

Michigan Law Review

Volume 82 | Issue 4

1984

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Recommended Citation

Gene R. Shreve, *From Swift to Erie: An Historical Perspective*, 82 MICH. L. REV. 869 (1984).
Available at: <https://repository.law.umich.edu/mlr/vol82/iss4/27>

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FROM *SWIFT* to *ERIE*: AN HISTORICAL PERSPECTIVE

Gene R. Shreve*

HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM. By Tony Freyer. New York and London: New York University Press. 1981. Pp. xv, 190. \$22.50.

The content of Professor Freyer's book is both familiar and new. The cases have been the subjects of extensive commentary. *Swift v. Tyson*¹ precipitated a massive amount of literature.² *Erie R.R. v. Tompkins*,³ the case that overruled *Swift*, was once "the 'Pole Star' of contemporary legal scholarship" and remains a "star of the first magnitude in the legal universe."⁴ Freyer supplements the literature by concentrating in detail on the historical context surrounding the two cases and related events during the nearly one hundred years that separated them. He makes some interesting suggestions about where these facts might lead, but the book is, overall, refreshingly unorthodox. And, while Freyer is not the first to treat the subject from an historical perspective,⁵ enough of his work is both new and interesting⁶ to justify the reader's time.

The Supreme Court held in *Swift v. Tyson*, a federal diversity case, that it was not required by the Rules of Decision Act⁷ to follow

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1. 41 U.S. (16 Pet.) 1 (1842).

2. See, e.g., the authorities reviewed by Freyer at pp. 110-20.

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

4. Westen, *After "Life for Erie" — A Reply*, 78 MICH. L. REV. 971, 971 (1980) (quoting B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 272 n.4 (1977)).

5. See the discussion of M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977) and R. BRIDWELL & R. WHITTEN, THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM (1977), at notes 23-28 *infra*.

6. In chilling *obiter dictum*, Judge Kaufman once observed that a party before him was "very much in the position of the proverbial disappointed author: much of what he wrote was interesting, and much original; but what was interesting was not original, and what was original was not interesting." *Ionian Shipping v. British Law Ins. Co.*, 426 F.2d 186, 190 (2d Cir. 1970). Professor Freyer has clearly escaped this fate.

7. The statute was enacted as § 34 of the Judiciary Act of 1789. At the time of *Swift* it provided:

That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. 1 Stat. 92 (1789). In slightly amended form, the statute is now found at 28 U.S.C. § 1652 (1976).

New York state judicial decisions concerning the law of negotiable instruments. The common law of the New York state courts may not have been clear on the point before the Court,⁸ but that was not the reason for the decision. Writing for the Court, Justice Story stated that, at least with regard to "contracts and other instruments of a commercial nature," federal diversity courts were free to follow their own best understanding of "the general principles and doctrines of commercial jurisprudence."⁹ In such cases, Justice Story said, state judicial decisions to the contrary were not part of the "laws of the several states" as that term was used in the Rules of Decision Act. Hence, the Act's mandate that state laws be followed "as rules of decision" did not apply.¹⁰

Freyer's book is about the birth, growth, and demise of the *Swift* doctrine. In it he examines successive attitudes about the proper relationship between the Rules of Decision Act — perplexing in and of itself¹¹ — and the law and policy of diversity jurisdiction.¹² Justice Brandeis would eventually ask in *Erie* whether a narrow reading that excludes state judicial decisions from "laws of the several states" in the Rules of Decision Act would not put federal judges in the untoward, if not unconstitutional,¹³ position of displacing state substantive law with no greater claim to authority than that their diver-

8. Justice Story indicates that it was not, *Swift v. Tyson*, 41 U.S. at 17-18, and Freyer agrees. P. 12. *But see* G. GILMORE, *THE AGES OF AMERICAN LAW* 32 (1977) (arguing that the Court chose "to ignore an obvious solution to a simple case . . .").

9. 41 U.S. at 19.

10. 41 U.S. at 18-19.

11. For an excellent survey of developments under the Rules of Decision Act from *Swift* to the present, see C. WRIGHT, *THE LAW OF FEDERAL COURTS* 347-87 (4th ed. 1983). "No issue in the whole field of federal jurisprudence has been more difficult than determining the meaning of this statute." *Id.* at 347.

