THE YALE LAW JOURNAL

Subscription price $4.50 per year *80 cents per number*

Canadian subscription price $5.00 per year; Foreign, $5.25 per year
Yale Law Journal Company, Inc., Box 401A, Yale Station, New Haven, Conn.

THE DEMISE OF SWIFT v. TYSON

"IF I am right the fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[1] Then Mr. Justice Holmes, with a characteristic and cryptic argument struck at "the jugular" of *Swift v. Tyson*,[2] and showed that water, not blood, coursed its veins. Yet he was not ready to impose the sentence which his verdict seemed to require. "I should leave *Swift v. Tyson* undisturbed, as I indicated in *Kuhn v. Fairmont Coal Company*,[3] but I would not allow it to spread the assumed dominion into new fields."[4] Specifically, he insisted that the de-

1. Holmes, J., dissenting in Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518, 533 (1928).
2. 16 Pet. 1 (U. S. 1842).
3. 215 U. S. 349 (1910).
4. See note 1, *supra*.

cisions of the Kentucky courts governed the legality of a contract for exclusive taxicab stand privileges at a railroad station in Kentucky.[5] But only Justices Brandeis and Stone concurred with Mr. Justice Holmes. Their six colleagues not only expressed enthusiastic adherence to *Swift v. Tyson* but extended the dominion of its doctrine to the utmost limits. That was in 1928.

Just one decade later, when *Swift v. Tyson*, vigorous, confident and respected, was about to reach its centennial, the Supreme Court, in a surprise attack, killed it as dead as that Court can kill a legal doctrine.[6] Eight Justices participated in the case which was the ambush for the attack.[7] Four of them were not on the Bench when the *Black & White Taxicab* case was decided.[8] These joined in the execution. The four Justices who were members of the Court both in 1928 and 1938 maintained their previous position.[9] Thus was the revolution effected, without a change of vote. Only Justices McReynolds and Butler remained to protest against the deep swing of the reaction which their own extreme position in the *Black & White* case helped to insure.[10]

Though a number of cases attest the "fluidity of the Constitution" and the "courage of the Court"[11] in departing from its own precedents, *Erie Railroad v. Tompkins* is unique. The Court did not merely overrule *Swift v. Tyson* and the *Black & White Taxicab* case. It declared unconstitutional a "course" of conduct in which the federal courts had engaged almost daily since 1842. It destroyed the effect as precedents of literally hundreds, perhaps thousands, of federal cases in which the doctrine of *Swift v. Tyson* was applied. It made an incidental declaration that Congress, too, has no power to do what the federal courts had done continuously, albeit now unconstitutionally, for 96 years—provide federal rules of substantive law for non-federal causes of action in the federal courts. The Court did all this in a case in which decision of

5. Citizens of Kentucky owned the taxi and transfer business involved. Originally the business was incorporated in Kentucky. Before the contract in question was executed and "knowing that such a contract would be void under the common law of Kentucky", these Kentucky citizens incorporated the business in Tennessee.

6. Erie R.R. v. Tompkins, 58 Sup. Ct. 817 (1938).

7. Mr. Justice Cardozo was absent because of illness.

8. Hughes, C. J., Roberts, Black, and Reed, J. J.

9. Justices McReynolds and Butler voted to follow the doctrine of Swift v. Tyson; Justice Brandeis and Stone voted to disapprove.

10. The one case chosen by the majority in the Tompkins case for an illustration of the "evil" of the doctrine of Swift v. Tyson and the "widespread" criticism aroused by it, is the Black & White case. Without comment, the majority opinion simply lays bare the facts of the case so that the naked evil leaps to the eye. The case dealt with a clearly local matter; the state law and the policy on which it was based was definite and of long standing; the device of foreign incorporation was employed for the very purpose of enabling citizens of the state to evade its law; and the traditional justification for Swift v. Tyson, the need for uniformity, was entirely absent.

11. (1938) 51 HARV. L. REV. 1245. See West Coast Hotel v. Parrish, 300 U. S. 379 (1937); *cf.* Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 406-09 (1932).

the constitutional issues was not "absolutely necessary"; indeed, the constitutional issues were not raised, or argued, by the parties or by the courts below, but by the Supreme Court itself. And the Court did all this with reference to a legal situation which presented no novel problem, no current crisis, no immediate pressures for change, and no newly discovered evidence justifying change. While exciting widespread interest among lawyers, the *Tompkins* decision was hardly noticed by the general public. It was a change on an important but highly technical legal issue. One cause of the change was doubtless the settled conviction, as old as *Swift v. Tyson* itself and shared by a substantial part of the legal profession, that the decision in *Swift v. Tyson* was wrong.[12] Another cause, and probably the occasion also, may be found, in part at least, in the increased power and activity of the federal government sanctioned by the Supreme Court in the 1936 and 1937 terms.

II.

