 616.

of the Constitution to have the federal courts declaring primary law, in disregard of state court decisions, with respect to matters as to which the state legislatures rather than Congress have legislative competence."<sup>65</sup> But vague talk about "the ideals of federalism"<sup>66</sup> and "consistency" with "the purposes of the Constitution" or the "theory of the Constitution" beg the question rather than answer it. The proponents of the constitutional theme must answer many questions to sustain the limitation they would assert. The most important of these questions are the ones raised by Mr. Justice Reed in his *Erie* opinion—questions which the majority in that case did not deign to answer: Why is it not true, as Professor Currie asserts, that the combination of the judicial article and the "necessary and proper" clause creates power in Congress to make the rules of decision for diversity cases, just as the combination has been held to create such power in other instances, notably in the field of admiralty and maritime law? Again, if the Constitution did not purport to vest in the federal government the power to make rules of decision for diversity cases, why did the framers of the almost contemporaneous First Judiciary Act set forth the limitations on judicial power contained in section thirty-four?

The response to the first question might be framed in terms of the suggestion that the Court has always recognized a fundamental difference between the grant of diversity jurisdiction and the other grants of judicial power contained in article three. This distinction, the argument would run, warrants the difference in constitutional analysis.<sup>67</sup> Admiralty, as the analogue most often drawn upon by those who reject the constitutional basis for the *Erie* rule, furnishes a relevant example. Although Congress has there exercised the legislative power with the approval of the Court, the federal courts have been recognized as the superior power whose decisions are binding on the state courts.<sup>68</sup> This superiority has certainly not been recognized for federally-created doctrines in diversity cases. Moreover, Congress can authorize review by the Supreme Court of state decisions involving only questions of admiralty

65. *Id.* at 616-17.

66. See Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513 (1954). The Australian example makes it clear that a federal nation can leave this power in the hands of the national judiciary without courting destruction of the "ideals of federalism." See Ross, *The Constitutional Law of Federalism in the United States and Australia: II*, 29 VA. L. REV. 1028, 1031-33 (1943).

67. The distinction is certainly suggested by the questions in HART & WECHSLER 617.

68. See *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918). In *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 214-15 (1917), the Court wrote: "Article III, § 2, of the Constitution, extends the judicial power of the United States 'To all cases of admiralty and maritime jurisdiction;' and Article I, § 8, confers upon the Congress, power 'To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof.' Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. . . . And further, that in the absence of some controlling statute the general maritime law as accepted by the



and maritime matters.<sup>69</sup> This power cannot be exercised with regard to state court decisions resolving nonfederal questions, at least in those cases in which the parties are citizens of the same state.<sup>70</sup> In short, under the admiralty and maritime jurisdiction, the federal courts together with Congress can, according to the Court's decisions, formulate a uniform system of law binding on all courts within the country. No such uniformity is possible, absent acceptance of Professor Crosskey's thesis—the supremacy of the federal judiciary to make law,<sup>71</sup> with regard to those matters which are the subject of controversy in diversity cases.

Still another, if less likely, answer to the first question is theoretically possible: *Erie* not only established lack of power in the federal government to make rules of decision for diversity cases but impaired Congress's power to promulgate rules of decision for admiralty and maritime cases as well.<sup>72</sup>

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federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction." See also *Washington v. Dawson & Co.*, 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

Mr. Justice Holmes, in his famed dissent in the *Jensen* case wrote: "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact. It always is the law of some State, and if the District Courts adopt the common law of torts, as they have shown a tendency to do, they thereby assume that a law not of maritime origin, and deriving its authority in that territory only from some particular State of this Union, also governs maritime torts in that territory—and if the common law, the statute law has at least equal force as the discussion in *The Osceola* assumes. On the other hand the refusal of the District Courts to give remedies coextensive with the common law would prove no more than that they regarded their jurisdiction as limited by the ancient lines—not that they doubted that the common law might and would be enforced in the courts of the States as it always has been. This court has recognized that in some cases different principles of liability would be applied as the suit should happen to be brought in a common-law or admiralty court . . . . But hitherto it has not been doubted authoritatively, so far as I know, that even when the admiralty had a rule of its own to which it adhered . . . the state law, common or statute, would prevail in the courts of the State. Happily such conflicts are few." *Southern Pac. Co. v. Jensen*, *supra* at 222-23.

It may readily be seen that the dissent in *Jensen* has had a far more pronounced effect on the progeny of *Erie* than did *Erie* itself or the dissents on which it relied. Cf. FRANKFURTER & SHULMAN, *CASES ON FEDERAL JURISDICTION AND PROCEDURE* 178 n.1a, 185 n.3 (rev. ed. 1937).

Of course, in admiralty cases, as elsewhere, the federal authority framing the appropriate governing rules may choose to apply state law though it is not compelled to do so. See *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955); *Mishkin*, *supra* note 38.

69. See *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942). *But see* *Caldarola v. Eckert*, 332 U.S. 155 (1947) (Frankfurter, J.). It should be noted, however, that the Court in *Caldarola* did not dismiss the writ but affirmed the judgment below.

70. See *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1874); ROBERTSON & KIRKHAM, *JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES* §§ 89-103 (2d ed., Wolfson & Kurland 1951).

