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STATE LAW IN THE FEDERAL COURTS: THE BROODING OMNIPRESENCE OF ERIE v. TOMPKINS*

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MY first acquaintance with Justice Cardozo was on an historic occasion, that when in 1921 "The Nature of the Judicial Process" was given to the world of jurisprudence through the medium of the Storrs Lectures at Yale University.¹ Being then a mere neophyte on the law faculty, permitted perhaps to be seen and not heard, I had joined somewhat perfunctorily in the faculty judgment that here there was not merely a good judge, but even more a student and scholar in the law worthy of our highest platform honor. The thought apparently was that the Justice would take his place among the galaxy of notables, eminent, respectable, and portentous, who had held the lectureship in the past. But I doubt that any of us was prepared to be so wooed and won as we were by the gentle, shy, and engaging personality who charmed his listeners to the point of achieving the supreme distinction of requiring a larger hall for his huge audience. That was contrary to all tradition. For attendance at a lecture series was expected to dwindle to only the dean and one or more nominated members of the faculty. In all my academic experience I can recall hardly another case where even a popular lecturer more than held his own over a number of days; perhaps the only competitor has been the irrepressible and ebullient President Hutchins, whose iconoclastic views of education² afforded a spicy contrast with the calm and impartial ideal judge as pictured in "The Nature of the Judicial Process."

After that first academic success Justice Cardozo returned to complete his picture of the jurist in action, in the lectures he has called "The Growth of the Law",³ and several times thereafter he spoke from

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1. Published by Yale U. Press, 1921.

2. HUTCHINS, *THE HIGHER LEARNING IN AMERICA* (Storrs Lectures, 1936) published by Yale U. Press, 1936.

3. Lectures given at the Law School of Yale University, December, 1923; published by Yale U. Press, 1924.

academic and other platforms⁴ until membership in our highest court unfortunately limited his activities as our premier judicial essayist. But I think he always retained a peculiar affection for my colleagues and me, because we were the first as a faculty to recognize his juristic worth and to render him academic obeisance and honor. At any rate there followed for me, as for all of us at Yale, a delightful personal friendship which lasted until his death. Only recently I picked up again some correspondence of twenty years ago wherein he repulsed with gentle firmness some criticism I had made of one of his decisions, causing me to publish some "friendly criticism from a person familiar with" the case, as he asked to have himself described.⁵ I wish I could stop to recall the many tokens of friendship and inspiration owed him, but I must turn without delay to the garland of intellectual flowers which this lectureship so fittingly requires as our yearly tribute to him.

It is not without some trepidation that I approach my present task. The Justice's own standard of literary effort was so high as to make our lesser attempts seem feeble indeed. Moreover, the standard of the four memorial lectures already given will be hard for those of us who come after to maintain. Indeed, the level was set on an upper plateau by the very first one, where our dear friend Chief Judge Lehman paid his superb tribute to his intimate associate of so many years.⁶ How alike were these two great men, not only in superb qualification for the judicial task, but in human sympathy and understanding as well! When I planned this essay I felt that I could look forward to at least one warm and friendly listener whose sympathetic interest would carry me over all rough spots. And now he, too, is gone and his place cannot be filled. May it not be hoped that these yearly memorial addresses may stand somewhat at least as a reminder and remembrance also of our dear friend so recently gone who stood so close in life to the kindred spirit in whose name the lectures are given!

But it is not so much the possibility of unequal contest with others to this platform accustomed and respected that gives me pause. After all, each of us must fashion his own form of intellectual tribute with such capabilities as he has; and it is idle to worry over its fitness to stand comparison with those of others. My trepidation comes from the task I have set myself—to suggest problems and raise doubts, rather

4. See LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES (1931); THE PARADOXES OF LEGAL SCIENCE (1928). Compare Shientag, *The Opinions and Writings of Judge Benjamin N. Cardozo* (1930) 30 COL. L. REV. 597; Shientag, *The Seventy-Fifth Anniversary of the Birth of Justice Benjamin N. Cardozo*, reprinted from N. Y. L. J., May 24, 1945, p. 1978, cols. 1-3; and the memorial essays cited *infra* note 12.

5. (1924) 37 HARV. L. REV. 760; CLARK, REAL COVENANTS (1929) 146, 147.

6. LEHMAN, THE INFLUENCE OF JUDGE CARDOZO ON THE COMMON LAW (1941), also reprinted (1942) 35 L. LIB. J. 2. Other lectures are FULLER, REASON AND FIAT IN CASE LAW (1942); SHIENTAG, THE PERSONALITY OF THE JUDGE (1943); JACKSON, FULL FAITH AND CREDIT, THE LAWYER'S CLAUSE OF THE CONSTITUTION (1944), (1945) 45 COL. L. REV. 1.

than to resolve confusion; to disturb thought, rather than to dispense legal or moral truth. I make no apology for my subject itself. Daily in the federal courts we are assailed by the problems of how to reconcile state and national juridical viewpoints. And every discussion of that matter must now begin and end with at least some reference to a single great case. My senior colleague Judge Learned Hand has a way of startling counsel in these "erieantompkinated" days by saying, as they approach that inevitable citation: "I don't suppose a civil appeal can now be argued to us without counsel sooner or later quoting large portions of *Erie Railroad v. Tompkins*."

That famous opinion, rendered in 1938, is already one of the most discussed cases in the Court's history, though it is strictly a lawyer's law case, unknown to the general public. In it, Justice Brandeis, in overruling Story's century-old decision in *Swift v. Tyson*, says that the books show nearly a thousand citations on the troublesome point of general versus local law in the federal courts which the earlier case had attempted to settle.⁷ But in the few short years since he spoke, an equal number of citations and of precedents have already spread out from the base he furnished; and the flood is clearly not diminishing.⁸ And those sensitive barometers of legal thought, the law reviews, show by their diligent and continuous attention to this case that it has suggested at least as many questions as it has answered.⁹ Moreover, the problem touches two ever fascinating vistas of American thought—one, the nature of our federal system and the difficulties of adjusting the spheres of authority of two independent, co-ordinate, and largely competitive sovereignties operating in the same territory, and the other, the one never more felicitously delimited than in Judge Cardozo's phrase, "the nature of the judicial process," or how judges can ever decide cases, particularly hard ones. Even our colleagues of the state judiciary may well assume an interest in this subject, for it is they who furnish—or gaily or maliciously or indifferently refuse to furnish—the "brute raw data," which we are required to "process" (to be technical about it) into the phenomenon of a "federal decision" without making a single change.

Hence it is not the subject itself, but its development in formal

7. 304 U. S. 64, 74 (1938), referring to the *Federal Digest*.

8. This estimate is based upon Shepard's United States Citations, which points to an increase of citations in the more recent volumes of the Federal Reporter. See also 22 FED. DIG. § 359 *et seq.*; cf. Zlinkoff, *Erie v. Tompkins: In Relation to the Law of Trade-Marks and Unfair Competition* (1942) 42 COL. L. REV. 955.

9. To these acute and stimulating articles I am deeply grateful for whatever thought I may have developed about the subject beyond the mere day-to-day worries of an "inferior" federal judge. Many, though not all, of those consulted are cited hereinafter to special points; for some bibliographies, see 1 MOORE, FEDERAL PRACTICE (1944 Cum. Supp.) 228; Zlinkoff, *supra* note 8; DOBIE AND LADD, CASES ON FEDERAL JURISDICTION AND PROCEDURE (1940) 556, 557, 573; and the *Tompkins* opinion as cited *infra* notes 10, 11.

lecture, which requires some fortitude. What more can be added to a topic already so thoroughly canvassed? Indeed, what can be said more than has been said by Story and Bradley and Brewer for the older view,¹⁰ and by Holmes and Field and Brandeis for the one now in ascendency?¹¹ One recalls Judge Cardozo's classic analysis of the six types of judicial opinions; surely we must classify these great decisions as of "the type magisterial or imperative," leaving further discussion to be only of "the type tonsorial or agglutinative, so called from the shears and the pastepot which are its implements and emblem."¹² But notwithstanding all this, my day-to-day work tells me that the last word has not been spoken, that perhaps it never will be so long as we have the states as independent competing sovereignties within the national framework, and that the judicial task becomes not only more difficult, but more dubious and unsatisfactory, as we try to attribute finality to a single arbitrary principle. I feel I should warn you at once of my rather unoriginal, but strongly held thesis that notwithstanding the present marked shift towards emphasis of state law in the federal courts, yet there is, even as yet, no rule of thumb to tell the federal judge what to do in many a particular case; that reliance on such an assumed rule leads only to confusion and more confusion; and that in ultimate analysis only the hardest and best mental effort, hard case by hard case, making use of all of the capacities stressed by Justice Cardozo or Justice Shientag¹³ and all of the materials allowed us by the Supreme Court, *and* the professors as well,¹⁴ can yield even a mod-

10. Compare Bradley, J., in *Burgess v. Seligman*, 107 U. S. 20 (1883), and Brewer, J., in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368 (1893); also Butler, J., dissenting in *Erie R. Co. v. Tompkins*, 304 U. S. 64, 80 (1938), and Johnson, J., in the cases cited *infra* note 39. Law review articles supporting this view are cited 304 U. S. at 77.

11. Compare the famous dissents by Holmes, J., in *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 370 (1910), and *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U. S. 518, 532, 533 (1928); and Field, J., in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 390 (1893), as well as the opinion of Brandeis, J., in *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938). The critical law review articles which had quite decisive influence, particularly Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, are cited in Justice Brandeis' opinion.

12. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* (1931) 10 (reprinted from (1925) 14 YALE REVIEW 699; also in the *Essays Dedicated to Mr. Justice Cardozo*, (1939) 35 COL. L. REV. 1, 52 HARV. L. REV. 353, 48 YALE L. J. 371) quoted in Shientag, *The Style of Judicial Opinions*, N. Y. L. J., May 26, 1944, p. 2036, col. 1.

13. CARDOZO, *op. cit. supra* note 1; SHIENTAG, *op. cit. supra* note 6.

14. See particularly Professor Corbin's plea in *The Laws of the Several States* (1941) 50 YALE L. J. 762, 771, for a wider content to "other persuasive data" (beyond mere state decisions) than is explicitly stated in Mr. Justice Stone's statement of sources in *West v. American Tel. & Tel. Co.*, 311 U. S. 223 (1940). See also Corbin, *The Common Law of the United States* (1938) 47 YALE L. J. 1351; Goodrich, *Mr. Tompkins Restates the Law* (1941) 27 A. B. A. J. 547; Stimson, *Swift v. Tyson—What Remains? What Is (State) Law?* (1938) 24 CORN. L. Q. 54; Broh-Kahn, *Uniformity Run Riot—Extensions of the Erie Case* (1943) 31 KY. L. J. 99; Zlinkoff, *supra* note 8, at 966-969.

erately satisfactory answer. In a slightly different connection Justice Shientag has said that "the problem in opinion writing is what may be termed 'architectonic' in character—to find the right scale and proportion."¹⁵ That I suggest as an apt description of our task.