The judicial power of the United States is established by Article III of the Constitution. It provides for the creation of a federal judiciary and states that its powers shall extend to, *inter alia,* "all cases of admiralty and maritime jurisdiction." On the basis of this grant of jurisdiction to the federal courts, aided by the "necessary and proper" clause, the Supreme Court decided that "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the United States"; that state laws may affect the "general maritime law as accepted by the federal courts" only within very narrow limits;[13] and that even Congress could not make state workmen's compensation laws applicable to work accidents within the admiralty jurisdiction of the federal courts.[14] The grant of jurisdiction in Article III is thus the basis for paramount, and in major part exclusive, power in Congress to enact a code of law for cases within that jurisdiction.[15] And it is the basis for the power of the federal courts to declare or make that law in the absence of federal legislation, without serious restraint from either state statutes or the decisions of state courts.

The same sentence of Article III which grants admiralty and maritime jurisdiction also extends the federal judicial power to controversies "between citizens of different states." Here it is the citizenship of the parties, not the nature of the controversy, that is the ground for federal jurisdiction. And it is here that *Swift v. Tyson* had its chief application. Federal courts have

12. The extensive literature on the subject, *pro* and *con,* is collected in the opinion of Mr. Justice Brandeis in the Tompkins case.

13. See Southern Pacific Co. v. Jensen, 244 U. S. 205 (1917).

14. Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 (1920); Washington v. Dawson & Co., 264 U. S. 219 (1924). See Comment (1932) 41 YALE L. J. 1037; note (1936) 45 YALE L. J. 1126.

15. Were the question at issue at the present time, great reliance would of course be placed upon the commerce power. The federal courts have had exclusive jurisdiction in admiralty since 1789.

power to adjudicate almost any controversy between citizens of different states. But since they must adjudicate only in accordance with law, the question arose: in accordance with what law? Broadly, two answers might have been suggested: (a) in accordance with federal law as enacted by Congress or declared by the federal courts in the absence of Congressional legislation —a technique similar to that developed in the admiralty cases; (b) in accordance with state law as enacted by state legislatures or declared by state courts. The answer that actually developed was still a third.

The first Judiciary Act, 1789, provided in its Section 34, which has been retained in the federal judicial code to date, that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States where they apply."[16] The answer to the question "in accordance with what law" was then to be sought not simply in the Constitution but also in the Judiciary Act. And, until the decision in the *Tompkins* case, the battle centered around the 34th section of the Judiciary Act rather than the Constitution.

In *Swift v. Tyson* and the host of cases following it, this answer was developed: that, except as prohibited by the Constitution, the states had plenary power to enact substantive law which would govern the adjudication of controversies including those in the federal courts; that Section 34 applied only to "state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character";[17] that as to matters of "general jurisprudence" or "commercial law" the federal courts were not bound by the decisions of the state courts, but rather by the common law, of which the state decisions were merely some evidence; that in these matters the federal courts were free to ascertain and declare the common law independently, "upon general reasoning and legal analogies", even if their decisions were consequently to conflict with applicable state decisions.

This doctrine was congenial to the juristic atmosphere in which it was born and to the human demands for self-expression of the federal judges who nurtured it. Even to-day, the common law is frequently regarded as a system of law prevailing throughout the United States and not anchored to any particular territorial sovereignty. Lawyers and judges are jealous of the conception that the common law is a living organism, that it grows and changes in response to felt needs and changing intelligence. And the moulders of change are the judges! State court judges can control their precedents: they can create, distinguish, modify, over-rule or ignore. They can put a little

16. 1 STAT. 73, 92 (1789), 28 U. S. C. § 725 (1928).

17. Swift v. Tyson, 16 Pet. 1, 18 (U. S. 1842). Some lower courts thought the N.I.L. was not a statute within this rule. But see Marine National Bank v. Kalt-Zimmers Mfg. Co., 293 U. S. 357 (1935).

of themselves into the growing or changing law. Federal judges feel the same need. Their tasks must have elements of creativeness. And they, like state judges, doubtless cherish independence and freedom in responding to their intelligence and to felt needs. The doctrine of *Swift v. Tyson* answered these demands. "Undoubtedly, the decisions of the local tribunals . . . [on matters of 'general commercial law'] are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."[18]

The stated justification for the doctrine of *Swift v. Tyson* is the need or desirability of uniformity of law throughout the country. That case itself involved a negotiable instrument. And Mr. Justice Story, though influenced by his "restless vanity", his fondness of "glittering generalities", his reputation for "great learning" and by the fact that "he was occupied at the time in writing a book on bills of exchange",[19] expressed an opinion commonly held to-day when he said: "The law respecting negotiable instruments may be truly declared in the language of Cicero, . . . not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, set et apud omnes gentes, et omni tempore, una eademque lex obtenebit.*"[20] The various uniform state laws already adopted and the continuing pressure for more attest the vitality of Mr. Justice Story's idea.

III.

Mr. Justice Holmes' exposure of the "subtle fallacy" underlying the doctrine of *Swift v. Tyson* was foreshadowed in 1917, when he wrote in his dissenting opinion in *Southern Pacific Co. v. Jensen*: "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."[21] There he was protesting against the Court's expansion of the federal maritime jurisdiction to the exclusion of state law. In 1928, in the *Black & White Taxicab* case, he addressed himself specifically to *Swift v. Tyson*. "Books written about any branch of the common law treat it as a unit. . . . It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it un-

18. Swift v. Tyson, 16 Pet. 1, 19 (1842).

19. GRAY, THE NATURE AND SOURCE OF THE LAW (2d ed. 1921) 253.

20. Swift v. Tyson, 16 Pet. 1, 19 (U. S. 1842). See Steffen, *Some Recent Supreme Court Decisions Relating to Negotiable Instruments* (1936) 12 IND. L. J. 1, 5; Beutel, *Common Law Judicial Technique and the Law of Negotiable Instruments—Two Unfortunate Decisions* (1934) 9 TUL. L. REV. 64.