71. See note 43 *supra*.

72. Compare the suggestion that Congress does not have the power to formulate rules of decision in cases to which the United States is a party. *Mishkin*, *supra* note 38,

In other words, the reasoning proceeds from the absence of power in diversity cases to an absence of power in admiralty cases rather than from a power to act in admiralty cases to a power to act in diversity cases. Thus, Mr. Justice Black, in an address to the Missouri Bar Association, said: "This decision [*Erie*] . . . did not answer all questions. For example, . . . the extension of the doctrine to admiralty jurisdiction [has] not yet been finally determined."<sup>73</sup> And Mr. Justice Jackson, then Solicitor General, wrote: "If the constitutional issue had been argued, the Court would have had to consider the interesting question whether its decision undermines the foundation of the rule of uniformity in maritime law, which also depends on a simple grant of jurisdiction to the Federal courts in the Constitution."<sup>74</sup> However admiralty cases in the Court since *Erie* give no hint that this alternative is now a real possibility. Indeed, Mr. Justice Black's opinion in *Pope & Talbot v. Hawk* makes clear that for the present at least, *Erie* has not impaired the federal powers in the admiralty and maritime field.<sup>75</sup>

Mr. Justice Reed's second question—concerning the need for section thirty-four if the Constitution commanded application of state law in diversity cases—also requires consideration of several answers. Charles Warren, whose researches on the subject are in part responsible for the *Erie* decision,<sup>76</sup> said as to the inclusion of section thirty-four:

"Unquestionably the addition of this Section was intended to remove the objection of those who had opposed the Constitution and which had been expressed in 1787 by a prominent Massachusetts man as follows:

'Causes of all kinds between citizens of different States are to be tried before a Continental Court. The Court is not bound to try it according to the local laws where the controversies happen; for in that case it may as well be tried in the State Court. The rule which is to govern the new Courts must therefore be made by the Court itself or by its employees, the Congress. . . . Congress, therefore, have the right to make rules for trying all kinds of questions relating to property between citizens of different States. . . . The right to appoint such Courts necessarily involves in it the right of defining their powers and determining the rules by which their judgment shall be regulated. . . . It is vain to tell us that a maxim of common law required contracts to be determined by the law existing where the contract was made; for it is also a maxim that the Legislature has the right to alter the common law.' "<sup>77</sup>

at 799 n.10; cf. *Wilson v. Cook*, 327 U.S. 474, 486 (1946); *Stanley v. Schwalby*, 147 U.S. 508 (1893), 162 U.S. 255, 278-79 (1896).

73. Address by Mr. Justice Black, Missouri Bar Ass'n Annual Banquet, Sept. 25, 1942, reprinted in 13 Mo. B.J. 173, 175 (1942).

74. Jackson, "The Rise and Fall of *Swift v. Tyson*," 24 A.B.A.J. 609, 644 (1938).

75. 346 U.S. 406 (1953) (Frankfurter, J., concurring in a separate opinion). See Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246 (1950); Comment, 26 TEXAS L. REV. 312 (1948).

76. See 304 U.S. at 72-73.

77. Warren, *New Light on the History of the Judiciary Act of 1789*, 37 HARV. L. REV. 49, 84 (1923), quoted in FRANKFURTER AND SHULMAN, *op. cit. supra* note 68, at 186.

Unfortunately, the Warren article does not clearly reveal whether the construction given the Constitution by the "prominent Massachusetts man"<sup>78</sup> is an accurate description of federal power with regard to diversity cases as understood by the Framers, and the section was therefore inserted to limit the exercise of the power so described, or whether the section was inserted to alleviate fears which had no real basis. John Marshall, as Mr. Justice Frankfurter has pointed out, presented a different view to the Virginia Convention:

"Responding to George Mason's question as to what law would apply in federal courts in diversity cases, Marshall declared: 'By the laws of which state will it be determined?' said he. By the laws of the state where the contract was made. According to those laws, and those only, can it be decided. Is this a novelty? No; it is a principle in the jurisprudence of this commonwealth.' 3 Elliott's Debates, 556."<sup>79</sup>

But again, we are in no position to know whether Chief Justice Marshall was reciting constitutional law or merely stating a principle of the conflict of laws as he knew it. His reference to "this commonwealth" is equally ambiguous.

Another answer to the second question is hardly an answer at all: that section thirty-four was merely declaratory of the law which would have existed in the absence of the statute.<sup>80</sup> Mr. Justice Frankfurter again quotes Marshall on this score:

"In *Bank of Hamilton v. Dudley's Lessee*, 2 Pet. 492, 525, Chief Justice Marshall, in discussing the applicability of Ohio occupant law as 'rules of decision' under § 34, said, 'The laws of the states, and the occupant law, like others, would be so regarded independent of that special enactment.'"<sup>81</sup>

But again we do not know whether Marshall was talking about the constitutional command or about a principle of the conflict of laws relating to real property. Certainly, this was not the rule he applied for the Court in *Huidekoper's Lessee v. Douglass*.<sup>82</sup>

Still another explanation of the insertion of section thirty-four, consistent with the interpretation of *Erie* as a constitutional doctrine, is that the section did not purport to relate solely to diversity cases but to all cases in the federal courts. Such a rule would not be merely declaratory of the principles of the

78. Cited by Warren, *supra* note 77, at 84 n.80, as: "Letters of Agrippa" (James Winthrop), Massachusetts Gazette, Dec. 11, 14, 1787.

79. *Guaranty Trust Co. v. York*, 326 U.S. 99, 104 n.2 (1945); see *Erie R.R. v. Tompkins*, 304 U.S. 64, 72 n.2 (1938).

80. See *Mason v. United States*, 260 U.S. 545, 558-59 (1923); quotation from *York* in text at note 32 *supra*.

81. See note 79 *supra*.

82. 7 U.S. (3 Cranch) 1 (1805). Hart and Wechsler dispose of this case on the ground that the contrary decisions of the Supreme Court of Pennsylvania which Marshall ignored were rendered at a time when the Supreme Court of Pennsylvania was not the highest court of the state. HART & WECHSLER 615. This is hardly an adequate answer unless only the highest court of a state can pronounce the law of the state. See text at notes 90-120 *infra*. Cf. 2 CROSSKEY, POLITICS AND THE CONSTITUTION 719-53 (1953).

Constitution, unless state rules of decision constitutionally must govern all nondiversity cases, where the federal statute is silent, as well as diversity cases, a thesis hardly consistent with the Supreme Court's decisions to date.<sup>83</sup>

On the evidence as it now stands, the constitutional basis for the *Erie* doctrine is, at best, unclear. Under these circumstances, the Court's avoidance of the question when possible seems appropriate. Should the Court be forced to face the issue by a congressional enactment purporting to make a substantive rule of decision for diversity cases, the limitations on the Court's powers of judicial review—a dominant policy at least since the late 1930's—might call for rejection of the constitutional thesis. "We must, of course, defer to the strong presumption—even as to such technical matters as federal jurisdiction—that Congress legislated in accordance with the Constitution."<sup>84</sup> In the meantime, the Court is likely to continue to apply with some rigidity what it conceives to be the spirit of the *Erie* rule, even in the absence of constitutional or statutory compulsion.<sup>85</sup>

#### ERIE AND THE ASCERTAINMENT OF STATE LAW

*"We shall never immolate truth, justice, and the law,  
because a State tribunal has erected the altar and decreed  
the sacrifice."*

—Swayne, J., in *Gelpcke v. Dubuque*,  
68 U.S. (1 Wall.) 175, 206-07 (1864).