Now in developing the right scale and proportion in our immediate context, we must at once accord great weight to the undoubted benefit, the general satisfaction, in the increased authority given state law upon issues of local significance. The anomaly of having two courts across the street (or as the Supreme Court now prefers to say, "a block away"¹⁶) dispensing justice in similar cases, but in different ways and according to different principles, is abhorrent. Perhaps we shall finally conclude that the gain in its abolition outweighs all losses or all doubts or confusions which the new rule has brought in its train. Certainly we shall be disposed that way if we remain of the opinion that no other course less drastic would have achieved these benefits. But against this we must place some very definite losses, both in the character of confusion which does, and perhaps of necessity must, result and in the lessened judicial skill and effectiveness which has been, so far at least, a required concomitant of the rule. And since in the time available to me I cannot hope to cover all aspects of this extensive topic, I propose to devote my attention to certain type situations which seem to me particularly to illustrate the point I am suggesting. Hence after a brief statement of both the *Tompkins* and *Swift* cases against their respective backgrounds, with some remarks on the vexed question of unconstitutionality of the earlier doctrine, I shall discuss first, the appropriate areas of federal and state law and the impact of the federal specialties, such as bankruptcy, copyrights, and patents; second, the choice to be made when not one, but several states have law at hand for federal use; third, the choice between federal "mere" procedure and state substance; and fourth, the discovery of state law when it is nonexistent, nonconsistent, or nonsensical. And first let us meet Messrs. *Tompkins* and *Swift*.

TOMPKINS VERSUS SWIFT

Tompkins, injured in Pennsylvania by a railroad freight train while he was walking on a path beside the tracks, brought suit in the District Court of the United States for the Southern District of New York and recovered a verdict of \$30,000 against the railroad. The latter appealed on the ground that under Pennsylvania law *Tompkins* could not claim the status of licensee, but was only a trespasser, since he was on a path which ran along, but not across, the tracks. The Circuit Court of Appeals affirmed, however, on principles of general law without exami-

15. Shientag, *op. cit. supra* note 12.

16. Compare both Justices Frankfurter and Rutledge in *Guaranty Trust Co. v. York*, 326 U. S. 99, 109, 112, 119 (1945).

nation of the Pennsylvania cases.¹⁷ Because of this method of decision the Supreme Court reversed and remanded the case to the appellate court for a determination of the local law which it held to be controlling. On remand, the appellate court obeyed the Supreme Court's mandate and determined Pennsylvania law with the result that it held Tompkins was not entitled to his verdict. Accordingly, it ordered the action dismissed, and the Supreme Court then declined further review.¹⁸ For Tompkins at least the change in doctrine meant a loss of \$30,000.

Now, even though there were weighty precedents for the course originally followed in the lower courts, I doubt if many of us would have paused long to object to a decision that rights and remedies flowing out of a personal injury sustained in Pennsylvania must be determined by Pennsylvania law. And I expect we would readily agree that the ground for the older view—the national character of an interstate railroad¹⁹—was hardly enough to justify treatment of a non-citizen so differently than Pennsylvania citizens would be treated in the local courts.²⁰ But other factors lent drama to the occasion. There was first the overruling of Story's long entrenched decision, or "doctrine," and the hundreds of cases relying upon and enforcing it.²¹ There was the determination that the famous Rules of Decision section of the Federal Judiciary Act of 1789 did include court decisions in its reference to the controlling force federal-wise of "the laws of the several States."²² There was the further fact, animadverted upon at length

17. *Tompkins v. Erie R. Co.*, 90 F. (2d) 603 (C. C. A. 2d, 1937), *rev'd* *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938).

18. *Tompkins v. Erie R. Co.*, 98 F. (2d) 49 (C. C. A. 2d, 1938), *cert. denied* 305 U. S. 637 (1938), *rehearing denied* 305 U. S. 673 (1938).

19. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368 (1893); *Cole v. Pennsylvania R. Co.*, 43 F. (2d) 953 (C. C. A. 2d, 1930), where Judge Augustus N. Hand followed the doctrine with obvious reluctance because of the cases he there cited.

20. As Professor Cook has acutely observed, the Court nowhere adverts to the possible question of choice of law which may be involved, or whether it is the New York view, if any, of the Pennsylvania law which should govern. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942) c. 5, 109, 122, a reprint of his essay, *The Federal Courts and the Conflict of Laws* (1942) 36 *ILL. L. REV.* 493; *F. H. McGraw & Co. v. Milcor Steel Co.*, 149 F. (2d) 301, 305 (C. C. A. 2d, 1945), *cert. denied* 66 Sup. Ct. 92 (U. S. 1945).

21. Probably there is no significance in the continued references throughout the opinion to disapproval of the "doctrine of *Swift v. Tyson*," rather than the simple statement that the case is "overruled," as the headnote has it, 304 U. S. 64. More important is it to note that it is this *doctrine*, rather than a statute or even a case, which constitutes "an unconstitutional assumption of powers by courts of the United States," and that "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." 304 U. S. at 79, 80.

22. Sec. 34 of the Judiciary Act of 1789, 1 *STAT.* 92 (1789), 28 U. S. C. § 725 (1940). The several qualifications attached to the provision should be noted; thus, "The laws of the sev-

in the dissent, that this occurred notwithstanding counsel's frank statement, "We do not question the finality of the holding of this Court in *Swift v. Tyson*, 16 Pet. 1, that the 'laws of the several States' referred to in the Rules of Decision Act do not include state court decisions as such."²³ There is then the flat declaration, "There is no federal general common law,"²⁴ though the same justice the same day in another case pointed out that there may be questions of "federal common law" upon which state statutes and decisions cannot be conclusive, such as the apportionment between two states of the water of an interstate stream.²⁵ And finally there is the statement that if only a question of statutory construction were involved, this century-old doctrine might be permitted to stand; but "the unconstitutionality of the course pursued has now been made clear and compels" abandonment of the doctrine. This oblique reference to unconstitutional judicial conduct, without invalidation of any specific legislative act, brought forth a concurring opinion from Justice Reed withholding assent from that part of the decision; and it produced forceful calls from the dissenting justices for reargument after statutory notice to the Attorney General, as required by recent legislation when issues of constitutionality of federal legislation arise.²⁶ Among many troublesome features of the opinion this statement is perhaps the most troublesome; at least commentators have found it so.²⁷

eral States, (1) except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be (2) *regarded as rules of decision* (3) in trials at common law, (4) in the courts of the United States, (5) in cases *where they apply*." (Numerals and italics supplied.) This is obviously much more qualified than the outright command of the *Tompkins* decision. It was the discovery by Mr. Warren in 1923, see *supra* note 11, at 86, of the original draft of the section by Ellsworth, showing that he had crossed out a longer phrase clearly including both "the Statute law" of the several states and "their unwritten or common law now in use," writing over it the word "laws," which has led to the conclusion that the wider meaning had always been intended. But, as the *Tompkins* dissent pointed out, 304 U. S. at 86, this view had not persuaded the Court earlier, since Justice Holmes, dissenting in the *Black & White Taxicab* case, 276 U. S. 518 (1928), had then cited the Warren article. Moreover, there is still the problem, as commentators have shown, whether the change in the draft supports the broader or the narrower interpretation. See particularly comments by Shulman, Schweppe, and Teton, cited *infra* notes 27, 29.

23. Argument of counsel, 304 U. S. at 66.

24. 304 U. S. at 78. This was not a new idea; compare the statement of McLean, J., for Marshall, Story, and all the Court, in the famous case of *Wheaton v. Peters*, 8 Pet. 591, 657 (U. S. 1834), that "It is clear there can be no common law of the United States"; but, diverging from Justice Brandeis' apparent view, "The common law could be made a part of our federal system, only *by legislative adoption*." (Italics added.)

25. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 110 (1938). See also *Robinson v. Campbell*, 3 Wheat. 212, 222, 223 (U. S. 1818); *Jackson, J.*, concurring in *D'Oench, Duhme & Co., Inc. v. Federal Deposit Ins. Corp.*, 315 U. S. 447, 465, 469, 470 (1942).

26. See 304 U. S. at 77, 78, 87-9, 90; see also quotations in note 21 *supra*.

27. The statement seems to have been generally criticized in the law reviews, and viewed as dictum, without basis in history or precedent; see, *inter alia*, COOK, *THE LOGICAL*

With the advantage of the hindsight now given us, let us turn to the decision whose wide sway has so suddenly ended. It seems to have become the custom not only to wonder at the strangeness of the *Tyson* decision, but to find as its "chief" cause "the character and position of Judge Story." In the view popularized by John Chipman Gray, Story's position as "the oldest judge in commission on the bench," his "great learning" and "reputation for learning greater even than the learning itself," his occupation with writing a book on the subject of the decision leading him "to dogmatize on the subject," his "great success in extending the jurisdiction of the Admiralty," his fondness for "glittering generalities," his possession "by a restless vanity"—all conspired to produce the result.²⁸ This seems just a bit severe; it rather justifies Professor Corbin's historical analogy, "After the Restoration, Cromwell's poor remains were exhumed and dishonored."²⁹ Be that as it may, the opinion itself is mild indeed, hardly demanding its assignment to "the type magisterial" to which I consigned it earlier. It held only that on a Maine bill of exchange accepted in New York, an assignment for a *past* consideration cut off the defense of fraud otherwise open to the acceptor. And it stated it would reach this conclusion as a matter of "general commercial law," even though the New York decisions, being somewhat in confusion, might be considered to hold a consideration already given insufficient for the purpose. The opinion had the concurrence of all the other justices of the then reconstituted or Jacksonian court.³⁰

It has been usual, also, to explain the decision as a consequence of a way of judicial thinking of the time—one where, in Holmes's trenchant phrases, there was "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," or "a brooding omnipresence in the sky";³¹ and the courts,

AND LEGAL BASES OF THE CONFLICT OF LAWS (1942) 138-43; Broh-Kahn, *Amendment by Decision—More on the Erie Case* (1941) 30 KY. L. J. 3; Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie Railroad v. Tompkins* (1939) 34 ILL. L. REV. 271, 293-5; McCormick and Hewins, *The Collapse of "General" Law in the Federal Courts* (1938) 33 ILL. L. REV. 126, 134-6; Shulman, *The Demise of Swift v. Tyson* (1938) 47 YALE L. J. 1336; Bowman, *Unconstitutionality of the Rule of Swift v. Tyson* (1938) 18 B. U. L. REV. 659; Cowan, *Constitutional Aspects of the Abolition of Federal "Common Law"* (1938) 1 LA. L. REV. 161; Schweppe, *What Has Happened to Federal Jurisprudence?* (1938) 24 A. B. A. J. 421; Herriott, *Has Congress the Power to Modify the Effect of Erie Railroad Co. v. Tompkins?* (1941) 26 MARQ. L. REV. 1; Note (1938) 22 MINN. L. REV. 885.

28. GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d Ed. 1921) 253, quoted in Shulman, *supra* note 27, at 1340; Jackson, *The Rise and Fall of Swift v. Tyson* (1938) 24 A. B. A. J. 609, 610.

29. Corbin, *The Laws of the Several States* (1941) 50 YALE L. J. 762, 763, n. 5. See also extensive criticism in Teton, *The Story of Swift v. Tyson* (1941) 35 ILL. L. REV. 519, 526.

30. Catron, J., concurring, differed only on a point of interpretation of the general law, viz., whether it applied in the case of assignment by way of pledge.