21. 244 U. S. 205, 222 (1917).

less and until changed by statute, the courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a state, whether called common law or not, is not the common law generally but the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else. . . .

"If within the limits of the Constitution a State should declare one of the disputed rules of general law by statute there would be no doubt of the duty of all courts to bow, whatever their private opinions might be. . . . I see no reason why it should have less effect when it speaks by its other voice. . . ."[22]

Mr. Justice Holmes referred to the research of Mr. Charles Warren[23] which showed "that Mr. Justice Story probably was wrong" in his interpretation of Section 34, "if anyone is interested to inquire what the framers of the instrument meant."[24] But to him the question was "deeper than that; it is a question of the authority by which certain particular acts . . . are governed. In my opinion the authority and only authority is the state, and if that be so, the voice adopted by the State as its own should utter the last word."[25] The issue as Mr. Justice Holmes phrased it, then, was not one of statutory construction, but rather of constitutional authority.[26] His argument, if right, undermined *Swift v. Tyson* itself as well as the extension of its doctrine to fields of law other than that relating to negotiable instruments. Yet he would "leave *Swift v. Tyson* undisturbed" and urged only a curb on the spread of its dominion to other fields.

Perhaps this was merely an instance of the traditional judicial reluctance to decide more than the issues necessarily presented in the case at hand.

22. 276 U. S. 518, 534 (1928).

23. Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49.

24. 276 U. S. 518, 535 (1928).

25. *Ibid.*

26. The issue was early put in constitutional terms by Mr. Justice Field dissenting in Baltimore & Ohio R.R. v. Baugh, 149 U. S. 368, 401 (1893): "But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence." But Mr. Justice Field stood alone. See the letter of Mr. Justice Field in (1938) 47 YALE L. J. 1104, 1105.

The *Black & White* case did not involve commercial paper and it was unnecessary to state then the power of the federal courts with respect to such paper. The "unconstitutional assumption of power" might be corrected by a series of decisions rather than by decision in one case. But perhaps, also, Mr. Justice Holmes was willing to leave part of the "unconstitutional assumption" uncorrected. Law not uncommonly develops on the base of an initial error. The fallacy which Mr. Justice Holmes exposed might cause difficulty in the articulation of a symmetrical juristic theory. But, after all, law had been administered on the basis of *Swift v. Tyson* since 1842. In the field of commercial paper at least, it had many adherents who thought that it tended to achieve what the state legislatures were striving for in the enactment of uniform laws. Insofar as the initial error did not, in the limited field, cause undesirable consequences but on the contrary seemed to be congenial to an expanded national commerce, it might well be left undisturbed, though the error were exposed to prevent its spread to other fields. Juristic theory could be left to make its own accommodation.

IV.

In the *Tompkins* case, the Court did not show the restraint of Mr. Justice Holmes. It decided to destroy with one blow the entire structure and its foundation. The difference between Mr. Justice Reed and his brethren in the majority related to the choice of tools. He would use the tool of statutory construction. He would make the words "the laws" in the Act of 1789 now "include in their meaning the decisions of the local tribunals". He is willing to upset a century old interpretation because "in this Court, *stare decisis,* in statutory construction, is a useful rule, not an inexorable command." And he is unwilling to invoke the Constitution because, if the statutory construction is changed, constitutional interpretation is unnecessary, and because he is not quite sure of his opinion on the constitutional issues. "I am not at all sure whether, in the absence of federal statutory direction, federal courts would be compelled to follow state decisions." And also "questionable" to him is the statement that "Congress is without power to declare what rules of substantive law shall govern the federal courts, . . . The Judiciary Article and the 'necessary and proper' clause of Article One may fully authorize legislation, such as this section of the Judiciary Act."[27]

Mr. Justice Butler, writing for himself and Mr. Justice McReynolds, argues for adherence to *Swift v. Tyson* and its superstructure. But he devotes major emphasis to the "extraordinary or unusual action by the Court" in raising a constitutional issue which, in his opinion, was not raised by the petition for certiorari and which was not argued either in the Supreme Court or below, and in deciding the constitutional issue without calling for argument on it, as requested to do by the dissenters. In his opinion, the Court declared Section 34, as construed, unconstitutional and, before doing so,

27. Erie R.R. v. Tompkins, 58 Sup. Ct. 817, 828. The Justice probably meant "legislation enacting the doctrine of Swift v. Tyson." No one doubted the validity of Section 34.

should have notified the Attorney General as required by the Judiciary Act of 1937. In any event since a constitutional question "of great public importance" was decided, the Court should have invited the United States to intervene and present argument. "Indeed, it would have been appropriate to give Congress opportunity to be heard before devesting it of power to prescribe rules of decision to be followed in the courts of the United States."[28]