*". . . judicial brains, not a pair of scissors and a  
paste-pot."*

—Corbin, *The Laws of the Several States*,  
50 YALE L.J. 763, 775 (1941).

The obligation of the federal courts to determine and apply state law did not originate with the decision in the *Erie* case.<sup>86</sup> Even under the rule of *Swift v. Tyson*, some questions were still to be governed by state rules of decision.<sup>87</sup> And the problem has existed in nondiversity cases as well.<sup>88</sup> *Erie* merely enlarged the area for application of a "state law" which, our most eminent

83. See, e.g., the cases treated in Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

84. *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Co.*, 348 U.S. 437, 452-53 (1954); cf. Rutledge, J., in *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 622 (1954) (concurring opinion); Frankfurter, J., *id.* at 655 (dissenting opinion). *But see* Jackson, J., *id.* at 585: "The considerations which bid us strictly to apply the Constitution to congressional enactments which invade fundamental freedoms or which reach for powers that would substantially disturb the balance between the Union and its component states, are not present here." (Emphasis added.)

85. See, e.g., *DeCastro v. Board of Comm'rs*, 322 U.S. 451 (1944); *Waialua Agriculture Co. v. Christian*, 305 U.S. 91 (1938).

86. See text at note 92 *infra*.

87. See HART & WECHSLER 617-19, 620-21.

88. For some recent examples, see *DeSylva v. Ballentine*, 351 U.S. 570 (1956); *Estate of Spiegel v. Commissioner*, 335 U.S. 701 (1949).

federal trial judge says, "most of the time . . . is readily ascertainable."<sup>89</sup> Nonetheless, since *Erie*, the Court has felt more pressure to attempt to establish guide lines for the lower courts to follow. In responding to this demand, the Court has sought to answer two questions. First, what action of the state legislatures or courts should be regarded as binding on the federal judiciary? Second, where within the federal judicial system should the ultimate responsibility lie for determining the appropriate state rules of decision? Both questions hark back to the *Erie* opinion.

### *Controlling Declarations of State Law*

"[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."<sup>90</sup> Thus, Mr. Justice Brandeis seemed to assert two guiding authorities for the state rules of decision in federal courts, the state legislature and the state high court. In the *Ruhlin* case,<sup>91</sup> however, the question was immediately presented whether decisions of lower state courts were also to be considered binding on the federal courts. Mr. Justice Reed, in a unanimous opinion written for the Court observed:

"It is not necessary here to consider whether, in the determination of the substantive Pennsylvania rule, the Circuit Court of Appeals was correct in declining to follow the *nisi prius Thomas* case, directly in point, and in applying the *Guise* case, which was decided by an intermediate appellate court . . . .

"Application of the 'state law' to the present case, or any other controversy controlled by *Erie R. Co. v. Tompkins*, does not present the disputants with duties difficult or strange. The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical situation in the state courts. Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include decisions of state courts, just as they would in a case tried in the state court, and just as they always have done in actions brought in the federal courts involving what were known as matters of 'local' law."<sup>92</sup>

Such reference to the past and the generalized admonition to apply "the entire body of substantive law governing an identical situation in the state courts" did not commend themselves to the lower federal courts, which, at that time at least, appeared generally to resent the *Erie* doctrine. Assuming their dignity to be at stake, they preferred the Brandeis reference to the state's "highest courts" as the only state judicial body that they must regard as their "superior"; and this view received reinforcement from the Court's opinion in

89. WYZANSKI, A TRIAL JUDGE'S FREEDOM AND RESPONSIBILITY 22 (1952).

90. 304 U.S. at 78.

91. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202 (1938).

92. *Id.* at 207-09.

*Wichita Royalty Co. v. City Nat'l Bank*.<sup>93</sup> That case was begun in a Texas trial court and appealed to the state high court, which wrote an opinion disposing of the issue presented. On remand to the trial court, additional parties were joined, and the case was removed to the federal courts. Meanwhile, the Texas supreme court wrote another opinion on the same subject, which seemed to conflict with the one it had rendered in the *Wichita* case; it also denied a petition for rehearing in *Wichita*. The Court of Appeals for the Fifth Circuit chose to follow the second Texas supreme court opinion. The United States Supreme Court ruled that the court of appeals had the right idea but had applied it erroneously: the second opinion was somehow distinguishable from the *Wichita* case. In the course of his opinion for a unanimous Court, Mr. Justice Stone wrote:

"In departing from the 'law of the case,' as announced by the state court, and applying a different rule, the court below correctly stated that by reason of the removal it had been substituted for the Texas Supreme Court as the appropriate court of appeal and that it was its duty to apply the Texas law as the Texas court would have declared and applied it on a second appeal if the cause had not been removed. It was the duty of the federal court to apply the law of Texas as declared by its highest court. . . . And since the Supreme Court of Texas holds itself free upon reconsideration to modify or recede from its own opinions . . . the court below, in applying the local law, was likewise free to depart from earlier rulings to the extent that examination of later opinions of the Texas Supreme Court showed that it had modified its opinion on the first appeal."<sup>94</sup>

Thus, the Court seemed to be saying that the lower federal courts were to act as though they were the highest court of the state in which the action was commenced, except that they were rigidly bound by *stare decisis* with regard to the opinions of that court.