12. Rules of Decision Act problems are conceivable when federal courts are exercising other types of subject matter jurisdiction, *see* Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1087 (1964), but it has always been in diversity cases that hard questions concerning the applicability of state law arise, and the difficulty of these questions is compounded by fundamental uncertainty concerning the purposes of diversity jurisdiction. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 18-19 (2d ed. 1973); Kurland, *Mr. Justice Frankfurter, the Supreme Court and The Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 195-96 (1957).

13. Writing of the *Swift* doctrine, Justice Brandeis stated:

If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so. 304 U.S. at 77-78. In failing to make the shape of the constitutional question clear in *Erie* or since, the Court created a congenial climate for spirited theorizing and debate. *See, e.g.*, Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Friendly, *In Praise of Erie — and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Mishkin, *Some Further Last Words on Erie — The Thread*, 87 HARV. L. REV. 1682 (1974); Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084 (1964); Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine*, 85 YALE L.J. 678 (1976).

sity jurisdiction had been invoked. However, as Freyer's book makes clear, the issue was framed quite differently at the time of *Swift*.

Freyer's thesis is that "the central question in *Swift v. Tyson* involved commercial law rather than federal-state relations" (p. 36). He notes that the only disagreement among the justices in *Swift* is evidenced in the concurring opinion of Justice Catron, who disagreed with a point in Story's negotiable instrument analysis (p. 17). Freyer points out that this degree of harmony cannot be explained by the suggestion that members of the Supreme Court were unfamiliar with the issue of federal versus state power at the time of *Swift*. On the contrary, he describes prior agitation over the propriety of federal common law crimes, where assertions of "federal jurisdiction threatened, Jeffersonians claimed, constitutional principles of limited federal power."¹⁴ By the time of *Swift*, Freyer notes, a majority of the Court was Jacksonian,¹⁵ sharing with earlier Jeffersonians a preference for decentralization of power (p. 2). Yet in *Swift* they agreed with Story, a nationalist.¹⁶ This was possible, argues Freyer, because concern over the uncertainty of commercial transactions united nationalists and states' rights adherents alike. The author surveys the legal, economic and political climate for commercial transactions at the time of *Swift*. Commercial credit was becoming increasingly important to the economic vitality of all sections of the country. It facilitated the growth of farmer and shopkeeper classes in the West and South and of the merchant class in the East (pp. 7-9). Yet commercial law was plagued internally by doctrinal confusion (pp. 23-25) and externally by hostility to the enforcement of debtor obligations exhibited by many state courts and state legislatures (pp. 20-23). And, while not all Jacksonian Democrats shared Story's concern over the unsettled state of the country's commercial environment,¹⁷ Freyer is convincing when he suggests that Story's colleagues

14. P. 12. "Agitation over the issue continued until 1816 when a divided Supreme Court disavowed any authority to create a federal criminal law." P. 12 (citing *United States v. Coolidge*, 14 U.S. (1 Wheat.) 612 (1816)). A full citation to *Coolidge* is missing from the book, apparently due to an editorial error in mismatching footnotes to text. See pp. 2, 165. Further discussion of *Coolidge* and the events leading up to it can be found in Note, *Swift v. Tyson Exhumed*, 79 YALE L.J. 284, 286-87 (1969). "[T]he effect of *Coolidge* was to resolve the doctrinal confusion; few later opinions even felt it necessary to state that federal courts had no jurisdiction over crimes at common law." *Id.* at 287 (footnote omitted).

15. They included "such Democratic stalwarts as Chief Justice Roger B. Taney and Justice Peter V. Daniel." Pp. 2-3.

16. From his youth in Marblehead, Massachusetts and early law practice in Salem, Story developed "a decidedly federalist interest in commerce." Teton, *The Story of Swift v. Tyson*, 35 ILL. L. REV. 519, 522 (1941). As a congressman, Story acted in the interests of the businessmen and shipmasters in his district, winning "the inflexible contempt of Jefferson." *Id.* Earlier a supporter of a federal common law of crimes, *id.* at 523, Story's nationalist sentiments were abundantly clear by the time of *Swift*.