With stirring emphasis, Mr. Justice Butler refers to the "safeguards against the improvident use of the great power to invalidate legislation" and the "reluctance to consider constitutional questions . . . if the case may be decided upon any other ground",[29] a point of view of which Mr. Justice Brandeis and Mr. Justice Stone have been the greatest exponents in the Supreme Court. But there is a noticeable lack of reference to the *Ashwander*[30] case where Mr. Justice Brandeis made the most elaborate exposition of this point of view, in dissenting from an opinion in which Mr. Justice Butler concurred. Nor is there reference to *Carter v. Carter Coal Company*,[31] where the majority, including Mr. Justice Butler, invalidated the Guffey Coal Act over the protest of Justices Cardozo, Stone and Brandeis that the constitutional issues were not ripe for decision. Nor is there reference to the Railroad Retirement case[32] where the majority, including Mr. Justice Butler, went far beyond the necessities of the case to curb the power of Congress over the protest of four Justices.

Yet the majority opinion written by Mr. Justice Brandeis was extraordinary, in view of the Justices who comprised the majority. The opinion begins by stating that the "question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved."[33] It concludes that: "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.

"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. 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

28. *Id.*, at 827.

29. *Id.*, at 826.

30. Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936).

31. 298 U. S. 238 (1936).

32. Railroad Retirement Board v. Alton R.R., 295 U. S. 330 (1935). Likewise there is no reference to Willing v. Chicago Auditorium, 277 U. S. 274 (1928) or to Bradford Electric Co. v. Clapper, 286 U. S. 145 (1932) where Mr. Justice Stone protested that the Court opinions, written by Mr. Justice Brandeis, unnecessarily decided constitutional issues. See (1932) 42 YALE L. J. 115.

33. Erie R.R. v. Tompkins, 58 Sup. Ct. 817, 818.

torts. And no clause in the Constitution purports to confer such a power upon the federal courts."[34]

It is quite apparent that the statement about the power of Congress was not necessary to a decision of the question even as propounded by the Court. It would have been enough to say that, at least in the absence of legislation, the state decisions must be followed. To that extent Mr. Justice Reed's protest is unanswerable. Yet the majority's dictum may be overemphasized. It was not elaborated. It could hardly be a complete delineation of Congressional power in that respect under the commerce clause, the necessary and proper clause and the other clauses of the Constitution. It probably means only that no general power of the kind stated is conferred upon Congress; that legislation of that character must be considered in the light of powers conferred in other terms. So construed, the statement is still unnecessary to the decision, but its importance is considerably lessened.

It was equally unnecessary to rule on the constitutionality of the "course pursued" by the federal courts. But here Mr. Justice Reed's opinion is not equally unanswerable.[35] On this point, indeed, the majority opinion, amended so as to apply only in the absence of Congressional legislation, seems preferable, if choice is restricted to the majority and concurring opinions. To be sure, *stare decisis* is not "an inexorable command"—even less so in constitutional interpretation than in statutory construction. But it is no derogation of the function of the judiciary in legislation that, at least

34. *Id.*, at 822. This and the quotations from Mr. Justice Holmes and Mr. Justice Field are all that the opinion contains on the constitutional issue. The opinion does not, as Mr. Justice Butler laments, "indicate precisely the principle or provision of the Constitution held to have been transgressed" (p. 826). Apparently the conclusion rests on the "limited powers" doctrine and the Tenth Amendment. Congress does not have a general power to legislate on all activities within the state. It is given no express power to prescribe the rules of substantive law to be applied in federal courts in all cases. In the absence of valid Congressional legislation and on matters not withdrawn from state cognizance by the Constitution, the States have paramount power to prescribe the legal consequences of conduct, whether by legislation or by judicial decision. Adjudication by federal courts in express disavowal of the binding authority of such prescription impairs the reserved power of the States. In this respect no differentiation is made between rules of law declared by state legislature, and those declared by state courts.

The suggestion of Mr. Justice Reed that Article III of the Constitution in conjunction with the necessary and proper clause may fully authorize Congress to prescribe the substantive law to be applied in diversity of citizenship cases which raise no federal questions is not mentioned in the majority opinion. Perhaps the suggestion was thought irrelevant, since the validity of such legislation would depend upon judgment as to necessity and propriety of the relation in the particular instance rather than upon the existence of a general power. The suggestion recalls, of course, what the Court did with the federal admiralty and maritime jurisdiction. See *supra*, p. 1338. But the differences in subject matter, history and necessity must also be recalled.