31. Holmes, J., dissenting in *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 370 (1910), in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U. S. 518, 532 (1928), and in *Southern Pac. Co. v. Jensen*, 244 U. S. 205, 218, 222 (1917).

even the federal courts, merely found and reported that law, but did not create it.³² Now there has undoubtedly been much of that view in our law generally; and Story does say, rather briefly in construing the rules of decision section of the Judiciary Act, that "in the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws," but are at most "only evidence of what the laws are."³³ But I believe that that alone is not enough for the decision. Just a few years earlier, in 1834, the Court, including Marshall as well as Story, had joined in a statement that there could be "no common law of the United States" and that "the common law could be made a part of our federal system only by legislative adoption."³⁴ And a little later when it came to a question of safeguarding municipal bondholders against loss under a change of state decision after acquisition of the bonds, the Court had no difficulty in protecting the investors against the new law under a somewhat different theory, which, however, was in practical effect only a logical extension of the *Tyson* doctrine of federal supremacy, as Mr. Justice Jackson has pointed out.³⁵ Moreover, its acceptance as a decisive factor requires in ultimate essence only the substitution of one premise for another. As Professor Corbin has said, "Is there an omnipresence brooding over the state of Pennsylvania?"³⁶ or, we may add, "only over Pennsylvania?" The question really at issue is not whether there is not anywhere the brooding omnipresence of the common law, but just where it shall be permitted to operate; and I think my subtitle fairly expresses the substitution we have made of one general abstraction for another.

True, we may get some support from the traditional conception of our national government as one of limited and specifically granted powers, though the picture of our operations in wartime, indeed of our

32. This analysis, adopted in the *Tompkins* decision, 304 U. S. at 79, is repeated in striking phrase by Mr. Justice Frankfurter in *Guaranty Trust Co. v. York*, 326 U. S. 99, 101 (1945), where he says the *Tompkins* decision did not "merely overrule a venerable case," but "overruled a particular way of looking at law." Cf., however, Mr. Justice Rutledge dissenting, 326 U. S. at 112.

33. *Swift v. Tyson*, 16 Pet. 1, 18 (U. S. 1842).

34. *Wheaton v. Peters*, 8 Pet. 591, 657 (U. S. 1834), quoted *supra* note 24. Thompson, J., dissenting, would have affirmed the grant of relief to the former court reporter Wheaton "whether as a [Pennsylvania] common law right or depending on the act of congress." 8 Pet. at 698. See, generally, Von Moschzisker, *The Common Law and Our Federal Jurisprudence* (1925) 74 U. of PA. L. REV. 109, 270, 367.

35. *Gelpcke v. City of Dubuque*, 1 Wall. 175 (U. S. 1863) (followed by some 300 other municipal bond cases), discussed in Jackson, *supra* note 28, at 612, commenting on the analyses by Gray and Holmes, *supra* notes 28, 31, and Rand, *Swift v. Tyson versus Gelpcke v. Dubuque* (1895) 8 HARV. L. REV. 328. These analyses had urged that this line of decision repudiated the *Tyson* thesis that court decisions constituted not law, but only evidence of what the law was.

36. (1938) 47 YALE L. J. at 1352, and see also his suggestions in (1941) 50 YALE L. J. 762, cited *supra* notes 14, 29.

vast united achievement as a nation, somewhat belies even this formalistic rule. But after all, these problems come down to a choice of policy; and the *Tyson* rule came in as a gradual and not unnatural development in balancing and adjusting the national against the local interests of that day and period. Indeed in support of the view that the Act did not apply to questions of a more general nature than those of local statutes, *as well as* rights and titles to real estate, "and other matters immovable and intraterritorial in their nature and character," Story felt it necessary to say only that "it never has been supposed by us" to be otherwise, without citing any cases.³⁷ But earlier cases do show a gradual development where is stressed the philosophy of comity, from the rather natural analogy of international law and the dealings between independent and mutually respected sovereignties.³⁸ So we find even the independent Justice Johnson, whose judicial opinions are much admired of late, developing the point that, outside of purely local and statutory matters, the decisions of state courts are to be treated with the respect that comity suggests, but without the compulsion of binding force.³⁹ It is interesting that in a fairly late case Justice Cardozo used the concept of "a benign and prudent comity" with complete success as a means of avoiding the *Tyson* doctrine, a judicial technique which, in the light of all the conflicting pressures here involved, has much to commend it.⁴⁰

I suggest, therefore, that the *Tyson* rule developed as a result of pressures fairly natural under the circumstances. The Court had and has to do with questions that transcend the artificial limits set by

37. 16 Pet. at 18, 19. Note that Justice Story does not limit the scope of local laws to statutes alone.

38. Cases are cited in *Burgess v. Seligman*, 107 U. S. 20, 34, 35 (1883); and see careful discussion in *Teton, loc. cit. supra* note 29, and *Broh-Kahn, op. cit. supra* note 27. Thus, Johnson, J., said in *Ogden v. Saunders*, 12 Wheat. 213, 359 (U. S. 1827), with respect to the effect of a state discharge from debts in another state and in the federal courts: "The question is one partly international, partly constitutional." And he held the discharge effective only in the state where given, and not in the federal courts or in other state courts. *Cf. Shaw v. Robbins*, 12 Wheat. 369 n. (U. S. 1827).

39. Compare his statements in *Shelby v. Guy*, 11 Wheat. 361, 368 (U. S. 1826); *Ogden v. Saunders*, 12 Wheat. 213, 359 (U. S. 1827), cited *supra* note 38; and *Fullerton v. Bank of U. S.*, 1 Pet. 604, 614 (U. S. 1828), and his concurring opinion in *Daly's Lessee v. James*, 8 Wheat. 495, 542 (U. S. 1823); and see, generally, Morgan, *Mr. Justice William Johnson and the Constitution* (1944) 57 HARV. L. REV. 328; Levin, *Mr. Justice William Johnson, Creative Dissenter* (1944) 43 MICH. L. REV. 497; Levin, *Mr. Justice William Johnson and the Common Incidents of Life* (1945) 44 MICH. L. REV. 59, 243.

40. *Mutual Life Ins. Co. of New York v. Johnson*, 293 U. S. 335, 339 (1934): "Without suggesting an independent preference either one way or the other, we yield to the judges of Virginia expounding a Virginia policy and adjudging its effect. The case will not be complicated by a consideration of our power to pursue some other course. The *summum jus* of power, whatever it may be, will be subordinated at times to a benign and prudent comity." See also his decisions in *Hawks v. Hamill*, 288 U. S. 52 (1933); and *Marine Nat. Exchange Bank of Milwaukee v. Kalt-Zimmers Mfg. Co.*, 293 U. S. 357 (1934).

state boundary lines; even now, after the *Tompkins* decision, as we shall see, courts are troubled by what to do with cases involving names or property or wrongs in many states.⁴¹ I do not wish to overemphasize this history; its importance is now lessened because I suppose hardly any one expects the *Tompkins* case to be reversed on its immediate point. But since I do believe that the *Tompkins* doctrine will be canalized and restrained within the boundaries where it is useful and responsive to the policies which gave it initial authority and continued sustenance, I think it desirable to keep in mind the forces which led to the original rule and to note that pressures, somewhat comparable, although differing as conditions have changed, call for present expression.⁴² And there is another matter which is of interest. I suggest that the original application of the doctrine, coming in somewhat naturally, did not arouse the objections and doubts of the later cases; it was, indeed—as Holmes wrote Pollock—the pressing of the doctrine to extremes which brought forth an aroused and deserved opposition.⁴³ This later history is of great importance in appraising the rule; I do not wish to minimize it or slide over it. But it has been well stated elsewhere,⁴⁴ and I must hurry on. The rule was pressed so far as to justify the statement of one enthusiastic supporter that “the doctrine is now well established that in matters of general law such as contracts, agency, negotiable instruments, insurance, negligence, torts, etc., the courts of the United States will follow their own decisions and not those of the several states.”⁴⁵ One may well see that in the light of the extensive field listed, the “etc.” is ominous. And finally came *Black & White Taxicab & Transfer Company v. Brown & Yellow Taxicab & Transfer Company*⁴⁶ which seems to have been the last straw. There

41. Compare *Purcell v. Summers*, 145 F. (2d) 979 (C. C. A. 4th, 1944), involving a church name and property, and other cases, such as those concerning copyright and trademarks, discussed later in this paper.

42. Such as the pressures for law protecting the investing public and in other “federal fields” discussed *infra* p. 284.

43. “It all comes from *Story v. Tyson*. . . . The decision was unjustifiable in theory but did no great harm when confined to what *Story* dealt with, but under the influence of *Bradley*, *Harlan*, et al. it now has assumed the form that upon questions of the general law the U. S. courts must decide for themselves—of course expressing a desire to follow the state courts if they can.” Holmes to Pollock, 1928, 2 HOLMES-POLLOCK LETTERS (1941) 215; LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES* (1943) 196; and *cf.* *Teton*, *supra* note 29, at 538.

44. A good succinct statement is to be found in Mr. Justice Jackson’s article, *supra* note 28. See also his *STRUGGLE FOR JUDICIAL SUPREMACY* (1941) 272-283.

45. Parker, *The Federal Jurisdiction and Recent Attacks upon It* (1932) 18 A. B. A. J. 433, 438. This statement led to the article: Campbell, *Is Swift vs. Tyson An Argument for or against Abolishing Diversity of Citizenship Jurisdiction?* (1932) 18 A. B. A. J. 809.

46. 276 U. S. 518 (1928), cited *supra* notes 11, 31. Among criticisms at the time, note Frankfurter, *Distribution of Judicial Power between United States and State Courts* (1928) 13 CORN. L. Q. 499, 524-530; (1928) 38 YALE L. J. 88; and articles cited 304 U. S. at 73, n. 6. Involved also was the fiction of corporate residence, so ably criticized in McGovney, *A Supreme Court Fiction* (1943) 56 HARV. L. REV. 853, 1090, 1225.

a taxicab company was able to avoid a state rule supporting a grant of exclusive privileges to a rival at a local Kentucky station by the mere device of dissolution and reincorporation in another state, enabling it thus as the citizen of another state to take advantage of the more favorable federal rule. Such inconsistencies of justice could not command assent or respect. That a change should come was probably to be expected; and perhaps it was natural that it should be of drastic nature.⁴⁷ But may there not be a lesson in this experience, that no violent arbitrary rule can be wholly successful in adjusting sovereign rights in a federal system, and that perhaps a middle or at least a more gradual way may be more successful in the long run?

JUDICIAL CONDUCT AS UNCONSTITUTIONAL

These last remarks have perhaps particular point as to Justice Brandeis' statement that overruling of the doctrine was compelled by the "unconstitutionality of the course" pursued by the courts for nearly a hundred years.⁴⁸ That statement did not win the assent of all the majority justices at the time and seems to have been rather carefully avoided by the Court ever since.⁴⁹ It has always puzzled commentators, who have been wont to consider the statement as a dictum, designed to make the overturn of the old doctrine seem more complete and more emphatic.⁵⁰ Dictum it surely seems to be. The opinion carefully refrains from terming the rules of decision act unconstitutional, and there was clearly no statute wherein Congress directly commanded the federal courts to apply the common law. At most it can be taken only as a declaration that if such an act were to be passed, it would conflict with the reservation of rights to the states by the Constitution. But that is in the teeth of earlier statements⁵¹ and, it is submitted, of earlier practice. There has been some suggestion, it is true, that Congress cannot control the jurisdiction of the federal courts; but that view is pretty surely discredited both in theory and in practice.⁵² It seems clear that Congress may determine the manner and

47. That an opposing trend had already set in is indicated by *Mutual Life Ins. Co. of New York v. Johnson*, 293 U. S. 335 (1934), and other cases cited *supra* note 40; and see *Burns Mortgage Co. v. Fried*, 292 U. S. 487 (1934); *Willing v. Binenstock*, 302 U. S. 272 (1937); *Jackson*, *supra* note 28, at 644.