17. A "program of simplifying the law to bring judges under control, reduce the power of lawyers, and increase the layman's ability to understand and deal with his own legal problems

on the court, as well as many others favoring states' rights (pp. 18-19) did.

In keeping with this view, Freyer suggests that Story drafted his opinion so as best to cultivate the narrow strip of ground he held in common with the Jacksonians.¹⁸ He did not directly pose the issue of how far the rival law-making authority of the federal courts extended. Instead, he framed the holding by characterizing the commercial law question as a matter of "general" law. From that conclusion, he reasoned that the Rules of Decision Act did not require state decisions on point to be followed because application was limited

to state laws strictly *local*, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more *general* nature,¹⁹

Whatever the faults of the approach, bottoming the decision on a characterization of the issue as one of general, rather than local, law invoked "a distinction . . . which was familiar to antebellum lawyers and judges" and one which "did not of itself challenge the states' rights values of [Justices] Daniel, Taney, and others" (p. 36).

Freyer finds support for his thesis in the manner in which *Swift v. Tyson* was received. He observes that the opinion was the subject of favorable commentary concerning its commercial law analysis and that no mention was made of *Swift's* interpretation of the Rules of Decision Act (pp. 17-18). Grant Gilmore reached a similar conclusion and offered a further perspective on *Swift*:

The point about *Swift v. Tyson* is that it was immediately and enthusiastically accepted. No one suggested that it was an unconstitutional usurpation of power by power-crazed judges or that it was a trick played by a wily Federalist justice on his unsuspecting Jacksonian colleagues On the contrary, the doctrine of the general commercial law was warmly welcomed and expansively construed, not only by the lower federal courts but by the state courts as well. For the next half century the Supreme Court of the United States became a great commercial law court.²⁰

Freyer's conception of Story's intent in *Swift* stands up well, I

was loosely related to the Jacksonian ideology of the period." Note, *supra* note 14, at 300. This is hardly compatible with the reverence displayed for "the general principles and doctrines of commercial jurisprudence" in *Swift*. 41 U.S. at 19.

18. "Cotton planters such as [Justice] Daniel, as much as commercially oriented justices like Story, understood the importance of uniform commercial rules to the smooth operation of the antebellum credit system. Presented with a case that embodied no direct federal-state issue, the justices were free to decide the commercial questions accordingly." P. 43 (footnote omitted).

19. 41 U.S. at 18 (emphasis added).

20. G. GILMORE, *supra* note 8, at 33-34.

think, against the theories of prior commentators. John Chipman Gray's suggestion that *Swift* grew out of Story's "restless vanity" and fondness for "glittering generalities"²¹ is no longer taken very seriously.²² The view of Story recently adopted by Morton Horwitz is more interesting. Horwitz saw *Swift* as Story's "attempt to impose a procommercial national legal order on unwilling state courts."²³ In a spirited reply,²⁴ Professors Bridwell and Whitten argue that Story's opinion in *Swift* was intended only "to preserve the intentions and expectations of the parties . . . against the assumed background of general commercial practice."²⁵ The views of Horwitz and Freyer on *Swift* are quite opposed, with Freyer having the best of the argument. In part, this is because Horwitz's view does not provide a satisfactory means of explaining the acceptance of Story's *Swift* opinion by his colleagues and the public. Freyer's view is closer to that of Bridwell and Whitten. They differ, however, over the degree of coherence and stability that commercial law had attained at the time of *Swift*. Freyer's view, that commercial law was essentially unclear, seems more convincing.²⁶ Insofar as Horwitz contends that *Swift* was shaped to suppress the populist underclass,²⁷ while Bridwell and Whitten contend that the opinion was intended to honor "longstanding and widely accepted principles of private international jurisprudence that were called general commercial law,"²⁸ their views are sharply antagonistic. At the same time, these opposing views seem to share the assumption that *Swift* can be explained by the monolithic influence of one idea at the time of decision. I think Freyer's book disproves that possibility. He is convincing in suggesting that *Swift* evolved from, and was made possible by, a climate of uncertainty. And, quite apart from what Story may have desired,²⁹ it was

21. J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 253 (2d ed. 1938).

22. Professor Gray's view is discussed and dismissed as "that of an amateur psychologist" in Teton, *supra* note 16, at 526.