35. His statement that "Mr. Justice Holmes evidently saw nothing 'unconstitutional' which required the overruling of Swift v. Tyson" is a whimsical version of the dissenting opinion in the Black & White case.

over a long period, the content of statute law is the special concern of the legislature, while in constitutional interpretation our system makes the Court supreme. The words of Section 34 which Mr. Justice Reed reinterpreted are not like the phrase "due process of law" or the words "reasonable" and "fair" which imply interpretation in accordance with changing time and circumstance. One can hardly censure a court for refusing to reverse the interpretation of a statute which for a century has received a consistent construction, yet has not been changed by the legislature despite repeated attempts to do so. And if the interpretation of the statute was not to be changed merely because of a later belief in the error of the initial interpretation, reversal of the doctrine of *Swift v. Tyson* could be justified only by other reasons. Moreover, the evidence that Section 34 was erroneously interpreted is still inconclusive, despite the positive assertion in the majority opinion. To Mr. Justice Holmes, Charles Warren's researches showed only that "Mr. Justice Story probably was wrong if anyone is interested to inquire what the framers of the instrument meant."[36] To Mr. Justice Brandeis, in the *Tompkins* case, the same researches established the certainty, rather than the probability, of error. Yet neither opinion undertakes a statement or analysis of the evidence adduced or a search for additional evidence. Nor does Mr. Justice Reed do so. Mr. Warren's researches are illuminating and of great value. But surely much is left for further scholarly investigation. And it is doubtful whether a reversal based on changed juristic conceptions of the meaning of the words "law" and "laws" would have carried conviction.

Choice was not, however, confined to the views of the majority and those of Mr. Justice Reed—and even those of the dissenting Justices. The Court could have followed Mr. Justice Holmes and left *Swift v. Tyson* undisturbed while preventing the extension of its doctrine to situations like those involved in the *Tompkins*, *Black & White*, and *Kuhn* cases. It could also have disapproved of the entire structure without resort to constitutional or statutory interpretation.

Assuming that Section 34 has the same meaning to-day that it had at least since 1842, it does not prescribe the rule to be followed when there is no applicable local statute. In the absence of such a local statute, Section 34 as construed does not apply; but the federal court must nevertheless decide by what law to adjudicate its cases. Similarly, Section 34 in express language applies only to "trials at common law". This, it was argued in *Mason v. United States*, "by implication excludes . . . equity suits."[37] But, the Court answered, the statute "is merely declarative of the rule which would exist in the absence of statute" and the rule "is not to be narrowed because of an affirmative legislative recognition in terms less broad than the rule."[38] The Court, therefore, applied the rule of Section 34 to equity suits.

36. See note 24, *supra*.
37. 260 U. S. 545, 558-9 (1923).
38. *Ibid.*

The freedom of the federal courts announced in *Swift v. Tyson* resulted not from constitutional or statutory command but rather from the assumed silence of the Constitution and the statute.[39] It was the Court's notion of sound policy in the absence of legislation that was given as a reason for not being bound by state decisions. Likewise, the Court in the *Tompkins* case could have left constitution and statute alone and announced its view that present public policy, in the absence of legislation, requires an adherence to state decisions. That would have involved only change of judge-made rule based on a stated policy to conform with a change of judicial view as to that policy in the light of experience. Mr. Justice Reed's notion that to disapprove *Swift v. Tyson* requires a reading of the words "the laws" in Section 34 "to include in their meaning the decisions of local tribunals" is premised on the unwarranted assumption that the Section, as previously construed, prohibits federal courts from following state decisions in the same manner that the Section requires them to follow state statutes. Neither *Swift v. Tyson* nor its sequelae announced such a doctrine. For cases outside the statute there was simply no command in the statute.[40]

It is quite clear that in the last analysis it was considerations of policy, rather than juristic symmetry, that were responsible for the decision in the *Tompkins* case, as they were in *Swift v. Tyson.* Before coming to the issue of constitutionality, the majority opinion depicts the "broad province" to which the dominion of *Swift v. Tyson* had been extended, the "widespread criticism" of the doctrine following the decision in the *Black & White* case, its "political and social defects", the "grave discrimination" which it introduced "by non-citizens against citizens" and "the injustice and confusion incident to the doctrine." These were consequences not of legislative command, but of judicial decision in the Court's own domain. They were risked

39. The doctrine of Swift v. Tyson must rest of course on an assumption that the Constitution permits it.

40. Swift v. Tyson was before the Court at this term in Willing v. Binenstock, 58 Sup Ct. 175 (1937). The decision of the court was unanimous that the Pennsylvania decisions were to apply on the issue whether a member of a partnership could set off his individual deposit in a Pennsylvania national bank against the partnership indebtedness to the bank which was then in the hands of a receiver. The opinion, written by Mr. Justice Sutherland, states: "We have no occasion to consider whether Section 721 of the Revised Statutes is applicable. Under Swift v. Tyson . . . it would not be. That case has been much criticized, and the tendency of our decisions which have followed has been to limit it somewhat strictly. And one of the practical restrictions upon the principle of that case, which we have many times announced, is that, even where it applies, 'for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt.' . . . Even if there were a conflict between the decisions of the state and those of the lower federal courts, we should be free to apply the 'harmony' rule and follow the state decisions." (p. 177). The result in the Tompkins case could have been reached, then, by expansion of the judge-made "harmony" rule. There was "no occasion" to reconsider the statute or the constitution.

for the achievement of ends which the Court thought important. When experience brought conviction that the ends were not to be achieved in that way or that the price was too high, the Court had the responsibility of correction. To have limited the decision in the *Tompkins* case to the narrowest available legal issue—that the liability of the railroad was to be determined by local rules—would have increased rather than diminished the confusion. An attempt to define specific limits within which the federal courts were to confine their freedom under the doctrine of *Swift v. Tyson* was doomed to failure by the experience of a century. Only a complete reversal of approach could lead to the required end. The reversal could have been effected without aid from the Constitution. But the Constitution comforted a hard-pressed nostalgia for decentralization and local responsibility. And it lent aid without imperilling any existing federal policy or any presently likely federal legislation.