Such a construction of the *Erie* rule did not last long. The issue was avoided in *Cities Serv. Oil Co. v. Dunlap*,<sup>95</sup> where the successful petitioner relied on an intermediate appellate court opinion, which in turn seemed to find support in a state high court judgment. But in the 1940 Term, the Court accepted a series of cases involving the question more directly and in several different forms. Four of these were argued consecutively in November 1940; and the first of them, *Fidelity Union Trust Co. v. Field*,<sup>96</sup> set the tone for all. Here, a clear conflict existed between the act of the state legislature, which Mr. Justice Brandeis had suggested as one of the governing criteria, and the decisions of two trial courts, rulings which had not received similar approbation in the *Erie* opinion.

After local courts had rejected the Totten trust device, the New Jersey legislature passed a series of statutes validating such informal trusts. Two

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93. 306 U.S. 103 (1939).

94. *Id.* at 107.

95. 308 U.S. 208 (1939).

96. 311 U.S. 169 (1940).

New Jersey chancery court decisions—decisions by courts of first instance—held that, despite the clear language of the statutes, Totten trusts were still not to be recognized by New Jersey law. When the *Field* case came before it, the Court of Appeals for the Third Circuit concluded that the chancery decisions did not “truly express the state law,”<sup>97</sup> and applied the statutes as they read. The Supreme Court, in an opinion by Mr. Chief Justice Hughes, unanimously reversed this decision:

“The highest state court is the final authority of state law . . . but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State. . . . An intermediate state court in declaring and applying the state law is acting as an organ of the state and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question. We have declared that principle in *West v. American Telephone & Telegraph Co.*[<sup>98</sup>]. . . .

“ . . . [J]udicial action in this instance has been taken by the Chancery Court of New Jersey and we have no other evidence of the state law in this relation. Equity decrees in New Jersey are entered by the Chancellor, who constitutes the Court of Chancery, upon the advice of the Vice-Chancellors, and these decrees, like the judgments of the Supreme Court of New Jersey, are subject to review only by the Court of Errors and Appeals. We have held that the decisions of the [New Jersey] Supreme Court upon the construction of a state statute should be followed in the absence of an expression of a countervailing view by the State’s highest court . . . and we think that the decisions of the Court of Chancery are entitled to like respect as announcing the law of the State.

“While, of course, the decisions of the Court of Chancery are not binding on the Court of Errors and Appeals, a uniform ruling either by the Court of Chancery or by the Supreme Court over a course of years will not be set aside by the highest court ‘except for cogent and important reasons.’ . . . It appears that ordinarily the decisions of the Court of Chancery, if they have not been disapproved, are treated as binding in later cases in chancery . . . but there is always, as respondent urges, the possibility that a particular decision of the Court of Chancery will not be followed by the Supreme Court . . . or even by the Court of Chancery itself.”<sup>99</sup>

This was a reversal of *Swift v. Tyson* with a vengeance. The judicial opinions of two vice-chancellors were to be binding on the federal courts, although they directly contradicted the state legislature. Thus, the federal courts in diversity cases were not to act, as suggested in *Wichita*, as would the highest court of the state rigidly limited by stare decisis; they were to be bound by decisions of state courts of first instance, decisions which were not even binding on other state courts of first instance. For, despite the language of the

97. *Id.* at 177. Later New Jersey courts chose to follow the Third Circuit ruling rather than the decisions of the chancery courts relied on by the Supreme Court. See Clark, *supra* note 62, at 292.

98. 311 U.S. 223 (1940).

99. 311 U.S. at 177-79.

opinion, the case clearly did not involve decisions by an intermediate appellate court, nor did it concern "a uniform ruling . . . by the Court of Chancery . . . over a course of years." The decisions were controlling because, in spite of the statutory language, they stood "as the only exposition of the law of the State."<sup>100</sup>

Mr. Chief Justice Hughes also wrote for a unanimous Court which, in *Six Companies v. Joint Highway Dist. No. 13*, reversed a circuit court for disregarding what that court believed to be a dictum by a California appellate court.<sup>101</sup> The Supreme Court held that the supposed dictum was really a holding and thus binding on the federal courts:

"The decision in the *Sinnott* case was made in 1919. We have not been referred to any decision of the Supreme Court of California to the contrary. We thus have an announcement of the state law by an intermediate appellate court in California in a ruling which apparently has not been disapproved, and there is no convincing evidence that the law of the State is otherwise."<sup>102</sup>

In *West v. American Tel. & Tel. Co.*, which Mr. Chief Justice Hughes had used to bolster his opinions in both the *Six Companies* and the *Field* cases, Mr. Chief Justice Stone, as the spokesman for the Court, announced a more reasonable and less mechanical rule:

"A state is not without law save as its highest court has declared it. *There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them.* In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear . . . ."<sup>103</sup>

Unfortunately, however, he did not stop here, but went on to the rule of thumb doctrine of *Field* and *Six Companies*:

"True, some courts of appeals of Ohio may in some other case arrive at a different conclusion and the Supreme Court of Ohio, notwithstanding its refusal to review the state decision against the petitioner may hold itself free to modify or reject the ruling thus announced. . . . Even though it is arguable that the Supreme Court of Ohio will at some later date modify the rule of the *West* case, whether that will ever happen remains a matter of conjecture."<sup>104</sup>

100. *Id.* at 179. Cf. *Gayes v. New York*, 332 U.S. 145, 152 n.10 (1947); *Huron Holding Co. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 n.7 (1941).

101. 311 U.S. 180 (1940).

102. *Id.* at 188. Presumably even as a dictum, the assertion should be taken as strong evidence of state law in the absence of contrary holdings. See text at notes 117, 118 *infra*. For discussion of the lower court cases, see Note, 59 HARV. L. REV. 1299 (1946).

103. 311 U.S. 223, 236-37 (1940). (Emphasis added.)

104. *Id.* at 237-38.



Only Mr. Justice Roberts dissented, but not on the question of what opinions of state tribunals are binding on the federal courts. He simply read the Ohio opinions differently from his brethren. In the fourth case,<sup>105</sup> Mr. Justice Murphy, writing for a unanimous court, relied on the earlier cases for the proposition that federal courts are bound to follow intermediate appellate court decisions.