48. See *supra* p. 273 and further quotations in note 21 *supra*.

49. Thus see the careful discussion and limitation in the latest case, *Guaranty Trust Co. v. York*, 326 U. S. 99 (1945), cited *supra* notes 16, 32.

50. Compare *Shulman* and others cited *supra* note 27. *Herriott*, *supra* note 27, has the interesting suggestion that the judicial conduct was unconstitutional because it was beyond limits yet authorized by Congress.

51. As in *Wheaton v. Peters*, 8 Pet. 591 (U. S. 1834), cited *supra* notes 24, 34.

52. There is a complete discussion and consideration of a contention that changes in federal jurisdiction were unconstitutional by a committee of the American Bar Association in 1932, in *McGovney*, *supra* note 46, at 1225 *et seq.*

form of adjudication of rights which under the Constitution may be committed to the federal courts.

Moreover, the other view obviously proves too much. It would mean, for example, that Congress could not legislate to restrict the use of injunction in labor cases or ban the so-called "yellow dog contract."⁵³ It would throw doubt on the federal declaratory judgments statute as applied in cases where there is no federal question, to say nothing of numerous of the federal rules of civil procedure.⁵⁴ Logically applied, it would raise doubt as to much of the peculiar value thought to inhere in federal trials, such as the relation of the judge and jury, the traditional position of the judge as more than a mere umpire at the trial, and even the requirement of jury trial itself.⁵⁵ And it would be vitally restrictive of the development of federal rights as a whole. There is little likelihood at present of a general statute re-establishing the common law in the federal courts; there is, however, already occurring the development or explanation of common-law remedies such as deceit and fraud based upon—and completing—a general federal superstructure. A good example is to be found in the expanded rights of the investor, not specifically stated in, but logically developed from, the various security regulation acts.⁵⁶ One may suggest that the battle for the validity of national welfare legislation has been fought and won; it would be, indeed, an anomaly to have it break out again in this narrow corner. I think we will not be unduly venturesome in believing that the suggestion has already served its function in aiding in the initial reversal of "doctrine" and that it will not return to hamper further development of national rights.⁵⁷

53. 47 STAT. 70 (1932), 29 U. S. C. §§ 101, 103 (1940); *cf.* also FED. R. CIV. P. 65(e). See discussion in (1941) 41 COL. L. REV. 104, 108-115, pointing out that the statute is framed in terms of *jurisdiction* of the federal courts; and *cf.* Tunks, *supra* note 27, at 295.

54. Tunks, *supra* note 27, at 279, 295. Consider, for example, the considerable discussion as to the validity—against varying state law—of FED. R. CIV. P. 23(b), stating conditions under which a shareholder's derivative action for the corporation against directors and officers may be brought. Committee Note, SECOND PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE (May, 1945) 24-30; 2 MOORE, FEDERAL PRACTICE (Supp. 1945) 85-9; (1941) 41 COL. L. REV. 104, 115-21; 4 FED. RULES SERV. 909; 6 *id.* 772. This is only the former Equity Rule 27, established in response to a felt need in the case of *Hawes v. City of Oakland*, 104 U. S. 450 (1882); it, too, could be framed, or viewed, in terms of federal jurisdiction.

55. The ramifications of this problem are considered *infra* at p. 289.

56. This, too, is considered *infra* at p. 284.

57. Note that Holmes, who originally developed the idea of an unconstitutional assumption of powers by the United States courts, perhaps as an expansion of an idea expressed in Field's dissent in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 391 (1893), cited *supra* note 11, of the autonomy of the states as preserved by the Federal Constitution, would "leave Swift v. Tyson undisturbed," but "would not allow it to spread the assumed dominion into new fields." Dissent in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U. S. 518, 535 (1928). And Holmes himself did not hesitate to apply the "general law" doctrine, not only in the conflicts cases, *infra*

Now I turn to the four type situations which I have chosen not as all-inclusive, but as offering the most striking illustrations to date of cases where the simple rubric of the intolerability of competing systems of law applicable to the same facts is not adequate. Useful and equitable as that rubric is in many cases, it can be easily pressed to the point of unreality, indeed of inequity, in complicated affairs of modern life. It is not my purpose to suggest definitive answers to these problems, or any general rule for their solution. Rather it is my belief that each calls for solution in terms of weighing and balancing policy considerations. Some undoubtedly will and can be settled in terms of local law; but others just as surely call for a solution on a more national basis, a solution which cannot be foreclosed or denied by any single pronouncement, however forthright. And first I raise a question as to

THE IMPACT OF FEDERAL SPECIALTIES ON LOCAL LAW

Merely to state the question of controlling force between local and federal law within the latter's definite field is, of course, to answer it. By the Constitution, by settled precedent, and by long-continued practice, the latter is supreme. But that is but the beginning stage of our problem. "Render unto Caesar the things which are Caesar's" does not tell us what things are Caesar's. And while some questions are easily answered, others become most difficult. Perhaps we may well start with the separate problem whether the *Tompkins* rule, and the revised view of the Rules of Decision Act, governs cases only in the federal courts by reason of the diverse citizenship of the parties.

Historically, of course, there is much to be said for that view. The provision for a federal tribunal to hear cases of out-of-state citizens aroused objection and debate, and the rules of decision act was an attempt to meet those objections to federal courts.⁵⁸ And the jurisdiction over federal questions came only many years later.⁵⁹ In all discussions of the *Tompkins* doctrine, the Supreme Court has been careful to limit both its rationale and decision to diversity cases—a limitation almost pointedly stressed in its latest case decided last June.⁶⁰ And one member of the Court has urged in a concurring opinion that the

note 83, but also in some much criticized tort cases. *United Zinc & Chemical Co. v. Britt*, 258 U. S. 268 (1922), 36 HARV. L. REV. 113; *Baltimore & O. R. Co. v. Goodman*, 275 U. S. 66 (1927), (1930) 43 HARV. L. REV. 926; LERNER, *op. cit. supra* note 43, at 201, 205. See also *Peck v. Tribune Co.*, 214 U. S. 185 (1939), where he settled an issue of libel without a single reference to the local law.

58. Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49; Friendly, *The Historic Basis of Diversity Jurisdiction* (1928) 41 HARV. L. REV. 483.

59. Act of Mar. 3, 1875, 18 STAT. 470; *cf.* FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928) 65.

60. *Guaranty Trust Co. v. York*, 326 U. S. 99 (1945), cited *supra* notes 16, 32.

rule be thus limited.⁶¹ On the face of the record, therefore, there is good ground for stating the limitation.

But except as a device for avoiding the rigidity and inflexibility of the doctrine, as now applied, such a limitation has doubtful benefits. Or to state it another way, if this doctrine does not apply in nondiversity cases, we must obviously fashion one of similar character for such cases. Consider the ordinary administration of a bankrupt estate. There, if anywhere, the federal law is supreme under the exclusive federal jurisdiction in bankruptcy. And yet much of such administration depends on interpretation of local law, statutory or common, involving such matters as conditional sales, chattel mortgages, conveyances in fraud of creditors, pledges, and so on. Here in New York we have no tougher cases to decide than those of this nature, though often the amount involved is almost negligible. And often there is very little to help us in the New York decisions, for the natural reason that these questions become important only on the bankruptcy of a debtor, and there is more occasion for decision in the federal than the state courts. But these are matters of local property law which even under the *Tyson* doctrine were relegated to the state precedents. Some of these problems arising in natural course may be actually decided in the state courts. Thus the distinction between summary jurisdiction and adjudication in bankruptcy as opposed to the necessity of a plenary suit in the civil courts is a narrow one, turning on such issues as the possession of the property or even the consent of the parties to bankruptcy jurisdiction.⁶² It can hardly be so that a summary turnover order will depend on one approach, while a plenary civil action by the trustee will turn on another. If, for example, the latter action should be determined by a single ancient state precedent of a lower court (as is now asserted),⁶³ it would seem that like principles should determine the bankruptcy judgment. And that, in fact, is the practice.⁶⁴

But in the interweaving of state and federal law, nice questions of

61. Jackson, J., concurring in *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U. S. 447, 465 (1942). Douglas, J., for the Court said that the question need not be decided, for the matter at issue involved decision of a federal question, 315 U. S. at 456. See Notes (1942) 26 MINN. L. REV. 899; (1942) 16 TEMP. L. Q. 336; (1942) 28 VA. L. REV. 821.

62. *Cline v. Kaplan*, 323 U. S. 97 (1944), (1945) 54 YALE L. J. 461, (1945) 19 J. N. A. REF. BANKER. 75, 107.

63. Compare (1941) 54 HARV. L. REV. 879, criticizing *Lockhart v. Garden City Bank & Trust Co.*, 116 F. (2d) 658 (C. C. A. 2d, 1940).

64. Compare the case, discussed below, where we awaited the decision of the state court. *Wickes Boiler Co. v. Godfrey-Keeler Co.*, 116 F. (2d) 842 (C. C. A. 2d, 1940), *rev'd* 121 F. (2d) 415 (C. C. A. 2d, 1941), *cert. denied* *Godfrey-Keeler Co. v. Wickes Boiler Co.*, 314 U. S. 686 (1941), 50 YALE L. J. 1268. The Supreme Court has even directed the bankruptcy court to seek a state court adjudication. *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940), criticized in (1940) 53 HARV. L. REV. 1394.

balancing interests must necessarily develop. I recall with somewhat melancholy interest a situation where we felt bound by a state rule of interpretation of contractual priorities among creditors in the case of the guaranteed mortgage bonds, so prominent a feature of recent New York real estate history. But we were wrong, for the bankruptcy rule of equality was held to govern;⁶⁵ and the blow was not tempered for us, and, I suspect, for the interested creditors, upon learning first by a case coming by way of the state courts,⁶⁶ and later by a federal bankruptcy case,⁶⁷ that as to most of the bond issues involved, the state law would ultimately prevail. Such inconsistencies, however, as I realize, can be easily overstressed; for they point only to the infinite complexities of our problem and the resulting necessity of unusual due care and foresight lest the judicial foot stumble.⁶⁸

Another aspect of this problem appears when theory suggests diversity, but practical experience presses towards uniformity, in situations such as those of unfair business competition closely connected with infringement of patents, copyrights, or trademarks. Thus in connection with trademark litigation, where the question has already directly arisen, it now seems fairly well settled, notwithstanding some earlier doubts, that federal law does govern trademark infringement, just as it does infringement of a patent or copyright.⁶⁹ But in a particular case unfair trade practices are likely to go beyond mere appropriation of a registered trademark and include such other wrongs as the misuse of a company or firm name or the passing off of goods to the misleading of customers. Should such an integrated course of conduct be of necessity broken up into component parts, some for decision under federal

65. *Prudence Realization Corp. v. Geist*, 316 U. S. 89 (1942), *rev'g* 122 F. (2d) 503 (C. C. A. 2d, 1941) (Frank, J., dissenting).

66. *Prudence Realization Corp. v. Ferris*, 323 U. S. 650 (1945), *aff'g* 292 N. Y. 210, 54 N. E. (2d) 367 (1944).

67. *In re 1934 Realty Corp.*, 150 F. (2d) 477 (C. C. A. 2d, 1945) (per Frank, J.), *cert. denied* *Prudence Realization Corp. v. Hurd Committee*, 66 Sup. Ct. 43 (U. S. 1945).