23. M. HORWITZ, *supra* note 5, at 250.

24. "Certainly, it is apparent that no desire to force a national procommercial jurisprudence on the states was behind the *Swift* decision." R. BRIDWELL & R. WHITTEN, *supra* note 5, at 95.

25. *Id.* at 90.

26. At the same time, it is difficult to excuse Freyer's failure, despite his frequent references to Horwitz's work, pp. 1, 2, 165, 167, 170, 171, to grapple with his arguments, and Freyer's failure to give more than superficial attention, p. 165, to Bridwell and Whitten's work.

27. Reviewing Horwitz's earlier writing on this theme, Professor Holt observed:

In noting the darker side of the intimacy between instrumentalist judges and entrepreneurs, he emphasizes that the law not only facilitated but cemented and protected the enlargement of the political power of the capitalist class.

Holt, *Now and Then: The Uncertain State of Nineteenth-Century American Legal History*, 7 *IND. L. REV.* 615, 624 (1974).

28. R. BRIDWELL & R. WHITTEN, *supra* note 5, at 70.

29. Freyer does not appear to question the conventional view that a unified body of commercial law was *hoped* for under *Swift*, see, e.g., L. FRIEDMAN, *A HISTORY OF AMERICAN LAW*

impossible that he could have foreseen, much less orchestrated, the effects the *Swift* doctrine would ultimately have. Story's nationalist reveries never led him to suggest that federal courts had anything approaching exclusive jurisdiction over commercial law cases.³⁰ It was only after postbellum changes in the scope and application of federal diversity jurisdiction that massive inroads on the concurrent jurisdiction of state courts became possible.³¹

As the force of *Swift* as a commercial precedent declined, it began to take on a new and more disturbing significance. Discussion of "general" and "local" law in *Swift* left many points of law unaccounted for and usually it was the general law category into which new problems were placed.³² Even more troublesome was the tendency of the Supreme Court to displace state law even within the sanctuary of "local" matters originally defined in *Swift*.³³ The *Swift* doctrine, though it never was without champions, grew increasingly unpopular. The formalistic jurisprudence of characterization — exemplified by the supposed distinction between general and local law — was to face growing skepticism in the twentieth century.³⁴ The problems with *Swift*, however, went deeper than jurisprudential style.

The "general law" exception to the Rules of Decision Act led to the creation of an expanding body of general federal common law. Corporations, an enormous new class of litigants,³⁵ regarded the difference between rights conferred under general federal common law and those recognized by state courts as an advantage.³⁶ Through judicious selection of the place of incorporation (pp. 102-10), a corporation was frequently able to insure that suits by or against it would be litigated by a federal court exercising its diversity jurisdic-

231 (1973), or that Story might have gone further than his opinion in *Swift* to achieve a kind of national *law merchant* if he could have taken the Court with him. P. 73; see also note 16 *supra*.

30. See pp. xv, 25.

31. See notes 35-37 *infra* and accompanying text.

32. Freyer's discussion of the phenomenon in bond and torts cases is particularly interesting. Pp. 58-72.

33. The most significant example was the removal of state cases interpreting state statutes or constitutions from the preserve of "local" law created by *Swift*. See note 19 *supra* and accompanying text. Four of these cases, *Rowan v. Runnels*, 46 U.S. 134 (5 How.) (1846), *Watson v. Tarpley*, 59 U.S. (18 How.) 517 (1855), *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175 (1863), and *Burgess v. Seligman*, 107 U.S. 20 (1882), are discussed both by Freyer, pp. 48, 51, 58, 61, and Jackson, *The Rise and Fall of Swift v. Tyson*, 24 A.B.A. J. 609, 611-13 (1938).

34. See, e.g., Morse, *Characterization: Shadow or Substance*, 49 COLUM. L. REV. 1027 (1949) (criticism of characterization in conflict of laws).