In *Vandenbark v. Owens Ill. Glass Co.*,<sup>106</sup> the Court announced a rule already indicated by the opinion in the *Wichita* case. Where a federal court judgment rests on a state court decision which the state court modified while the federal case was on appeal, the federal appellate court must apply the later state court ruling. After dealing with apparently inconsistent language in earlier Supreme Court opinions, Mr. Justice Reed, speaking for a Court in which there was no dissent, said:

“[T]he dominant principle is that *nisi prius* and appellate tribunals alike should conform their orders to the state law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered.

“ . . . While not insensible to possible complications, we are of the view that, until such time as a case is no longer *sub judice*, the duty rests upon the federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state courts [or intermediate appellate courts]. Any other conclusion would but perpetuate the confusion and injustices arising from inconsistent federal and state interpretations of state law.”<sup>107</sup>

*Moore v. Illinois Cent. R.R.*<sup>108</sup> also revisited the problem of the *Wichita* case. *Moore* had once gone up to the high state court, which passed on the issue later raised between the same parties in a diversity action in the federal courts. The circuit court of appeals, considering itself the equivalent of the Mississippi supreme court, decided that it could reverse the position taken by that court in the earlier appeal. The Supreme Court shortly dispelled the court of appeals' delusions of grandeur in an opinion by Mr. Justice Black:

“The Mississippi Supreme Court had the power to reconsider and overrule its former interpretation, but the court below did not. And, in the absence of a change by the Mississippi legislature, the court below could reconsider and depart from the ruling of the highest court of Mississippi on Mississippi's statute of limitations only to the extent, if any, that examination of the later opinions of the Mississippi Supreme Court showed that it had changed its earlier interpretation of the effect of the Mississippi statute.”<sup>109</sup>

A few years later, the Court felt compelled to back away from an extension of this mechanical jurisprudence to its ultimate extreme. In *King v. United*

105. *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940).

106. 311 U.S. 538 (1941).

107. *Id.* at 543. See also *Huddleston v. Dwyer*, 322 U.S. 232 (1944); *Carter Oil Co. v. Welker*, 317 U.S. 592 (1942); *Chase Securities Corp. v. Vogel*, 312 U.S. 666 (1941).

108. 312 U.S. 630 (1941).

109. *Id.* at 633.

*Commercial Travelers*,<sup>110</sup> the refusal of the lower federal court to follow a decision of a South Carolina court of common pleas was sustained by the Supreme Court. In an opinion for a unanimous Court, Mr. Chief Justice Vinson said:

"In the first place, a Court of Common Pleas does not appear to have such importance and competence within South Carolina's own judicial system that its decisions should be taken as authoritative exposition of that State's 'law.' In future cases between different parties, as indicated above, a Common Pleas decision does not exact conformity from either the same court or lesser courts within its territorial jurisdiction; and it may apparently be ignored by other Courts of Common Pleas without the compunctions which courts often experience in reaching results divergent from those reached by another court of coordinate jurisdiction. . . . [I]t would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court."<sup>111</sup>

But apparently fearing that this license might be unreasonably indulged, the Chief Justice added a "second place" that the common pleas decisions were unreported and therefore not generally available except by a search of the judgment rolls. In addition, he cautioned:

"Nor is our decision to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts. As indicated by the *Fidelity Union Trust Co.* case, other situations in other states may well call for a different result."<sup>112</sup>

Thus the Court seemed to arrive at a rule to the effect that high court and intermediate court judgments of the state judiciary were regularly binding on the federal courts, but *nisi prius* decisions were binding only to the extent that they bound other state *nisi prius* courts. However, a footnote in a later Supreme Court decision suggested that the line is between "local courts" and those that are part of a "system of State courts"; only the decisions of the former are not binding on federal courts.<sup>113</sup>

In the cases after *Ruhlin*, Mr. Justice Frankfurter silently concurred in all that the Court said.<sup>114</sup> In his 1928 article, he had indicated that he believed state law to be something more than the combination of the state's statutes and high court decisions.<sup>115</sup> But in the *Bernhardt* case, he suggested for the first time that the function of the federal courts in diversity cases was greater than the exercise of the slot-machine techniques which had received the approbation of the Supreme Court in the *Ruhlin* line of decisions.<sup>116</sup> There, the question was whether the law of Vermont would honor an arbitration clause in a New York contract. The majority, in an opinion by Mr. Justice Douglas,

110. 333 U.S. 153 (1948).

111. *Id.* at 161.

112. *Id.* at 162.

113. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 753 n.23 (1950).

114. He concurred in the judgment but not in the opinion in *Moore v. Illinois Cent. R.R.*, 312 U.S. 630, 636 (1941).

115. See text at note 59 *supra*.

116. 350 U.S. at 198.

held that the Vermont law would not so effectuate the agreement of the parties over the objection of one of them and affirmed the reliance by the district court on two Vermont high court decisions, the first announced in 1803, the second in 1910.

“[T]here appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of the Vermont judges on the question, no legislative development that promises to undermine the judicial rule.”<sup>117</sup>

For Mr. Justice Frankfurter, a look behind these decisions to determine whether the Vermont law of 1956 really was what it had been in 1910 was essential:

“As long as there is diversity jurisdiction, ‘estimates’ are necessarily often all that federal courts can make in ascertaining what the state court would rule to be its law. See *Pomerantz v. Clark*, 101 F. Supp. 341. . . . [T]he mere fact that Vermont in 1910 restated its old law against denying equitable relief for breach of a promise to arbitrate a contract made under such Vermont law, is hardly a conclusive ground for attributing to the Vermont Supreme Court application of this equitable doctrine in 1956 to a contract made in New York with explicit agreement by the parties that the law of New York which allows such a stay as was here sought, New York Civil Practice Act § 1451, should govern. . . . Law does change with times and circumstances, and not merely through legislative reforms. It is also to be noted that law is not restricted to what is found in Law Reports, or otherwise written. . . . The Supreme Court of Vermont last spoke on this matter in 1910. The doctrine that it referred to was not a peculiar indigenous Vermont rule. The attitude reflected by that decision nearly half a century ago was the current traditional judicial hostility against ousting courts, as the phrase ran, of their jurisdiction. . . . To be sure, a vigorous legislative movement got under way in the 1920’s expressive of a broadened outlook of view on this subject. But courts do not always wait for legislation to find a judicial doctrine outmoded. Only last Term, although we had no statute governing an adjudication, we found significance in a relevant body of enactments elsewhere: ‘A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process.’ *National City Bank v. Republic of China*, 348 U.S. 356, 360.”<sup>118</sup>

Both the majority and Mr. Justice Frankfurter thus indicated that the lower courts are to have the shackles loosened, if not removed. Law is not merely what the last state court judicial opinion says it is. The area of relevant “convincing evidence of what a state law is”<sup>119</sup> would appear to have been broadened by the action of the Court in this case. Other rulings of the Court strengthen the suggestion that the automaton doctrine has been rejected.<sup>120</sup>

117. *Id.* at 205.