68. As in other "federal fields" discussed below, the interweaving of bankruptcy and state law presents an infinite variety of questions; consider such problems as whether priorities among creditors under the equitable doctrines of *Pepper v. Litton*, 308 U. S. 295 (1939), may turn also upon state law, 3 COLLIER, BANKRUPTCY (14th Ed. 1941) 1767-8, or whether an adopted plan of reorganization is to be interpreted according to state law, *Shores v. Hendy Realization Co.*, 133 F. (2d) 738 (C. C. A. 9th, 1943); *North American Car Corp. v. Peerless Weighing & Vending Mach. Corp.*, 143 F. (2d) 938 (C. C. A. 2d, 1944); *Reese v. Beacon Hotel Corp.*, 149 F. (2d) 610 (C. C. A. 2d, 1945), including the requirement that the manner of selecting directors and officers stated in the plan shall be "equitable" and "consistent with public policy." Bankruptcy Act, § 216(11), 52 STAT. 895 (1938), 11 U. S. C. § 616(11) (1940). See also *Bakers Share Corp. v. London Terrace, Inc.*, 130 F. (2d) 157 (C. C. A. 2d, 1942); *Brown v. McLanahan*, 58 F. Supp. 345 (D. Md. 1944).

69. *Dwinell-Wright Co. v. National Fruit Product Co.*, 140 F. (2d) 618 (C. C. A. 1st, 1944), citing cases; *Zlinkoff, Erie v. Tompkins: In Relation to the Law of Trade-Marks and Unfair Competition* (1942) 42 COL. L. REV. 955, 974-86.

precedents uniform throughout the nation, some for decision under purely local and varying principles?⁷⁰ Students of the subject have made persuasive arguments for the single approach, and have mourned the loss of the expert touch which many experienced federal judges have developed in this joint field in the past.⁷¹ But there is already strong precedent to the contrary; and one may apprehend that the trend for the immediate future will be the other way.⁷²

Often, however, the dispute borders on the academic. In the past the views of state judges in this field have been largely influenced by important federal decisions which have been often cited. Except for some slight nuances of emphasis, this law may well be much the same, whether expounded by state or federal judges; and some difficulties of

70. Of course, where diverse citizenship of the parties is lacking, there is a troublesome question of jurisdiction involved at the outset of the case; differing from my colleagues, I have felt that usually the federal court should be held to have jurisdiction under the theory of the one cause of action of *Hurn v. Oursler*, 289 U. S. 238 (1933), and *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U. S. 315 (1938). See *Musher Foundation v. Alba Trading Co.*, 127 F. (2d) 9, 11 (C. C. A. 2d, 1942), *cert. denied* 317 U. S. 641 (1942); *Zalkind v. Scheinman*, 139 F. (2d) 895, 905 (C. C. A. 2d, 1943), *cert. denied* 322 U. S. 738 (1944); (1943) 52 YALE L. J. 922; 1 MOORE, FEDERAL PRACTICE (Supp. 1945) 91-3; 3 *id.* 141-52; PRELIMINARY DRAFT, REVISION OF FEDERAL JUDICIAL CODE (1945) § 1360.

71. Chafee, *Unfair Competition* (1940) 53 HARV. L. REV. 1289, 1296-1300; Zlinkoff, *supra* note 69, at 966-969, 986-990; Zlinkoff, *Monopoly versus Competition* (1944) 53 YALE L. J. 514, 542-551.

72. See the scholarly decision of Wyzanski, J., in *National Fruit Product Co. v. Dwinell-Wright Co.*, 47 F. Supp. 499 (D. Mass. 1942), *aff'd on other grounds* *Dwinell-Wright Co. v. National Fruit Product Co.*, 140 F. (2d) 618 (C. C. A. 1st, 1944), cited *supra* note 69; *Mishawaka Rubber & Woolen Mfg. Co. v. Panther-Panco Rubber Co.*, 55 F. Supp. 303, 310 (D. Mass. 1944); *Skinner Mfg. Co. v. Kellogg Sales Co.*, 143 F. (2d) 895, 897 (C. C. A. 8th, 1944), *aff'g* 52 F. Supp. 432 (D. Neb. 1943), *cert. denied* 323 U. S. 766 (1944); *cf.* *Dwinell-Wright Co. v. White House Milk Co.*, 132 F. (2d) 822 (C. C. A. 2d, 1943). But this view has been criticized in Zlinkoff, *Some Reactions to the Opinion of Judge Wyzanski in National Fruit Product Co. v. Dwinell-Wright Company* (1942) 32 TRADE-MARK REP. 131, and in (1943) 11 GEO. WASH. L. REV. 255; and *Philco Corp. v. Phillips Mfg. Co.*, 133 F. (2d) 693 (C. C. A. 7th, 1943), held federal law to govern unfair competition in use of a mark similar to a registered trademark on goods not of "substantially the same descriptive properties" as required under 33 STAT. 728 (1905), 15 U. S. C. § 96 (1940)—a decision upon which Mr. Zlinkoff bases considerable hope for restriction of the *Tomphins* doctrine in this field. Zlinkoff, *supra* note 71, at 544. It is settled, however, that state law governs where jurisdiction rests on diversity alone, *Pecheur Lozenge Co. v. National Candy Co.*, 315 U. S. 666 (1942), *rev'g* 122 F. (2d) 318 (C. C. A. 3d, 1941), and cases cited Zlinkoff, *supra* note 71, at 549, n. 104, though, as pointed out, a number of cases have decided the issue on the basis of general law without mentioning the *Tomphins* case, e.g., *RCA Mfg. Co. v. Whiteman*, 114 F. (2d) 86 (C. C. A. 2d, 1940), *cert. denied* 311 U. S. 712 (1940); *American Fork & Hoe Co. v. Stampit Corp.*, 125 F. (2d) 472 (C. C. A. 6th, 1942); *J. C. Penney Co. v. H. D. Lee Mercantile Co.*, 120 F. (2d) 949 (C. C. A. 8th, 1941); *Cleo Syrup Corp. v. Coca-Cola Co.*, 139 F. (2d) 416 (C. C. A. 8th, 1943), *cert. denied* 321 U. S. 781 (1944); *Brooks Bros. v. Brooks Clothing of California*, 60 F. Supp. 442 (S. D. Cal. 1945), but compare on later motion, 5 F. R. D. 14 (S. D. Cal. 1945). In *Remick Music Corp. v. American Tobacco Co.*, 57 F. Supp. 475 (S. D. N. Y. 1944), the court followed state law against its own views. See (1945) 45 COL. L. REV. 473, 478; N. Y. L. J., 1262, 1278.

decision have been avoided upon note of this fact.⁷³ The real difficulty thus becomes one of seeming avoidance of a primary citation and reliance upon one of lesser persuasive weight. Perhaps then no permanent harm results beyond a legal opinion more formalistic than usual. And the remedy for so much of the difficulty is not hard to find. It is merely that the federal judges be allowed to resume their functions in exercising the judicial process, as I hope to demonstrate later, and not be restricted to the rôle of "ventriloquist's dummy" as to state law, to borrow the apt phrase coined by my colleague Judge Frank.⁷⁴

There is another line of development away from the *Tompkins* doctrine in the so-called "federal fields," in the shape either of strictly new or of recently uncovered bodies of federal law. This may be, in fact, the broadest line of partial return to Story and his colleagues that we shall discover. Mention has already been made of some such fields, as the labor law developed in the Norris-La Guardia Act.⁷⁵ Others of present importance include those of a national law of government commercial paper, applicable to instruments of exchange issued by the United States,⁷⁶ a revaluation of the law of estoppel in the patent and anti-trust cases,⁷⁷ and, quite literally, a flock of diverse matters ranging from telegraphic libel, through federal taxation, to claims against the United States under the Tucker Act.⁷⁸ I have already mentioned the

73. Thus, see *Gum, Inc., v. Gummakers of America*, 136 F. (2d) 957 (C. C. A. 3d, 1943), discussed by Zlinkoff, *supra* note 71, at 550; and note particularly the cases citing only federal precedents in note 72 *supra*.

74. In *Richardson v. Commissioner of Internal Revenue*, 126 F. (2d) 562, 567 (C. C. A. 2d, 1942).

75. 47 STAT. 70 (1932), 29 U. S. C. § 103 (1940), cited *supra* note 53. *Cf.* *Steele v. Louisville & N. R. Co.*, 323 U. S. 192, 204 (1944); *N. L. R. B. v. New Era Die Co.*, 118 F. (2d) 500, 505 (C. C. A. 3d, 1941).

76. *Clearfield Trust Co. v. United States*, 318 U. S. 363, 744 (1943), 43 COL. L. REV. 520. See also *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U. S. 447 (1942), cited *supra* notes 25, 61, and *Deitrick v. Greaney*, 309 U. S. 190 (1940), 40 COL. L. REV. 712, 35 ILL. L. REV. 218, 88 U. OF PA. L. REV. 876, dealing with federal banking laws; and *cf.* *American Surety Co. of New York v. First Nat. Bank*, 141 F. (2d) 411, 416 (C. C. A. 4th, 1944).

77. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173 (1942), (1943) 56 HARV. L. REV. 814, 12 GEO. WASH. L. REV. 94; *Scott Paper Co. v. Marcalus Mfg. Co.*, 66 Sup. Ct. 101 (U. S. 1945); *American Cutting Alloys, Inc. v. General Electric Co.*, 135 F. (2d) 502 (C. C. A. 2d, 1943); *Nachman Spring-Filled Corp. v. Kay Mfg. Co.*, 139 F. (2d) 781 (C. C. A. 2d, 1943).

78. *O'Brien v. Western Union Telegraph Co.*, 113 F. (2d) 539 (C. C. A. 1st, 1940) (libel by telegraph company) (1940) 54 HARV. L. REV. 141; *cf.* *Vaigneur v. Western Union Telegraph Co.*, 34 F. Supp. 92 (E. D. Tenn. 1940), (1941) 41 COL. L. REV. 125; *Richardson v. Comm'r of Int. Rev.*, 126 F. (2d) 562 (C. C. A. 2d, 1942), cited *supra* note 74 (tax action), and *Lusthaus v. Comm'r of Int. Rev.*, 149 F. (2d) 232 (C. C. A. 3d, 1945) (taxation of husband and wife as partners; the dissent urged state law); but see *Tower v. Comm'r of Int. Rev.*, 148 F. (2d) 388 (C. C. A. 6th, 1945), and *Grant v. Comm'r of Int. Rev.*, 150 F. (2d) 915 (C. C. A. 10th, 1945); *Girard Trust Co. v. United States*, 149 F. (2d) 872 (C. C. A. 3d, 1945) (Tucker Act); *cf.* (1941) 54 HARV. L. REV. 1070; *United States v. Forness*, 125 F.

interesting cases arising in connection with the security regulation acts for the protection of the investor. Here the Securities and Exchange Commission is established as the general guardian of the public interest; but intermediate federal courts have held that private rights of action accrued to individuals damaged through violation of the regulatory actions, even without specific definition of such rights in the statutes.⁷⁹ The recent important *York* case arising out of the collapse of the Van Sweringen railroad empire somewhat suggested this point; indeed, a commentator suggested affirmance of the lower court decision refusing to apply state statutes of limitation to a federal remedy in equity on this ground.⁸⁰ Since, however, the acts complained of occurred long before this new legislation, it is not strange that the majority of the Supreme Court did not refer to the matter, but followed its principle of equality of treatment of litigants in the same territorial area to hold the state statutes applicable. The dissenting justices did, however, suggest this view, and obviously left it open for further examination later.⁸¹ There will surely be a further constantly developing body of federal law for the benefit of the "common man," and the federal courts can hardly set themselves once again against the trend.