35. Specialized middlemen, who were the primary commercial creditors at the time of *Swift*, had, by 1870, given way to corporate entities. P. 56.

36. Pp. 56, 110; see also J.W. HURST, *THE GROWTH OF AMERICAN LAW — THE LAW MAKERS* 190 (1950); Teton, *supra* note 16, at 529-30.

tion.³⁷ The most famous example of this manipulative use of *Swift* doctrine and federal diversity jurisdiction was in *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*³⁸ In this federal diversity proceeding, the Supreme Court permitted the plaintiff to enforce in Kentucky a contract which under Kentucky state law was void as against public policy. Originally, plaintiff and defendant had both been Kentucky corporations. Plaintiff created federal diversity jurisdiction before suit by dissolving the Kentucky Corporation and reincorporating in Tennessee. It has been suggested that the facts of *Black and White Taxicab* were so blatant that it was open to the Supreme Court to refuse jurisdiction without renouncing *Swift*.³⁹ It may have been better, however, for the case to have been decided the way it was, for the egregious facts of the case and the "enormous criticism" (p. 105) that the decision evoked may have had a purgative effect upon the Court. *Erie* was to follow in a decade.⁴⁰ Meanwhile, "the Court drew back from further extensions of the *Swift* doctrine" (p. 106). Finally, *Black and White Taxicab* provided Justices Holmes, Brandeis and Stone an opportunity to join in the last and most famous of a line of principled and visionary dissents which were to herald the coming of *Erie*.⁴¹

Though the outline of events between *Swift* and *Erie* was already understood, Freyer contributes something by pulling information heretofore found in scattered sources into a single narrative. However, his more interesting and original contributions at this point of the book are his suggestions concerning how changing conceptions of law and sources of legal authority contributed to the criticism and eventual demise of the *Swift* doctrine. It is at least arguable that *Swift* sought to secure for federal judges no more than a view of general principles of law unobstructed by conflicting state judicial precedents. Freyer suggests that this conception began to seem amorphous and, to some, disingenuous only when,

after the Civil War, the metaphysical foundation of the belief in gen-

37. In 1875, corporations were aided by congressional enlargement of the scope of general diversity jurisdiction and removal. P. 55.

38. 276 U.S. 518 (1928)

39. C. WRIGHT, *supra* note 11, at 351. It is important to remember that, when *Erie* did overrule *Swift*, it deprived corporations of their greatest gain from manipulating diversity jurisdiction but did not bar the manipulation itself. Finally, in 1958, Congress acted to stem these abuses by extending the citizenship of a corporation to the additional state, if any, "where it has its principal place of business." 28 U.S.C. § 1332(c) (1976). See C. WRIGHT, *supra* note 11, at 129.

40. *Black and White Taxicab* was exhibit "A" in Brandeis's indictment of the *Swift* doctrine. 304 U.S. at 73.

41. See Freyer's discussions of Justice Field dissenting in *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368 (1893), pp. 69-70; Miller dissenting in *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall) 175 (1863), pp. 59-60; and Holmes dissenting in *Muhlker v. N.Y. & Harlem R.R.*, 197 U.S. 544 (1905), *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 (1910), and *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), pp. 102-04.

eral standards back of all legal rules seems to have been eroded. Undermining this belief was a growing perception that legal principles were in fact nothing more than doctrines found in the local law of the state, or in the national common law . . . [Pp. 73-74].

Holmes may have said it best in his famous observation: "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign . . ." ⁴²

What sovereign has or should have authority to create rules of decision to govern federal diversity cases? Skirted in the *Swift* decision itself,⁴³ this question had become a favorite both of those condemning the *Swift* doctrine and those defending it. The argument that federal courts acting under *Swift* usurped state lawmaking authority was made forcefully in Supreme Court dissents,⁴⁴ by members of academe (pp. 87-92) and in Congress (pp. 78-81, 108-09). On the other side of the debate, "the Court increasingly based its common-law authority" under the *Swift* doctrine "on constitutional principle" (p. 74). Some members of academe supported the preeminence of federal sovereignty as well (p. 118-19).