IV.

An appraisal of the *Tompkins* and *Swift* cases in terms of "justice" and "mischief" is not likely to command universal assent. The litigant who escaped an "unjust" rule of state law by resort to the federal court doubtless thinks that he found "justice". His adversary is equally sure that he has suffered an "injustice". And the paradox is that both are equally right.[41] Even to a disinterested person the results reached in some cases via the "federal rule" seem more just than those via the "state rule"; in other cases, less just. Yet all agree that discrimination in the rights and liabilities of litigants simply on the basis of whether they happen to be, at the institution of suit, citizens of the same state or of different states is at least regrettable. The discrimination conflicts with the ideals of certainty in legal rights and equal justice before the law. In a federal system it is a constant source of irritation. It constitutes a curious limitation upon state law in matters concededly within state cognizance. And escape from state law by the device of creating diversity of citizenship arouses resentment, particularly in cases of wide public interest.[42]

41. In the Tompkins case it was the railroad that complained of the Swift v. Tyson doctrine and called for the application of the local rule. The reversal of the judgment by the Supreme Court may cost Mr. Tompkins his $30,000 verdict. In the controversy about the higher law, the merits of Mr. Tompkins' claim were all but forgotten. They are mentioned only in the last sentence of Mr. Justice Butler's opinion: "I am of opinion that the constitutional validity of the rule need not be considered, because under the law, as found by the courts of Pennsylvania and generally throughout the country, it is plain that the evidence required a finding that plaintiff was guilty of negligence that contributed to cause his injuries, and that the judgment below should be reversed upon that ground." (p. 828).

42. Suits in federal courts for labor injunctions are cases in point. See Shulman & Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936) 45 YALE L. J. 393, 400-03.

These regrettable consequences may be deemed not too high a price for the expected benefits of the *Swift v. Tyson* doctrine: uniformity of law throughout the country and, perhaps, the development of a more suitable law. This view is premised, of course, on the assumptions that the law will be improved by permitting the federal courts to contribute to its development through their independent decisions, and that, in any event, uniformity even of poor law is better than variety of state law, some good, some bad.

To what extent the doctrine of *Swift v. Tyson* has promoted uniformity of law is still a mystery. Very little has been done to ascertain the fact, if, indeed, it is possible to ascertain it at all.[43] It may be assumed that federal decisions have influenced state courts as much as decisions of sister states. But beyond that assumption may not venture. For, *a priori,* there is little reason to expect a greater influence. The Supreme Court has been handling a steadily diminishing number of common law cases. Litigation which is the stuff of the daily work of state judges is something of a sport in the Supreme Court. If it once had the prestige as an oracle of supreme wisdom on common law questions, it could not maintain that position when common law issues became a small and minor part of its business. The ten Circuit Courts of Appeals and the more than four score federal district courts, are too numerous and too close to home, and they differ too much among themselves, to promote uniformity in greater degree than the decisions of sister states.[44] Some state courts, particularly some state judges, have unquestionably achieved great prestige and influenced the development of law in other states. Whether *Swift v. Tyson* has enabled the federal courts to do as much or more is, however, an open question.

But one conclusion is not questionable. In 96 years the doctrine of *Swift v. Tyson* has not achieved complete or even near uniformity. The list of differences between state and federal law, as disclosed in the *Tompkins* case, is still imposing. To variety in state laws has been added an element of uncertainty, even greater than that implicit in that variety. Without *Swift v. Tyson,* one might attempt a prediction that his conduct or transaction will be governed by the law of a particular state, and then seek to ascertain what that law is. With *Swift v. Tyson,* he must take into account two additional and uncertain contingencies: that the possible litigation may or may not land in a federal rather than a state court, and that the federal court may or may not follow the law of the state as he ascertains it from the state decisions. If the doctrine tended to promote uniformity of law throughout the country, it also caused lack of uniformity within the state. It enabled

43. See Frankfurter, *Distribution of Judicial Power between United States and State Courts* (1928) 13 CORN. L. Q. 499, 529 n. 150; Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction* (1931) 79 U. OF PA. L. REV. 869, 881 n. 23; Shulman & Jaegerman, *supra* note 42, at 402 n. 36.

44. *Cf.* A. N. Hand, J., in Cole v. Pennsylvania R.R., 43 F. (2d) 953, 956-7 (C. C. A. 2d, 1930).

federal courts frankly and boldly to assert their independence of state court decisions, to confess expressly that their decisions would have been different if they were bound to decide as the state courts did.