CHOICE OF STATE LAW IN THE FEDERAL COURTS

When we come to the question of choice of law among that of several states, it is hardly necessary to tell lawyers at all familiar with the problems of the conflict of laws that we are about to open a veritable Pandora's box. We can, of course, proceed from the comparatively simple case of choice between the law of only two states to most complicated problems involving the law of many states. This question was not settled by the *Tompkins* case; indeed, so far as that went, it appeared to apply the law of the situs, Pennsylvania, rather than the law of the forum, New York.⁸² Before that case, as Professor Walter

(2d) 928 (C. C. A. 2d, 1942), *cert. denied* *City of Salamanca v. United States*, 316 U. S. 694 (1942) (Indian law). In general, see Eisenhart, *Federal Decisional Law Independent of State Common Law since Erie R. R. Co. v. Tompkins* (1941) 9 GEO. WASH. L. REV. 465; Sibley, *Delimitations of Erie Railroad Co. vs. Tompkins* (1941) 29 KY. L. J. 172; (1943) 43 COL. L. REV. 520, 521.

79. *Goldstein v. Groesbeck*, 142 F. (2d) 422, 427 (C. C. A. 2d, 1944), *cert. denied* *Groesbeck v. Goldstein*, 65 Sup. Ct. 36 (U. S. 1944); *Baird v. Franklin*, 141 F. (2d) 238, 245 (C. C. A. 2d, 1944), *cert. denied* 65 Sup. Ct. 38 (U. S. 1944).

80. (1944) 44 COL. L. REV. 915. In the Supreme Court the Solicitor General filed a brief on behalf of the Securities and Exchange Commission, as *amicus curiae*. (1945) 13 U. S. L. WEEK 4568.

81. *Guaranty Trust Co. v. York*, 326 U. S. 99 (1945), cited *supra* notes 16, 32. The Supreme Court has granted certiorari, 66 Sup. Ct. 176 (U. S. 1945), in *Holmberg v. Armbrrecht*, 150 F. (2d) 829 (C. C. A. 2d, 1945), where a state statute of limitations was applied to a federal equity right.

82. See note 20 *supra*. There were differing views as to the effect of the *Tompkins* decision on the law of conflicts; see citations to law reviews in COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942) 108.

Wheeler Cook has shown, the Court had always assumed to apply its own version of the law in the conflicts situation, and both Justices Holmes and Brandeis had done so, without ever raising question as to it.⁸³

But after the *Tompkins* decision, it was perhaps to be expected that the law of some one state must be the rule of decision. In the first important case, the question was whether the federal court in Massachusetts in a suit upon a Maine automobile accident should apply the rule of burden of proof of contributory negligence of Maine or that of Massachusetts. Judge Magruder for the First Circuit Court of Appeals, in a carefully reasoned opinion, which, however, appears not to have commanded the support of his colleagues, held that the *Erie* principle required adoption of the law of the forum.⁸⁴ That decision has been explicitly approved and followed in the Supreme Court, notably in cases dealing with the interest to be awarded on a recovery upon a contract, and insurable interest on life insurance policies.⁸⁵ Whatever the theoretical arguments for the other views, it may be taken as now settled that the law of the forum must control in the federal courts in the choice of law among states.

As Professor Cook has shown, however, this still leaves open many an important problem. Indeed, Professor Cook's entire monograph on *The Logical and Legal Bases of the Conflict of Laws* is a warning against making judicial decision too simple and thereby glossing over the difficulties involved in adjudication.⁸⁶ He makes a persuasive argument that, amidst the uncertainties not merely of state decisions, but of the theories upon which conflicts questions are to be resolved, indeed, the sharp conflict among differing conflicts-theories, the federal courts would be bringing some order to the law by attempting to determine at least the more appropriate among the various state-supported rules. The subject is fascinating, and I wish I need not hurry over it; but the insurance case will have to serve as illustration of the kind of problems.⁸⁷ There it was held that, where the personal representatives sued in a Texas federal court on a New York policy

83. COOK, *op. cit. supra* note 82, at 113-122. This was a natural approach to the subject through the Court's initial conception of it as private "international law." Ogden v. Saunders, 12 Wheat. 213 (U. S. 1827), cited *supra* note 38.

84. *Sampson v. Channell*, 110 F. (2d) 754 (C. C. A. 1st, 1940) (Wilson, C. J., concurring in the result; Peters, D. J., dissenting), *cert. denied* *Channell v. Sampson*, 310 U. S. 650 (1940). This case was extensively discussed in the law reviews, and has been cited approvingly by such cases—in addition to those noted *infra* note 85—as *Palmer v. Hoffman*, 318 U. S. 109 (1943), and *Guaranty Trust Co. v. York*, 326 U. S. 99 (1945), cited *supra* notes 16, 32, 49, 60, 81.

85. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941); *Griffin v. McCoach*, 313 U. S. 498 (1941).

86. COOK, *op. cit. supra* note 82, at 3-5, 41-47, 154-156, 183-186, 211-214.

87. *Griffin v. McCoach*, 313 U. S. 498 (1941), cited *supra* note 85.

and the company by interpleader brought in assignees of the policy who had paid the premiums, the contract was controlled by the peculiar and unique Texas policy,⁸⁸ that an assignee or beneficiary without an insurable interest could not collect upon it.⁸⁹ That is, had the assignees started suit first in any other federal court (as in New York, where the policy and assignments were delivered, or in New Jersey, where the company's own office was), they must have recovered; but the chance of the location of suit leads to a windfall to the estate. This seems to be the very kind of shopping for a favorable tribunal which the *Tompkins* rule was designed to discourage. Professor Cook, in his critique of the case, suggests some interesting further problems, such as whether the assignees, having paid premiums, can properly claim to have lost property without due process of law, or, indeed, whether the assignees are now barred from a more favorable tribunal, since the decision was based on a Texas public policy closing its courts to litigants so circumstanced.⁹⁰

The question becomes more involved when the law of several states is concerned. I will content myself with citing two cases by way of example and contrast. The first was one for violation of a claimed right of privacy and for libel in several states by an article in a magazine published in New York and widely distributed.⁹¹ The second was an action for a declaratory judgment and injunction concerning the use of a name and disposition of property of church organizations active in many states.⁹² The results, so far as the cases in what are termed—doubtless with not a little reason—the “inferior” federal courts are concerned, are that the first is governed by the differing provisions of state law, while the second went somewhat tentatively (and with a suggestion of exemption for activities in South Carolina, the state of the forum) on the law of unfair competition “which we think is recognized as the law by practically all courts in this country and England.” And cited therefor were three federal cases.⁹³ Thus,

88. Obtaining only in Texas and Quebec. *New England Mut. Life Ins. Co. v. Spance*, 104 F. (2d) 665, 668 (C. C. A. 2d, 1939).

89. This was the obvious effect of the decision in the Supreme Court; it was made clear when the court below denied all recovery, *Griffin v. McCoach*, 123 F. (2d) 550 (C. C. A. 5th, 1941), and the Supreme Court refused review, 316 U. S. 683, 713 (1942). On further proceedings in the *Klaxon* case the court found the law of the forum, Delaware, not different from that of the situs, New York. *Stentor Electric Mfg. Co., Inc. v. Klaxon Co.*, 125 F. (2d) 820 (C. C. A. 3d, 1942), *cert. denied* 316 U. S. 685 (1942).

90. COOK, *op. cit.* *supra* note 82, at 130-135. See also Morgan, *Choice of Law Governing Proof* (1944) 58 HARV. L. REV. 153, 157, 158; Zlinkoff, *supra* note 69 at 962-966.

91. *Sidis v. F-R Pub. Corp.*, 113 F. (2d) 806 (C. C. A. 2d, 1940), *cert. denied* 311 U. S. 711 (1940).

92. *Purcell v. Summers*, 145 F. (2d) 979, 989 (C. C. A. 4th, 1944).

93. One of these was *RCA Mfg. Co. v. Whiteman*, 114 F. (2d) 86 (C. C. A. 2d, 1940), *cert. denied* 311 U. S. 712 (1940), cited *supra* note 72, which relied on general law.

there was applied—to an end practically desirable, however difficult the rationale—the technique I referred to earlier as followed in the case of unfair competition, which might be developed for general use, if a broader basis of decision of existing state law is restored to federal judges.⁹⁴

SUBSTANCE VS. PROCEDURE

The dichotomy of substance and procedure has had more discussion than any other single feature of the *Tompkins* doctrine. This was natural in view of the general importance of the subject; but it was made more dramatic by reason of the fact that four months earlier the Supreme Court had adopted rules of civil procedure, effective only several months later, designed to make uniform the procedure in all the federal courts throughout the country. Thus at the time the Court was substituting uniformity for state conformity in procedure, it was requiring state conformity in substantive matters. Since the matter has been so often discussed,⁹⁵ I shall limit myself to stating the conclusions already judicially reached. The most definite to date is that the burden of proof of contributory negligence is a matter of substance which must follow state law, while the burden of pleading that issue may follow the uniform federal rule as announced.⁹⁶ But also, along with the holding that state statutes of limitation must govern even equity actions, is the definite admonition that not too much stress should be put upon these labels "as though they defined a great divide cutting across the whole domain of law," that, indeed, "such abstractions" should be put aside for "the nub of the policy," that the accident of citizenship "should not lead to a substantially different result."⁹⁷ We may take it, therefore, as assured that the Court is attempting to view the rules sensibly and practically in the light of this policy and that it will not overthrow most of the rules or even perhaps an unusual number, as has been suggested by some commentators⁹⁸ to press for an unreal enforcement of its ideal.⁹⁹ This is, I think, as might be expected under the present climate of opinion; and though

94. Developed *supra* p. 282, also *infra* p. 294.

95. Various articles and notes are collected in 1 FED. RULES SERV. 860-867, and see bibliography in current issues. Compare my articles: *Procedural Aspects of the New State Independence* (1940) 8 GEO. WASH. L. REV. 1230; and *The Tompkins Case and the Federal Rules* (1941) 24 J. AM. JUD. SOC. 158, 1 F. R. D. 417.

96. *Palmer v. Hoffman*, 318 U. S. 109 (1943), and *Sampson v. Channell*, 110 F. (2d) 754 (C. C. A. 1st, 1940), both cited *supra* note 84.

97. *Guaranty Trust Co. v. York*, 326 U. S. 99, 108, 109 (1945). For the "accident of citizenship," see L. Hand, J., in *Weiss v. Routh*, 149 F. (2d) 193, 195 (C. C. A. 2d, 1945).