Erie v. Tompkins overruled *Swift's* interpretation of the Rule of Decision Act. Justice Brandeis stated:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.⁴⁵

Freyer spends relatively little of the book focusing upon the

42. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222, (1917) (Holmes, J., dissenting), quoted by Freyer, p. 104. Story, of course, would have regarded the common law of commercial transactions as a felicitous omnipresence in the sky.

43. See note 18 *supra* and accompanying text.

44. See note 41 *supra* and accompanying text.

45. 304 U.S. at 78. Of course, Justice Brandeis did not suggest that federal courts should entirely give up making common law. "[T]he 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." Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 *YALE L.J.* 268, 273 (1946) (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938)).

While Freyer clearly grasps the distinction between federal general common law and federal common law, *see* pp. xv, 25, he is not always careful to observe it in the book, referring to federal general common law as "federal common law," *see* pp. 94, 107. Moreover, he overstates the importance of the true federal common law which survived *Erie*, suggesting it has become a centralizing force which threatens "to overturn the decentralist intent of the *Erie* opinion . . ." P. xv. Instances of Supreme Court creation of federal common law have been episodic and undisciplined. *See* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *COLUM. L. REV.* 527 (1947); Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 *COLUM. L. REV.* 1 (1945). *But see* Friendly, *supra* note 13, at 408-21. In a series of recent cases, the Supreme Court expressed reservations about adopting an expansive view of the lawmaking power of the federal judiciary. *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Texas Industries v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1 (1981).

Court's decision in *Erie* (pp. 129-53). This may be, in part, because virtually every aspect of *Erie* — for example, the true importance of Professor Warren's research,⁴⁶ or the choice between the approaches of Brandeis and Reed to overruling *Swift*⁴⁷ — has been so thoroughly explored before. Part of the reason may also be Freyer's apparent interest in winding the book up without proceeding to questions concerning application of the Rules of Decision Act which have plagued courts and commentators since *Erie*.

When I finished the book I found the chronological point at which Freyer chose to end it premature and arbitrary. Do not contemporary questions about *Erie's* reach also set up, to use Freyer's words, a "tension between harmony and dissonance" touching "the very essence of American Federalism," concerning "a determination of the limits of power of state and national government" (p. 160)? On further reflection, and in fairness to Freyer, I think the answer is no.

It is certainly true that in hard cases today under the Rules of Decision Act, *Erie*, alone, is of little help. What does the federal diversity judge do when the meaning of state law is unclear?⁴⁸ When state law and a federal rule of civil procedure conflict?⁴⁹ When

46. In part, Brandeis based his attack on *Swift* on Charles Warren's research and argument that Story had misconstrued the original purpose of the Rules of Decision Act. Warren, *New Light on the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51-52, 81-88, 108 (1923). Brandeis's partial reliance on the article was to cast a slight shadow over *Erie*, since Warren's methods and conclusions were, in time, roundly attacked. See, e.g., the critics cited at p. 178 n.21. For a particularly lucid critique of Warren's position, see A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS* 1033-34 (1965).

Freyer provides the conventional view of this episode. Pp. 111-13. His more original contribution is to suggest elsewhere in the book how longstanding was the alliance of academics and Court skeptics of *Swift*. Holmes had allied himself with Charles Warren in his dissent in *Black and White Taxicab*. P. 105. Earlier, in *Kuhn*, Holmes had allied himself with John Chipman Gray's attack of *Swift*. P. 103.

47. The debate concerned whether allusions to the constitutional infirmity of the *Swift* doctrine, see note 13 *supra*, were necessary in order to overrule *Swift's* reading of the Rules of Decision Act. Concurring separately, Reed thought they were not. 304 U.S. at 90-92. It has been assumed that Brandeis could bring himself to overrule a prior settled interpretation of a congressional enactment (and, with it, overrule hundreds, if not thousands, of general federal common law precedents) only by entertaining the prospect of a constitutional question. See E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 56-57 (1948); Friendly, *supra* note 13, at 392. On the use of such an argument to broaden judicial powers of statutory interpretation, see Kurland, *supra* note 12, at 204. Interestingly, Freyer gives Justice Stone considerable credit for shaping Brandeis's approach in handling *Erie's* constitutional law dimension. Pp. 138-39.