Another consideration is to be weighed in pondering the question what price uniformity via *Swift v. Tyson*. To-day, unlike the condition in 1842, lawyers and judges receive their legal education in national law schools. Many students at the law schools do not know where they will practice. Not the law of a particular state, but the law of the states is their subject. Treatises on law and legal periodicals are numerous. They deal with the law of the states, not that of a single state. The American Law Institute Restatements recognize no differences between the states. They restate the better rule for all of them. The Commissioners on Uniform State Laws are constantly striving for the enactment of more uniform laws. National reporting and digest services are everywhere available and in common use. All these are factors tending toward uniformity. All offer law to the states for voluntary adoption. None of them imposes from the outside at the pain of penalty. None of them creates the "injustice", "confusion" or "discrimination" which are thought to attend the doctrine of *Swift v. Tyson*. And each of them seems to be a force for uniformity much more powerful than that doctrine can be.[45]

But the *Tompkins* case does not destroy the power of the federal courts to influence the development of the non-statutory law. That power is exerted not so much by the judgments in cases as by the written opinions. Federal judges may still analyze, expose, criticize or excoriate the rule which they may feel compelled to follow. The persuasive influence and moral pressure of their opinions will not be diminished by the fact that they obediently follow decisions which they do not have the power to overrule.

V.

What, then, are the effects of the *Tompkins* decision? One effect may be ventured with confidence. Federal courts may no longer declare themselves free of state decisions. They may not adjudicate a case as if state decisions were irrelevant. They must express obedience to state law, including state decisions. And they must make a conscientious effort to decide in accordance with that state law. Beyond this confidence will not go. Both the *Tompkins* case and *Swift v. Tyson* deal more with verbal statement of the law than with the judgments in cases.[46]

A case is not born ordained for a particular legal rule. Nor are legal rules complete, unique works of art with every feature, every line, every contour definitely fixed. Identity of legal rules does not insure identity of judgments. Even with the *Tompkins* case, the federal courts are still free to find, inter-

45. An attempt to appraise the influence of the doctrine of Swift v. Tyson on uniformity must allow, of course, for these and other factors pulling in that direction.

46. See Shulman & Jaegerman, *loc. cit. supra* note 42.

pret and appraise the facts. They are still free, presumably, to choose between rules or legal theories in the light of their appraisal of the facts. And they still have the judicial prerogative of at least honestly distinguishing cases. Does this carry the power to disregard a state decision on the ground that it will doubtless be overruled by the state court at the first opportunity? And does the *Tompkins* case require adherence to a single state decision or only a line of decisions, to the decisions of lower courts or only to those of the highest state courts?[47] And if the "applicable" state decision is rendered during the pendency of the federal case either in the district court or on appeal, must it be given effect?

Again, when the requisites of jurisdiction exist, must the federal courts enforce every right, every liability, for example, a yellow dog contract, which is enforceable in the comparable state courts? May the federal courts have a policy of their own, independent of the policy of any state, against the grant of certain types of relief or against the enforcement of certain types of claims, such as an injunction against peaceful picketing, at least if the parties are free to pursue their claims in the state courts? The *Tompkins* case probably has no bearing on these questions. Congress has the power, in its regulation of federal jurisdiction, to make certain forms of relief unavailable in the federal courts under stated circumstances or to make certain transactions unenforceable by federal process.[48] The extent of the similar power in the courts depends upon their function within the federal government rather than upon their relation to state law.

The *Tompkins* case relates primarily to the diversity of citizenship jurisdiction of the federal courts. Issues of non-statutory law may, however, arise also in cases in which federal jurisdiction is based on some other ground, in patent or bankruptcy cases, in litigation with the Government concerning federal taxation, in the liquidation of national banks, etc., etc. When a common law issue arises in the course of such litigation, interests are affected which are not involved in diversity of citizenship cases. Specialized federal common law for such controversies is consistent with the statement of the majority in the *Tompkins* case that "there is no federal general common law".[49] On the very same day on which the decision in the *Tompkins* case was rendered, Mr. Justice Brandeis delivered the unanimous opinion of the Supreme Court that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."[50]

47. See the comment of Prof. Corbin, *infra*, p. 1352.

48. See, for example, the Norris-LaGuardia Act, 47 STAT. 70 (1932) 29 U. S. C. § 101 (1934) and Levering & Garrigues v. Morrin, 71 F. (2d) 284 (C. C. A. 2d, 1934). And see the previous Supreme Court decision in the same case, 289 U. S. 103 (1933).

49. 58 Sup. Ct. at 822.

50. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 58 Sup. Ct. 803, 811 (1938).

The decision in the *Tompkins* case may facilitate the joinder of actions in the federal courts and the decision of non-federal as well as federal claims when presented together in a case in which federal jurisdiction is properly invoked.[51] A serious objection to such a practice in the past was the likelihood that the federal decision would be different from the one that could be expected if the non-federal claim were to be tried in a state court.[52] With this likelihood diminished, there may be greater freedom in yielding to the felt needs for economy and convenience in judicial administration by disposing of the several claims in a single action.

Conflict of laws and the due process clause may assume an added importance. If a case is to be governed by decisions of a state court rather than by federal decisions, it becomes important to decide by the decisions of what state. And what state's rule of conflict of laws is to govern? Again, cases like *Gelpcke v. Dubuque*,[53] *Burgess v. Seligman*[54] and the *Black & White Taxicab* case[55] may raise substantial questions of due process, now that the escape of diversity of citizenship is shut off. Is the power of state courts to overrule previous decisions or to invalidate contracts on grounds of public policy unlimited?[56]

Further argument on the distinction between "substantive law" and what is "procedure" is probably another consequence. For federal power over procedure in the federal courts is left undisturbed by the *Tompkins* case.