98. Compare Tunks, *supra* note 27, at 279, 283; (1939) 27 GEO. L. J. 375, 376; *cf.* (1941) 41 COL. L. REV. 1403, 1416.

99. Compare Clark, *The Tompkins Case and the Federal Rules* (1941) 24 J. AM. JUD. SOC. 158, 1 F. R. D. 417, arguing for prima facie validity to the rules; 1 MOORE, FEDERAL PRACTICE (Supp. 1945) 24-26.

there will remain a certain amount of uncertainty as to particular rules until the Supreme Court has spoken as to each, there will certainly be no more uncertainty in this branch of the subject than in others, perhaps not as much.¹⁰⁰ Here, too, the variety of problems is fascinating. For example, I see a case coming over the horizon in my state where the Court has nullified a legislative policy through vigorous application of the procedural doctrine of "invited error." After a serious case in 1930 which failed because the victim was killed and plaintiff had no other eyewitness, the Connecticut legislature gave such a plaintiff the benefit of a presumption of due care, with the burden of proof of contributory negligence upon the defendant; but the local cases say that a plaintiff who pleads due care (as in the old forms) forfeits all benefit of the statute. What should prevail in these procedural matters (as the state courts hold them)—the legislative policy or the important judicial gloss thereon?¹⁰¹

Now let us turn to the impact of state law on federal jury trials. Here we come up against a provision of the Constitution itself—the Seventh Amendment, preserving the right of trial by jury in suits at common law where the value in controversy is more than twenty dollars and containing the added provision that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." But if burden of proof and presumptions are to be governed by state law in diversity cases,¹⁰² then it rather logically follows that rules as to the direction of a verdict, taking a case from the jury, and even the so carefully cherished right of "comment" on the evidence may be either lost or greatly limited

100. See discussion of FED. R. CIV. P. 23(b), *supra* note 54. FED. R. CIV. P. 4(f), dealing with the territorial limits of service, is now before the Court. *Mississippi Pub. Corp. v. Murphree*, 66 Sup. Ct. 44 (U. S. 1945), *granting cert.* in *Murphree v. Mississippi Pub. Corp.*, 149 F. (2d) 138 (C. C. A. 5th, 1945). [The *Murphree* case was affirmed, and Rule 4(f) upheld, by the unanimous court, *per* STONE, C. J., Jan. 2, 1946.]

101. *Balchunas v. Palmer*, C. C. A. 2d, Nov. 5, 1945, states the problem in construing CONN. GEN. STAT. (Supp. 1939) § 1399e (as amended in 1939), passed in 1931 as a result of *Kotler v. Lalley*, 112 Conn. 86, 151 Atl. 433 (1930) (Wheeler, C. J., dissenting); and *cf.* *Colligan v. Reilly*, 129 Conn. 26, 26 A. (2d) 231 (1942); *Hatch v. Merigold*, 119 Conn. 339, 176 Atl. 266 (1935), with discussion in (1935) 9 CONN. BAR J. 282, 290 (1942) 16 *id.* 83, 92 (1940) 8 GEO. WASH. L. REV. 1230. Though the statute is held to be procedural, *Toletti v. Bidizcki*, 118 Conn. 531, 537, 173 Atl. 223 (1934), the *York* case, 65 Sup. Ct. 1464 (U. S. 1945), cited *supra* note 97, warns that such holding is immaterial on the present issue.

102. See cases *supra* note 96. In *New York Life Ins. Co. v. Gamer*, 303 U. S. 161 (1938), just before the *Tompkins* decision, the Court, Black J., dissenting, reversed for the application of federal law to burden of proof and presumptions; the decision provoked criticism in the law reviews, as not giving due weight to a Montana statute. But on new trial the statute was followed, with a verdict for plaintiff, *aff'd* 106 F. (2d) 375 (C. C. A. 9th, 1939) (Wilbur, J., dissenting), *cert. denied* 308 U. S. 621 (1939), which appears to represent the present law. (1941) 9 U. OF CHI. L. REV. 113, 123; (1940) 25 IOWA L. REV. 375; (1940) 17 N. Y. U. L. Q. REV. 466.

by such law. Though there are cases to the contrary,¹⁰³ Professor Morgan, in a recent acute article already cited with favor by the Supreme Court, has suggested with considerable force the application of state rules as to the discovery of a "jury question," that is, as to direction of a verdict or non-suit.¹⁰⁴ His final suggestion is the practical one that both the notion and the expression that matters of procedure are governed by the law of the forum be abandoned for a rule which should hold the law of the locus applicable "to all such matters of procedure as are likely to have a material influence upon the outcome of litigation except where (a) its application will violate the public policy of the forum or (b) weighty practical considerations demand the application of the law of the forum."¹⁰⁵ I suspect he is probably correct in prophecy; but I wonder how his thesis would apply to the problem of grant of jury trial itself. For there has already developed some division of view as to whether the right to claim trial by jury is governed by state law or by federal principles in the diversity cases.¹⁰⁶

HOW IS STATE LAW TO BE ASCERTAINED?

I come now to the last of my type situations, that where the state law is confused or nonexistent. And this, I say without hesitation, is the most troublesome, the most unsatisfying in its consequence, of all the rules based upon the *Tompkins* case. The other situations require nice choices of the kind judges must make; we may regret for the sake of the litigants that the law is not more settled, but we can face decision as an intellectual issue of importance if we may exercise our judicial faculties. But the current view, rippling down through the lower federal courts from Supreme Court precedents which perhaps were not intended to go quite so far, is that we must act as a hollow sounding board, wooden indeed, for any state judge who cares to ex-

103. *Gorham v. Mutual Ben. Health & Accident Ass'n of Omaha*, 114 F. (2d) 97, 99 (C. C. A. 4th, 1940), *cert. denied* 312 U. S. 688 (1941); *McSweeney v. Prudential Ins. Co. of America*, 128 F. (2d) 660 (C. C. A. 4th, 1942), *cert. denied* 317 U. S. 658 (1942); *Zauderer v. Continental Cas. Co.*, 140 F. (2d) 211 (C. C. A. 2d, 1944); *Barr v. Equitable Life Assur. Soc. of United States*, 149 F. (2d) 634 (C. C. A. 9th, 1945); *cf. Grobelny v. W. T. Cowan, Inc.*, C. C. A. 2d, Nov. 27, 1945. This, of course, was the former view. *Herron v. Southern Pac. Co.*, 283 U. S. 91 (1931). But *cf. Goodall Co. v. Sartin*, 141 F. (2d) 427 (C. C. A. 6th, 1944), *cert. denied* 65 Sup. Ct. 34 (U. S. 1944); and cases *infra* note 104.

104. Morgan, *Choice of Law Governing Proof* (1944) 58 HARV. L. REV. 153, 175, cited in *Guaranty Trust Co. v. York*, 326 U. S. 99, 110 (1945). Professor Morgan cites for this: *Stoner v. New York Life Ins. Co.*, 311 U. S. 464 (1940); *Laxton v. Hatzel & Buehler, Inc.*, 142 F. (2d) 913 (C. C. A. 6th, 1944); *Waldron v. Aetna Casualty & Surety Co.*, 141 F. (2d) 230 (C. C. A. 3d, 1944). See also 3 MOORE, FEDERAL PRACTICE (Supp. 1945) 3-23.

105. (1944) 58 HARV. L. REV., 195.

106. See extensive discussion and citation of cases by Goodrich, J., in *Ettelson v. Metropolitan Life Ins. Co.*, 137 F. (2d) 62 (C. C. A. 3d, 1943), *cert. denied* *Metropolitan Life Ins. Co. v. Ettelson*, 320 U. S. 777 (1943) (supporting the federal rule); also 3 MOORE, FEDERAL PRACTICE (Supp. 1945) 14-21; Note (1940) 88 U. of PA. L. REV. 1015.

press himself. When the *Tompkins* case was first decided, my colleague Professor Corbin wrote an article to the effect that, except for the specific point decided, the *Tompkins* decision should not be and probably would not be far-reaching, and that in their search for state law the federal judges could do little else than they were now doing in their search for law. They would still read and evaluate the cases and statutes according to their best learning, rather than by some set formula. This point of view he has again urged more lately, in criticism of some decisions stating a more arbitrary principle. As he points out, in cases where the parties are citizens of different states Congress has made the federal courts a part of the state system of tribunals, coequal and co-ordinate therewith; and anything short of full judicial action on the part of the federal judges is a deprivation of the rights of the litigants to due process and a fair trial.¹⁰⁷ That, I believe, is the best advice and exposition of the doctrine possible. And our attempted departures from that conduct are what have made the *Tompkins* result seem at times bizarre and strange.

Rationally considered, what essential difference is there in our task in discovering the will of Congress in newly enacted statutes or the will of the Supreme Court as to changing judicial principles and in our task in discovering state law, either statutory or common? We deal with the same types of material or basic data; in each case our duty is to ascertain the jural views of another body, not to glorify our own; in each we have to fill in the gaps where a definite showing of intent is lacking in order to make a consistent and operable whole; and in each case we are subject to being set right if we err, first by the Supreme Court, and second by the law reviews and the "court of public opinion." Why should we abdicate our judicial functions and even prostitute our intellectual capacities to discover not state law, but the particular views a state judge may have uttered many years ago under quite different circumstances?¹⁰⁸ If we do this we are depriving litigants of our best judicial and scholarly effort; in fact we are offering a premium for litigants to jockey to get away from us and before judges who need not keep their capabilities atrophied. Of course we are doing no such thing in the vast majority of cases. We are deciding what state law is in the traditional way of judges in finding the law.¹⁰⁹ But every so often, under the stimulus of the *Tompkins*

107. See the articles by Professor Corbin cited *supra* note 14, also other articles there cited. The idea of the federal court as being for the time being a state tribunal is expressed in *Guaranty Trust Co. v. York*, 326 U. S. 99, 111-2 (1945).

108. See note 63 *supra*. As pointed out by Broh-Kahn, *Uniformity Run Riot—Extensions of the Erie Case* (1943) 31 Ky. L. J. 99, this may mean accepting an authority which the state court will not, as in Ohio, or, it might be added, New York. Conversely the state courts hold themselves bound only by decisions of the Supreme Court. *People ex rel. Ray v. Martin*, 294 N. Y. 61, 73, 60 N. E. (2d) 541, 547 (1945).

109. As, indeed, was actually done in the federal courts before the *Tompkins* decision,

goad, we suddenly turn to a rigid wooden decision on the theory that it is required of us by law.

To cite examples may be dangerously to invite invidious comparisons. And yet I believe the matter of such importance as to require the risk. The very case wherein the Supreme Court reinforced the view that lower state court decisions must be accepted as state law in the absence of higher precedents,¹¹⁰ in its ultimate outcome certainly suggests the problem. There it appeared that New Jersey by statute had accepted the New York juristic novelty or oddity of the Totten or "tentative trust," a trust (in bank deposits) which could remain wholly tentative so far as the beneficiary was concerned until the settlor's death; but two vice-chancellors had more respect for the law than to believe it could be made imperfect by a mere legislature, and so they had construed the statute away by decision. With this background the Third Circuit Court of Appeals, speaking through Judge Biddle, thought and held that the statute still stood, since the highest court of the state had not spoken—and was promptly reversed by the Supreme Court for failing to follow state law. Thereafter another vice-chancellor in New Jersey, called upon to interpret the statute, did so in the light of its obvious intent, and cited Judge Biddle's opinion—reversed "on another point," as he said, not without irony—to support his departure from the prior decisions.¹¹¹ And his opinion seems to be accepted as the New Jersey law not only in New Jersey, but also in New York.¹¹²

There are other cases where, I suggest, formalism, rather than the true essence of interpretation, is now given scope; and this trend now goes so far as to reach the construction of state statutes and other written evidences of the law. Quite naturally I recall best those cases where, over my protest, my colleagues felt themselves bound by what seemed to me an overstrict view of the local law or of only an interlocutory pleading ruling not intended as a final adjudication.¹¹³ As

for the great majority of cases presenting the problems were decided by state law. See 22 FED. DIG. § 359 *et seq.*; Corbin, *The Common Law of the United States* (1938) 47 YALE L. J. 1351.

110. *Fidelity Union Trust Co. v. Field*, 311 U. S. 169 (1940), *rev'g* *Field v. Fidelity Union Trust Co.*, 108 F. (2d) 521 (C. C. A. 3d, 1939).