118. *Id.* at 209-12. *Cf.* Black, J., dissenting in *Francis v. Southern Pac. Co.*, 333 U.S. 445, 451 (1948).

119. See text following note 97 *supra*.

120. In *Riverbank Laboratories v. Hardwood Products Corp.*, 350 U.S. 1003 (1956), which was argued the same day that the *Bernhardt* case was decided, the issue was whether

So long as the rigidities of the *Field* and *King* opinions prevailed, the Court had substituted one kind of forum shopping for another in diversity cases. Those who sought to have the state law applied as it was last stated by a state court would choose the federal forum to entertain the case, since the federal courts were unable to mold the law to new demands. Those who sought the possibility of having a new or amended doctrine applied to their cause would equally certainly choose the state forum, for only that tribunal would have power to offer the relief such a litigant would be seeking.

With this rigidity removed, certain problems remain. The Court has been fully cognizant of the difficulty of ascertaining state law. Mr. Justice Frankfurter, for example, stated in his opinion in the *Bernhardt* case that the *Erie* rule makes a choice between two evils:

“One of the difficulties, of course, resulting from *Erie R. Co. v. Tompkins*, is that it is not always easy and sometimes difficult to ascertain what the governing state law is. The essence of the doctrine of that case is that the difficulties of ascertaining state law are fraught with less mischief than disregard of the basic nature of diversity jurisdiction, namely, the enforcement of state-created rights and state policies going to the heart of those rights.”<sup>121</sup>

But federal court incapacity to make law under *Erie* was not so great as some commentators would contend. Thus, when the Seventh Circuit confronted the issue whether children had stated a valid claim for damages against a woman who caused their father to leave his family and refuse them support, it found no Illinois decisions on the subject and rejected the implications of the state’s “heart balm” statute.<sup>122</sup> “Because such rights have not heretofore been recognized is not a conclusive reason for denying them.”<sup>123</sup> And, while the problem of ascertaining state law appears with perhaps the greatest frequency in diversity cases, it is by no means limited to those cases nor even to cases in which a federal court is seeking to apply the law of a state in which the action was commenced. To quote Judge Wyzanski again:

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the Court of Appeals for the Seventh Circuit had properly followed state court decisions on the question whether the defendant was “doing business” for purposes of personal jurisdiction in the northern district of Illinois. The Illinois decisions relied on by the Seventh Circuit in rejecting personal jurisdiction were rendered prior to the Supreme Court’s opinion in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and the cases which thereafter broadened the power of the states in this area. The petitioner argued that the Illinois courts would apply a different rule than that which had prevailed before the *International Shoe* case, though it could refer to no Illinois decision in support of its thesis. The Court, in a per curiam opinion which effectively concealed its ground for decision, ruled in petitioner’s favor on the question of personal jurisdiction. It might thus have been expressing a view that recognizes state law to be something other than what the last reported judicial decision states it to be.

121. 350 U.S. at 208-09. Cf. Black, J., in *Rutkin v. United States*, 343 U.S. 130, 144 n.5 (1952); DOUGLAS, *WE THE JUDGES* 102 (1956).

122. *Daily v. Parker*, 152 F.2d 174 (7th Cir. 1945). See Fitzgerald, *The Celebrated Case of Daily v. Parker*, 15 U. KAN. CITY L. REV. 120 (1947).

123. *Daily v. Parker*, *supra* note 122, at 177. Compare the more cautious approach of the Supreme Court in *United States v. Standard Oil Co.*, 322 U.S. 301 (1947).

“[T]his is part of a larger problem of the twentieth century judicial emphasis on conflict of laws. Every time judges are called upon to apply the law of a foreign jurisdiction are they not inclined to give undue weight to the recorded landmarks and to underestimate the mobile qualities and thrusts of principle we discern in our domestic law?”<sup>124</sup>

Several mechanical solutions are possible to the problem of inequality resulting from the inferior capacity—power, not ability—of federal courts to frame state law in diversity cases. The first is at the same time the most extreme and the most desirable: abolition of diversity jurisdiction.<sup>125</sup> The second has already been rejected by the Court: the possibility of a federal court’s refraining from the exercise of jurisdiction in those cases where it finds itself unable to ascertain accurately the law of the state involved. In *Meredith v. Winter Haven*, Mr. Chief Justice Stone wrote the opinion in which Mr. Justice Frankfurter joined:

“*Erie R. Co. v. Tompkins* . . . did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state law in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decisions, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain. . . . Even though our decisions could not finally settle the question of state law involved, they did adjudicate the rights of the parties with the aid of such light as was afforded by the materials at hand, and in accordance with the applicable principles for determining state law. In this case, as in those, it being within the jurisdiction conferred by Congress, we think the plaintiffs, petitioners here, were entitled to have such an adjudication.”<sup>126</sup>

That the Court need not have ruled that the grant of diversity jurisdiction compels its exercise is evidenced by the refusal of the federal courts to resolve issues of domestic relations and probate matters, even though jurisdictional requirements are met.<sup>127</sup> Justices Black and Jackson dissented from the Court’s ruling in *Meredith*. And Mr. Justice Frankfurter has since indicated doubts about the result in which he once concurred.<sup>128</sup> The Court might do well to take another look at that case.