Answers to these and other questions will be worked out primarily by the inferior federal courts. The Supreme Court, having given the direction, will probably be unable and unwilling to watch the road through the entire journey. In the meantime many a federal judge may writhe in pain at the prospect of having to follow "the last breath" of the state judges.

HARRY SHULMAN†

THE COMMON LAW OF THE UNITED STATES

"There is no federal general common law." True, beyond doubt, in the sense that there is no system of universal general rules and principles, no "brooding omnipresence in the sky." In view of the action of the court in

51. *Cf.* Hurn v. Oursler, 289 U. S. 238 (1933).

52. Shulman & Jaegerman, *supra* note 42.

53. 1 Wall. 175 (U. S. 1863).

54. 107 U. S. 20 (1882).

55. 276 U. S. 518 (1928).

56. In the type of case represented by Gelpcke v. Dubuque, there was considerable vacillation between the theory of freedom from state decisions and the impairment of contracts clause of the Constitution. The former prevailed. See Tidal Oil Co. v. Flanagan, 263 U. S. 444 (1924). The Tompkins decision may leave that type of case undisturbed; but if not, will not the due process clause be pressed into service? *Cf.* Great Northern Ry. v. Sunburst Oil Co., 287 U. S. 358 (1932) and Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673 (1930).

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overruling *Swift v. Tyson*, it may now be pertinent to ask whether there is a "Pennsylvania general common law." Is there an omnipresence brooding over the state of Pennsylvania?

The Supreme Court sent the instant case back to the District Court with directions to find and apply the law of Pennsylvania, supposedly distinct from the non-existent "federal general common law." To what sources is that harassed trial court to go? Do the words of Section 34 of the Judiciary Act of 1789 now restrict the federal judge? Is it now "unconstitutional" for him to go outside the opinions of the judges of the Supreme Court of Pennsylvania?

If the answer to the foregoing questions is "yes," the federal judges are, for the first time in one hundred and fifty years, limited in a way in which the Pennsylvania judges are not themselves limited. The common law of Pennsylvania, like its statutory and constitutional law, is an evolutionary and variable product. In the main, it is the creative work of the judges, dealing with the living stream of dispute and conflict, searching in each new litigated case for a reasonable and workable guide to a solution. This guide is a rule of law, a generalization drawn from life history, one that is so well drawn from that history that it will successfully meet the pragmatic test of explanatory rationalization. The judge's work in constructing this generalization instantly becomes a part of the history that will be used by the judges in succeeding cases; it is one new step in the evolution of the law. Every new case has some new factors that require original consideration by the court. In some degree, every new case is a case "of first impression."

In dealing with each new controversy, the Pennsylvania judge must search for the applicable law, not merely in earlier Pennsylvania cases, not merely in the varying custom of Philadelphia or Pittsburgh or Bryn Mawr. He looks for enlightening direction to the decisions and doctrines and custom of England, old and new, of other states and countries, of other courts, federal or state or foreign. He is not hidebound by any antecedent doctrine, itself man-made by some judge or jurist like himself. Of course, he weighs all such doctrines with constructive and respectful care, and passes his independent judgment as to which form of worded rule will best serve for the solution of his immediate problem. He is far from certain of finding this worded rule in the opinions of Pennsylvania courts alone.

Are the federal judges now being directed to act differently from the Pennsylvania judges themselves? It can not be so intended; and if the Supreme Court does so intend, the federal judiciary, including the Supreme Court itself, will be quite unable to comply with the direction. On the new trial in the District Court, the applicable "Pennsylvania" law will be discovered by the same process and from the same broad general sources as before. If, on appeal, the new decision is considered by the Supreme Court, it will use the same process and the same sources.

In the cases that are rightly before them, the federal courts have the same constitutional power, as have the Pennsylvania courts, of determining the law that is applicable to the instant case. And their decisions have the same effect as precedents and as a part of the new history. This will be true, whether on the new trial the court decides that there is a special rule that is applicable to trespassers on a longitudinal pathway by a railroad track, or decides that there is not. In either event, the court is making the law of the case and is helping to determine the rule that will be applied in later cases.

Did the founding fathers, sitting in constitutional convention, have other views than these? Did the members of Congress enacting the Judiciary Act of 1789 have other views? Did they command the federal courts to follow Pennsylvania "law" as yet unmade, at the same time that they gave these courts jurisdiction over cases in which new law must often be discovered and applied? We can not know what were their theories of the nature of the common law and of its evolutionary growth. It is not necessary for us to know them.

The overruling of *Swift v. Tyson* is a matter of much less importance than it may seem to many. On the whole, its effect may be beneficial. It will not affect "vested rights" or invalidate the numerous decisions rendered on the theory stated by Mr. Justice Story. In actual practice, it will not deprive the federal judge of the freedom and power that have been his. It is not an order by Brandeis, J., that hereafter Learned Hand, J., must take his law from the words of Finch, J. If it is an admonition to federal judges that there is no "federal general common law" that is to be found *solely* in the opinions of other federal judges, much is thereby gained. But if it is a direction to substitute an omnipresence brooding over Pennsylvania alone, in place of the roc-like bird whose wings have been believed to overspread forty-eight states, something has indeed been lost.

A. L. C.