48. Judge Clark found problems posed "where the state law is confused or nonexistent" to be "the most troublesome" aspect of *Erie*. Clark, *supra* note 45, at 290. Judge Clark's fear that federal courts would be constrained by *Erie*, *id.* at 290-91, has not always been realized. The willingness of federal courts to leap into the breach is exemplified in *Mason v. American Emery Wheel Works*, 241 F.2d 906 (1st Cir. 1957) (district court not obligated to apply state law to determine tort liability where state supreme court had indicated a willingness to revise the prevailing rule). But there is no clear guidance available from *Erie* or succeeding Supreme Court cases and the problem remains perplexing.

49. Supreme Court opinions grappling with such conflicts, e.g., *Ragan v. Merchants Trans-*

choice-of-law and change-of-venue issues combine?⁵⁰ But these and other contemporary questions belong to the era begun by *Erie*, while Freyer's book treats the era which *Erie* at long last brought to an end: the reign of *Swift v. Tyson*. Henry Hart aptly described the difference:

The *Erie* case left in its train many unresolved questions But the questions were left to be resolved as questions only of choice between state law and federal law. The case put a period, with an exclamation point, to the notion that the decisional rules of the state courts had a status inferior to state statutes in the spheres, whatever they were, in which state law governed.⁵¹

It was not unreasonable for Freyer to place the last period in his manuscript at about the same place. Policies of federalism may figure in the contemporary resolution of post-*Erie* issues but the politics of federalism have become inaudible. Federal courts no longer do much, if any, violence to state substantive law.⁵² *Erie* marks the boundary line and Freyer is justified in not taking his readers across.

fer and Warehouse Co., 337 U.S. 530 (1949), *Hanna v. Plumer*, 380 U.S. 460 (1965), *Walker v. Armco Steel Corporation*, 446 U.S. 740 (1980), have been less than clear and not altogether consistent. For thoughtful but distinctly different responses to the problem compare M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 169-203 (1980) (arguing for a balancing test under the Rules of Decision Act), with Ely, *supra* note 12 (arguing for the accommodation of cases within the Rules Enabling Act).

50. After *Erie*, there was a brief uncertainty whether choice-of-law rules for federal courts sitting in diversity were still permissible or whether they were part of the general common law *Erie* had invalidated. The Supreme Court determined them to be the latter in *Klaxon Co. v. Stentor Electric Mfg.*, 313 U.S. 487 (1941). Analytic problems have greatly taxed federal courts in administering the *Klaxon* rule. Difficulties in ascertaining state law, *see* note 48 *supra*, can be particularly acute when federal judges attempt to ascertain state choice-of-law rules. This is due in part to the inherent difficulty of choice-of-law doctrine and in part due to inconsistency in state choice of law brought about by local bias. *See* Shreve, *In Search of a Choice-of-Law Reviewing Standard—Reflections on Allstate Insurance Co. v. Hague*, 66 MINN. L. REV. 327, 339 n.63 (1982).

Klaxon problems are aggravated in transfer-of-venue cases. While it is now settled that the state choice-of-law rule of the transferor forum is generally to be applied, *Van Dusen v. Barrack*, 376 U.S. 612 (1964), the troublesome questions remain whether *Van Dusen* should be followed in transfers under 28 U.S.C. § 1404(a)(1976) when plaintiff's case clearly would have been dismissed on *forum non conveniens* grounds if he had filed in the state court of the transferor forum. To follow *Van Dusen* in such a case would appear to give plaintiff unfair leverage in shopping for favorable conflicts law. Yet this was the result *In re Air Crash Disaster at Boston, Mass.*, 399 F. Supp. 1106 (D. Mass. 1975).

51. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 506 (1954).

52. After Justice Frankfurter's stern lecture in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), distinctions between substance and procedure are usually attempted with a certain trepidation. Nonetheless, it seems clear that intrusions upon expressions of local policy reflected in state rules of liability, intrusions represented by *Swift* and continuing through *Black and White Taxicab*, were largely, if not completely, snuffed out by *Erie*.