111. *Hickey v. Kahl*, 129 N. J. Eq. 233, 19 A. (2d) 33 (1941). Such trusts have been supported. *Gulliver and Tilson, Classification of Gratuitous Transfers* (1941) 51 YALE L. J. 1, 38; see SCOTT ON TRUSTS (1939) §§ 58-58.6; *id.* (1944 Supp.) 43.

112. It was cited approvingly in *Lester v. Guenther*, 132 N. J. Eq. 496, 28 A. (2d) 777 (1942), and *Franklin Washington Trust Co. v. Beltram*, 133 N. J. Eq. 11, 29 A. (2d) 854 (1943), as well as in *In re Weinstein's Estate*, 176 Misc. 592, 28 N. Y. S. (2d) 137 (Surr. Ct., 1941), which also cites Judge Biddle's opinion.

113. *Smith v. Town of Orangetown*, 150 F. (2d) 782 (C. C. A. 2d, 1945), *cert. denied* (1945) 14 U. S. LAW WEEK 3180; *Droste v. Harry Atlas Sons*, 145 F. (2d) 899 (C. C. A. 2d, 1944), 147 F. (2d) 675 (C. C. A. 2d, 1945). That lower state courts do not feel themselves thus bound, see cases cited 147 F. (2d) at 677, and *High v. Pritzker* (Sup. Ct., N. Y. 1945),

to these I have to face the disagreeable possibility that I might be wrong; but even so, I think all of us agree in regretting the compulsion which seems to force us to such a course. These, and other instances, where the federal court feels it cannot really re-examine state law beyond the wooden limits set by a single precedent, lead, I submit, in reality to a falsification of the state law by erecting a single instance into a general principle to the point where, in all likelihood, the state court eventually would refuse to go.

Then there is the case where there are literally no state precedents to guide—a situation which we often find in trying to determine the incidence of New York law affecting creditors in the settlement of bankrupt estates. As I have suggested, such a situation is not strange, since the testing of debtor-creditor relations is more usual for the bankruptcy than the ordinary state court. In one such case involving the existence of a trust or lien on assets of an estate we were informed that a test case was actually coming before the Court of Appeals, and consented to delay a rehearing of our decision already rendered until the state court had settled the law. So for a court term we awaited the decision of the august state tribunal, which was duly informed, as we were told, that we were waiting. And when that ruling eventually came, I cannot believe that there was not a little malice in it; for the case was dismissed on a procedural point, the court saying that a definitive ruling must await proper presentation of the issue. But at least that freed us from the bondage of the ruling below, and we decided the case as we thought judges should when acting judicially.¹¹⁴ As a distinguished New York lawyer put it, "You had to dangle your own parsnip before your nose."

This experience casts some light on a tendency occasionally shown, though perhaps more often repudiated, of ordering a federal ruling deferred until the state courts have spoken.¹¹⁵ Such directive has even taken the form of a mandate that decision should be held until an action for a declaratory ruling has been undertaken and concluded in the state court.¹¹⁶ With deference I suggest that this is neither a desirable nor a practical solution. When the parties have submitted

114 N. Y. L. J. 1021. See also *Leithauser v. Hartford Fire Ins. Co.*, 149 F. (2d) 152 (C. C. A. 6th, 1945).

114. *Wickes Boiler Co. v. Godfrey-Keeler Co.*, 116 F. (2d) 842 (C. C. A. 2d, 1940), *rev'd* 121 F. (2d) 415 (C. C. A. 2d, 1941), cited *supra* note 64. See also *Cooper v. American Airlines*, 149 F. (2d) 355 (C. C. A. 2d, 1945).

115. *Meredith v. City of Winter Haven*, 320 U. S. 228 (1943), stated the duty of the federal court to decide questions of state law in the diversity cases. Cases where state adjudications have been sought or required include *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940), cited *supra* note 64, and *Burford v. Sun Oil Co.*, 319 U. S. 315 (1943). See critical comments in (1943) 56 HARV. L. REV. 1162; (1944) 53 YALE L. J. 783; [1944] WIS. L. REV. 163.

116. *Spector Motor Service, Inc. v. McLaughlin*, 323 U. S. 101 (1944).

their rights to a tribunal of competent jurisdiction and have carried the case on appeal, it is somewhat cold comfort to be told that they must undertake three to five years' more litigation in the hope of then getting a more nearly perfect ruling. That such a course of justice delayed will operate to allay friction between state and federal agencies I submit is hardly a realistic view of our political system; there are too many points of dispute to make a single case loom so large in the over-all picture. Justice delayed is justice denied; on close issues with arguable positions on either side a reasoned opinion now is more to be desired by the litigants than a possibly better one in the remote future. And the chances of jockeying for place, the heart of the *Tompkins* doctrine, are measurably increased. I understand there are already cases where a losing litigant starts a state action before final termination of his federal action for the very purpose of repairing his defeat and where the accidental possibility of double litigation operates to give a despairing attorney a chance to fend off the impending doom. The very uncertainty in the present federal law on this procedure makes for further chance-taking or chance-making in litigation.

But there is a still further practical objection which has apparently not been explored fully. If the rule of thus deferring decision is to be applied uniformly, it must be applied in a very much greater number of cases, so much so that certain forms of federal administration, notably bankruptcy, must literally break down.¹¹⁷ I doubt if the number of cases in bankruptcy calling for state adjudication has been considered. A survey of some recent volumes of the *Federal Reporter* shows that New York statutes are regularly involved in 15 to 20 per cent of our cases; if we were to exclude criminal appeals and admiralty and tax cases, or if we were to confine our count to bankruptcy cases alone, it would thus run very high. And should we force a descent of lawyers on state courts for declaratory rulings, I imagine we can already see a wicked gleam in the eyes of our state colleagues as they contemplate measures to avoid the flood.

On this, therefore, the presently most restrictive feature of the *Tompkins* doctrine, I cannot believe the solution is difficult or beyond the scope of existing decisions of the high court properly applied. Only recently the Supreme Court said that in the absence of guidance from state tribunals it would leave undisturbed "the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan."¹¹⁸ That, I submit, points to a release of federal judges back to judging. Other cases, too, show the trend; witness such cases as those

117. While this seems so far to have been almost exclusively a device for the Supreme Court, yet it must be resorted to by intermediate and trial courts if that is the system directed by the highest court.

118. *MacGregor v. State Mutual Life Assurance Co.*, 315 U. S. 280, 281 (1942).

where the state decision is based upon misconceived or now outmoded federal law,¹¹⁹ or where a common-law concept is taken over into federal law, as negligence under the Federal Employers' Liability Act.¹²⁰ Hence my plea is for freedom for the federal judicial process to be judicial.

THE JUDICIAL PROCESS AND NATIONAL LAW

In a memorial lecture to Justice Cardozo, it is fitting that at length I should return to the fascinating subject of the operation of the judicial process. Just as it has been usual to consider the judicial qualities of Story in the past, I think it is proper to indulge in a like word or two about his great modern compeers. Lest this would seem indiscreet, I add at once that their fame is too secure for any words of those of us who come after to dim it in the slightest; and moreover, discussion of such historic figures is now the best way in which we can do them honor. In particular, Justice Brandeis is one of my own judicial idols, as, indeed, he has been generally of those brought up in the atmosphere of the law schools.¹²¹ His great qualities were those of the advocate in the highest and best sense; they were shown in those powerful and documented dissents, which eventually became the law, concerned with the judicial attitude towards welfare legislation. It is possible that a long period of minority decisions may have made him not fully cognizant of his own power, so that he failed to realize that an ancient doctrine, already tending towards decay and death, did not need the sledge-hammer blows he employed for its destruction. Rumor has it that the *Tompkins* case was originally intended for Cardozo and would have gone to him except for his illness. Perhaps this has no more basis than the fitness of having the justice who already had several times found means of employing state law¹²² now consolidate his gains, so to speak, by a yet more specific holding. At any rate, along with Justice Jackson in his last year's memorial lecture,¹²³ we

119. *Breisch v. Central R. R. of New Jersey*, 312 U. S. 484 (1941); *State Tax Commission of Utah v. Aldrich*, 316 U. S. 174 (1942). See discussion of recent cases in 1 MOORE, *FEDERAL PRACTICE* (Supp. 1945) 51-53. Elsewhere the Court has referred to the importance of the expression of views by lower federal judges "who are familiar with the intricacies and trends of local law and practice." *Huddleston v. Dwyer*, 322 U. S. 232, 237 (1944); see also *City of Texarkana v. Arkansas Louisiana Gas Co.*, 306 U. S. 188, 198 (1939).

120. *Willis v. Pennsylvania R. Co.*, 122 F. (2d) 248 (C. C. A. 2d, 1941), *cert. denied* 314 U. S. 684 (1941); *Jacobs v. Reading Co.*, 130 F. (2d) 612 (C. C. A. 3d, 1942); 3 MOORE, *FEDERAL PRACTICE* (Supp. 1945) 23.

121. Thus see the law review essays on his seventy-fifth birthday, reprinted in the volume *MR. JUSTICE BRANDEIS*, edited by Prof. Felix Frankfurter and published by Yale U. Press, 1932; also (1931) 41 *YALE L. J.* 1 *et seq.*; (1941) 51 *id.* 85.

122. In the cases cited *supra* note 40.

123. As Justice Jackson said, referring to the *Tompkins* case: "Mr. Justice Cardozo was ill and did not participate in this decision. I have no reason to doubt that he was sympathetic with the desire to overcome the evils of the *Swift v. Tyson* doctrine. The

can speculate how the gentler touch of Cardozo might have left this doctrine, and venture the suggestion that perhaps at times the judicial process may prove too powerful an engine for the material upon which it has to work.

And my final thought is as to the future of national law. For after all, we are one country and a united country; and our law must and will develop to fit our national needs. True, we are a union of states; and it is proper and fitting that we give scope to state law upon matters of local interest and value which do not conflict with national needs or ideals. But when such conflict occurs, no judicial generality or abstraction will, or should, reject the national demand, whether it be for laws protecting the investor, setting fair standards for employment, adjusting labor relations, or what not. And this particular segment of the entire field should not set a different trend; it should be analyzed with these broader concepts as a definite part of the total picture.

When I chose my topic and began this paper, we were still at war with both our great enemies. Since then much has occurred of terrific impact on the history of the world and the future of civilization. I do not wish to link my poor efforts here to the great menace of the atomic bomb, though I might have some strong precedents for so doing.¹²⁴ But I do think that terrible weapon has brought a sense of the nearness of all parts of the world to all other parts, and a conviction of the great need of unity among mankind. Perhaps there is not much we as practicing lawyers and judges can do to satisfy that need other than to hope for its fulfillment and support our political leaders in the steps they take towards it. But at least in our business of the law we can remember that our forefathers planned "a more perfect union," not a proving ground for the conflicts of laws, and that that union after many a travail has achieved a power and a unity, and in consequence a purpose and force, unequalled in history. And we should ask ourselves whether its jurisprudence should lag behind.

opinion, however, seems to assume that the process of judging state law by a federal court can be so mechanical that without the use of judgment of its own it can pick out and apply state precedents which determine the law of the state. If I read Judge Cardozo aright, he had no thought that the process of finding decisional law could be so simplified. See, for example, CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 64 *et seq.*" JACKSON, *FULL FAITH AND CREDIT* (1945) 1, n. 2.

124. See "The Three Modern Wonders—Radar, Atomic Force, and Words & Phrases," depicted on the back cover of the West Publishing Co.'s Reporter pamphlets for the first week of Nov. 1945.