A third answer to the difficulties of the federal courts in ascertaining state law is closely related to the second. Under this solution, federal court proceedings

124. WYZANSKI, A TRIAL JUDGE’S FREEDOM AND RESPONSIBILITY 23 (1952).

125. See text at notes 51-53 *supra*.

126. 320 U.S. 228, 237-38 (1943). See also *Williams v. Green Bay & W.R.R.*, 326 U.S. 549, 553-54 (1946).

127. See HART & WECHSLER 1013-18. See also *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947).

128. See Frankfurter, J., in *Lumbermen’s Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 53 (1954).

might be stayed pending a determination of the state law in the state courts. The Court has followed this procedure in nondiversity cases.<sup>129</sup> But without adequate explanation, it has rejected such an approach in a diversity case, over the dissent of Mr. Justice Frankfurter.<sup>130</sup>

The fourth possibility, offering the greatest promise, is to have the federal intermediate appellate court certify the troublesome question of state law to the state high court for resolution. Such an opportunity has been afforded the federal courts by the Florida legislature, although it appears not to have been utilized.<sup>131</sup> The practice might be adopted through congressional action without the necessity for state enabling legislation.<sup>132</sup> In this manner, the court best equipped to answer the state law questions could do so in a definitive manner, without the expense of time and resources demanded by a stay of the federal court proceeding pending a declaratory judgment action in the state court. Unless the certification process were abused by the federal appellate courts, it would not unduly burden the state courts; and the equality of treatment which the *Erie* rule was aimed to accomplish would be better assured.

Admittedly, none of these reforms is likely to be effected in the near future. Thus, the federal courts must continue to exercise the power which the *Bernhardt* case implicitly recognizes. Judge Wyzanski's question—"Shall we seek to evolve the state rules exclusively from the state precedents, some of which are quite old . . . ?"<sup>133</sup>—ought now to be answered in the negative. As long as federal judges can be trusted to enforce the *Erie* rule in the spirit which brought it forth, the dogma of the *Field* cases and those which followed need not control their actions. Indeed, if the *Bernhardt* case represents a retreat from such dogma, an explainable cycle may be revealed. The Court, in *Erie*, announced a doctrine which left the lower federal courts with the necessary leeway to apply state law in a constructive manner in the diversity cases coming before them. On confronting the hostile attitude of those courts toward the *Erie* principle, however, the Supreme Court found necessary the imposition of more rigid and mechanical rules for the ascertainment of state law. Now, as *Erie* becomes accepted as an established doctrine and receives more sympathetic treatment from the lower federal judiciary—a judiciary whose membership has been radically changed since the initial pronouncement—the Court seems ready to recognize that the need for tight rein has disappeared. Time will reveal whether the language of the *Bernhardt* case does represent such a major revision, or whether it is merely an aberration subsequently to be ignored. Much may depend on how the lower courts act in the use of their new freedom.

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129. See HART & WECHSLER 869-73.

130. *Sutton v. Lieb*, 342 U.S. 402, 412 (1952); cf. *Propper v. Clark*, 337 U.S. 472, 486, 492 (1949).

131. FLA. STAT. ANN. § 25.031 (Supp. 1956). See Vestal, *The Certified Question of Law*, 36 IOWA L. REV. 629, 643 (1951).

132. See HART & WECHSLER 391-99.

133. WYZANSKI, *op. cit. supra* note 124, at 22.

*Responsibility for Determining State Law*

The major conflict between the majority position in *Bernhardt* and that taken by Justices Frankfurter and Harlan was over the question whether the case should be remanded to the district court, which had already passed on the state law issue, or to the court of appeals, which had not done so because it had erroneously assumed that federal law was controlling. Both positions relied on the expertise in the law of Vermont of the court to which they would remand. The problem of which court within the federal judicial system should be charged with ultimate responsibility for ascertaining the state law has never been directly answered by the Court.

Of course, the ultimate power to decide whether state law was properly applied in a diversity case rests with the Supreme Court itself. The Court's rules, both before and after *Erie*, have indicated that one of the factors to which the Court would give weight in considering a petition for certiorari was that "a court of appeals . . . has decided an important state or territorial question in a way in conflict with applicable state or territorial law."<sup>134</sup> The retention of the power in the Court does not, however, provide a guide as to when it will be exercised. In nondiversity as well as diversity cases, the Court has indicated its reliance on lower federal courts for the interpretation of state law.<sup>135</sup> But in all cases, it has retained the right to reject the interpretation given by the lower courts to the state law.<sup>136</sup>

In *Erie* itself, Mr. Justice Brandeis refused to interpret the Pennsylvania law which he thought applicable. He remanded the case to the court of appeals to decide that question, a question which had gone unanswered because the lower court had ruled that "general" law governed.<sup>137</sup> And the practice of remanding for interpretation was followed in all of the early cases under the *Erie* doctrine.<sup>138</sup>

Since that time the Court has undertaken to decide the question of state law for itself in two situations: where certiorari has been granted to resolve an alleged conflict between the decision of the court of appeals and the state law,<sup>139</sup> and where, after granting certiorari to decide whether the lower court

134. SUP. CT. RULE 19(1)(b).

135. See, e.g., *Propper v. Clark*, 337 U.S. 472, 486-92 (1949); *Spiegel v. Commissioner*, 335 U.S. 701, 707-08 (1949); *Gardner v. New Jersey*, 329 U.S. 565, 583-84 (1947); *Hillsborough Township v. Cromwell*, 326 U.S. 620, 629-30 (1946); *Reitz v. Mealy*, 314 U.S. 33, 39 (1941); *National Fertilizer Ass'n v. Bradley*, 301 U.S. 178, 180-81 (1937); *Wayne County Bd. v. Great Lakes Steel Co.*, 300 U.S. 29, 30 (1937).

136. See, e.g., *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, 112 (1939); cf. *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940).

137. 304 U.S. at 80.

138. *Mutual Benefit Health & Acc. Ass'n v. Bowman*, 304 U.S. 549 (1938); *Hudson v. Moonier*, 304 U.S. 397 (1938); *Rosenthal v. New York Life Ins. Co.*, 304 U.S. 263 (1938); *New York Life Ins. Co. v. Jackson*, 304 U.S. 261 (1938); *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206-07 (1938).

139. *Equitable Life Ins. Co. v. Halsey, Stuart & Co.*, 312 U.S. 410 (1941); *Texarkana v. Arkansas, La. Gas. Co.*, 306 U.S. 188 (1939).

properly refused to follow certain state court decisions, the Court decided that the court of appeals erred in rejecting the decisions in question.<sup>140</sup> In other cases, the Court has usually refused to decide the state law issue when the court of appeals had not first passed on it. If that court had considered the question, the Supreme Court might reject its ruling,<sup>141</sup> but has more often accepted it.<sup>142</sup> Where the lower court had not passed on the state question, the Supreme Court's custom has been to remand to that court for a decision on the issue.<sup>143</sup>

Although the Court has indicated that it will ordinarily be guided by the lower courts' construction of state law, it has usually not distinguished with any care between the district court and the court of appeals. At times, it has spoken of the district court as the best judge of local law.<sup>144</sup> At other times, the courts of appeals have received the accolade.<sup>145</sup> Often, the lower federal courts have been lumped together as if they were one.<sup>146</sup> From these statements only one conclusion may be drawn: for purposes of administering the federal system, the lower federal courts, not the Supreme Court, will generally settle state law questions. As the Court said in *Huddleston v. Dwyer*: "[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of state law by the intermediate federal appellate courts . . . ."<sup>147</sup>

When, however, as in the *Bernhardt* case, the lower federal court to be given the final say on the meaning of state law must be identified, no real guidance may be found in the decisions preceding *Bernhardt*. If *Bernhardt* is to control, the United States district courts are clearly designated. But the decision certainly did not mean that the views of a district court judge cannot be reversed by the court of appeals on a question of state law. Probably the confusing element in these cases, as in *Bernhardt*, is that deference to the lower courts is said to be based on their expert knowledge of the law of the states in which they are located. Mr. Justice Holmes is partially responsible

140. *Wichita Royalty Co. v. City Nat'l Bank*, 306 U.S. 103 (1939). See *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940); *West v. American Tel. & Tel. Co.*, 311 U.S. 223 (1940); *Six Companies v. Joint Highway Dist. No. 13*, 311 U.S. 180 (1940).

141. See, e.g., *Lyon v. Mutual Benefit Health & Acc. Ass'n*, 305 U.S. 484, 485-90 (1939); *Riverbank Laboratories v. Hardwood Products Co.*, 350 U.S. 1003 (1956) (per curiam decision; *semble*); note 120 *supra*.

142. See, e.g., *Francis v. Southern Pac. Co.*, 333 U.S. 445 (1948); *Palmer v. Hoffman*, 318 U.S. 109 (1943).

143. See, e.g., *King v. United Commercial Travelers*, 333 U.S. 153 (1948); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Huddleston v. Dwyer*, 322 U.S. 232 (1944); *Meredith v. Winter Haven*, 320 U.S. 228 (1943); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 241 (1940); *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208 (1939).

144. See, e.g., *Texarkana v. Arkansas, La. Gas Co.*, 306 U.S. 188, 198 (1939).

145. See, e.g., *Francis v. Southern Pac. Co.*, 333 U.S. 445, 447-48 (1948); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

146. See, e.g., *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943).

147. 322 U.S. 232, 237 (1944).



for this thesis, which might be valid in so far as foreign law is concerned. In *Diaz v. Gonzales*, he said of the Puerto Rican law, which has different roots from our own: “[To] one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books.”<sup>148</sup> But when the reference is shifted to the law of the states, with the possible exception of Louisiana, the very essence of the *Erie* doctrine is that a federal judge can find, if not make, the law almost as well as a state judge. Certainly, if the law is not a brooding omnipresence in the sky over the United States, neither is it a brooding omnipresence in the sky of Vermont, or New York or California. The bases of state law are assumed to be communicable by lawyers to judges, federal judges no less than state judges.<sup>149</sup> Congress has adopted this premise in authorizing the assignment of district judges from one circuit to another.<sup>150</sup> And the premise is certainly basic to all conflict of laws doctrine, including the full faith and credit clause. If judicial expertise in the law of the state in which the district court sits is really to be the test, review of its rulings on state law ought to be permitted only when the appellate bench is also made up of judges from the same state jurisdiction. But no such limitation is proposed.

The real reason for the Supreme Court to bow, and it usually does, to the decisions on state law of the lower federal courts rests not on the premise of expertness but on one of economy of judicial administration. As Mr. Justice Brandeis said in his dissent in *Railroad Comm'n v. Los Angeles Ry.* after he had quoted with approval the *Diaz v. Gonzales* argument:

“[T]he special province of this Court is the Federal law. The construction and application of the Constitution of the United States and of the legislation of Congress is its most important function. In order to give adequate consideration to the adjudication of great issues of government, it must, so far as possible, lessen the burden incident to the disposition of cases, which come here for review.”<sup>151</sup>

If considerations of judicial administration are to govern, the reason for allowing review on questions of state law in the courts of appeals is the same as that for permitting review of any question of law in the appellate court. Our jurisprudence has developed a thesis that a man is entitled as of right to

148. 261 U.S. 102, 106 (1923).

149. *But cf.* *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947): “There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.”

150. 28 U.S.C. §§ 291-96 (1952).

151. 280 U.S. 145, 166 (1929). Mr. Justice Brandeis cited in support of this proposition, Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 503 (1928), and Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1928*, 43 HARV. L. REV. 33, 53, 56, 59-62 (1929).

one appeal; if the thesis is not constitutional, it is at least statutory.<sup>152</sup> In *Bernhardt*, the respondent was denied that opportunity for a review of the question of Vermont law, since only the district court passed on the issue; neither the Supreme Court nor the Second Circuit did so.

In short, then, in diversity cases as in others, each of the courts in the hierarchy of the federal judicial system is entitled to the views of the court below on the question of state law, as on other questions of law. But the highest court to pass on the question will have the final say as to the meaning of state law. Ordinarily, the highest court to pass on the issue will be a court of appeals, since the Supreme Court's energies must be husbanded for resolution of issues of greater public importance.

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152. Cf. 28 U.S.C. § 1291 (1952); *Griffin v. Illinois*, 351 U.S. 12 (1956).